CASE NO: SC/CIV/03/21

IN THE COURT OF APPEAL OF THE FALKLAND ISLANDS
ON APPEAL FROM THE SUPREME COURT

London
United Kingdom

Date: 12th October 2022

Before:

The President, Sir John Saunders, and Justices of Appeal, Belinda Bucknall KC and Timothy Straker KC

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BETWEEN:

SENTINEL MARINE FALKLAND ISLANDS LTD

Appellant

and

COMMISSIONER OF TAXATION

Respondent

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Julian Ghosh KC and Laura Ruxandu for the **Appellant**

Laura Poots for the **Respondent**

Hearing date: 22nd and 23rd September 2022

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Approved Judgment

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Timothy Straker KC

Introduction

1. This is an appeal from the judgment (dated 4 February 2022) of the Chief Justice, sitting in the Supreme Court of the Falkland Islands, whereby he upheld a determination of the Tax Appeal Tribunal dated 20 August 2021. Further, he decided an unresolved issue arising under Article 25 of the UK – Falklands Double Taxation Agreement 1997 against the Appellant.

2. The Appellant, Sentinel Marine Falkland Islands Ltd, is a member of the Sentinel Group, whose parent company is Sentinel Offshore Holdings Ltd. Both that company and the Appellant were incorporated in the United Kingdom.

The Falklands Taxes Ordinance 1997

3. As the Chief Justice explained, the Falklands Taxes Ordinance 1997 provides 'ring fencing' for petroleum extraction activities for tax purposes. In ring fenced activities leasing costs (of a vessel) are capped at an annual maximum of 7.5% of the original cost of the leased vessel and without such a cap a much higher deduction could be made for leasing costs.

4. Thus, questions can arise as to whether one is within or without such ring-fenced provisions; if one is without such provisions the ordinary corporation tax regime obtains, which is, it appears, more generous to someone in the position of the Appellant.

Features of the Ring Fence Provisions

5. Mr. Julian Ghosh KC who, with Miss Laura Ruxandu, appeared for the Appellant submitted that the ring fence provisions had two particular features namely, a higher tax charge than would otherwise obtain and more limited relief. He submitted that the

purpose of the relevant provisions, bearing in mind these two features, was to ensure that those who benefited from the oil resources of the Falklands should in consequence pay more tax. He emphasised that the additional tax was or should be a consequence of the benefit.

6. This, in turn, means, according to Mr. Ghosh, that if a trade is brought within the ring fence, because of a connection to oil exploration, the connection must be sufficiently strong to warrant the increased tax rate and the lessening in relief. Such strength of connection was, it appeared to be suggested, given by being directly involved in the physical exploration work or being rewarded by reference to the oil extracted. However, I consider the statutory words, providing that those carrying on a trade in connection with oil exploration are brought within the ring fence, must extend beyond those who are directly and physically dealing with oil exploration. Further, there can be no basis for asserting that a connection to oil exploration requires financial reward by reference to the value of any oil extracted. This does not disable the proposition that there must be a sufficiently strong connection, but it does show one is, ultimately, simply looking for a connection, which can, no doubt, take a variety of forms.

7. I will make reference to the particular legislative provisions in due course. It should, however, be noted that the provisions are not the easiest in all respects to follow. Further, there appear to have been some copying and pasting from other provisions. This led, in one instance, Miss Laura Poots, who appeared for the Respondent, to suggest there had been a mistake in the drafting of the legislation.

8. I do not consider we can resolve any such mistakes, assuming such exist. The role of the Court is to interpret, as best we can, the legislative words used, always remembering that such words stand to be construed in context, which can sometimes mean interpolation but not wholesale re-writing.

