227/74

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter of:

SECRETARY FOR INLAND REVENUE ..... appellant,

versus

L.J. DOWNING ..... respondent.

Coram: RUMPFF, C.J., BOTHA, HOLMES et CORBETT, JJ.A., et GALGUT, A.J.A.

Date of hearing: 15 May 1975.

Date of Judgment: 19-8-1975

J U D G M E N T

CORBETT, J.A.:

This is an appeal, upon a case stated, in terms of section 86(1)(b) of the Income Tax Act, No. 58 of 1962, against a decision of the Natal Income Tax Special Court.

According/.....

According to the statement of case the respondent, who had previously been domiciled and resident in South Africa, left this country in 1960 and went to live in Switzerland. Since then he has been resident at all times in Switzerland. Under the South African Exchange control regulations in force at the time respondent was permitted to take only R20 000 (£10 000) of his capital out of South Africa. The balance of his assets, which consisted mainly of a large portfolio of shares, had to remain in this country and became what are known as "blocked assets". To indicate that the shares were blocked assets each certificate was required, under the regulations, to be stamped with the words "non resident". In terms of the regulations, however, respondent was entitled to have remitted to him in Switzerland any income which accrued upon his South African assets.

At all material times during his absence in Switzerland respondent has entrusted the handling of his

financial/.....

financial affairs generally to a firm known as Palmers Investment and Estate Administrators Limited (which carries on business under the name of William Palmer and Sons and is hereafter referred to as "Palmers") of Durban and the management of his share portfolio to a Mr D.A. Smith, a broking member of the Johannesburg Stock Exchange and presently a partner in the firm of Max Pollak and Freemantle, stockbrokers, of Johannesburg. Palmers has held respondent's power of attorney, kept his shares, collected the dividends accruing thereon and maintained his books. Smith has managed respondent's share portfolio in terms of an unwritten arrangement.

Smith first became acquainted with respondent's share portfolio in 1948, through links with a representative of Palmers. When respondent departed from South Africa in 1960 he verbally instructed Smith so to manage the portfolio as to cause it to yield the greatest possible income for

respondent's/...

respondent's enjoyment in Switzerland. The management was left entirely to Smith. He was given a free hand and made changes in the portfolio, both sales and purchases, without prior reference to the respondent. Every time a change was made Smith immediately wrote to the respondent informing him thereof and explaining his reasons for either purchasing or selling the shares in question. These communications to the respondent occurred regularly and frequently, as during most weeks there were transactions of purchase or sale. As a general rule the respondent did not communicate with Smith. Once every three years, on visits to South Africa, respondent would see Smith, mainly at lunch. At the same time that Smith sent advices to respondent about share transactions, he sent similar advices to Palmers to enable the latter to have a record for accounting purposes and to collect dividends.

The/.....

The normal procedure with regard to transactions in stock exchange securities by a non-resident principal is for the principal to authorise his banker in South Africa to settle all purchases and sales of shares upon delivery of scrip and/or cash in terms of contract notes settled by his stockbroker. In respondent's case the transactions of purchase and sale were handled by Smith in Johannesburg. The approval of respondent's bank was obtained by Palmers. The procedure was for Smith to send to Palmers two copies of the relevant contract note, one for Palmers and one for the bank. In the case of a purchase Smith would forward the scrip to the local branch of his firm in Durban for delivery to Palmers, upon whose authority the respondent's bank in Durban would transfer funds to Smith for payment of the price to the seller. In the case of a sale Smith would remit the proceeds to Palmers for deposit at the bank. The scrip would then be sent to Smith for delivery to the purchaser, the

"non/.....

"non resident" stamp thereon having been cancelled by the bank.

In regard to Smith's functions in the management of share portfolios, paragraph 10 of the stated case reads:-

"(10) As respects the question of the relationship between Mr Smith's management of the portfolio and his ordinary functions as a stockbroker, Mr Smith's evidence was as follows:-

(a) It was necessary for him to display constant watchfulness in order to decide whether investments in the portfolio should be suitably changed;

(b) Factors in regard to which he was watchful for purpose of deciding whether investments should be changed included

(i) company reports;
(ii) technical opinions;
(iii) changing economic conditions;
(iv) fluctuating market prices of shares;
(v) appreciation in market value of a security resulting in a lower yield by reference to the new value;
(vi) proximity or otherwise of dividend payments;
(vii) parliamentary budget.

