

IN THE COURT OF APPEAL OF BELIZE, A.D. 2013

CIVIL APPEAL NO. 12 OF 2010

BETWEEN:

STEPHEN OKEKE

Appellant

AND

UNIVERSITY OF BELIZE

Respondent

—

BEFORE:

The Hon. Mr. Justice Morrison	-	Justice of Appeal - Presiding
The Hon. Mr. Justice Mendes	-	Justice of Appeal
The Hon. Mr. Justice Awich	-	Justice of Appeal

Mr. Bryan Neal for the appellant.

Mr. E. Andrew Marshalleck SC for the respondent.

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19, 23 October 2012; 28 March 2013.

MORRISON JA

[1] I have had the opportunity to consider in draft the judgment prepared by Awich JA in this matter. I agree with the reasons he has given for the court's dismissal of the appeal on 23 October 2012 and have nothing to add.

MORRISON JA

MENDES JA

[2] I too agree and have nothing to add.

MENDES JA

AWICH JA

[3] The appellant, Mr. Stephen Okeke, was appointed an associate lecturer at the University of Belize, the respondent, on 1st August, 2002 by a letter of that date written by the President of the University, Dr. Angel E. Cal. The University is a statutory corporation established by the University of Belize Act, Chapter 37, Laws of Belize. On 11th August, 2004 the appellant was dismissed from his employment. The letter of dismissal was written by Corinth Morter-Lewis. Ph.D., President of the University, who succeeded Dr. Cal.

[4] About 2 ½ years after the dismissal, the appellant made a claim by a general claim form dated 23rd February, 2007 in which he claimed that the dismissal was unlawful, that it was, “arbitrary and without justification”. He asked for the following relief:

- “1. A Declaration or Order that the termination of his appointment as Associate Lecturer (Permanent) from the University of Belize with effect from the 11th day of August 2004 was unlawful.
2. A Declaration that as a consequence of such wrongful dismissal the Claimant is entitled to be paid damages for wrongful dismissal by the Defendant.

3. An Order that the damages due and payable by Defendant to the Claimant be assessed and paid to him along with interest pursuant to Section 166 of the Supreme Court of Judicature Act, Chapter 91 of the Laws of Belize Revised Edition 2003, on the amount found to be due at such rate, and for such a period as the Court shall think fit.
4. An order that the Defendant pay to the Claimant the costs of these proceedings.
5. Such further or other relief as to the Honourable Court seems just.”

[5] The appellant’s claim was made on the grounds that: (1) the appellant, “carried out his duties in a diligent, competent and committed manner”; (2) the appellant made repeated requests to the University administrators to supply equipment, materials and books for teaching associate degree courses, but the administrators did not grant the request, and the appellant was unable to teach the courses assigned to him; (3) the respondent asked the appellant to assign to the students pass and credit grades when the students did not earn any grades, the appellant refused because it was unethical; (4) the students became undisciplined in the classroom, and the respondent refused to discipline them; and (5) on 11th August, 2004 the respondent, “arbitrarily and without justification terminated the [appellant’s] appointment.”

[6] The claim was in contract. It was based on a contract of employment between the respondent, the employer, and the appellant, the employee, which contract the appellant claimed had been breached by the respondent when it wrongfully dismissed the appellant, “arbitrarily and without justification”. So, it is important to identify the terms of the contract of employment that are said to have been breached.

[7] The terms of the contract were set out in the letter of appointment dated 1st August, 2002, by the President to the appellant, and in the “Faculty and Staff

Handbook”, dated June 15, 2000. The latter is a set of policies, rules, regulations and information that applied in regard to, among other things, disciplinary action regarding staff.

[8] The letter was as follows:

“1 August, 2002

Dear Stephen Okeke:

I am pleased to inform you of the continuation of your appointment as **Associate Lecturer-Permanent** in the Faculty of Engineering and Information Technology. This appointment continues conditional on the following broad expectations with complete specifications within the UB Faculty and Staff Handbook and the job description that is attached. Teaching and service-are key responsibilities of an **Associate Lecturer-Permanent**. You are responsible to be in office a minimum of 35 hours per week for courses, consultation and service. Office hours must be posted on your door and be on file with the department secretary and Dean.