The Facts

9. The facts have never, in substance, been in dispute. They can be briefly summarised. Two companies, Premier Oil Exploration & Production Ltd (Premier) and Noble Energy Falklands Ltd (Noble) came to undertake an exploration programme seeking oil in waters surrounding the Falkland Islands. The programme used the rig Eirik Raude (a mobile, offshore drilling unit) and the companies undertaking that exploration programme sought a tender for an Emergency Response and Rescue Vehicle. The Appellant entered into an agreement in respect of such a vessel, namely the Fastnet Sentinel.

10. The role of the Fastnet Sentinel was, as summarised by the Chief Justice, to rescue persons from the water and provide medical aid; act, in accordance with certain regulations, as a place of safety; provide on scene co-ordination as required; participate fully in executing the installation collision avoidance strategy; act as a reserve radio station; try to divert objects drifting towards the platform and alert other vessels if sailing in the direction of the rig; try to disperse oil spills or try to clean using oil gathering equipment and, in one instance, to carry cargo.

11. It is worth noting that the Appellant in its skeleton argument records, see paragraphs 7 and 8, that Premier and Noble were undertaking an oil exploration programme for which they sought the provision of vessels for its support. One of those vessels was the Fastnet Sentinel.

12. It is possible to be precise as to the role of the Fastnet Sentinel. There was, at the relevant time, a uniform time charter party, dated 9 December 2014. It is at pages 450-451 of our bundle. This identified (box 17) the area of operation as 'offshore to Falkland Islands and transit waters on the redelivery voyage'. The same form at box 18 indicated that the employment of the vessel was, referring to clause 5(a) of Part II of the Uniform Time Charter, restricted to on a continuous 24/7 basis, all duties,

including but not limited to emergency response and resource duties and all other duties in the vessel's specified and safe capabilities and capacities.

13. Box 18 continued by saying 'Vessel to work to UK Oil and Gas Emergency Response and Reserve Vessel Management Guidelines' issue 5 April 2013 and comply with UK Oil and Gas ERRV Survey Guidelines Issue 5 2013.

14. I do not need to recite the balance of Box 18. Clause 5(a), to which I have referred, said the vessel should be employed in offshore activities which are lawful in accordance with the law of the place of the vessel's flag and/or registration and of the place of operation. Such activities, it said, should be restricted, to the service(s) as stated in Box 18.

15. Furthermore, we have, at page 633, a certificate of valuation of the Fastnet Sentinel. This records her dimensions and place of build. She is recorded as being classed ABS+A1(E), ERRV Gr B (300) Offshore Support Vessel, +AMS,+ACCU, +DPS-1, Envir, GP, UWILD. This terminology along with her recorded rescue equipment (page 635), deck machinery, navigation equipment, dynamic-positioning capability and communications equipment (ibid) are all consistent with at least an ability to provide a variety of services, which, in fact, happened.

16. The Charter Party, at box 2, recorded the owner as Sentinel Marine Falkland Islands Limited with an address in Aberdeen. The Charterers were recorded as (box 3) Premier Oil Exploration and Production Ltd. with an address in London.

The Relevant Provisions

17. Section 150 of the Taxes Ordinance 1997 says, in material part, that where a person carries on, as part of a trade, any petroleum extraction activities those activities shall

be treated as a separate trade distinct from all other activities carried on by him as part of the trade. The word any can be noted as preceding petroleum activities.

18. There is no dispute but that the Appellant carried on a trade. It is therefore important to know what amount to 'petroleum extraction activities'. The answer to that question is given by section 140 of the Taxes Ordinance 1997.

19. Section 140 says (omitting certain words) that the phrase 'petroleum extraction activities' means any activities carried on in connection with searching for petroleum, extracting petroleum, transporting petroleum or effecting initial treatment or initial storage for petroleum.

20. Thus, when reading section 150 of the Taxes Ordinance 1997, one must read 'any petroleum extraction activities' in an extended way to include activities in connection with the search for petroleum and those other matters set out in section 140. It is, of course, notorious that the search for oil in the waters surrounding the Falklands can be difficult and dangerous. It will involve a multitude of different, but connected, tasks. It is no surprise that there are regulations touching on safety.