(c) Company card reference registers were maintained in his office, wherein every client's shareholding was listed. Any downward trend in the circumstances of a particular company would cause

reference/....

reference to be made to the relevant card to see which client might be involved. The portfolio of such client would then be scrutinized to decide whether action required to be taken.

(d) Watching portfolios on behalf of clients in the manner indicated above was part of his normal occupation as a stockbroker. The appellant was not unique in having this service performed for him. What Mr Smith sought to establish with a client was the client's policy or purpose in having funds in Stock Exchange investments, and then, within the lines of such policy, to advise the client or, as in the case of the appellant, to take action for him.

(e) At no time since 1948 had he ever had to refer decisions to the appellant. It had been "one of the enjoyments" that he could get on with decisions when prices were suitable and without the labour of correspondence and consequential loss of opportunities."

During the period 1 July 1962 to 1 March 1971 (no earlier information being available) the value of respondent's portfolio increased from R275 593 (with the investment being spread over 69 companies listed on the Johannesburg stock exchange) to R659 780 (with holdings in 120 companies). This increased investment arose

largely/....

largely out of gains made on the disposal of shares. The net gains from share realisations over the aforementioned period amounted to R306 999. Dividends received during this period totalled R351 193.

In respondent's income tax returns for the years ended 28 February 1966, 28 February 1967 and 29 February 1968 the following amounts were reflected as net gains (being the excess of the prices realised over the book value of the shares sold) derived by him from the sale of shares in those tax years:

1966	R42 999
1967	R21 582
1968	R31 458

In the determination of the respondent's liability to normal tax for the 1966, 1967 and 1968 years of assessment appellant (the Secretary for Inland Revenue) included the above-stated amounts in the respondent's income and raised assessments accordingly.

Respondent objected to those assessments and, his objections being overruled, noted an appeal to the Special Court for hearing income tax appeals. The grounds of his objection and appeal were, in brief:-

(1) that the amounts in question were receipts of a capital nature and, therefore, did not form part of his gross income; and

(2) that in terms of the convention between the Republic of South Africa and the Swiss Confederation for the avoidance of double taxation with respect to taxes and income (hereinafter referred to as "the convention") profits on the sale of shares were taxable only in Switzerland and not in South Africa.

At this stage it is relevant to point out that whereas the dividend income derived from respondent's share portfolio, subject to the deduction of collection expenses and South African non-resident shareholders' tax,

has/.....

has been remitted to him in Switzerland throughout his residence there, no portion of the gains made on the realisation of shares has ever been so remitted. Furthermore, respondent is not taxable under Swiss taxation law in respect of such gains and has not been so taxed.

It was held by the Special Court that the amounts in issue were not receipts of a capital nature but constituted income earned in the carrying out of a scheme for profit-making; but that, in terms of the convention, respondent was exempt from tax in the Republic of South Africa in respect of these amounts. Being dissatisfied with this decision the appellant required a case to be stated for appeal to this Court, the necessary consents thereto having been lodged.

Inasmuch as the respondent has not challenged the finding of the Special Court that the amounts in issue constituted income earned in the carrying out of a scheme of profit-making, the only issue on appeal is whether in

terms/.....

terms of the convention the respondent was exempt from South African tax in respect of those amounts. Before the Special Court a number of arguments were advanced on behalf of the Secretary to show that the provisions of the convention were not applicable but in this Court some of those were not pursued and the issue was narrowed down, substantially, to the question as to whether or not, during the years in question, respondent had carried on business in South Africa "through a permanent establishment situated therein", within the meaning of article 7(1) of the convention. This depends, partly, upon the proper interpretation to be placed on the relevant provisions of the convention.

The convention was signed on behalf of the Government of the Republic of South Africa and of the Swiss Federal Council on 3 July 1967. It was notified by proclamation in South Africa, in terms of section 108 (2) of the Income Tax Act, No. 58 of 1962, on 29 September 1967.

While/....

