[2014] JMCA Civ 36

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 2/2012

BEFORE: **THE HON MR JUSTICE MORRISON JA**
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE McINTOSH JA

BETWEEN **DIGICEL JAMAICA LIMITED** **APPELLANT**

AND **THE COMMISSIONER OF TAXPAYER APPEALS** **RESPONDENT**

Dr Lloyd Barnett, Mrs M. Georgia Gibson-Henlin and Marc Jones instructed by Henlin Gibson Henlin for the appellant

Mrs Cecelia Chapman-Daley and Miss Sophia Preston for the respondent

18, 19 and 20 February 2013 and 24 October 2014

MORRISON JA

Introduction

[1] The appellant ('Digicel') is a company incorporated under the Companies Act and a registered taxpayer for the purposes of the General Consumption Act ('the Act'). The respondent ('the Commissioner') is the public official, appointed pursuant to section 11B of the Revenue Administration Act, with responsibility for the general administration of

the Taxpayer Appeals Department. At the material time, the person who held the position of commissioner was Mr Winston Lawson.

[2] Digicel is in the business of supplying mobile telephone and allied services in Jamaica, under licence from the Government of Jamaica. The company also carries on business in several other Caribbean jurisdictions, and elsewhere.

[3] In 2004, Digicel maintained an "Equipment All Risk (Material Damage & Business Interruption) Insurance" policy ('the policy') with West Indies Alliance Insurance Company Ltd ('the insurer'). In the aftermath of the passage of Hurricane Ivan ('the hurricane') in September of that year, Digicel suffered serious damage to its equipment and facilities. This in turn caused an interruption of its business. The resultant claim by Digicel under the policy was settled by the insurer for (i) US$578,533.00 (or J$13,216,000.00) in respect of damage to "equipment and related costs"; and (ii) US$6,967,831.00 (or J$416,000,000.00) in respect of "business interruption". These sums were brought to book in Digicel's profit and loss statement for the relevant financial year and income tax was paid on them at the applicable rate of 33 1/3%.

[4] In 2008, the Commissioner of Taxpayer Audit and Assessment ('CTAA') carried out an "integrated audit" on Digicel's operations. With regard to general consumption tax ('GCT'), the period covered by the audit was December 2003 to December 2005. As a result of the audit, Digicel was on 23 July 2008 assessed to additional general consumption tax of $85,843,200.00, being 20% of the total settlement of $429,216,000.00. The CTAA took the view that the insurance proceeds received by

Digicel for loss of income during the hurricane were caught by section 18(4) of the General Consumption Tax Act ('the GCT Act'), which provides that:

> "(4) Where a registered taxpayer receives an amount by way of reimbursement, recovery or otherwise in respect of goods or services acquired by him for the purpose of making taxable supplies, he shall be deemed to have made a taxable supply and the amount aforesaid shall be deemed to be the consideration for that supply."

[5] The result of the application of section 18(4) to Digicel's insurance settlement was, the CTAA explained, that -

> "…the amount received for loss of business due to the breakdown of the Network during the hurricane would represent a taxable supply. If the network had not failed during the hurricane, customers would still be using the network and income would be earned and therefore General Consumption Tax would be payable."

[6] In February 2009, in response to an objection from Digicel, the CTAA reduced the assessment (by $9,655,087.00) to $76,188,113.17. Digicel's appeal to the Commissioner (pursuant to section 41 of the GCT Act) resulted in a further reduction (by virtue of the Commissioner's decision dated 27 November 2009) in the assessment to $59,077,084.97 (as a result of a reduction in the GCT rate, conceded by the CTAA, from 20% to 16.5%). By his judgment given in the Revenue Court on 9 December 2011, R Anderson J dismissed Digicel's appeal against the substance of the Commissioner's decision, but allowed the appeal in respect of the GCT rate, holding that the applicable rate of tax at the material time was 15%.

[7] This is therefore an appeal from R Anderson J's judgment. Digicel has maintained throughout, from the time of the CTAA's audit through to the hearing in the court below, that the insurer's settlement of its business interruption claim is not exigible to GCT within the meaning of section 18(4), given the nature of business interruption insurance and the actual terms of the policy. The single issue which arises on the appeal is therefore whether the learned judge was correct in upholding the determination of the CTAA and the Commissioner that the settlement amount did in fact fall within the terms of section 18(4).

What the Act says

[8] Section 3(1) of the Act provides for the imposition of GCT as at 22 October 1991 –

> "(a) on the supply in Jamaica of goods and services by a registered taxpayer in the course or furtherance of a taxable activity carried on by that taxpayer; and
>
> (b) on the importation into Jamaica of goods and services,
>
> by reference to the value of those goods and services."

[9] (Section 9, which provides for the imposition of "a tax to be known as special consumption tax on the manufacture in or importation into Jamaica of prescribed goods", is not relevant to the present enquiry.)

[10] Section 2 defines "consideration", "input tax", "output tax", "taxable activity", "taxable period" and "taxable supply" in the following terms:

"'**consideration'** in relation to the supply of goods and services to any person, includes any payment made or any act or forbearance in respect of, in response to, or for the inducement of, the supply of any goods or services, whether by that person or by any other person;

'input tax' in relation to a registered taxpayer means -

(a) tax charged under section 3 (1) on the supply of goods and services made to that taxpayer or on the importation into Jamaica of goods and services by that taxpayer being goods and services required wholly or mainly for the purpose of making taxable supplies; or

(b) tax charged under section 9 on the manufacture of prescribed goods or on the importation into Jamaica of such goods being prescribed goods acquired wholly or mainly for the purpose of manufacturing taxable supplies;

'output tax' means –

(a) tax paid by a registered taxpayer on the manufacture by him of prescribed goods; or

(b) tax charged by a registered taxpayer on a supply by him of a taxable supply;

'taxable activity' means any activity, being an activity carried on in the form of a business, trade, profession, vocation, association or club, which is carried on continuously or regularly by any person whether or not for a pecuniary profit, and involves or is intended to involve, in whole or in part, the supply of goods and services (including services imported into Jamaica) to any other person for a consideration;

'taxable period' in relation to a registered taxpayer means the period prescribed as the period in respect of which a return of tax is to be made;

'taxable supply' means any supply of goods and services on which tax is imposed pursuant to this Act;

..."

(My emphasis)

[11] Part IV of the Act, of which the all-important section 18(4) is a part, makes "Provisions Relating to Making of Taxable Supply". Section 18(1) provides that "supply", includes (a) the sale, transfer or other disposition of goods by a registered taxpayer; (b) the exercise of a power of sale by a person other than a registered taxpayer in satisfaction of a debt owed by a registered taxpayer; and (c) the provision of services. However, there is no supply where an asset of a taxable activity ('a specified asset') is used as collateral for a loan; transferred to a trustee pursuant to his appointment as trustee; or transferred as a gift valued less than $100.00, a sample, or as an unconditional gift to an approved charity.

[12] Section 18(2) provides for a situation in which a registered taxpayer, in the course or furtherance of any taxable activity, "uses for himself or for any other business carried on by him any goods which form part of the stock of his taxable activity". In those circumstances, once tax would have been payable on those goods if they were supplied to any other person, "the use of such goods shall be deemed to be a taxable supply".

[13] Section 18(3) provides for a situation in which a specified asset is (a) used as collateral for a loan and on the borrower's default is forfeited to the lender, or (b) transferred to a trustee, who distributes the assets of the estate of which the specified asset forms part or the assets of a company of which it forms part. In either case, "the forfeiture or distribution, as the case may be, shall be deemed to be a supply".

[14] The effect of section 18(4) is that, once a registered taxpayer receives an amount, "by way of reimbursement, recovery or otherwise, in respect of goods or services acquired by him for the purpose of making taxable supplies", he is deemed to have made a taxable supply and the amount of the reimbursement or recovery is deemed to be the consideration for that supply. Output tax will therefore be chargeable on that amount accordingly.

[15] Section 18(6) is also a deeming provision of sorts, by providing that, for the purposes of the Act, "anything which is not a supply of goods but is done for a consideration is a supply of services".

[16] Section 20 makes provision for the calculation and payment over to the revenue of the tax payable by a registered taxpayer in accordance with the regulations made under the Act. Section 20(2) provides that the tax payable by a registered taxpayer in respect of each taxable period in relation to taxable supplies, other than prescribed goods and taxable supplies specified in Part 1 of the First Schedule (which relates to motor vehicles), shall be "...the amount arrived at after deducting the total amount of input tax or such portion thereof as may be prescribed from the total amount of output tax".

[17] Regulation 14 of the General Consumption Tax Regulations, 1991 elaborates in detail the manner in which a registered taxpayer is permitted to claim, as a credit against his output tax liability, any input tax payable by him. Specifically, regulation 14(2) provides that:

> "...the input tax in relation to which a credit may be claimed shall be the sum of –
>
> > (a) any amount stated as tax on a tax invoice issued to the registered taxpayer in respect of taxable supplies made to him during a taxable period; and
> >
> > (b) any input tax paid by that registered taxpayer on the importation of taxable supplies into Jamaica.
>
> being supplies used by the registered taxpayer in carrying out his taxable activity."

The policy

[18] The policy provides that the insurer will indemnify Digicel in respect of, among other perils, "forces of nature, such as hurricane, windstorm, rainstorm, hail, flood, overflow of the sea, landslide, volcanic eruption, earthquake". There is no question that, in this case, the hurricane was a peril covered under the policy.

[19] The policy is divided into two sections. Section 1 deals with material damage to equipment and installations (listed in a detailed specification attached to and forming part of the policy) and Section 2 deals with business interruption. The basic cover afforded under Section 2 is as follows:

> "**Insurance Coverage**
>
> If at any time during the Period of Insurance stated in the Schedule the Business carried on by the Insured at the Premises specified in the Schedule be Interrupted or interfered with in consequence of loss or destruction of, or damage to Insured Objects which are:
>
> i) ready for commercial operation. In the case of newly Installed Equipment or Installations, coverage under

this Section shall commence once such Equipment or Installation has been commissioned and the testing period has been completed successfully;

ii) at work or at rest, or dismantled for the purpose of cleaning, overheating, or of being shifted within the Premises, or in the course of subsequent re-erection;

iii) on the Premises specified in the Schedule

and in respect of which the Insured has a valid claim under Section 1 of this Policy, the INSURERS will in respect of each item stated in the Schedule to be insured by this Section indemnify the Insured against the amount of loss resulting from such interruption or interference.

However the liability of the INSURERS during any one year of Insurance, shall in no case exceed

i) In respect of each item Insured by this Section, the Sum Insured, stated against such item in the Schedule, or

ii) in the whole the Total Sum stated in the Schedule to be insured by this Section, or

iii) such sum or sums as may hereafter to substituted therefore by memorandum or endorsement signed by or on behalf of the INSURERS.

Sums Insured

It is a requirement of this Insurance that the Sum Insured on each item insured by this Section shall be based on figures for the past financial year adjusted for the trend of the Business and that these figures shall be adjusted annually.

Periods

i) Indemnity Period shall mean the period not exceeding the Maximum Indemnity Period stated in the Schedule commencing with the occurrence of the loss, destruction or damage and during which the results of the Business are affected in consequence of the loss, destruction or damage, provided always that the

INSURERS shall not be liable for the amount of loss suffered during the Time Excess Period.

ii) Time Excess Period runs from the occurrence of the loss, destruction or damage. When an interruption or interference exceeds the Time Excess Period, the indemnity is reduced in the same proportion as the Time Excess Period bears to the Indemnifiable period of Interruption."