Your salary is to be paid on UB pay scale 18 at \$27,912 per annum. On a day-to-day basis you report to the Dean (or his/her delegate) of the FEIT. Your Dean will conduct a yearly formal evaluation of your performance based upon your self-developed work plan and your job description.

...

Please sign and initial as appropriate both copies of this letter and return it to the Office of Personnel. Save one copy for your records.

In anticipation of your acceptance, we thank you for agreeing to remaining in the Academic Team of the University of Belize and we look forward to a fruitful academic year.

Sincerely,

A Cal

Angel E. Cal, PhD
President

Copied to: Dean, FEIT”

[9] The paragraphs of the Faculty and Staff Handbook which were made parts of the joint issues in the claim were: 3.10.1, 4.2.1, 4.2.2, 4.5.1, 4.8.1., 4.8.2.a, 4.8.2.c, 4.8.2.d, 4.8.2.e and 4.8.4. I shall quote some of them when desired.

[10] The post to which the appellant was appointed was described as, “associate lecturer-permanent”, in the Faculty of Engineering and Information Technology. That entitled him to “tenure” which was defined in paragraph 4.5.1 of the Handbook as, “a permanent status in a given post subject to termination only on resignation, retirement, termination for [a] just cause, or on closure or reorganization of a given unit or department”. A just cause is repeated in paragraph 4.8.1 as the reason for “termination or dismissal of [a] permanent/tenured staff”. At the trial it was common ground that the respondent would be entitled to dismiss the appellant or any lecturer for a just cause.

[11] The respondent answered the claim of the appellant by stating that: (1) the appellant had been employed as a temporary employee at Belize Technical College, up to the year 2000 when Belize Technical College became part of the respondent; (2) the respondent first employed the appellant in the year 2000, as a temporary associate lecturer, and then in the year 2002, as an associate lecturer on permanent and pensionable terms in the Faculty of Engineering and Information Technology; (3) the respondent supplied materials, tools and equipment that were necessary for teaching the associate degree courses assigned to the appellant, the problem was that the appellant always failed to submit requisition for necessary materials; (4) the tools and equipment that the respondent had in the workshop were adequate for teaching the courses that the appellant was assigned to teach, but he refused to use the tools and equipment, and made unreasonable demand for equipment that the respondent was financially unable to purchase; (5) the appellant refused to teach using available tools and equipment and generally failed to attend classes and teach, and instead went to work in his sculpture business during the time he was required to teach students of the Faculty of Engineering and Information Technology; (6) because the appellant was missing too many classes and did not arrange for classes to make up for the lost classes, students became agitated and he could not manage discipline in the classroom; (7) appellant’s students reported persistent absence of the appellant from classes to the Dean of the Faculty and to the President of the

respondent; (8) appellant was generally lacking in his work, uncooperative and insubordinate towards his supervisor and other seniors; and (9) the respondent terminated the employment of the appellant for a just cause and in accordance with the procedure in the Faculty and Staff Handbook.

[12] The appellant conducted his claim by adducing evidence by his own testimony alone, primarily to prove that, on that evidence his dismissal was not for a just cause, and was unlawful. Regarding the 'arbitrariness' of the dismissal, the appellant did not adduce evidence, his learned counsel, Mr. Anthony Sylvestre, simply relied on cross-examination of the witnesses for the respondent, as to the procedure or steps leading to the termination of the employment of the appellant. Mr. Sylvestre then urged that the testimony of the appellant be accepted as proof of no justification for the dismissal and proof of arbitrary manner of terminating the contract of employment.

[13] The regulations in the Handbook that applied to procedure for termination of employment of permanent staff were in paragraphs: 4.8.1, 4.8.2.a, or c and 4.8.2.d. Paragraph 4.8.1 simply provided that, "termination shall be based on [a] just cause", and that the President of the University, "shall afford to permanent/tenured ... staff, all established due process/procedure/safeguards and protection ..." Paragraphs 4.8.2.a and c set out the procedures step by step. Clause "a" applied when the disciplinary action was on the ground of criminal conviction, insubordination and other misconducts. Clause "c" applied when the performance of the member of staff was evaluated as poor. Clause "d" applied in the event of summary dismissal.