While in force it applies, in South Africa, to any year of assessment beginning on or after 1 March 1965. The effect of proclamation is that, as long as the convention is in operation, its provisions, so far as they relate to immunity, exemption or relief in respect of income tax in the Republic, have effect as if enacted in Act No. 58 of 1962 (see section 108(2)). The terms of the convention are evidently based upon a model convention contained in the 1963 report of the fiscal committee of the Organisation for European Economic Co-operation and Development (O.E.C.D.). This model has served as the basis for the veritable network of double taxation conventions existing between this country and other countries and between many other countries inter se.

In the convention income from different types of source, such as income from immovable property, business profits, profits from the operation of ships or aircraft, dividends, interest, royalties, etc., is dealt with in separate articles. The issue between the parties centres

mainly/.....

mainly on article 7, which is concerned with "business profits". Paragraph 1 of this article reads as follows:

> "The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment."

The convention makes liberal use of what has been termed "international tax language" (see Ostime (Inspector of Taxes) v. Australian Mutual Provident Society, 1960 A.C. 459, at p. 480). This is evidenced in article 7(1) by the use of words such as "enterprise", "Contracting State" and "permanent establishment". To some extent these terms are defined in the convention. Article 3 in so far as it is relevant, reads:

> "In this Convention, unless the context otherwise requires:
> .....
> (c) the terms 'a Contracting State' and 'the other Contracting State' mean South Africa or Switzerland, as the context requires;
> .....

(f)/....

(f) the terms 'enterprise of a Contracting State' and 'enterprise of the other Contracting State' mean respectively an enterprise carried on by a resident of a Contracting State (including that State itself, its political subdivisions and local authorities) and an enterprise carried on by a resident of the other Contracting State (including that State itself, its political subdivisions and local authorities);"

Applying these definitions to article 7(1) and adapting them to the facts of this case, this must be read to provide that the profits of an enterprise carried on by a resident of Switzerland shall be taxable only in Switzerland unless that person carries on business in South Africa through a permanent establishment situated therein. If this person carries on business in this way then his profits may be taxed in South Africa, but only to the extent that they are attributable to that permanent establishment.

The term "permanent establishment" is defined in article 5, the relevant portion of which reads:

"1. For/....

"1. For the purposes of this Convention, the term 'permanent establishment' means a fixed place of business in which the business of the enterprise is wholly or partly carried on.

2. The term 'permanent establishment' shall include especially:

(a) a place of management,

(b) a branch,

(c) an office,

(d) a factory,

(e) a workshop,

(f) a mine, quarry, or other place of extraction of natural resources,

(g) a building site or construction or assembly project which exists for more than twelve months.

3. The term 'permanent establishment' shall not be deemed to include:

(a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise,

(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery,

(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise,

(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or for collecting information, for the enterprise,

(e) the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise.

4./.....

4. A person acting in a Contracting State on behalf of an enterprise of the other Contracting State - other than an agent of an independent status to whom paragraph 5 applies - shall be deemed to be a permanent establishment in the first-mentioned State if he has, and habitually exercises in that State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise.

5. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, where such persons are acting in the ordinary course of their business."

This definition falls naturally into three parts. The first, consisting of paragraphs 1 and 2, defines "permanent establishment" by reference to a place where business is carried on; the second, consisting of paragraph 3, excludes certain activities or functions from the term; and the third, consisting of paragraphs 4 and 5, regulates the position where business is carried on through an agent.

It is clear from article 7(1) that, in order for the business profits of a Swiss resident to be taxable in South Africa, it must appear -

(a) that he has carried on business in South Africa ; and

(b) that the business has been carried on through a permanent establishment situated in South Africa.

In the present case it is not disputed, on appeal, that the respondent carried on business, viz., the business of buying and selling shares on the stock exchange in order to make profits, in South Africa. The crucial question is whether or not this was done through a permanent establishment situated in this country.