[20] Under the rubric, "Loss Settlement under Section 2", the policy details the manner of calculation of the amount payable as indemnity as follows:

"The amount payable as indemnity in respect of each item insured by this Section shall be limited to such portion or portions of the Standing Charges insured by such item as the Insured is unable to pay out of Revenue due to:

i) the Revenue during the Indemnity Period, in consequence of the loss, destruction or damage insured by Section 1 of this Policy, falling short of the Standard Revenue.

ii) additional expense being necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in Revenue which, but for that expenditure, would have taken place during the Indemnity period in consequence of the loss, destruction or damage insured by Section 1 of this Policy, but not exceeding the amount of the reduction thereby avoided.

Less any sum saved during this Indemnity Period in respect of such of the charges and expenses of the Business Insured by such Item as may cease or be reduced in consequence of the loss, destruction or damage

PROVIDED THAT if, in the event of a claim under this Section, it is found that the Sum Insured is less than the amount required to be Insured, then the amount recoverable by the Insured under this Section shall be reduced in such proportion as the Sum Insured bears to the

amount required to be insured. This Condition applies separately to every item of the Schedule Insured by this Section.

For the purposes of this Section

i) Revenue shall mean the money paid or payable to the Insured for all goods sold, work done and services provided in course of the Business at the Premises

ii) Standard Revenue shall mean, the Revenue during that period in the 12 (twelve) months immediately before the date of the loss, destruction or damage which corresponds with the Indemnity Period, to which amount such adjustments shall be made as may be necessary to provide for the trend of the Business and for variations in or special circumstances affecting the Business either before or after the loss, destruction or damage or which would have affected the Business had the loss, destruction or damage not occurred so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which but for the loss, destruction or damage would have been obtained during the relative period after the loss, destruction or damage.

If during the Indemnity Period goods shall be sold or services shall be rendered elsewhere than at the Premises for the benefit of the Business either by the Insured or by others on his behalf the money paid or payable in respect of such sales or services shall be brought into account in arriving at the Revenue during the Indemnity Period."

[21] In the policy schedule, the "maximum indemnity period" is stated to be six months, while the "insured standing charges" for the purposes of section 2 are itemised as follows:

ITEM NO	DESCRIPTION	SUM INSURED
1	Salaries and Wages	US$ 8,400,000.00

2	Marketing Expenses	4,080,000.00
3	Property Leases and Rentals	1,380,000.00
4	Contractors (Ericsson support)	1,200,000.00
5	Other Overheads	7,740,000.00
	TOTAL SUM INSURED	US$ 22,800,000.00

[22] As I will attempt to explain in greater detail in due course, the policy therefore offers an indemnity in respect of such portion or portions of the standing charges as the insured is unable to pay out of revenue due to (i) revenue falling short of standard revenue and (ii) additional expenses being "necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction of Revenue which, but for that expenditure, would have taken place...in consequence of the loss, destruction or damage insured by Section 1 of the Policy, but not exceeding the amount of the reduction thereby avoided". As will also presently emerge, the continuing dispute in this case surrounds item (ii) only.

The evidence before the judge

[23] As the learned judge more than once observed in his judgment (at paras [11] and [16]), there was no significant dispute between the parties as to the facts. The Commissioner relied on a single affidavit of Kevin Dixon, a senior tax auditor at the Taxpayer Audit and Assessment Department ('TAAD'), sworn to on 23 April 2010, which traced the history of the audit and assessment process which had resulted in the

decision under appeal. Digicel for its part relied on (i) two affidavits of Mr David Waller, sworn to on 30 April and 10 May 2010 respectively; (ii) an affidavit of Conal O'Donnell sworn to on 10 May 2010; and (iii) an affidavit of Elizabeth Ann Jones sworn to on 1 June 2010. What follows is a summary of this evidence.

[24] In a letter to Digicel dated 8 June 2009, Mr T W Dawson, a director of Crawford Jamaica Ltd, a firm of loss adjusters, provided information on how Digicel's business interruption claim arising out of Hurricane Ivan had been dealt with. The claim as originally submitted was in respect of "loss of standing charges and increased costs of working of US$292,237 and US$8,678,550 respectively".

[25] The loss of standing charges aspect of the claim was agreed by the loss adjusters at US$205,477.00 and ultimately accepted by the TAAD and the Commissioner as falling outside of the ambit of section 18(4). However, the Commissioner had to consider the CTAA's decision in respect of the increased cost of working. At the hearing before the Commissioner, the TAAD relied on its analysis of Digicel's GCT returns for the months of August and September 2004, which showed that input tax had increased by 40% over the same period the previous year. Further, input tax claimed in September 2004 (the month in which the hurricane occurred) was far more than that claimed in September 2003 and September 2005, from which the TAAD deduced that the company would have paid input tax in relation to costs incurred as a result of the passage of the hurricane. Therefore, the TAAD contended, any funds received from the insurance company as reimbursement for these expenses should attract output tax.

[26] The Commissioner considered (at page 19 of his decision dated 27 November 2009) that the "key issue" to be resolved was whether the insurance settlement received by Digicel was "compensation for loss of cash flow and profit which was due to a business interruption" or "reimbursement for the increased working expenses and standing charges incurred during a business interruption". This is how he stated his conclusion (at pages 22-23 of his decision):

> "Based on the facts presented, it has been ascertained that the insurance proceeds paid to the appellant company consisted of:
>
> a) a portion in respect of 'loss of standing charges'; and
> b) Reimbursement for expenses and standing charges which the company would have incurred to reestablished [sic] its normal operations (i.e. its taxable services).
>
> In light of the above, I find that the amount paid to the company in respect of loss of standing charges amounting to US$205,477.00 would not fall within the ambit of Section 18(4) since this was calculated as a percentage of trends in monthly revenue over a period of time which represented a loss of profit, and therefore cannot be regarded as consideration for any taxable supply. Hence, this component of the claim proceeds is not subject to GCT as was stated in the letter of February 18, 1999 from the GCT Department. However, the amount paid to the company in respect of reimbursement for expenses and standing charges is deemed a taxable supply and is therefore taxable pursuant to the provisions of Section 18(4) of the GCT Act."

[27] Mr Dawson's account of how the increased cost of working aspect of the claim was assessed and adjusted was as follows:

> "Under this heading, we reviewed the reasonableness and accuracy of the proposed increased costs before considering the loss of revenue, their expenditure avoided i.e. the economic limit.
>
> The most significant aspect, the Subscriber Acquisition Cost (SAC) being effectively the cost of acquiring customers was said to have increased during September and October 2004 by US$6,129,395. We eventually reduced this figure to US$4,697,838 which, together with our adjustment of the other costs and the reclassification of two items from the property claim, produced a total increased cost of working of US$6,583,026 or US$6,916,076 including emergency expense of US$333,050.
>
> In terms of the economic limit, we were satisfied that had the above expenditure not been made, the insured would have faced a significant loss of market share, at least through to the end of December 2004. Based upon the projected revenue for this period, US$114,689,000 on a month by month analysis, we arrived at a possible loss of revenue of US$16,333,000. In establishing a rate of gross profit of 53.77%, this translated to a potential loss of gross profit of US$8,782,254. Based upon which, an increased cost of working spend of US$6,583,026 was considered economic.
>
> Finally through the application of policy limits, the increased costs of working and emergency expense were eventually reduced from US$6,916,076 to US$6,762,354 or a total US$6,967,831 including the loss of standing charges of US$205,477.
>
> No doubt you will advise if you require any further information."

[28] Having received the proceeds in settlement of its insurance claim from the insurer, Digicel sought advice from its taxation advisors, PricewaterhouseCoopers

('PWC'), as to whether the proceeds of a business interruption policy claim were subject to GCT. PWC provided Digicel with copies of two items of correspondence, the first dated 14 February 1999, from the firm to the General Consumption Tax Department ('the GCTD'), and the second the latter's reply dated 18 February 1999.

[29] The first letter was an enquiry:

> "I urgently need your assistance in clarifying the following matters:
>
> 1. Are insurance claim proceeds relating to the following generally taxable :
>
> a. Consequential loss or business interruption
>
> b. Loss of fixed assets and current assets such as cash, food and chemical inventories etc?
>
> 2. If the abovementioned proceeds are generally taxable, are there any circumstances under which the claims may be deemed not taxable? (For example if the insurer is an overseas company)
>
> 3. Are there any insurance claim proceeds which are not taxable?"

[30] In response, over the signature of Mr Winston Lawson, the GCTD said this:

> "**Re: GCT on Insurance Claim Proceeds**
>
> As refer to your facsimile transmission dated February 14, 1999 on the above matter.
>
> The application of GCT to insurance compensation is provided for in section 18 (4) of the GCT Act. Based on that provision, we advise as follows:
>
> 1. (a) Compensation for consequential loss or business interruption does not fall within the ambit of section 18 (4),

and cannot be regarded as consideration for any taxable supply. Accordingly, this component of the claim proceeds is not subject to GCT.

(b) Compensation for loss of fixed assets or taxable current assets (such as taxable inventories) falls squarely within the scope of the provision, and is subject to tax on an 'inclusive basis'. Hence 15/115 of the claim proceeds is to be accounted for by the recipient registered taxpayer as output tax. Compensation for non-taxable current assets (such as cash) is not subject to tax.

2. The claim proceeds are taxable as long as they result from loss of taxable goods and services acquired for the purpose of making taxable supplies. The proceeds are then taxable even if the insurer is an overseas company.

3. By virtue of a waiver granted by the Minister of Finance, notwithstanding section 18 (4), insurance proceeds are not subject to tax if the assets in respect of which the settlement is made would not themselves be subject to tax if they were disposed of within the course of the taxable activity. In particular, insurance claims in respect of the loss of real property is not subject to tax."

[31] As a result of being shown this correspondence, Digicel reversed the input tax credit which it had "inadvertently" claimed in respect of the business interruption component of the insurance premium and treated the insurance proceeds as not subject to GCT.

[32] As it turned out, by letter dated 15 September 2005 (again over the signature of Mr Winston Lawson), the Tax Administration Directorate ('the TAD') gave advice virtually identical to that given in 1999 to PWC by the GCTD to KPMG, another leading auditing firm in Jamaica:

"Dear Sirs:

Re: Insurance Compensation for Loss of Business Profit

We refer to our discussions on the captioned issue and write to confirm that compensation received by an insured person for interruption or loss of business profits:

(i) does not in our view represent consideration for the supply of goods or services, and

(ii) does not fall within the deeming provision of Section 18(4) of the General Consumption Tax (GCT) Act, as it does not constitute 'reimbursement, recovery or otherwise in respect of goods and services acquired…for…making taxable supplies'.

Accordingly, as the Act imposes tax only on the supply of goods and services, we further confirm that an insurance compensation for loss of business profits is not subject to GCT.

As a consequence of this treatment, no input tax credit will be allowed in respect of the premiums paid to the insurer for coverage of the risk of business profit interruption.

Yours faithfully,

Winston K. Lawson
for Director General"

[33] This letter was produced on affidavit by Ms Elizabeth Ann Jones, a tax partner at KPMG. Ms Jones was also aware of the GCTD's letter to PWC dated 18 February 1999. Her evidence (at para. 5 of her affidavit) was that, based on her interpretation of section 18(4) of the Act, as confirmed by the TAD's letter dated 15 September 2005, "the general practice at KPMG in Jamaica, as to the taxation of insurance proceeds under business interruption policies, is that those proceeds are not treated as being subject to [GCT]". Ms Jones further stated that, in her practice, she had advised

individuals and companies on the basis of this understanding and pointed out (at para. 11) that, were it otherwise, "the insured would be required to increase...the amount insured to enable them to recover the [GCT] imposed".