[14] Although the appellant raised the question that he was dismissed, "arbitrarily and without justification", and therefore in breach of the regulations in paragraph 4.8.2.a of the Handbook, he did not in his pleading or in his testimony outline the irregularity; he did not testify to it. The witnesses for the respondent did. The appellant simply challenged by cross-examination, the testimonies of the witnesses for the respondent. He was able to obtain from the witnesses some clarifications in his favour that, the regulation at 4.8.2.a, in the Handbook was not complied with, instead an established "practice" was followed.

The judgment and orders in the trial court.

[15] On 16th February, 2010, Hafiz-Bertram J. dismissed the claim of the appellant. She made the following order:

“Order

The Declaration is refused that the termination of the Claimant’s appointment as Associate Lecturer (Permanent) from the University of Belize with effect from the 11th day of August 2004 was unlawful.

The Declaration is refused that the Claimant is entitled to be paid damages for wrongful dismissal by the Defendant.

Prescribed costs is awarded to the Defendant.”

The grounds of appeal.

[16] The appellant has appealed against the judgment and order on the grounds that:

- “1. the Learned trial judge erred in law in holding that though the UB Faculty Handbook Rules were not strictly followed before the Ad Hoc Committee met, no substantial requirement of natural justice was violated (paragraph 109 of the judgment).
2. the Learned trial judge erred in law in finding that the Ad-Hoc Committee was properly and fairly constituted and that there was no breach of [the] rules of natural justice (paragraph 122 of the judgment).
3. the Learned trial judge misdirected herself in holding that the Appellant’s termination would only take effect if there was compliance with the procedures for termination as set out in the

Faculty and Staff Handbook, and yet holding that the steps omitted by the Defendant in accordance with the Handbook are procedural irregularities and could not have prejudiced the Appellant in anyway. (paragraph 64 and 109 of the judgment).”

[17] The appellant then made the following requests:

1. That this Honourable Court quash the decision of the Honourable Madam Justice Hafiz-Bertram refusing the declarations sought by the Appellant in the court below and awarding prescribed costs to the Respondent.
2. That costs of this appeal and of the case below be awarded to the Appellant.”

Determination.

[18] The more significant terms of the contract of employment were that: the respondent employed the appellant as an associate lecturer in the Faculty of Engineering and Information Technology with effect from 1st August, 2002, at a salary of \$27,912.00 per annum, until retirement with pension, subject to termination for a just cause or resignation, or closure, or reorganization of the Department; and the appellant agreed to carry out the duties of an associate lecturer for the period, and warranted that he was qualified, competent, available and able to carry out the duties personally.

[19] There was no question that there was a contract of employment in which there was mutuality of obligations between the parties. The mutuality on the part of the appellant was principally an obligation to work for the respondent; and on the part of the respondent, an obligation to pay for the work done and to pay a retainer for any time that the appellant would be available, and there might be no work of the respondent – see **Clark v Oxfordshire Health Authority [1998] IRLR 125**; **Carmichael v National Power plc. [2000] IRLR 43**; and **St Ives Plymouth Ltd v Haggerly [2008] All ER (D) 317**. The obligation of the appellant to work for the

respondent was to provide to the respondent, the services of an associate lecturer personally – see **Express and Echo Publications Ltd v Tanton [1999] IRLR 367**; and **Staffordshire Sentinet Newspapers Ltd v Potter [2004] IRLR 752**. Furthermore, the parties agreed that the appellant would be subjected to the overall control of the respondent as the master – see **Ready Mixed Concrete (Couth East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497**, and **Montgomery v Johnson Underwood Ltd [2001] EWCA Civ 318**. The contract of employment was a common ground, but performance and breach of it were strongly contested.

[20] In addition to the express terms of the contract of employment between the parties, and the warranties implicit, the common law imposed duties on the appellant employee to obey lawful and reasonable orders of the respondent employer, to work only for the respondent during the hours of work, and to work faithfully and with due diligence. These were made direct issues in the claim. They must be considered together with the corresponding common law duties of the respondent where applicable.