Argument for the Appellant

21. Before this Court, as before the Tribunal and the Chief Justice, the Appellant has argued that the activities of the Appellant, although part of a trade, were not in connection with the search for petroleum. This proposition does not sit happily with the paragraphs in its skeleton argument, mentioned above, which describe why its vessel was provided. Further, the proposition does not sit happily with the terms of the charterparty or her description.

22. The Appellant's argument is that the phrase 'in connection with' is not a statutorily defined phrase or a term of art and, therefore, stands to be contextually construed as

an ordinary English expression. However, it is difficult to determine precisely what the Appellant says the phrase should mean beyond the suggestion that there should be a relationship or a close relationship with oil exploration.

23. On the face of it, as an ordinary English expression, 'in connection with' simply means there is a link or connection between (a) and (b). The scheduled meeting of a branch train with a mainline train is an everyday example (as well as being mentioned in the Shorter Oxford English Dictionary). Something is in connection with something else if it is ancillary to that other thing.

24. Such, at any rate, was the approach of the Court of Appeal in *Kebede v. Newcastle* [2013] EWCA Civ 960 where Sir Stanley Burnton (with whom Laws and McCombe LJJ agreed) said, at paragraph 13, that the phrase 'in connection with' was apt to denote things that are ancillary i.e., connected with, something else. This is a well-known feature in the world of town and country planning where, for example, a permitted retail use of a building allows, illustratively, for some space to be used for connected office purposes. On the other hand, if there were no (retail) connection there would be a material change of use requiring planning permission.

25. I see no difference between the approach just stated and the judgments in *Revenue & Customs Commissioners v Barclay's Bank* [2007] EWCA Civ 442. In that case the judgment was given by Arden LJ, as she then was, and upheld, see paragraph 11, the proposition that the words 'in connection with' were broad. She made plain that context was to be considered, paragraphs 18 & 19, and that a connection could be indirect with the possibility of a relevant connection with more than one thing, paragraph 20.

Context

26. The Appellant points out that the context here is either constituted by or includes the Taxes Ordinance 1997. That proposition is correct although it can be remembered that individual sections in legislation generally express a single idea and operate or can operate independently of other sections: see Halsbury's Laws of England, volume 96 at paragraph 266. The context may also refer to the Double Taxation Agreement 1997. However, nothing in that Agreement can change a legislative term or displace, by itself the clear, contextual, meaning of a legislative term.

27. The Taxes Ordinance 1997 came to be amended by subsequent legislation. We have been provided with a list of those amendments, at page 543, of the bundle of authorities. The legislation as in force from 1 August 2019 we have at pages 131 -146 of that bundle. This includes sections that were introduced by amendment. During the hearing we were also provided with a copy of the whole of the Ordinance, which is substantial.

28. One section, which came to be inserted by amendment, is section 152B. The Appellant draws particular attention to it. It is within a group of sections, 152B to 152G, which group, according to the Appellant, provides a cap on the amount of leasing costs paid to connected parties which can be deducted in the computation of profits of ring fenced trades. Before considering the character of the Appellant's argument it is worth having in mind the character of the legislation.

29. Part VI of the Taxes Ordinance 1997 makes special provisions for ring fence trades and related businesses. This Part is divided into Chapters. Chapter 1 consists of but one section, namely 140, providing for the interpretation of Part VI. It does so by defining a variety of terms for that Part including petroleum extraction activities.

30. This means that when one sees those words in the other sections of Part VI they carry the meaning given by that section. It can be observed that the Ordinance is careful in its interpretative provisions to indicate to what the given interpretation relates. Thus, section 2 says in this Ordinance, subject to context, the words and phrases that follow have the meaning assigned to them. Section 140 makes plain that its interpretative provisions operate, as stated, for Part VI. Other sections in the Ordinance indicate interpretative provisions operate on an expressly limited basis. This legislative language greatly inhibits the Appellant in bringing from one section a meaning given for an identified purpose to another section.