[34] Hereafter, I will refer to the GCTD's letter to PWC dated 18 February 1999 and the TAD's letter to KPMG dated 15 September 2005 as 'the 1999 letter' and 'the 2005 letter' respectively. Nothing now turns on the fact that, as has been seen, the author of both letters was Mr Winston Lawson, who, as it transpired, had become the Commissioner by the time Digicel's appeal came to be considered. Although much was made of that fact during the hearing before the Commissioner himself, there is not now any challenge to his determination that he was nevertheless competent (and indeed legally obliged) to hear Digicel's appeal.

[35] Mr David Waller, a loss adjuster and risk consultant of over 45 years' experience in Europe, Latin America and the Caribbean, provided expert evidence, "in the light of the GCT Act, current insurance practice both in Jamaica and elsewhere and the facts of the Digicel claim". His evidence is, I think, of sufficient importance to warrant extensive quotation:

> "**BUSINESS INTERRUPTION PRINCIPLES**
>
> 11. The intention of business interruption insurance is to restore the insured party to the same financial position as if the damage had never occurred, within certain parameters.
>
> 12. The current standard policy wording has been in use for more than 70 years with only minor modifications, so has

stood the test of time. In its basic form it covers loss of Gross Profit, which in practice means the operating costs of the business which continue after an insured event, plus net operating profit (i.e. before income or profits tax). The Gross Profit cover includes Increased Cost of Working, and the policy specifies that payments will be made for additional expenses incurred to avoid or reduce a loss of revenue, subject to an economic expenditure test.

13. In order to estimate the amount of insurance required (the Sum Insured) it is necessary to consider, inter alia, the profit and loss account of the business for previous years, current performance and the budget for the following year. Indeed, the policy issued to Digicel Jamaica Limited requires that the sum insured be based on figures for the past financial year adjusted for the trend of the business.

14. Profit and loss accounts do not normally include revenue taxes, GCT GST, VAT and the like being accounted separately. Similarly budgets do not normally allow for revenue taxes. Thus for consideration of performance of the business, the platform on which business interruption insurance is built, revenue is net of GCT, and operating costs also exclude tax.

15. Calculation of a loss following an insured event comprises, in its simplest form, six elements:

    i. Agreement on the period during which the business was affected by the incident;

    ii. Estimation of the lost revenue, a theoretical exercise based on budget;

    iii. performance prior to the incident and any other relevant matters;

    iv. Calculation of the gross profit on that revenue, using a formula specified in the policy applied to figures from the profit and loss account of the business;

v. Deduction of any savings, insured costs which do not in the event continue;

vi. Addition of any increased costs incurred to reduce the loss of gross profit;

vii. Calculation of the adequacy of the sum insured, and application of a percentage penalty for any underinsurance.

16. In the absence of specific statutory requirements, my firm view is that a sales tax which is levied on the provision of services and/or goods should not apply to business interruption insurance or loss of profit claims, which do not fit into either category.

THE POLICY

17. The policy issued by West Indies Alliance Insurance of Kingston, Jamaica to Digicel Jamaica Ltd is written in US dollars, and is unusual in covering only Standing Charges which cannot be paid out of normal revenue stream. Specified standing charges are Salaries and Wages, Marketing Expenses, Property Leases and Rentals and Contractors (Ericson Support); remaining standing charges of the business are grouped into a general item covering All Other Overheads. The policy also covers Increased Cost of Working incurred to avoid or minimise the loss of revenue, subject to the economic limit, i.e. this cover will not pay more than one dollar to save a dollar. In this respect it is simply reflecting the proper action of any prudent business, to minimise the loss by whatever means may be practicable.

18. It is important to stress that increased cost of working cover is not an additional benefit. Any money spent under this heading must by definition reflect a greater saving in respect of the standing charges. By way of example, and I stress that this is simplified to show the principle of the cover, assume that a business is closed and insurers are paying $1,000,000 per month. If the period of closure can be shortened by one month through the expenditure of, say, $400,000 in extra advertising then Insurers will pay the

$400,000 as an increased cost of working, while taking a saving of $1,000,000 in respect of salaries and wages.

19. In summary then, the policy is designed to reimburse costs which continue after an insured event, and which cannot be paid from the revenue stream, and/or expenses incurred by Digicel to reduce to [sic] avoid the loss of income from which such standing costs are paid.

THE INSURANCE CLAIM

The Claim Payment

20. I do not have access to the full workings of the loss calculation, such detail is not necessary to reach a conclusion on the matter at hand. The amounts agreed and paid by the Insurers were as follows:

Description	US$	US$
Standing charges		$205,477
Subscriber acquisition costs	$4,697,838	
Marketing	$ 110,822	
Shipping	$ 460,544	
Cost and installation	$ 550,475	
Fuel	$ 295,634	
Various	$ 171,472	
C & W	$ 100,452	
Technical overtime	$ 9,124	
Customer Care overtime	$ 16,523	
Staff bonus	$ 150,000	
Other increased costs of working	$ 341,614	

Cleaning of roadways	$ 11,578	
Policy limits adjustment	($153,722)	$6,762,354
Total		**$6,967,831**

21. In the evidence given in this case there are various references to the text of the policy, the definition of 'loss' and the use of such terms as 'cash flow', but I believe that these are distractions in the present context. We are simply dealing with payment of continuing costs (Standing Charges) and the extra expense of recovering business (Increased Costs of Working).

Standing Charges

22. In my view the lost revenue on which the standing charges payment is calculated is an estimate based on prior experience, budgets etc. and by definition there is no actual revenue generated; there are no goods sold and no services provided and thus no taxable supply.

Increased Cost of Working

23. In dealing with the above, regard must be had to the letter dated 8 June 2009 from Mr Dawson of Crawford Jamaica Limited. As indicated earlier in this report increased costs are payable by the Insured when they are economic, i.e. they generate more gross profit than the costs incurred. The allowance of increased costs totalling US$6,762,354 tells us that revenue considerably in excess of this figure was obtained as a result. **A copy of the letter is being shown to me and marked "D.W.2."**

24. The claim can only be considered in the light of laws and regulations in force at the material time, and I can state unequivocally that had I been dealing with the claim I would have been guided by my interpretation of the GCT Act, above, and the advice in the tax authorities' letter dated 18th February 1999 that compensation for business interruption

claims does not fall within the scope of Section 18(4) of the GCT Act.

Operation of General Consumption Tax

25. The relevant sections of the Act appear to be Sections [sic] 2 and Section 18(4). Section 2 defines a taxable supply as any supply of goods and services on which tax is imposed pursuant to the Act, while Section 18(4) states that where a taxpayer receives an amount by way of reimbursement in respect of goods or services acquired by him for the purpose of making a taxable supply he is deemed to have made a taxable supply and the amount of the reimbursement is a consideration for that supply, and thus taxable.

26. Earlier in this report I stated that the standard business interruption policy has two elements of cover, Gross Profit and Increased Cost of Working. I defined Gross Profit as net profit plus those costs that continue after damage, the calculation of these costs being based on an estimate of revenue which has not actually been received, but which would have been received but for the damage. In that context any insurance payment relating to gross profit cannot in my view be considered as a taxable supply since there is no real supply of goods or services, only an abstract estimate.

27. Increased Cost of Working covers additional expenses incurred to minimize the loss of revenue, subject to the normal economic limit. The expenses will include services provided by third parties, and it is likely that many of these will carry GCT. Such expenditure may enable the insured party to continue to trade, and/or maintain the level of revenue. Some expenses will be untaxable (e.g. wages) others will be invoiced with GCT, enabling the insured party to recover input tax.

RELATED ISSUES

28. There are some additional matters which arise from the foregoing comments, which should in my opinion be taken into account when considering the claim, as follows:

a. If the present ruling stands then practically every business interruption insurance claim dating from the time-bar for taxation to the present is liable to be re-opened. Any tax payable would have formed a legitimate part of the insurance claim but in many cases will not now be recoverable because claimants will [sic] have signed acceptance forms in full and final settlement of their claims.

b. If insurers were to reopen claims despite the above, most sums insured will become inadequate due to the addition of 16½% GCT (or the current rate of 17.5%) to the insurable amount. Operation of the underinsurance provisions which apply to all policies will unfairly penalise the claimants because at the material time neither they, nor their brokers nor their insurers would have been able to forsee this ruling. Indeed, if they had considered tax at all they would have been guided by the view of the tax authorities as set out in their letter of 18th February 1999. **A copy of the letter is being shown to me and marked 'D.W.3.'**

c. If insurers were to accept and pay the additional claims they may well be unable to recover their additional outlay from their reinsurers, because treaties and facultative facilities change, reinsurers merge or go out of business or simply refuse to accept additional claims, and in many cases records will [sic] have been destroyed.

d. The administrative cost of reviewing, recalculating and re-negotiating all business interruption claims will be excessive for all parties."

[36] In a brief supplemental affidavit sworn to on 10 May 2010, Mr Waller clarified paragraph 15 of his first affidavit by pointing out (at para. 5) that sub-paragraphs 4(ii) and 4(iii) should be read together, as follows: "*Estimation of the lost revenue, a*

theoretical exercise based on budget, performance prior to the incident and any other related matters".

What the judge found

[37] After recounting in some detail the history of the matter and the rival contentions of the parties, R Anderson J posed seven questions (at para. [74]) by which, he considered, the issue raised by the case could be "simply analysed":

1. Is the policy a business interruption policy?
2. Does it automatically insure loss of profits?
3. What are the relevant provisions of the contract?
4. What are the meanings of standing charges and increased costs of working?
5. Ought the receipts to be deemed 'consideration' under Section 18(4)?
6. If GCT is exigible, what rate is appropriate?
7. If tax is exigible, are penalties and interest appropriate?

[38] The learned judge answered question 1 in the affirmative, pointing out however (at para [76]) that "business interruption policies are of different kinds and the nature of each such policy and hence the extent of the coverage, is to be determined by looking at its precise terms". Question 2 elicited a negative answer from the judge, who observed (at para. [78]) that "...it is for [Digicel] to demonstrate from the terms of the policy where loss of profits is specifically provided for". On question 3, the judge concluded (at para. [81]) that the specific terms of the policy did not cover loss of

profit. Further, he pointed out, "one critical factor in loss of profit insurance is the defining of 'the indemnity period'", but Digicel's submissions had omitted to state "the period by reference to which the profits had been lost". And, on the first part of question 4, the judge considered (at para. [82]) that standing charges "are simply fixed expenses which do not change in direct proportion to changes in sales (i.e. fixed and semi-fixed costs such as taxes, rent and insurance)".