[21] Regarding ground one of the appeal that: “the learned trial judge erred ... by holding that although the UB Faculty Handbook Rules were not strictly followed before the ad hoc committee met, no substantial requirement of natural justice was violated ...,” it was our view that, natural justice was not pleaded in the claim; the appellant conducted his claim on the premise that he had been dismissed, “arbitrarily and without justification”, that is, contrary to the contract of employment. The “irregularity” mentioned by the trial judge simply referred to steps in the procedure for termination set out in the Faculty and Staff Handbook, that were omitted during the termination process. Natural justice was a new ground that the appellant raised for the first time on appeal, in ground one. In the circumstances of this case we cannot allow the appellant to introduce the question of natural justice without having pleaded it.

[22] Regarding ground two that: “the learned trial judge erred in law in finding that, the Ad Hoc Committee was properly and fairly constituted and that there was no breach of the rules of natural justice ...,” we were similarly of the view that, natural

justice was not pleaded. The learned judge stated so in her judgment although in the end she decided the question of natural justice. Had it been pleaded the respondent might have responded, for instance, it might have raised the question of acting promptly. We concluded that in the circumstances we will similarly not allow the question of natural justice to be raised on appeal, in ground two.

[23] As a matter of the terms of the contract of employment, the members of the committee were appointed in accordance with the regulation in paragraph 4.8.2 of the Handbook; they included: "... the faculty representative ... a peer preferably from another department and one additional person from within, not including the person making the accusation". The appellant complained in this appeal that Mr Lyndon Flowers was wrongfully included on the committee, he was one of those who made the accusation against the appellant.

[24] We agree with the trial judge that, "the accuser", that is, the person who made the complaint and recommended investigation in order to determine, "whether the appellant should remain part of the Faculty of Engineering and Information Technology" was Mr. Morrison, the Chair of the Department. His recommendation was made to Dr. Barrow, the Provost, and copied to Dr. Lewis, the Dean of the Faculty. Mr. Flowers did not join in making the complaint and recommendation. He was not, "the person making the accusation", who must be excluded from the committee. He had been the supervisor of the appellant at another place and time when both had been employed by another employer, Belize Technical College. Mr. Flowers had questioned the performance of the appellant then. Those questions ended with the demise of Belize Technical College and the appointment of the appellant on the staff of the respondent. Ground two of the appeal also fails.

[25] It is not clear from the evidence who appointed the ad hoc committee. If the appointment was not made by the President, it would not render the entire process a breach of the contract. There was substantial compliance with the regulations concerning the procedure for termination. The appellant refused the invitation of the committee to hear him for a different reason.

[26] Ground three merely stated a process of reasoning, namely, that the learned judge held that termination of the employment of the appellant would only take effect if there had been compliance with the procedure in the Handbook, yet in the end held that, although some procedural steps in the Handbook were not followed, the appellant was not prejudiced. That was merely a matter of Philosophy. The questions of law on which the appeal depends have been discussed in deciding the first two grounds.

[27] In his notice and grounds of appeal the appellant requested, “1. That this Honourable Court quash the decision of the Honourable Madam Justice Hafiz-Bertram refusing the declarations sought by the appellant in the court below and awarding prescribed costs to the respondent.” Hafiz-Bertram J refused to grant the declarations to the appellant for the reason that, the appellant was dismissed for a just cause.

Was there no just cause for the dismissal?

[28] The question whether there was no just cause for which the respondent was entitled to dismiss the appellant depended wholly on what facts from the evidence adduced by the parties the learned judge was entitled to accept as having been proved. For his part, the claimant/appellant impliedly admitted in his statement of claim and witness statement that, during his employment he missed classes, and he did not attend certain meetings called by his seniors, the Chair of the Department, Mr. Douglas Morrison, and the Dean of the Faculty, Dr. Aaron Lewis. But he gave explanations which he asked the court to accept as justification for missing classes and failing to teach and not attending those meetings. The trial judge disbelieved the explanations. There is no ground for this Court to interfere with the judge’s assessment of credibility on the points of fact.

[29] In addition the appellant mentioned one reason which could be taken as raising a question of law, namely that, he refused to carry out an instruction by the Dean that the appellant should assign credit and pass grades to his students; he refused because the students did not earn the grades, and it would be unethical. The question of law in that would be whether the instruction on behalf of the

employer was a lawful and reasonable order. In the end however, the appellant did not pursue the point as a question of law, in his submissions at the trial court or at this Court. The learned trial judge disbelieved it as a matter of fact. There is no ground on which this Court can interfere with that finding of fact by the trial judge.