31. Chapter II deals with the taxation of petroleum related capital gains. Chapter III is headed ring fence trades and section 150 provides for the ring fencing of petroleum extraction activities, if part of a trade. Section 151 deals with non arm's length disposals and appropriations. Section 151A, a section introduced by amendment, deals with the determination of petroleum market value. Section 152 deals with payment of interest. Section 152A, whilst in force, dealt with leasing costs. However, that Section came to be replaced by Sections 152 B et seq.

Section 152B

32. Section 152B serves to define the circumstances in which restriction on hire of relevant assets under section 152C applies. Section 152C deals with that restriction. Other sections in the Chapter follow. They deal with particular matters, which I need not recite.

33. Section 152B says when section 152C applies. On the face of it Section 152B does not serve to define or alter the definitions of anything in section 150. The Sections are dealing with different matters.

34. Thus, one has a general provision dealing with ring fencing and then particular provisions dealing with particular matters, which may arise in any set of accounts for taxation purposes.

35. As stated the express purpose of section 152B(1) is to say that if certain conditions obtain, one of which is that the lessor of an asset is an associated person of a contractor, then section 152C applies. For the purposes of section 152B(1) a person is a contractor if he carries out certain activities for a company including exploration activities in connection with providing a relevant asset in a relevant offshore service.

36. In section 152B, by virtue of subsection (6), providing a relevant offshore service is defined. I emphasise that the language used in section 152B makes plain that such is for the purposes of section of 152B. Mr Ghosh was unable to point to any purpose within section 152B that related to the Appellant's position.

37. None the less it is said the section shows a person may provide services to a ring fence trader without those activities being connected to petroleum extraction activities or falling within section 150 of the Tax Ordinance. It is then said this shows that activities carried on in connection with searching with petroleum in section 150 (having in mind the definition in section 140) means there has to be a clear and strong connection. Further, that it does not extend to a service that was a relevant offshore service.

38. I do not consider this argument to be correct. First, the definition of 'provide a relevant offshore service' is for the purposes of section 152B. Second, in any event section 152B does not change or bear on the meaning of the ordinary English phrase 'in connection with'. Third, there is no basis for adding an adjectival qualification to the phrase 'in connection with'.

39. It is argued that if one provides, as defined in section 152B, a relevant offshore service one cannot fall within, or within a connection to, petroleum extraction services. This is because in section 152B the provision of such a service means using an asset in connection with exploration or exploitation activities, which, within section 152B, does not include petroleum extraction activities.

40. I do not consider that the Appellant's argument can be sustained. The factual question is whether someone is carrying on a trade being an activity in connection with the search for petroleum. The Chief Justice had to determine whether the Tribunal was able to arrive at that conclusion as a matter of law. Section 152B does not read across to section 150 in the manner necessary to sustain the Appellant's argument.

41. It seems to me beyond doubt that the provision of the relevant vessel was in connection with the search for petroleum. There was an inseparable connection between that search and the use of the vessel. Indeed, the use of the vessel may have gone further than, as set out above, the Chief Justice described. The reality is that the activities of the vessel were connected to the exploration for oil. The Appellant agrees that the statutory words extend rather than restrict relevant activities and it is difficult to contemplate that any reasonable person could have said anything other than that the provision of the vessel was in connection with oil exploration.

42. It is worthwhile reciting (with certain omissions) paragraphs 53 to 54 of the Chief Justice's judgment. 'The complaint that [there was insufficient identification of] facts or links that brought the Appellant's activities [within a] connection… is misplaced. …The Tribunal found expressly that were 7 linked activities: see paragraph 104. Given the width of the words … the only error of law the Appellant can argue … is that none of the activities … are capable … of being in connection with petroleum exploration…'. I add, by reference to paragraph 104 of the Tribunal's determination that in addition to search and rescue there was monitoring around the installation,

warning vessels of the presence of the installation and vice versa, monitoring for debris and moving cargo if needed. The vessel was able to act as scene commander in the event of an emergency.