[39] Understandably, since it lay at the heart of the case, the learned judge spent considerably more time on the second part of his question 4, that is, what are "increased costs of working"? First, he considered (at para. [83]) that "[i]ncreased costs of working are the reasonable additional expenses incurred with the permission of the insurance company the purpose of which must be to maintain the normal operation of the business". Next, the judge pointed out (at para. [84]) that, in his evidence (see the passage quoted at para. [28] above), Mr Waller had used the word "reimbursement". The judge observed that "[i]t is difficult to believe that he meant anything other than 'reimburse'". This was, the judge also pointed out, similar to the language used by Mr Dawson in his letter (quoted at para. [21] above). Thus, the judge concluded on this question (at paras [86]-[87]):

> "The above refers throughout to 'costs' and 'expenditure' and nowhere speaks of 'lost profits during an indemnity period.' It seems clearly to contemplate the making of expenditure by the Appellant to acquire goods and/or services in order to allow it to preserve market share and to make taxable supplies. It should also be noted that although the Appellant submitted that no taxable supplies were made during the period, the section does not require such. It will

> be sufficient if the taxable supplies are to be made in the future as a result of the goods and services acquired for that purpose today.
>
> The Appellant had submitted that: 'Under the policy the indemnity relates to loss of profits *computed by reference to gross revenue less expenses including increased costs of working*.' But if that were correct the amount of the indemnity and what the Appellant would have received based upon Crawford's letter quoted above would be:
>
> | | |
> |---|---|
> | Gross Revenue | 16,333,000 |
> | Less Expenses (including increased cost of working) | 7,550,746 |
> | Indemnity | 8,782,254 |
>
> However, the amount recovered as indemnity by the Appellant was the sum of US$6,967,831 and, as Crawford's letter stated: 'The cost of acquiring customers was said to have increased during September and October 2004 by US$6,129,395'."

[40] On the basis of his analysis of the meaning of "increased cost of working", the learned judge had no difficulty in answering his question 5 in the affirmative (at para. [88]):

> "...it seems that once the expenditure in respect of which the reimbursement was made is considered to have been 'to acquire goods or services for the purpose of making taxable supplies' then the reciept in the form of 'reimbursement or recovery or otherwise' is to be deemed 'consideration'. I hold that the receipt herein is deemed to be 'consideration'."

[41] As to his question 6 (at what rate should tax be levied?), the learned judge accepted (at para. [90]) Digicel's contention that the Commissioner had erred in applying a GCT rate of 16.5% in calculating its tax liability, given that the applicable

rate at the time when the insurance settlement was received was 15%, as prescribed by the Provisional Collection of Tax (General Consumption Tax)(No. 2) Order, 2005.

[42] And, as regards his question 7, which related to the matter of penalties and interest, the learned judge acknowledged (at para. [92]) that section 54 of the Act appeared to make the imposition of penalties and interest mandatory in these circumstances. However, he indicated, "I would urge the CTAA not to seek to insist upon the full penalties and interest and certainly, no penalties or interest should continue to run between the time of the filing of the appeal before CTAD and the date of this decision".

[43] Turning finally to the GCTD's letter to PWC dated 18 February 1999 and the TAD's letter to KPMG dated 15 September 2005, the judge then said this (at para. [91]):

> "I turn to the letters previously described as the '99 letter and the '05 letter. I hold that on a proper construction of the '99 letter, the insurance compensation payments which are stated to be not subject to GCT (output tax) are payments which are defined as 'consequential loss' payments and that a reference to 'business interruption' payments does not *per se* take a payment outside of the purview of section 18(4). Further, it is clear that the letter did not say or imply that every payment received as a consequence of the business being interrupted was not taxable. I further hold that the '05 letter written by the Tax Administration Directorate to Price Waterhouse [sic] is not inconsistent with either the '99 letter or the position of the CTAA as set out in his decision, since it is made quite clear that it was compensation for the *loss of business profits* to which reference was being made. In the context of the citation from **Colinvaux's** Law of Insurance

> that loss of profit must be specifically stated in the policy coverage, I would hold that the policy must make clear that loss of profits is what is being insured. Moreover, and I so hold, this is not retroactive application of the tax. The assessment arose out of an audit of the Appellant's business. Audits are by definition a look at historical data to confirm whether, and if so to what extent, the taxpayer has complied with the provisions of the taxing statute."

[44] In the result, the learned judge made the following order:

> "The Appeal is dismissed with costs to the Respondent to be taxed if not agreed, subject to
>
> i) the receipt of the insurance proceeds being treated as GCT inclusive and
>
> ii) further subject to the rate of tax to be applied being 15%, and
>
> iii) No penalties or interest being applied between the date of filing the appeal before CTAD and the date of this judgment."

The grounds of appeal

[45] Dissatisfied with this result, Digicel, by an amended notice and grounds of appeal dated 16 January 2012, sought an order allowing the appeal and setting aside the Commissioner's decision made on 27 November 2009, with costs in this court and in the court below. The grounds of appeal are as follows:

> "1) The learned Judge of the Revenue Court erred in law in failing to find that the Appellant's insurance policy in question provided for consequential loss or compensation for loss of profit, cash flow, or income caused by interruptions of the business as contemplated and provided for by the said policy of insurance so as to take the said insurance

proceeds outside the ambit of Section 18(4) of the General Consumption Tax Act;

2) The learned Judge erred in law in failing to find that the settlement received by the Appellant under its business interruption insurance policy consisted of reimbursement or compensation for the Appellant's loss of profit/revenue/cash flow falling short of "Standard Revenue" as defined in the Appellant's policy of insurance as a result of the business interruption and additional expenses incurred for the sole purpose of avoiding or diminishing the reduction in revenue which would have occurred in consequence of the loss destruction or damage insured under section 1 of the policy, despite the express provisions contained in section 2 of the Appellant's said policy of insurance that the insurance coverage is in respect of business interruption or interference as aforesaid.

3) The learned Judge erred in law in holding that the sums insured are defined by reference to the "items" covered in the section of the Policy's Loss Settlement Clause since that clause specifically deals with Revenue falling short of the standard revenue by reason of the loss or damage to those items, the clear intention being to cover consequential loss of profits as well as loss or damage to the facilities or apparatus listed.

4) The learned Judge erred in holding that the policy definitions of "revenue" and "standard revenue" do not refer to the extent of any loss of profits incurred since the language and clear objective of the provisions are to compensate for the consequential short fall in revenue, hence loss of profits.

5) The learned Judge erred in holding that it was necessary for the Appellant's submissions to state the period by reference to which the profits have been lost, since the Policy defined the indemnity period and specified how the losses for that period should be computed and in any event this was not an issue raised by the Respondent or arising on the appeal.

6) The learned Judge erred in law in stating that the evidence provided by Dr. Waller's affidavit and the letter

signed by Mr T W Dawson nowhere speaks of lost profits during an indemnity period, although there were clear references to loss of market share during the relevant period and of losses through the end of December 2004 and a calculation of profit losses related to the period of the insurance coverage.

7) The learned Judge inferentially held, contrary to the terms of the policy, that the reimbursement was in respect of expenditure to acquire goods and services and was to be deemed consideration for the purposes of section 18(4) of the Act, although the insurance policy made no such provision and imposed no such requirement.

8) The learned Judge erred in holding that the proceeds of the insurance claim were in respect of the acquisition of goods and services for the purpose of allowing the Appellant to carry on its business since the policy contains no such provision, requirement or stipulation and there was no evidence to support this conclusion.

9) The learned Judge erred in failing to hold that the Appellant having relied upon the ruling contained in letter from the General Consumption Tax Department of February 18, 1999 which expressly stated that compensation for consequential loss or business interruption does not fall within the ambit of 18(4) of the General Consumption Tax Act and cannot be regarded as consideration for the making of any taxable supply, would have acted to its detriment in relying on that ruling that the said proceeds were not taxable pursuant to the said section 18(4) of the General Consumption Act and as such, interest and penalty are unjust, arbitrary and inappropriate in the circumstances.

10) The learned Judge erred in holding that-

a. the '05 letter written by the Tax Administration Directorate to Price Waterhouse is not inconsistent with either the "99 letter or the position of the CTAA as set out in his decision, since it is made quite clear that it was compensation for the loss of business profits to which reference was being made;

b. In the context of the citation from Colinvaux's *Law of Insurance* that loss of profit must be specifically stated in the policy coverage, I would hold that the policy must make clear that loss of profits is what is being insured; and

c. Moreover, and I so hold, this is not retroactive application of the tax. The assessment arose out of an audit of the Appellant's business. Audits are by definition a look at historical data to confirm whether, and if so to what extent, the taxpayer has complied with the provisions of the taxing statute."

The submissions

[47] Dr Barnett's detailed written submissions for Digicel were supplemented by his oral argument. Taking all the grounds of appeal together (but concentrating in particular on grounds one to three), Dr Barnett posited six propositions:

(1) The basic aim and objective of the Act is to impose tax on goods or services by adding a percentage to the price or fee of such goods or services by way of a tax which must be paid over to the revenue.

(2) The deeming provision in section 18(4) of the Act is designed to capture amounts which, although not paid directly for goods or services, are repayments/reimbursements of the costs of those goods or services.

(3) For the section to apply, payment must be (a) in respect of goods or services delivered or acquired, and (b) for the purpose of making a taxable supply of goods or services.

(4) The insurance settlement in question in this case was paid, not for the supply of goods or services or to enable such supply, but to compensate Digicel for loss of business profits.

(5) The two factors contributing to profits and losses are expenses and income, so that if income diminishes in relation to expenses there is a reduction or loss of profit; *a fortiori*, if income is interrupted, but expenses continue, there is a loss of profit.

(6) In this case, it is loss of profits caused by the interruption of the business by reason of an insurable event that was compensated by the settlement; in this regard, 'reimburse' means "to repay or recompense for loss or injury sustained".

[47] Against this backdrop, Dr Barnett took us through the provisions of the policy in detail. He submitted that its terms are in typical, clear and unexceptional form and provide for a well accepted method of assessing revenue whenever a determination has to be made as to the amount of a loss. The policy makes it abundantly clear, it was further submitted, that any payment made under it is intended to compensate for the loss of revenue which is the consequence of a business interruption caused by the damage suffered as a result of the designated peril. Once a claim has been settled in accordance with the terms of the policy and the agreed mechanism, the insured is entitled to utilise the settlement proceeds as it thinks fit and neither the insurer nor anyone else has any right to insist that they be utilised in any particular way. The characteristics of the compensation for loss of profits consequent on a business

interruption are completely different from reimbursement for goods and services acquired by a taxpayer: under the policy, the indemnity relates to loss of profits computed by reference to gross revenue less expenses including increased cost of working. The judge had therefore come to an erroneous conclusion in holding that the reimbursement by the insurer was in respect of expenditure to acquire goods and services for the purpose of allowing Digicel to carry on its business, although the policy contained no such stipulation and there was no evidence to support this conclusion.

[48] In this regard, Dr Barnett referred us to Ivamy (General Principles of Insurance Law, by E R Hardy Ivamy, 6th edn, page 13), to make the point that it is necessary to identify the subject matter of the policy (see also The Law of Insurance, by Raoul Colinvaux, 4th edn, para. 4-15); Clarke (The Law of Insurance Contracts, by Malcolm A Clarke, para. 4-5N), to indicate that profits are insurable where they relate to loss of property; and McGee (The Modern Law of Insurance, by Andrew McGee, 2nd edn, para. 50.13), for a statement on the nature of business interruption insurance. I will refer to these works of authority, as well as the other authorities to which we were referred, in greater detail in a moment.