Appellant's counsel advanced two grounds for contending that the respondent had carried on business through a permanent establishment in South Africa. In the first place, he submitted that respondent's business had been carried on partly in the office of Smith and partly in the office of Palmers and that, therefore, the

case fell within the ambit of article 5(1), read with article 5(2)(c). I do not think that this argument is sound. I incline to the opinion that, whatever the precise scope of article 5(1), read with article 5(2), may be, it contemplates the situation where, by reason of factors such as occupation and control, the fixed place of business can be said to be the taxpayer's place of business and does not cover the case where the taxpayer's business is conducted through an agent who himself carries on his own business on his own business premises. It is not necessary, however, to decide this point because, in any event, it is clear to me that article 5 must be read as a whole and, if under paragraph 5 thereof, the activities of the taxpayer are such that he is not to be deemed to have a permanent establishment in this country, that conclusion must prevail. Were this not so I have difficulty in seeing how paragraph 5 could have any effective field of operation. Virtually all brokers, general

commission/....

commission agents and other agents of independent status operate from a fixed place of business; and, consequently, if counsel's argument were accepted, it would mean that a non-resident doing business in this country through such an agent would invariably be regarded as having a permanent establishment here. This is not a tenable view.

This brings me to articles 5(4) and 5(5) and to counsel's second (and alternative) submission. This was to the effect that Smith, who acted on respondent's behalf, in South Africa, must be deemed to have been a permanent establishment in the Republic through which respondent carried on business. Making use of the definitions and translating article 5(4) into language appropriate to the facts of the present case, it means that a person acting in South Africa on behalf of a Swiss resident - other than an agent of an independent status to whom article 5(5) applies - is deemed to be a permanent establishment in South Africa if he (the agent) has, and habitually

exercises/....

exercises in South Africa, an authority to conclude contracts in the name of the Swiss resident, unless his activities are limited to the purchase of goods or merchandise for the Swiss resident. The appeal was argued on the basis that if the exception made in the case of agents of independent status, falling under article 5(5), did not apply, the position would be covered by article 5(4). There are, however, certain problems in this regard. It is not clear to me whether Smith actually had an authority to conclude contracts "in the name of" respondent; whether article 5(4) requires the agent to actually conclude the contracts in question "in the name of" his principal and, if so, whether this occurred when Smith bought and sold shares on respondent's behalf. (Bearing in mind stock exchange practice, it probably did not.) Nevertheless, these matters were not canvassed either in the Court a quo or on appeal and I shall assume (without deciding the point) that, but for the exception created by article 5(5), article 5(4) would fit the present case.

Article 5(5), also translated into relevant terms, means, in this case, that a Swiss resident shall not be deemed to have a permanent establishment in South Africa merely/....

merely because he carries on business in South Africa through a broker, general commission agent or any other agent of an independent status, where such persons are acting in the ordinary course of their business. Article 5(5) is curiously worded in that it is cast in an essentially negative mould. Thus the phrase used is ".... shall not be deemed to have....", instead of "... shall be deemed not to have....". This form of wording seems to be due to the fact that this paragraph is intended to cover only the case of a person who "merely" carries on business, i.e., does no more than carry on business, through an agent of independent status, who himself acts in the ordinary course of his business. Despite its negative form, paragraph 5 must, in my view, be interpreted as meaning that where, for example, a Swiss resident does no more than carry on business through a South African broker and the latter, in transacting that business on behalf of his Swiss principal, acts in the ordinary course of his business, the Swiss resident must be deemed not to have a permanent establishment in South Africa. That the paragraph has this, more positive, significance is

borne out by the express exception made in article 5(4) in favour of agents of independent status to whom paragraph 5 applies.

I turn now, more specifically, to the applicability of paragraph 5. It was not disputed by appellant's counsel that the buying and selling of shares which produced the profits which the fiscus seeks to tax, constituted the carrying on by respondent, a Swiss resident, of a business in South Africa through a broker, viz., Smith. He submitted, however —

(i) that in handling respondent's portfolio as he did, Smith was not acting in the ordinary course of his business; and

(ii) that, in any event, the facts indicated something more than the mere employment of a broker, acting in the ordinary course of his business.

For these reasons, so counsel argued, paragraph 5 did not apply and, in terms of paragraph 4, Smith must be

deemed/....

deemed to have been a permanent establishment in South Africa, through which respondent carried on business here.

One of the difficulties which confronted appellant's counsel when he endeavoured to develop these submissions, was the fact that certain findings of fact had been made by the Special Court with reference to the ordinary course of a stock-broker's business. Here I would refer to paragraph 10 of the stated case, quoted above, and more particularly to that portion of subparagraph (d) reading -

> "Watching portfolios on behalf of clients in the manner indicated above was part of his normal occupation as a stockbroker. The appellant was not unique in having this service performed for him."