[30] The evidence adduced by the respondent was that: the appellant was generally lacking in his job; the Chair and Dean were not consulted in the appointment of the appellant; the appellant refused to teach according to his own course outline and the syllabus; the equipment and tools provided by the respondent were adequate for the course, but the appellant refused to teach using them, yet other lecturers used them; the appellant missed too many classes and did not compensate for them by arranging 'make-up' classes, and students were not given grades for the semester; the appellant always failed to meet deadlines in his work; the appellant usually failed to request for materials such as steel rods and acetylene required for teaching in the workshop; the appellant attended to his sculpture business during the time he was required to be working for the respondent; and the appellant had bad behavioral conduct and was insubordinate. Letters, internal memoranda and minutes of meetings were included in the evidence to support the testimonies of the two witnesses for the respondent.

[31] The learned trial judge accepted the evidence for the respondent and rejected that for the appellant. In paragraphs 63 and 64 of her judgment she stated:

"63. On a balance of probabilities, I find the evidence of the Defendant, University of Belize, credible. Mr. Okeke has failed to prove that there was a failure by the University to provide the course materials and equipment for the engineering course at the Associate Degree level. Mr. Okeke has failed to prove that the University wanted him to engage in a scheme of deception to give students passes for the Engineering course at Associate Degree Level without having the necessary materials and equipment. In fact, the evidence of Mr. Morrison and Dr. Lewis which I find credible, establishes that the materials and equipment were adequate to teach the engineering course. Mr.

Okeke refused to use the materials and equipment available to teach the course at the Associate Degree level. This is insubordination and this I find led to the frustration of the students as they would get no grade (NG) for the subject.

64. Mr. Okeke has impliedly contracted to obey the lawful and reasonable orders of his employer, the University of Belize within the scope of the employment he contracted to undertake. Mr. Okeke has failed to obey the lawful and reasonable orders of the University by failing to use the materials and equipment available to teach the course at the Associate Degree level. There is no evidence that Mr. Okeke was dismissed arbitrarily and without justification. I find that Mr. Okeke was terminated for good and sufficient cause. However, this would take effect only if there was compliance with the procedures for termination as set out in the Faculty and Staff Handbook.”

[32] There were certainly available items of evidence in the record of proceedings from which the learned judge could reach the conclusion that the evidence for the respondent was credible, and could reject the evidence for the appellant. Her conclusion was not plainly wrong, or unreasonable having regard to the total evidence.

[33] Although this court, an appellate court, has power under **s: 19(b) of the Court of Appeal Act, Cap. 90**, to draw inferences of fact, the practice of appellate courts have been that the power is exercised in a very restricted manner when a question of credibility is raised on appeal. In **National Justice Cia Naviera SA v Prudential Assurance Co. Ltd (The Ikarian Reefer) [1995] 1 Lloyd Rep. 455**, the Court of Appeal (England) interfered with a finding of fact, but sounded the following warning in the words of Stuart-Smith LJ on pages 458 – 459:

“(1) The burden of showing that the trial judge was wrong lies on the appellant ... (2) When questions of the credibility of witnesses who have given oral evidence arise the appellant must establish that the

trial judge was plainly wrong. Once again there is a long line of authority emphasizing the restricted nature of the Court of Appeal's power to interfere with a judge's decision in these circumstances, though in describing that power different expressions have been used. In the SS Hontestroom v SS Sagaporak [1927] AC 37, 47 Lord Sumner said: 'None the less not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge and unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at merely on the results of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case ...'

[34] Those words cannot be taken as excuse for an appellate court for abandoning its responsibility to draw inference of fact, but an appellate court must be alert to when the exercise of its power to draw inference of fact becomes an undesirable interference with the evaluation by the trial court of the credibility of a witness. That delicate exercise was described in, **Harbour Board v Proctor [1923] AC 253**, at page 258 by Viscount Cave LC as follows:

"In such a case ... it is the duty of the Court of Appeal to make up its own mind not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liability to draw its own inferences from the facts proved or admitted and to decide accordingly."