[49] Referring to Mr Waller's expert evidence, Dr Barnett submitted that the learned judge had misunderstood the evidence, by failing to take into account the basic financial proposition that a loss of profits may result from increased expenses as well as from decreased revenue. As Mr Waller had been careful to point out, it was submitted, the policy was designed to facilitate steps being taken by the insured to reduce the loss of profits. It was submitted that it was therefore illogical to suggest that, if there was a

business interruption which caused loss of income, an indemnity paid in respect of that loss would not be taxable, but that, if the insured sought to reduce the amount of the loss, thus reducing the amount recoverable from the insurer, an indemnity paid in respect of any amount paid to offset the cost of such a reduction is taxable. This was not, it was submitted, the intention of the GCT Act, which was essentially designed to tax consumption of goods and services and not efforts to reduce losses. The methodology for calculating losses under the policy referred to by Mr Waller clearly related to loss of profits and is completely inapplicable to a claim with respect of goods and services acquired or to be acquired.

[50] Turning finally to what was described in Digicel's written submissions as "The Revenue's Reversal of its Declaration", Dr Barnett submitted as follows (at para. 49):

> "In the absence of judicially decided cases, the rulings or declarations of the Tax Administrators are of critical importance to the tax payers in the way they order their businesses. They seek to promote certainty and consensus. It is therefore conducive to orderliness and compliance."

[51] It was accordingly submitted that, by reversing the position clearly stated in the GCTD's 18 February 1999 letter to PWC and the TAD's 15 September 2005 letter to KPMG, upon which reliance had been placed by Digicel and others, the CTAA was guilty of an illegal abuse of power. I will also come shortly to the authorities cited in support of this submission.

[52] Detailed written submissions, in which each ground of appeal was specifically addressed, were also filed on behalf of the Commissioner. In supplemental submissions

filed after the hearing had commenced, Mrs Chapman-Daley also focussed directly on Dr Barnett's oral submissions before us.

[53] Mrs Chapman-Daley submitted firstly that GCT is not so much a consumption tax as it is a tax on the supply of goods. So even where a taxpayer does not incur input tax, he will still be required to pay over the GCT charged as output tax if he is engaged in making taxable supplies, although he will be unable to claim a tax credit in accordance with section 20(2) of the Act and regulation 14. Thus to make a determination of whether a taxable supply has taken place, it was submitted, it is not necessary "to disaggregate the various components included in making the taxable supply provided the proceeds were in respect of goods and services acquired for making the taxable supply".

[54] Mrs Chapman-Daley next referred to section 18(4) of the Act, submitting that, although the state of affairs contemplated by the section would not ordinarily fall within the "normal operations of the GCT Act...the legislation creates a 'legal fiction' upon which it imposes a tax obligation, where it would not otherwise apply". It was accordingly submitted that, while the sums received by Digicel under the insurance settlement were not conceived of by the parties as a reimbursement within the meaning of section 18(4), they in fact fell within the section, since they did amount to a reimbursement in respect of goods and services acquired to enable Digicel to make its taxable supplies, *viz*, telecommunication services. Mrs Chapman-Daley submitted further that, because Digicel would have claimed input tax credit on the additional expenditures incurred (and there was evidence that the amount of input tax paid by the

company in 2004, the year of the hurricane, was greater than in 2003 and 2005), the CTAA was in these circumstances "duty bound" to impose output tax on the amount received by way of reimbursement for those expenditures. Thus, while the CTAA did not impute an "adverse intention" to the parties, where tax implications arise from a transaction, the Revenue has an obligation to act.

[55] As regards Mr Waller's evidence, Mrs Chapman-Daley submitted that the insurance settlement figures referred to by him in his affidavit (see para. [35] above) reflected actual and not projected expenditures and that it therefore cannot be argued that the insurance payment was made in respect of loss of profits. It was submitted further that, where sums are received and the purpose falls within the meaning of section 18(4), those sums are taxable notwithstanding the name attached to the payment by the parties. In this regard, Mrs Chapman-Daley expressly disavowed any intention to suggest that the transaction was in any way artificial, fictitious or a sham, but maintained that the insurance settlement nevertheless fell within section 18(4) as a reimbursement and as such attracted GCT output tax.

[56] With regard to the Revenue's "reversal", Mrs Chapman-Daley contended that neither the 1999 letter nor the 2005 letter was incorrect in indicating that insurance proceeds for business interruption/consequential loss/loss of business profits did not come within section 18(4). But in this case, it was submitted, the policy was clearly not dealing with loss of profits. Digicel sought to equate loss of profit with loss of revenue, but the two concepts were not the same. Neither letter was therefore applicable to relieve Digicel from liability to output tax under section 18(4).

[57] It appears to me that the grounds of appeal and these submissions invite consideration of the following matters:

(a) The characteristics of business interruption insurance.

(b) The nature and extent of the cover afforded by the policy.

(c) The assessment and settlement of Digicel's business interruption claim.

(d) The meaning and effect of section 18(4).

(e) The effect of the 1999 and 2005 letters.

The characteristics of business interrruption insurance

[58] Professor Ivamy makes the point (op. cit., page 13) that "[a] description of the subject matter of insurance necessarily forms part of every policy, and this description must be framed in terms sufficiently adequate to enable the subject-matter to be identified with precision". And so, in similar vein, Mr Colinvaux observes (op. cit., para. 4-15) that –

> "It also follows that where the assured desires to cover himself against loss consequential on the loss of property, he must be careful to ensure that the subject-matter of the desired insurance is properly described in the policy. Thus, where the policy simply covers loss of goods, their value alone can be recovered and nothing can be recovered in respect of loss of profits. Though profits may be insured, they must be described as such."

[59] The policy in this case was described, as has been seen, as an "Equipment All Risk (Material Damage & Business Interruption) Insurance" and R Anderson J found that it was indeed a business interruption policy (see para. [37] above). Professor McGee describes the usual cover offered by such policies in this way (op. cit., paras 50.13-50.14):

> "**Business interruption insurance**
>
> 50.13 Business Interruption policies protect against the risk of economic loss arising from the interruption of business activity through extraneous event. They are complementary to, but distinct from, those policies which protect against the risk of physical damage to the real or personal property of the business. Both types of risk may of course be covered by the same policy.
>
> *Quantum*
>
> 50.14 A special feature of business interruption insurance is that by its nature the loss against which it insures is to some extent speculative – the intention is to indemnify the insured for the profit which he would have made if the interruption had not occurred. Two basic problems therefore arise when calculating the amount due under a valid claim. The first is to decide what the turnover of the insured would have been, whilst the second is to establish what element of that would have been profit. The former problem is commonly solved to a large extent by looking at the turnover of the business for the corresponding previous accounting period, though of course this can give no more than an approximate result, since the trend of a business at any given time may be either up or down. In the modern practice it is common to provide for a liquidated sum per day in order to avoid these difficulties of proof.

> The second problem is more complex, since a reduction of X% in turnover is likely to lead to a reduction of more than X% in profit (this is because many of the overhead costs of the business will remain despite the fall in turnover though obviously the variable cost will be reduced). Any method of calculating the level of indemnity must therefore distinguish with reasonable accuracy between overhead costs and variable costs."

[60] In a footnote to paragraph 50.13, Professor McGee directs attention to Riley on Business Interruption Insurance (8th edn, by David Cloughton) ('Riley'), the leading standard text on the subect in the United Kingdom. Riley provides a very helpful outline (at paras 4-8) of the nature of the cover generally provided by business interruption policies in the United Kingdom and, under the rubric "Compensation for additional expenditure" (at para. 8), the learned author says this:

> "Interruption of trading which follows damage by fire or other perils generally involves additional expenditure of one kind or another with the object of minimising the loss of turnover and restoring normal conditions as quickly as possible. Any insurance which is intended to to give an indemnity for loss consequent upon such damage must therefore provide compensation for additional expenditure undertaken to reduce the prospective loss of turnover during a period of interruption.
>
> Without provision being made for the additional expenditure insurers would benefit through their insured's action whilst the latter would suffer the loss of the amount incurred. In practice, such additional expenditure is generally of considerable amount and because of its effectiveness frequently exceeds the loss arising from reduction in turnover.
>
> Consequently, provision is made in the policy as explained in paragraph 45 for the payment of increase in cost of working.

> This rounds off the indemnity provided for loss of gross profit and the broad lines of the U.K. business interruption insurance may be summarised as giving compensation for:
>
> (i) loss of net profit due to shortage in turnover;
>
> (ii) loss due to the increased ratio of continuing charges to a reduced amount of turnover;
>
> (iii) loss due to additional expenditure incurred with the object of minimising the effects of the damage on turnover."

[61] Amplifying the notion of "Increase in the cost of working", Riley goes on to say this (para. 45):

> "It is in an insured's interest to restore a business to normal trading conditions as quickly as possible after Incident and, moreover, there is a duty to do so imposed by the policy claims conditions...This however may involve considerable expense in undertaking special measures to reduce the loss of turnover during the indemnity period and to hasten the resumption of normal trading. But action on these lines is also of benefit to the insurers as its effect is to reduce the amount which would otherwise be payable for loss of gross profit. Therefore, clause (b) under the heading Increase in Cost of Working compensates the insured for 'the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in turnover' which would otherwise have taken place.
>
> No sum insured is stated in respect of this benefit nor is anything to be added to the amount insured on gross profit to provide for it because it is an alternative to loss which would otherwise be payable under the latter heading. An exception to this arises, however, when it is anticipated that the amount which may have to be expended on increase in cost of working in the event of a claim will exceed the amount of the gross profit which will be conserved by such expenditure. Specific insurance is then required in respect of the excess amount...

> Payments under the provisions for increase in cost of working can be made for very varied expenditure. The payment of the additional part of overtime wages, either to an insured's employees to try to make good the loss of production or to builder's or other tradesmen's workers to speed up the restoration of the damaged property and plant, is a regular feature of claims. Other typical examples are the cost of having provisional repairs effected to buildings or plant, of temporary roofing or flooring, or of the installation of heating, lighting or power arrangements of a provisional nature, which subsequently have to be scrapped. It might be possible to promote some turnover by having work done on commission or by having components or finished products made by other firms, thus incurring an increase in productive costs which can be claimed under this clause. Changes in works shop-floor practice and other provisional production expedients can involve extra expense. The occupation of temporary premises generally entails additions expenditure of various kinds which may continue for a prolonged period. Sometimes it is necessary to purchase premises, or buy out another business, purely as a temporary measure, with a subsequent loss on resale when the insured's permanent premises are again ready for occupation. Heavy advertising expenditure may be necessary for a considerable period after the restoration of the damaged property in order to regain lost custom."

[62] Finally for present purposes, under the rubric, "'Economic limit' to additional expenditure", Riley adds this (at para. 47):

> "(a) Theory
>
> The increase in cost of working section of the cover is invoked in most claims and involves insurers in very substantial payments which often exceed the amount paid concurrently in respect of loss of gross profit. Provided however that the expenditure is 'necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in turnover…' and the amount of it is less than the insurers would otherwise have had to pay under clause (a) for the loss of gross profit which that expenditure has avoided, the policy compensates for it and insurers welcome

> the steps taken. A provision that the insurance will not contribute in respect of increase in cost of working an amount greater than that saved by the expenditure on it, that is, will not pay more than £x to save £x, is a natural and equitable one. Effect is given to this so-called 'economic limit' by the final sentence of clause (b) in the words 'but not exceeding the sum produced by applying the rate of gross profit to the amount of the reduction (in turnover) thereby avoided'."