With this must be read the two extracts from the judgment of the President of the Special Court. In the first the general enquiry was considered as follows:

> "If, therefore, the appellant carried on business through a permanent establishment it could only be by virtue of paragraph

4 or 5 of Article 5. Mr. Shaw, for the appellant, contended that paragraph 4 has no application because Mr. Smith enjoys independent status as a broker and that, because he acted in the ordinary course of his business as a broker in the management of the appellant's share portfolio, paragraph 5 is applicable and is, in the circumstances of this case, decisive of the question at issue in the appellant's favour. This appears to us to be correct. The evidence established that Mr. Smith received no remuneration over and above the normal brokerage payable to a broking member of the Stock Exchange; that it was in the ordinary course of such a broker's business to manage portfolios for clients; that it was part of his duty as a broker, in the course of management of the portfolio, to buy or sell shares on behalf of his client."

In the second the Court, in dealing with an argument based upon a certain passage in the report of the O.E.C.D., said:

"But that passage pre-supposes that the commission agent, by acting habitually, as a permanent agent, and by exercising authority to conclude contracts, would not be acting in the ordinary course of his own business or trade. And that was the essence of Mr Kirkup's submission. The evidence, however, is against him. There is nothing to contradict

> or to place in doubt Mr Smith's assertion that it was within the scope of his ordinary functions as a stockbroker to handle the appellant's portfolio as he did and to exercise authority to buy or sell equities in the interests of his client. It may be that the exercise of authority to conclude transactions on behalf of and in the name of a principal may fall beyond the scope of the ordinary business of certain types of agents or brokers but that is not necessarily, nor even probably, so in the case of a stockbroker handling a portfolio for a client. It is of the very nature of his business, dealing as he does in shares which are bought and sold in a market where rapid and substantial fluctuations of price are not uncommon, to be able to deal expeditiously with situations which might suddenly arise. Nor does the circumstance that there was a degree of permanency in the management of the portfolio militate against a finding that the broker acted in the ordinary course of his own business; management of a portfolio of shares implies a degree of permanency."

It is clear from all this that the Special Court (i) equated the concept, "the ordinary course of his business", as it appears in paragraph 5, with what the particular type of independent agent normally does in the course of carrying on his business; (ii) found as a fact that what Smith did in managing respondent's share

portfolio/....

portfolio fell within the scope of what a stockbroker normally does in carrying on business as a stockbroker; and (iii) concluded, accordingly, that in carrying on these activities Smith had been acting in the ordinary course of his business.

Assuming, for a moment, the correctness of step (i) in the Court's reasoning, it seems to me that the Court's conclusion under (iii) is unassailable on appeal. Step (ii) manifestly constitutes a finding of fact which could be challenged in this Court only on the ground that there was no evidence to support it or that it was a finding which could not reasonably have been reached (Strathmore Holdings (Pty.) Ltd. v. C.I.R., 1959 (1) 460 (A.D.), at p. 467; S.I.R. v. Cadac Engineering, 1965 (2) S.A. 511 (A.D.), at p. 519). It has not been suggested that any such ground exists. On the contrary it would appear from the judgment that the evidence of Smith,

which on this aspect of the matter was accepted by the Court, stood uncontradicted and was never placed in doubt. Appellant's counsel did submit that the facts found and set forth in the statement of case did not warrant the Court's finding that it was within the ordinary course of Smith's business as a stockbroker to exercise the "very wide discretion and unqualified power of management" which he did in respect of respondent's portfolio. While the statement of case (of which paragraph 10, quoted above, is the relevant portion) may not clearly indicate that it was part of Smith's normal occupation as a stockbroker to do all that he did on respondent's behalf, any uncertainty on this score is, to my mind, eliminated by the judgment itself. In the second of the two passages from the judgment quoted above, there occurs a passage indicating the Court's acceptance of Smith's assertion in evidence —

> "..... that it was within the scope of his ordinary functions as a stockbroker to handle appellant's portfolio as he did...." (my italics).

A/....

