



محكمة قطر الدولية
ومركز تسوية المنازعات
QATAR INTERNATIONAL COURT
AND DISPUTE RESOLUTION CENTRE

**In the name of His Highness Sheikh Tamim bin Hamad Al Thani,
Emir of the State of Qatar**

Neutral Citation: [2026] QIC (A) 7

**IN THE QATAR FINANCIAL CENTRE
CIVIL AND COMMERCIAL COURT
APPELLATE DIVISION**

[On appeal from [2025] QIC (RT) 1]

Date: 30 March 2026

CASE NO: RTFIC0002/2025

RUTHERFORD, BESS AND ATTWOOD LLP

Appellant

v

QATAR FINANCIAL CENTRE AUTHORITY

Respondent

JUDGMENT

Before:

Lord Thomas of Cwmgiedd, President

Justice Laurence Li SC

Justice James Allsop AC

Order

1. Permission to appeal granted and appeal allowed.
2. The orders of the Regulatory Tribunal made on 29 July 2025 are set aside.
3. The matter is remitted to the Regulatory Tribunal to deal with arguments made by the Respondent to support its position that were not dealt with by the Regulatory Tribunal in the light of its views on the issues it addressed and to deal with the issue addressed in paragraph 68 of the reasons below.
4. The parties are to file brief submissions as to costs within 7 days of the date of the judgment.

Judgment

Introduction

1. This is a rolled up application for permission to appeal and, if permission is granted, an appeal from orders made by the Regulatory Tribunal on 29 July 2025 by which the Regulatory Tribunal upheld the decision of the Respondent, the Qatar Financial Centre Authority ('QFCA'), which had amended the Appellant's 2021 tax return by increasing tax payable from nil to QAR 151,459. The increase was based upon a determination that the Appellant (a limited liability partnership) should not be allowed certain claimed deductions, being payments to the two (founding) members of the partnership, Dr Bessedik and Mr Elwen, in the sum of QAR 1,920,000 by way of remuneration under contracts of employment with the Appellant, as distinct from distributions to them as members.
2. The limited liability partnership agreement governing the partnership (the '**LLP Agreement**') was dated 2 October 2017. On 30 November 2017, Dr Bessedik and Mr

Elwen executed a resolution (the ‘**Resolution**’) as members of the Appellant to approve employment contracts for each of themselves with the Appellant in accordance with the QFC Employment Regulations (as amended) with an annual (N.B. it was plainly intended to be monthly) salary not to exceed QAR 80,000. The contracts were stated to be deemed by the Resolution to be service agreements (between each of the members and the Appellant) for the purposes of clause 6 of the “*partnership agreement*” (it is to be noted that clause 6 of the LLP Agreement did not use that phrase and was concerned with releases and indemnities). However, clause 7 of the LLP Agreement is relevant (though it does not use that phrase), as explained below.

3. The salaries were paid thereafter (and in the relevant year of income), and there appears to be no suggestion that the payments were not made by the Appellant LLP to its two members bona fide in the course of the carrying on of the business of the LLP for the purpose of gaining or producing assessable income of the Appellant. Notwithstanding such, the question was and is whether, in the circumstances of the LLP, the Resolution, the apparent agreement among the members, the Limited Liability Partnerships Regulations (2005) (as amended in 2012) (the ‘**LLP Regulations**’) and the Tax Regulations 2020 (the ‘**Tax Regulations**’), the payments were deductible, or not.
4. The Respondent and the Regulatory Tribunal answered this question in the negative.
5. It is necessary to note that whilst the Respondent disallowed the deduction for remuneration by way of salary of QAR 1,920,000, it treated the sum as a distribution, and, because the sum to the extent of QAR 869,880 had been paid in cash, this portion of the payment was treated as a distribution of “*ready moneys*” which was expressly permitted by clause 16 of the LLP Agreement. So treating the payments and applying article 65 of the Tax Regulations, the Respondent allowed a deduction of QAR 464,471 of the cash payment leaving a balance of QAR 1,514,590 as not deductible and representing Chargeable Profits, producing a tax liability (applying a tax rate of 10%) of QAR 151,459.

The context

6. We must begin with the LLP Regulations, the Tax Regulations in particular article 19 and paragraphs (a) and (d) of article 21, the terms of the Appellant’s LLP Agreement, and the Resolution.