[63] As R Anderson J observed (at para. [75]), "[t]he intention of business interruption insurance is to restore a business to the same financial position as if the loss had not occurred". The usual form of business interruption policy described by Riley therefore seeks to compensate the insured for economic loss resulting from an insured peril by indemnifying it against (i) a loss of profits resulting from the diminution in income stream occasioned by the business interruption; and (ii) additional expenses ("the increased cost of working") necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in gross profit. The indemnity offered under (ii) is however subject to the 'economic limit', that is, it cannot exceed amount of gross profit potentially saved by the additional expenditure.

[64] But, as the learned judge also observed (at para. [32]), I think obviously correctly, the nature of "each such policy and hence the extent of the coverage, is to be determined by looking at its precise terms".

The nature and extent of the policy cover

[65] Nothing turns directly on Section 1 of the policy, which provides for an indemnity in respect of material damage to the various items of equipment and installations listed in the policy. However, Sections 1 and 2 are clearly linked, in that the indemnity offered by Section 2 is only available if the insured's business is interrupted or interfered with, in consequence of loss or destruction of, or damage to, insured objects which are (i) ready for commercial operation; (ii) on the premises specified in the policy schedule; (iii) at work or at rest, or dismantled for the purpose of cleaning, overhauling, or of being shifted within the insured's premises, or in the course of subsequent re-erection; and (iv) in respect of which the insured has a valid claim under Section 1 of the policy.

[66] Once these conditions are satisfied, the insurer will, subject to the limit of liablity during any one year of insurance stated in the policy, indemnify the insured against the amount of loss resulting from such interruption or interference in respect of each item stated in the policy schedule to be insured by Section 2. It is therefore clear that what Section 2 provides for is an indemnity against losses resulting from interruption or interference with the insured's business, in cases of material damage in respect of which the insured has a valid claim under Section 1.

[67] The policy, having identified the nature of the indemnity offered, goes on to specify, in the section headed "Loss Settlement under Section 2", how the amount payable by the insurer by way of indemnity against the losses resulting from the interruption or interference with business is to be arrived at. The critical variables for

this purpose are (i) the insured "standing charges" (which are set out in the policy schedule - see para. [16] above); (ii) "revenue" (which is the money paid or payable to the insured "for all goods sold, work done and services provided in course of the Business at the Premises"); and (iii) "standard revenue" (which is all the revenue during the corresponding 12 month period immediately preceding the date of the loss, suitably adjusted for the trend of the insured's business and for variations in or special circumstances affecting the insured's business, either before or after the loss).

[68] The indemnity amount in respect of each item insured by Section 2 is made up of such portion or portions of the standing charges insured by such item as the insured is unable to pay out of revenue due to (i) the extent to which revenue during the indemnity period falls short of standard revenue as a consequence of material damage falling under Section 1; and (ii) the increased cost of working necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in revenue, but not exceeding the economic limit (that is, the amount of the reduction thereby avoided).

[69] Commenting generally on the policy, Mr Waller stated (at para. 19 of his affidavit) that "...the policy is designed to reimburse costs which continue after an insured event, and which cannot be paid from the revenue stream, and/or expenses incurred by Digicel to reduce or avoid the loss of income from which such standing costs are paid". So what the policy offers is an indemnity against loss of revenue occasioned by a business interruption, measured by reference to such portions of the standing charges as the insured is unable to meet out of revenue, due to the diminution

in revenue, and the increase in the cost of working reasonably incurred in order to prevent further diminution in revenue. As Riley points out (see para. [60] above), if no provision were made for the increase in the cost of working, "insurers would benefit through their insured's action whilst the latter would suffer the loss of the amount incurred". In this regard, Mr Waller's further observation (at para. 18) that, "increased cost of working cover is not an additional benefit...[a]ny money spent under this heading must by definition reflect a greater saving in respect of the standing charges", therefore appears to me to be fully justified by the logic of business interruption insurance and the terms of the policy.

[70] R Anderson J considered that, in the light of the fact that, (a) as the authorities state, profits, though insurable, must be described in the policy as such; and (b) the policy does not "specifically say that 'loss of profits' is insured" (in addition to which Digicel in its submissions did not state "the period by reference to which profits had been lost"), it did not appear that loss of profits was in fact within the scope of the cover offered by the policy. I am bound to say, with respect, that I find this to be a puzzling conclusion. For I would have thought it to be a business truism that, as Dr Barnett submitted, if revenue diminishes or is interrupted over a given period, during which expenses either continue unabated or do not reduce in direct proportion to revenue, there will inevitably be a reduction in or loss of profit for that period. Profit is, after all, "[the] positive difference that results from selling products and services for more than the cost of producing those goods" (Dictionary of Finance and Investment Terms, 4th edn, by John Downes and Jordan Elliot Goodman, page 442).

[71] Both Riley and Mr Waller's evidence make it clear, in my view, that business interruption insurance is in general concerned with providing an indemnity against loss of profits. And further, as the learned author of Riley observes, the indemnity provided by such policies against an increase in the cost of working "rounds off the indemnity provided for loss of gross profit". While it is true that, as the judge emphasised, the policy does not refer specifically to 'loss of profits', it seems to me that the clear intendment of the policy was to indemnify Digicel against the loss of business profits caused by a reduction in revenue. In this regard, nothing in particular turns in this case, in my view, on the absence of any reference by Digicel to a particular indemnity period, since the policy itself was clear on the point and the question simply did not arise for the purposes of the insurance claim.

The assessment and settlement of Digicel's business interruption claim

[72] In his letter dated 8 June 2009 (para. [27] above), Mr Dawson explained his approach to the 'increased cost of working' aspect of the claim. The most significant item in monetary terms related to 'Subscriber Acquisition Cost', that is, the increased cost of acquiring customers during September and October 2004. After the claim was reviewed for "reasonableness and accuracy", the original amount of US$6,129,395.00 claimed under this head was reduced to US$4,697,838.00. This figure, together with adjustments to the other costs and the reclassification of two items from the property claim, resulted in "a total increased cost of working of US$6,583,026 or US$6,916,076 including emergency expense of US$333,050". Mr Dawson's next step was to check this

total against the economic limit. Since I cannot possibly approximate the clarity with which he explained this process, I will set it out again:

> "In terms of the economic limit, we were satisfied that had the above expenditure not been made, the insured would have faced a significant loss of market share, at least through to the end of December 2004. Based upon the projected revenue for this period, US$114,689,000 on a month by month analysis, we arrived at a possible loss of revenue of US$16,333,000. In establishing a rate of gross profit of 53.77%, this translated to a potential loss of gross profit of US$8,782,254. Based upon which, an increased cost of working spend of US$6,583,026 was considered economic."

[73] In other words, it was considered to be reasonable to spend US$6,583,026.00 in order to avoid a loss of US$8,782,254.00. At the end of the process, through the application of policy limits, the increased cost of working and emergency expense figure was reduced to US$6,762,354.00, producing, when added to the loss of standing charges of US$205,477.00, a total of US$6,967,831.00. This was the amount agreed and paid by the insurer under Section 2 of the policy.

[74] In terms of the policy, the total amount paid was therefore paid by way of indemnity; that is, as compensation for the loss of revenue occasioned by the business interruption. This loss was calculated and assessed in the manner stipulated by the policy; that is, by reference to (i) such portions of the standing charges as the insured was unable to meet out of revenue; and (ii) subject to the economic limit, the additional expenditure which was reasonably incurred by the insured in order to prevent further diminution in revenue. (It appears that, as Dr Barnett pointed out, the learned judge

clearly misunderstood this aspect of Mr Dawson's letter, wrongly attributing the opening figure of US$16,333,000.00 to revenue, as opposed to **loss of** revenue, and thereby arriving at a meaningless conclusion in the context of the evidence – see para. [39] above.)

The meaning and effect of section 18(4)

[75] The parties are agreed that no question of whether the transaction upon which the taxpayer relies is a 'sham' or in any way artificial arises in this case. As Dr Barnett pointed out, it could not be contended that, by entering into the policy, Digicel was involved in a scheme to avoid taxation; and Mrs Chapman-Daley, quite properly in my view, expressly disavowed any intention "to impute an adverse intention to the parties involved in the policy". So the only question for the court is whether the insurance settlement received by Digicel from the insured was in large part captured by the language of section 18(4) of the Act, as the Commissioner ruled, or not at all, as Digicel maintains.

[76] The parties are also agreed that, in interpreting the provisions of a revenue statute, such as the Act, "the paramount question for the court is the construction of the particular provision and its application to the facts of the particular case", as this court held in **Cigarette Company of Jamaica Ltd (in voluntary liquidation) v Commissioner of Taxpayer Audit and Assessment** [2010] JMCA 3, para. [75] (a decision subsequently upheld on appeal to the Privy Council in **Commissioner of Taxpayer Audit and Assessment v Cigarette Company of Jamaica Limited (in**

Voluntary Liquidation) [2012] UKPC 9). This approach derives from the landmark decision of the House of Lords in **W.T. Ramsay Ltd v Inland Revenue Commissioners et al** [1981] 1 All ER 865, in which Lord Wilberforce stated, as the first of "some familiar principles" on the construction of revenue statutes, the following (at pages 870-871):

> "A subject is only to be taxed on clear words, not on 'intendment' or on the 'equity' of an Act. Any taxing Act of Parliament is to be construed in accordance with this principle. What are 'clear words' is to be ascertained on normal principles; these do not confine the courts to literal interpretation. There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded…"

[77] **Ramsay** was applied by the Privy Council in **Carreras Group Ltd v Stamp Commissioner** [2004] UKPC 16, where, in reference to the Transfer Tax Act, Lord Hoffmann said this (at para. [8]):

> "Whether the statute is concerned with a single step or a broader view of the acts of the parties depends upon the construction of the language in its context. Sometimes the conclusion that the statute is concerned with the character of a particular act is inescapable: see *MacNiven (HM Inspector of Taxes) v Westmoreland Investments Ltd* [2001] UKHL 6; [2003] 1 AC 311. But ever since *W T Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300 the courts have tended to assume that revenue statutes in particular are concerned with the characterisation of the entirety of transactions which have a commercial unity rather than the individual steps into which such transactions may be divided. This approach does not deny the existence or legality of the individual steps, but may deprive them of significance for the purposes of the characterisation required by the statute.

> This has been said so often that citation of authority since *Ramsay's* case is unnecessary."

[78] And, amplifying the post **Ramsay** approach in a conjoint judgment in the later case of **Barclay's Mercantile Finance Ltd v Mawson (Inspector of Taxes)** [2005] 1 All ER 97, the Appellate Committee of the House of Lords said this (at para. [32]):

> "The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of statute, upon its true construction, applies to the facts as found."

[79] It accordingly seems to me that, in seeking to discover whether section 18(4) applies to the proceeds of the insurance settlement received by Digicel in accordance with the terms of the policy in this case, it is necessary to have regard to the clear words of the Act, looked at against the context, scheme and purpose of the Act as a whole and section 18(4) in particular.

[80] The Act, it will be recalled, imposes GCT on the supply of goods and services by a registered taxpayer in the course or furtherance of a taxable activity carried on by that taxpayer. A taxable activity is an activity, whether carried on for pecuniary profit or not, which involves the supply of goods and services to any other person for a

consideration. GCT is broken down into input tax and output tax. Input tax is the tax charged to a registered taxpayer by a third party or parties, on the supply to the registered taxpayer of goods and services required by him wholly or mainly for the purpose of making taxable supplies. A taxable supply is any supply of goods and services on which tax is imposed by the Act. Output tax is the tax charged by a registered taxpayer on the making by him of taxable supplies. GCT is calculated by reference to the value of the goods and services supplied. A registered taxpayer is required to pay over to the revenue periodically all output tax collected by him, but he is permitted to claim, as a credit against his output tax liability, any input tax paid by him in respect of taxable supplies made to him during a taxable period, being supplies used by him in carrying out his taxable activity.