A finding of fact in the judgment must be regarded as if that finding had been specifically set forth in the body of the stated case and in the event of conflict between the judgment and the stated case, the former prevails (W.F. Johnstone & Co. Ltd. v. C.I.R., 1951 (2) S.A. 283 (A.D.), at p. 290). I am satisfied that, in finding that Smith's activities in managing respondent's portfolio were part of his normal occupation as a stockbroker, the Special Court took into account the wide discretion and unqualified power of management, referred to by appellant's counsel. In my view, this argument seeks to assail, without the requisite grounds, a finding of fact by the Special Court and consequently runs into a dead alley.

It remains for me to consider the correctness of step (i) - above - in the Court's reasoning. Although the Special Court found that Smith had acted in the ordinary course of his business as a stockbroker, this in itself is not a

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pure finding of fact. It really amounts to deciding whether the facts found as to the normal scope of a stockbroker's business bring the case within the provisions of paragraph 5 and, more particularly, within the ambit of the words "broker, general commission agent or any other agent of an independent status.... acting in the ordinary course of his business": this is, in my opinion, a question of law (see S.I.R. v. Cadac Engineering, supra, at pp. 520-1). The question of law is whether the Court correctly interpreted these words as having reference in this case to what a stockbroker normally does in the course of carrying on his business as a stockbroker.

It was not disputed by appellant's counsel that a stockbroker was a type of broker. In any event, he would fall under the all-embracing description of "any other agent of independent status". The words "acting in the ordinary course of their business" are certainly capable of bearing the meaning ascribed to them by the Special Court, viz. doing what the particular type of agent, viz. a stockbroker, normally does in the course of carrying on his business. Moreover, this would seem to be the natural meaning of these words. It is true

that certain of the services involved in portfolio management fall outside agency work in the strict sense in that they do not directly involve the principal in relationships with third parties. I have in mind here matters such as the provision of knowledge and expertise in regard to the stock market, the watching of the client's particular shareholdings, decisions as to which shares should be held and which sold, what to buy with the proceeds, and so on. It might be argued that the words "acting in the ordinary course of business" were introduced in order to limit the scope of paragraph 5 to agency work in this strict sense. It is not always easy, however, to define the boundaries of agency work. Moreover, it is well-known that there are, for example, several types of broker who, in addition to acting strictly as agents, normally perform various other services for their principals. Nor am I able to discern any reason as to why the parties to the convention should have wished to draw distinctions along these lines. On the contrary, reading paragraphs 4 and 5 together, it

seems/.....

seems to me that the emphasis falls broadly upon a distinction between non-independent agents acting habitually on behalf of a non-resident principal and agents of independent status who conduct the business of the principal in the ordinary course of their own business operations. It can readily be appreciated that in the former case the agent could be regarded as a permanent establishment; but in the latter not.

Viewing the article as a whole, I have come to the conclusion that the meaning ascribed to the relevant words in paragraph 5 by the Special Court is the correct one. The first submission by appellant's counsel must accordingly fail.

The second and alternative submission was to the effect that the facts indicated something more than the mere employment of a broker, or other agent, acting in the ordinary course of his business and that, therefore, the case fell outside the ambit of paragraph 5. In this connection appellant's counsel stressed the use of the word

"merely"/....

"merely" in paragraph 5 and relied upon the following factors to show that more than the mere employment of a broker or other agent was involved: (i) the fact that appellant himself took no part whatever in the management of the portfolio; (ii) the wide discretion and unqualified power of management given to Smith; and (iii) the degree of permanency relating to this discretion and power. As I have already indicated, however, the Special Court found as a fact that it was within the scope of Smith's ordinary functions as a stock-broker to handle respondent's portfolios "as he did". This finding must have taken account of the three above-mentioned factors relied upon by counsel. If, in handling respondent's portfolio in this way, Smith acted within the scope of his ordinary functions as a stockbroker (as was held on the uncontradicted evidence before the Special Court), then on the meaning ascribed to paragraph 5 by the Court - and correctly so ascribed - in doing so Smith acted in the ordinary course of his business. There is, thus, no room for the argument that there was something more than

the/....

the mere employment of a broker or other agent acting in the ordinary course of his business and this second, alternative, submission must also fail.

The appeal is dismissed with costs, including the costs of two counsel.

RUMPFF, C.J.)
BOTHA, J.A.)
HOLMES, J.A.) Concur.
GALGUT, A.J.A.)