[35] The nature of the power of an appellate court is that of a power of review, but not the same power of review that obtains in judicial review. The judgment of the Court of Appeal (England) in, **Assicurazioni Generali SpA v Arab Insurance Group [2003] 1 WLR 577**, illustrates the review nature of the power of an appellate court. Note, however, that the case was decided after the rules of procedure in England had been changed to reflect the practice that had prevailed.

[36] By accepting the evidence for the respondent, especially the evidence that, the materials and equipment available for teaching were adequate and that the refusal by the appellant to teach was insubordination, the trial judge rejected what the appellant gave as justification for refusing to provide to the respondent the services that the appellant was employed to provide. The appellant had conducted his claim on the footing that he did not teach, but that he had justification in that the respondent had failed to provide the necessary tools, conditions and opportunity for work. The trial judge categorically stated that the appellant was not a credible witness. The trial judge had to conclude that the appellant breached the contract of employment.

[37] The learned trial judge did not make specific findings on all the questions raised such as whether the appellant refused to participate in planned activities such as orientation of new student activities, seminars, and educational trips, and the question of rudeness and aggression on the part of the appellant. Had the learned judge deemed it necessary to decide those questions of fact she would have easily found that the evidence available supported the respondent's case. It was not necessary for the trial judge to make findings on all the items of the evidence in order to decide the claim between the parties.

[38] The breach of the contract of employment by the appellant was a fundamental breach, its consequence was that it was impossible for the contract to continue. Without the students being taught, the contract by which the appellant was employed as an associate lecturer could not be continued. The respondent was entitled to bring the contract to an end. Failing to teach the students was the highest justification that the respondent could have for dismissing the appellant. It easily qualified as a just cause for dismissal.

The contractual disciplinary procedure.

[39] Regarding failure to follow some steps in the disciplinary procedure, the trial judge made two decisions. The first comprised of the following. On 11th May, 2004 the Chair of the Department, Mr. Morrison, made a recommendation to the Provost, Dr. Dorian Barrow, copied to the Dean, Dr. Aaron Lewis, that several named

misconducts by the appellant be investigated, and a decision be made, “whether the appellant should continue to be part of the department”. The Provost who was the academic Vice President, did not put that recommendation to the President of the University who would decide on “a course of action”. One of the actions was to appoint an ad-hoc committee. The trial judge concluded that while an ad-hoc committee was appointed and the recommendation to have an investigation was referred to the committee, an irregularity had occurred in that the President had taken no part in referring the matter to the ad-hoc committee, as required by the rules of procedure set out in the Faculty and Staff Handbook in paragraph 2.8.2.a. Thus far, the appellant had no complaint.

[40] The trial judge went on to say: “The court would have to accept as a matter of fact that this is the practice. In any event, even if I am wrong to accept this evidence as the practice, any steps omitted in accordance with clause 4.8.2 before the committee met, in my view, are procedural irregularities and could not have prejudiced the claimant in any way.” In those words lies the complaint in ground two of the appeal. There is hardly any substance in the complaint.

[41] Viewed as a term in the contract of employment, the requirement that the President would receive a complaint or recommendation for disciplinary action and may refer it to an ad-hoc committee for investigation and report, was a warranty or a collateral term of the contract of employment. Breach of it was not a fundamental breach. At the highest it would entitle the appellant to damages, not to a declaration that the termination of his contract was unlawful. The damages would be his salary and any benefit he would have earned in the period that the step in the procedure would have taken to complete – see **Gunton v Richmon-upon-Themes London Borough Council [1980] ICR 755**, and **Focsa Services (UK) Ltd v Birkett [1996] IRLR 325**. But the appellant did not conduct his claim with damages for breach of procedure in mind; he did not adduce evidence of any damages that might have resulted from such a breach. He did not, in the first place, adduce evidence as to the breach of that step in the procedure. The trial judge reached her conclusion from answers given in cross examination by the appellant, of witnesses for the respondent. There was no evidence on which to award such damages.

[42] The appeal is dismissed. The judgment of the trial judge is upheld, subject to the modifications that flow from the points of law that we have clarified. The orders made by the trial judge are confirmed. The orders requested by the appellant on appeal are refused.

[43] Costs to the respondent to be agreed or taxed.

AWICH JA