[81] At the heart of the regime is therefore the notion of a taxable supply, that is, a supply of goods or services which attracts output tax. Mrs Chapman-Daley accordingly placed much reliance on a statement, essentially to this effect, by the Full Court of the Australian Federal Court (Heery, Dowsett and Conti JJ) with respect to the Australian Goods and Services Tax ('GST') regime in **Sterling Guardian Pty Ltd v Commissioner of Taxation** [2006] FCAFC 12 (paras 14-15):

> "14 The burden of GST is progressively passed down the chain of persons who make taxable supplies as for example, in the case of goods, from manufacturer to wholesaler to retailer. At each transaction the price includes GST, which the supplier pays to the Commissioner. The acquirer gets an input tax credit for the amount of GST included in the price which he has paid and includes GST in the price he charges the next person in the chain. Finally, the ultimate consumer pays a price which includes the GST paid by the previous

> person in the chain (in this example, the retailer). The ultimate consumer does not get any input tax credit because he is not registered or required to be registered.
>
> 15 In economic terms it may be correct to call the GST a consumption tax, because the effective burden falls on the ultimate consumer. But as a matter of legal analysis what is taxed, that is to say what generates the tax liability (and the obligations of recording and reporting), is not consumption but a particular form of transaction, namely supply;…"

[82] Part IV of the Act, as has been seen, makes "Provisions Relating to Making of Taxable Supply" (see paras [11]-[15] above). Taken in its context, it is clear that the intention of section 18 is to (i) elucidate the meaning of "supply" (section 18(1)); and (ii) make provision for certain factual situations which, although not falling within the usual meaning of supply, are deemed, upon the stated preconditions being met, to fall within the statutory definition of supply (section 18(2), (3) and (4)). Section 18(2)(3) and (4) therefore enlarges the circumstances in which GCT is exigible by the use of the mechanism of a deeming provision.

[83] In **R v Verrette** [1978] 2 SCR 838, 845, a decision of the Supreme Court of Canada, Beetz J defined a deeming provision in this way:

> "A deeming provision is a statutory fiction; as a rule it implicitly admits that a thing is not what it is deemed to be but decrees that for some particular purpose it shall be taken as if it were that thing although it is not or there is doubt as to whether it is. A deeming provision artificially imports into a word or an expression an additional meaning which they would not otherwise convey beside the normal meaning which they retain where they are used; it plays a function of enlargement analogous to the word 'includes' in certain definitions."

[84] A deeming provision therefore explicitly creates for the purposes stated in the statute a situation which does not in fact (and would not otherwise) exist. So the question in this case is not whether Digicel in fact made a taxable supply, but whether the precondition to the deeming effect of section 18(4) has been met. Once that precondition has been met, the company will be treated for GCT purposes as though it had in fact made such a supply. It is, it seems to me, to be precisely because of the fact that the legislature has, as Mrs Chapman-Daley submitted, by the use of a legal fiction extended the meaning of the word 'supply' beyond that which it would ordinarily bear, that it becomes necessary to consider the question whether the precondition has been satisfied with especial care. Put plainly, did Digicel receive an amount, firstly, by way of reimbursement, recovery or otherwise; and, secondly, in respect of goods or services acquired by the company for the purpose of making taxable supplies. The first question turns on the meaning of the words used in the section, while the second gives rise to an issue of fact.

[85] The Chambers Dictionary (12th edn) ('Chambers'), defines the verb 'reimburse' (at page 1314) as meaning "to repay; to pay an equivalent to for loss or expense". 'Repay' is defined (at page 1321) as meaning "to pay back; to make return for; to recompense; to pay or give in return; to make repayment". 'Recover' is defined (at page 1304, insofar as is relevant for present purposes) as "to obtain as compensation; to obtain for injury or debt...to obtain a judgment..." Black's Law Dictionary (9th edn, page 1399) defines reimbursement as, "1. Repayment. 2. Indemnification." In **Inland Revenue**

Commissioners v John Dow Stuart Ltd [1950] AC 149, 164, Lord Porter observed (in relation to the word 'repayment' appearing in the English Finance (No 2) Act, 1939) that "[r]epayment is not, nor indeed is payment, a term of art". And among the meanings of the word 'otherwise' given by Chambers (at page 1090) are "in another way or manner" and "by other causes".

[86] These definitions suggest, in my view, a clear connection between the words 'reimbursement' and 'recovery'. Taken together, and read in conjunction with the words "or otherwise", both words are apt to convey the notion of a payment, made either by way of repayment, compensation, indemnity or any other reason, of monies owed to or otherwise due to the payee. It accordingly appears to me that, on the face of it, as a matter of ordinary language, the insurance settlement received by Digicel, being a payment made pursuant to the insurer's contractual obligation to pay in certain stated circumstances, is capable of falling within the meaning of the words "an amount [received] by way of reimbursement, recovery or otherwise". It further appears to me that this must obviously have been the sense in which Mr Waller used the word 'reimburse' in the paragraph of his affidavit which so attracted the learned judge's attention ("the policy is designed to reimburse costs which continue after an insured event..." – see para. [35] above; and see also the judge's comment at para. [38] above). In other words, Digicel was compensated for its loss of revenue, calculated in accordance with the policy, arising from the business interruption brought about by the hurricane.

[87] As regards the second question, that is, whether the amount received by Digicel from the insurer was received in respect of goods or services acquired by the company for the purpose of making taxable supplies, both Mr Waller's description of the usual claims assessment exercise and Mr Dawson's account of the one actually carried out by him in this case struck me during the hearing of the appeal (and for some considerable time thereafter) as significant. Mr Waller's evidence, it will be recalled, related to the calculation of a loss following an insured event, comprising (i) agreement on the period of business interruption; (ii) estimation of the lost revenue, taking into account performance prior to the incident and any other relevant matters; (iii) calculation of the gross profit on that revenue, using a formula specified in the policy applied to figures from the profit and loss account of the business; (iv) deduction of any savings, insured costs which do not in the event continue; (v) addition of any increased costs incurred to reduce the loss of gross profit; and (vi) calculation of the adequacy of the sum insured, and application of a percentage penalty for any underinsurance. This method of calculation is clearly, as Dr Barnett submitted, completely inapplicable to a calculation simply with respect to goods and services acquired or to be acquired for the purpose of making taxable supplies.

[88] Added to this, Mr Dawson's account demonstrated that the sum of money finally agreed for payment by the insurer was arrived at by a process of adjustment by his firm, having regard to matters such as "the reasonableness and accuracy of the proposed increased costs", the economic limit and the policy limit. The end result was therefore truly a 'settlement' of the claim under the policy, rather than the outcome of a

purely arithmetical exercise of calculating the insured's expenses (indeed, as Mr Dawson said, Digicel's original claim in respect of subscriber acquisition costs was adjusted downwards from US$6,129,395.00 to US$4,697,838.00, a not insignificant reduction of just over 23%).

[89] Given that once the process of assessment and adjustment was completed, the insurer was obliged to pay the adjusted claim in accordance with the policy, that is, as an indemnity against loss of revenue occasioned by the business interruption, it seemed strongly arguable that what Digicel received was an indemnity for loss of revenue, calculated pursuant to the policy. This in turn made it difficult to say, it appeared, that the payment received from the insurer was, as a matter of fact, by way of reimbursement made in respect of goods or services acquired by Digicel for the purpose of making taxable supplies.

[90] But I have come to the view that these considerations cannot by themselves suffice to take the increased cost of working component of the settlement outside of the plain language of section 18(4). For although, as Dr Barnett submitted, the policy did not cover reimbursement of expenditure as such (and indeed, as I have suggested, the policy was in fact designed to cover loss of profits arising from a business interruption) section 18(4) refers to receipt of "an amount", without any qualification as to the nature or characterisation of the amount received, save that it must be in respect of the acquisition of goods and services for the purposes of making taxable supplies. Further, the fact that Digicel's claim was subject to the normal claims adjustment process and that the full amount claimed in respect of the increased cost of working

was not in the end included in the settlement is of no moment for these purposes: receipt of "an amount" is all that the subsection requires.

[91] The only remaining issue is therefore whether the amount received by Digicel from the insurer was received in respect of goods or services acquired by the company for the purpose of making taxable supplies. There was, it is true, no evidence creating an explicit link between the monies spent by Digicel for the increased cost of working and the acquisition of goods and services for the purpose of making taxable supplies. But both the Commissioner and the learned judge proceeded on the presumptive basis that, since (i) Digicel had made a claim under the policy for the increased cost of working, with reference to specific items of expenditure made and proposed to be made by it; and (ii) Digicel was in the business of supplying telecommunications services ("making taxable supplies"), it followed that goods and services were acquired by Digicel for the purpose of making taxable supplies. In my view, this was a reasonable approach in the circumstances. It is clear that considerable amounts were in fact spent by Digicel in the immediate aftermath of the hurricane and it is not in issue that the burden and objective of this extraordinary expenditure was to enable it to mitigate its losses as a result of the hurricane. In expending the lion's share of the amount on subscriber acquisition costs, for instance, it seems clear that Digicel's primary objective must have been the enhancement of its customer base for the purpose of providing telecommunications services, that is, making taxable supplies, to its customers.

[92] In these circumstances, in agreement with R Anderson J, I am of the view that the increased cost of working component of the insurance settlement was an amount

received by Digicel by way of reimbursement or recovery in respect of goods or services acquired by it for the purpose of making taxable supplies. In accordance with section 18(4), Digicel was therefore deemed to have made a taxable supply and the amount received was accordingly deemed to be the consideration for that supply.

[93] In this regard, it seems to me that nothing ultimately turns on the fact that the insurer's payment was made pursuant to a policy which provided for the recovery of expenditure for the increased cost of working. For the parties are agreed that, unlike **Ramsay** and **Carreras Group Ltd**, this is not a case of a scheme of tax avoidance, in which the modern tendency is, as Lord Hoffmann put it in the latter case, "to assume that revenue statutes in particular are concerned with the characterisation of the entirety of transactions which have a commercial unity rather than the individual steps into which such transactions may be divided" (see para [77] above). Rather, this is a case, it seems to me, in which section 18(4) itself, taken both in its immediate context and in the wider context of the Act as a whole, makes it clear that the single question that arises is whether there has been a reimbursement of an amount in respect of goods or services acquired by a taxpayer for the purpose of making taxable supplies.

[94] For the reasons I have attempted to state, therefore, I have come to the conclusion that both the Commissioner and the learned judge were correct in thinking that the increased cost of working component of the insurance settlement received by Digicel was captured by section 18(4).

The Revenue's reversal

[95] In the 1999 letter, in answer to the specific question whether "insurance claims" relating to consequential loss or business interruption are taxable, the GCTD, after referring specifically to section 18(4), opined that "[c]ompensation for consequential loss or business interruption does not fall within the ambit of section 18 (4), and cannot be regarded as consideration for any taxable supply". The TAD's advice in the 2005 letter was equally forthright: "compensation received by an insured person for interruption or loss of business profits...does not fall within the deeming provision of Section 18(4) of the [GCT] Act, as it does not constitute 'reimbursement, recovery or otherwise in respect of goods and services acquired…for…making taxable supplies'".