43. I agree with the Chief Justice. The Chief Justice was criticised for relying on a regulatory requirement, which the Appellant maintained it was not actually fulfilling. I think this criticism is unjustified. It is, as to be expected, clear that there were regulations but whether or not the Appellant would have said, if asked, that such regulations were met by the presence of the vessel does not answer the question whether its presence was in connection with oil exploration. Further, the criticism of the Chief Justice and the Tribunal that they had proceeded on the basis the provision of the vessel was necessary to comply with the Regulations when such Regulations would have been met without such provision does not, to my mind, matter. One might over provide but such over provision would still be in connection with oil exploration.

44. It is additionally argued that because the Fastnet Sentinel had provided the same or similar services to the United Kingdom's Government when engaged in migrant rescue it follows that its provision in the waters off the Falklands cannot have been in connection with oil exploration. This is a non sequitur. The fact the vessel was once engaged in connection with migrant rescue does not preclude its use from having been in connection with oil exploration.

The second issue

45. The second issue sought to be pursued by the Appellant begins (unpromisingly for the Appellant) with agreement with the proposition that whether activities are within section 150(1) or 150(11) will stand or fall together.

46. Section 150(11) says that a reference in the Ordinance to a ring fence trade includes a reference to anything undertaken by one person (C) as a contractor for another person

(P) who carries on a ring fence trade for the purposes of Chapter III if and so far as C's activities are undertaken for P's ring fence trade.

47. The argument is that there was an error in not taking account of section 152B in the interpretation of what constitutes a contractor for the purposes of any relevant trade within section 150(11). This argument is based on the proposition that section 152B defines contractor in a particular way. It is certainly true that section 152B does but it precedes such definition by saying it is for the purposes of section 152B(1).

48. It does not say it is for the purpose of any other section, for the purposes of the Ordinance generally or for the purposes of the Part or Chapter.

49. Thus, the premise on which the Appellant's argument stands is unsound. Contractor in section 150 is an ordinary English word carrying its ordinary English contextual meaning. The Appellant undertook something, namely the provision of the vessel, for another person's ring fence trade, namely a search for petroleum. Such provision was made by way of an agreement. The Appellant was inescapably a contractor.

50. It follows I reject the argument there was any error in the consideration or application of section 150(11).

The Double Taxation Arrangement

51. The third (and final) argument deployed by the Appellant is based on article 25 of an arrangement, effective from 1 January 1997, made between the United Kingdom and the Falkland Islands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion. Article 25 says that the taxation on a permanent establishment which an enterprise of a territory has in the other territory shall not be less favourably levied in that other territory than the taxation levied on enterprises of that other territory

carrying on the same activities. (This Article is set out at page 536 of our bundle of authorities).

52. The Appellant argues that the ring fenced trade legislation is discriminatory because it affects companies outside the Falkland Islands more than companies within the Falkland Islands. It is said that the thrust of the legislation is at cross border pricing. It is accepted that on its face the legislation applies equally to companies incorporated or resident in the Falklands and companies incorporated in the United Kingdom. There is no ex facie discrimination.

53. However, it is said that the chance of a United Kingdom company being connected with an offshore lessor is greater than the chance for a Falklands Island company.

54. This does not seem to me to represent a point of discrimination at all but rather to reflect the fact that the United Kingdom is vastly bigger than the Falkland Islands. The various companies are, under the legislation, treated in exactly the same way. There just happen to be more UK companies.

55. Accordingly, I do not consider there is anything in the discrimination point.

56. It follows I consider this appeal should be dismissed.

The President, Sir John Saunders

57. I agree.

Belinda Bucknall KC

58. I agree.