[96] Digicel's evidence was that, in seeking to categorise the proceeds of the insurance settlement, it was advised and governed itself in accordance with the 1999 letter. Ms Jones' evidence was that, based on her interpretation of section 18(4), as confirmed by the 2005 letter, it was the general practice of her firm to treat insurance proceeds under business interruption policies as not subject to GCT.

[97] To make the point that the Revenue's reversal of its position in this case was an abuse of power and should not be countenanced, Dr Barnett referred us to **R v Board of Inland Revenue, ex parte MFK Underwriting Agencies Ltd and others** [1990] 1 All ER 91, **R v Inland Revenue Commissioners, ex parte Unilever plc** [1996] STC 681, **F & I Services Ltd v Customs and Excise Commissioners** [2001] STC 939 and **Fletcher (Inspector of Taxes) v Thompson and another**, **R (on the**

application of Thompson and another) v Fletcher (Inspector of Taxes) [2002] STC 1149.

[98] In **ex parte MFK**, the Revenue promulgated a number of guidelines and answered questions by or on behalf of taxpayers about the likely approach to a number of given problems. The question arose in judicial review proceedings whether and to what extent the Revenue was entitled to act otherwise than in accordance with its previous answers. It was held (by Bingham LJ and Judge J, sitting in the Queen's Bench Division) that, in carrying out its statutory function under the relevant legislation to administer and manage the taxation system in the way best calculated to achieve its primary duty of obtaining for the Exchequer the maximum amount of tax that it was practicable to collect, the Revenue could give advice and guidance to taxpayers. But a taxpayer could only have a legitimate expectation that he could hold the Revenue to a ruling or statement in respect of his fiscal affairs if on his part he approached the Revenue with clear and concise proposals about the future conduct of his fiscal affairs, made full disclosure of all the material facts known to him and made it plain that a considered ruling was being sought, indicating the use he intended to make of any ruling; and if on its part the Revenue gave him an unequivocal statement about how his affairs would be treated. On the facts of the instant case, it was held that the views given by the Revenue officials were tentative and were not intended to fetter the Revenue's future actions. There had therefore not been any abuse of power on the part of the Revenue and the applications were accordingly dismissed.

[99] In explaining the significance to be attached to statements of intent by the Revenue, Bingham LJ said this (at page 110):

> "No doubt a statement formally published by the Revenue to the world might safely be regarded as binding, subject to its terms, in any case falling clearly within them. But where the approach to the Revenue is of a less formal nature a more detailed inquiry is, in my view, necessary. If it is to be successfully said that as a result of such an approach the Revenue has agreed to forgo, or has represented that it will forgo, tax which might arguably be payable on a proper construction of the relevant legislation it would, in my judgment, be ordinarily necessary for the taxpayer to show that certain conditions had been fulfilled. I say 'ordinarily' to allow for the exceptional case where different rules might be appropriate, but the necessity in my view exists here. First, it is necessary that the taxpayer should have put all his cards face upwards on the table. This means that he must give full details of the specific transaction on which he seeks the Revenue's ruling, unless it is the same as an earlier transaction on which a ruling has already been given. It means that he must indicate to the Revenue the ruling sought. It is one thing to ask an official of the Revenue whether he shares the taxpayer's view of a legislative provision, quite another to ask whether the Revenue will forgo any claim to tax on any other basis. It means that the taxpayer must make plain that a fully considered ruling is sought. It means, I think, that the taxpayer should indicate the use he intends to make of any ruling given. This is not because the Revenue would wish to favour one class of taxpayers at the expense of another but because knowledge that a ruling is to be publicised in a large and important market could affect the person by whom and the level at which a problem is considered and, indeed, whether it is appropriate to give a ruling at all. Second, it is necessary that the ruling or statement relied on should be clear, unambiguous and devoid of relevant qualification."

[100] And, in a passage on which Dr Barnett placed particular reliance, Judge J said this (at page 115):

> "The Revenue is not bound to give any guidance at all. If however the taxpayer approaches the Revenue with clear and precise proposals about the future conduct of his fiscal affairs and receives an unequivocal statement about how they will be treated for tax purposes if implemented, the Revenue should in my judgment be subject to judicial review on grounds of unfair abuse of power if it peremptorily decides that it will not be bound by such statements when the taxpayer has relied on them. The same principle should apply to Revenue statements of policy."

[101] The question in **ex parte Unilever** was whether it was open to the Revenue, having for period of over 20 years of dealings with the applicant not insisted on a statutory two year time bar for submission of claims for loss relief against profits for income tax purposes, to refuse to entertain the applicant's claim on the ground that it was out of time. The Court of Appeal upheld the decision of the judge below that, although the claims in question were in fact made out of time, the Revenue could not in fairness, having regard to their past conduct, treat the claims as time-barred and should therefore have exercised its discretion in the applicant's favour. Sir Thomas Bingham MR (with whom Simon Brown and Hutchinson LJJ agreed) considered (at page 691) that "on the unique facts of this case...to reject [the applicant's] claims in reliance on the time-limit, without clear and general advance notice, is so unfair as to amount to an abuse of power".

[102] **F & I Services Ltd** was a case in which, in answer to a direct enquiry from the taxpayer as to whether particular transactions would attract value added tax, the Commissioners of Customs and Excise expressed the view in writing that they would not. The taxpayer having gone ahead and taken further steps in pursuance of the

transactions, the commissioners changed their position and informed the taxpayer of this in writing, allowing the taxpayer 30 days within which to advise its customers of the revised ruling. The taxpayer's application for judicial review of the commissioners' reversal of their position failed, both at first instance and on appeal to the Court of Appeal. Delivering the leading judgment in the Court of Appeal, Robert Walker LJ observed (at page 958) that –

> "The commissioners are bound...to administer the VAT system correctly and to collect all tax which is properly due. They have no general dispensing power, and taxpayers cannot have any legitimate expectation that they will administer VAT in any way which is contrary to law...
>
> [The taxpayer's] only legitimate expectation was that it would not be asked to pay tax in respect of past transactions. The 30-day breathing space which the commissioners allowed (for existing customers) may not have been generous, but it was reasonable in all the circumstances."

[103] In a brief concurring judgment, Sedley LJ added this:

> "There is an initial attraction to an argument that once a tax-collecting authority has given a potential taxpayer the all-clear, fairness dictates that the authority should be held to the expectation it has created. The short answer in the present case is the one given by Carnwath J: the commissioners never generated a larger expectation than that they would give fair notice of any change of mind about the exigibility of VAT, and this is what they did."

[104] And finally, in **Fletcher**, the taxpayers over a period of four years incorporated six companies with the intention that they should satisfy the conditions for business expansion scheme relief. Such relief, which was subsequently granted by the Revenue,

was withdrawn in 1995. Among other things, the taxpayers sought judicial review of the Revenue's decision to withdraw the relief, contending that the withdrawal was unfair and an abuse of power, because (i) the published Revenue documents were misleading as to the circumstances in which relief would be withdrawn; and (ii) the Revenue withdrew the relief notwithstanding that it had known the full facts for several years, and allowed the taxpayers to make the investments.

[105] Lawrence Collins J stated the three relevant principles to be applied as follows (at paras [40]-[42]):

> "First, a decision of the Revenue is open to judicial review if it is so unfair as to amount to an abuse of power…
>
> When the general principle is applied to statements of the Revenue, in assessing the meaning, weight and effect reasonably to be given to them, the factual context, including the position of the Revenue itself, is all important. If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it; but the ruling or statement relied on should be clear, unambiguous and devoid of relevant qualification…
>
> **…**the categories of unfairness are not closed…"

[106] Applying these principles (which he derived explicitly from **ex parte MFK** and **ex parte Unilever**, among others), Lawrence Collins J concluded that there was no basis for the taxpayers' challenge to the fairness of the decision to withdraw the relief, since they did not rely on the published Revenue documents and there was nothing in them which supported their case. Also, the documents made it absolutely clear that

readers should not assume that the guidance was comprehensive or that it would provide a definitive answer in every case. There was nothing in the documents that was sufficiently clear, unambiguous and devoid of qualification as to found a legitimate and enforceable expectation.

[107] In my view, these cases suggest the following. It is the duty of the revenue authorities to administer the tax laws correctly and to collect all tax which is properly due. The Revenue has no general dispensing power and taxpayers cannot have any legitimate expectation that the tax laws will be administered otherwise than in accordance with the law. Although there is nothing wrong with the authorities giving advice and guidance to taxpayers, a taxpayer will only be entitled to claim a legitimate expectation of holding the Revenue to a particular ruling or statement in respect of his fiscal affairs if it can be shown that the Revenue (i) was asked to consider and rule on clear and concise proposals about the future conduct of the taxpayer's fiscal affairs; (ii) was given full disclosure of all the material facts known to the taxpayer, who made it plain that a considered ruling was being sought and indicated the use he intended to make of any ruling; (iii) gave the taxpayer an unequivocal and unambiguous statement, devoid of relevant qualification, about how his affairs would be treated; and (iv) that the taxpayer relied on the statement. Such a legitimate expectation will in any event generally extend no further than an entitlement by the taxpayer to fair notice of any change in position in relation to its subject matter by the Revenue.

[108] It seems to me that the problem with the 1999 letter, upon which Digicel must primarily rely, is that it is a general response to an enquiry made in general terms:

PWC's question to the GCTD, which was whether insurance claims relating to consequential loss or business interruption were "generally taxable", elicited the equally general response that compensation for consequential loss or business interruption "does not fall within the ambit of section 18 (4), and cannot be regarded as consideration for any taxable supply".

[109] Neither the terms of the policy in this case, nor a specimen of a policy in similar form, accompanied PWC's enquiry. The GCTD would not therefore have had in mind its specific provisions, particularly as regards the critical question of reimbursement in respect of goods and services acquired for the purpose of making taxable supplies, and there has been no suggestion that the department was or should have been aware that this was the form of such policies generally. Nor was there any evidence of a history of previous dealings between the department and Digicel, such as in **ex parte Unilever**, so as to give rise to any question of unfairness. In these circumstances, the 1999 letter cannot be treated, in my view, as an unequivocal statement that the Act would be applied otherwise than in accordance with its terms.

[110] In any event, although there was evidence in this case that the 1999 letter influenced the manner in which Digicel classified the insurance settlement, there was no evidence to suggest that, in entering into the policy of insurance in the first place, Digicel placed any reliance on the 1999 letter.

[111] The 2005 letter, it appears to me, suffers from the same vice of generality. In any event, it was written after the policy was entered into and after the hurricane and

cannot therefore, in my view, take this aspect of the matter any further. I would therefore conclude that neither the 1999 letter nor the 2005 letter can affect Digicel's liablity to GCT by virtue of the operation of section 18(4).

Conclusion

[112] For all the reasons which I have attempted to state, at, I fear, far too great length, I would therefore dismiss the appeal, with costs to the Commissioner to be agreed or taxed.

DUKHARAN JA

[113] I have found this a very difficult case. However, having read in draft the judgment prepared by Morrison JA, I agree with his reasoning and conclusions and have nothing to add.

McINTOSH JA

[114] In the carefully crafted judgment of my brother Morrison JA, which I have been privileged to read in draft, all the essential issues for determination in this appeal have, in my opinion, been addressed. I agree with his reasoning and conclusions, the thoroughness of which leaves me nothing useful to add.

MORRISON, JA

ORDER

Appeal dismissed. The judgment of R Anderson J is affirmed. Costs to the respondent to be agreed or taxed.