The LLP Regulations

7. Part 2 of the LLP Regulations provides for the incorporation of a legal entity known as a limited liability partnership with separate legal capacity from that of its members.
8. Part 4 of the LLP Regulations deals with membership. The relationship between members is governed by article 12, relevantly as follows:

Article 12 – Relationship of Members

- (1) *Except as otherwise provided by these Regulations, the mutual rights and duties of the Members of a Limited Liability Partnership, and the mutual rights and duties of a Limited Liability Partnership and its Members, shall be governed:*
 - (A) *By a Limited Liability Partnership Agreement between the Members, or between the Limited Liability Partnership and its Members, or*
 - (B) *In the absence of a provision in a Limited Liability Partnership Agreement as to such matter, by any provision made in relation to that matter in Article 18.*

9. Article 18 of the LLP Regulations provides for the rights and obligations of members in the absence of a provision in the LLP Agreement. This is a default regime concerned with the mutual rights and duties of members and the LLP. For present purposes, article 18 must be read with the definition (“*shall where the context permits have the meaning*”) of the phrase “*Limited Liability Partnership Agreement*” in article 74 of the LLP Regulations. They provide as follows:

Article 18 – Rights and Obligations of Members in the Absence of Provisions in the Limited Liability Partnership Agreement

In the absence of any provision in that regard in the Limited Liability Partnership Agreement the mutual rights and duties of the Members and the mutual rights and duties of the Limited Liability Partnership and the Members shall be determined by the following rules:

- (1) *All the Members of a Limited Liability Partnership are entitled to share equally in the capital and profits of the Limited Liability Partnership;*

...

(4) *No Member shall be entitled to remuneration for acting in the business or management of the Limited Liability Partnership;*

...

Article 74 – Definitions

The following words and phrases shall where the context permits have the meaning shown against each of them:

....

Limited Liability Partnership

In relation to a Limited Liability Partnership means any agreement express or implied between the Members of the Limited Liability Partnership or between the Limited Liability Partnership and the Members of the Limited Liability Partnership which determines the rights and duties of the Members, and their rights and duties in relation to the Limited Liability Partnership.

10. The importance of having regard to the definition of “*Limited Liability Partnership Agreement*” in article 74 of the LLP Regulations is that when one is undertaking the necessary exercise required by the overarching introductory paragraph of article 18 (ascertaining whether there is “*any provision in that regard in the Limited Liability Partnership Agreement*”) one must have regard not only to the formal written LLP Agreement executed on, but also to:

... any agreement express or implied between the Members ... or between the Limited Liability Partnership and the Members ... which determines the mutual rights and duties of the Members, and their rights and duties in relation to the Limited Liability Partnership.

11. We do not consider that the defined term in article 74 of the LLP Regulations is limited to agreements which purport to be an entire and whole Limited Liability Partnership Agreement, and we reject the argument of the Respondent to that effect. Article 74 of the LLP Regulations states that the phrase means **any** agreement (that is any contractual arrangement) “*which determines the mutual rights and duties of the Members, and their rights and duties in relation to the [LLP]*”.

The Tax Regulations

12. “*Taxable Profits*” are defined in article 11(1) of the Tax Regulations as “*Chargeable Profits*” reduced by the set off of any tax losses and Group Relief under Part 5.

13. “Chargeable Profits” are defined in article 11(2) as the “Accounting Profits” as defined in article 15, as adjusted by the Tax Regulations.

14. “Accounting Profits” as defined in article 15 are:

The profit, including any Capital Profits, before the payment of tax and dividends as reflected in QFC entities profit and loss account or income statement, based on accounts prepared in accordance with GAAP (defined in Article 153 as generally accepted accounting principles) and the laws of the QFC.

15. Part 4 of the Tax Regulations is entitled (and deals with) “computational provisions”. The first article in Part 4 is article 19 which provides as follows:

Article 19 – Policy Statement on Computational Provisions

Subject to any other provisions of these Regulations in computing the Chargeable Profits of a QFC Entity for an Accounting Period, expenses, costs or other disbursements may be deducted to the extent that they have been taken into account in arriving at the Accounting Profit of the QFC Entity for that Accounting Period and are incurred for the purpose of generating Local Source Profits or incurred in the operation of a business carried on for the purpose of generating such profits.

16. Article 21 of the Tax Regulations provides for 13 categories of deduction that are not allowable. Relevantly, it provides as follows:

(1) Subject to any other provisions in these Regulations, in computing the Chargeable Profits of a QFC Entity for an Accounting Period, no deduction shall be available in respect of–

(a) expenses not actually incurred or not supported by documentary evidence;

...

(d) any costs connected with unlawful acts;

...

The LLP Agreement

17. The LLP Agreement was made between Dr Bessedik and Mr Elwen. It recited that the partnership then named J & A Legal Consultants LLP (defined as the “Partnership”) “is a limited legal liability partnership established under the laws of the... [QFCA], pursuant to this agreement which will be registered in Qatar.” It further recited that the partners (Dr Bessedik and Mr Elwen) “wish to record ... the terms on which they will carry on the business of the Partnership.”

18. By clause 2.1 of the LLP Agreement the partners agreed to carry on the partnership in accordance with clause 3.2 and otherwise on the “*terms of this agreement*”.
19. Clause 3.2 of the LLP Agreement provided for the carrying on of professional and legal services in Qatar and internationally.
20. Clause 7.3(i) of the LLP Agreement relevantly provided:

7.3 Partners’ power to engage employees and agents

(i) The Partners may employ such persons and engage such independent agents, lawyers, accountants, custodians and financial advisors as it considers necessary or desirable in the performance duties and functions under this agreement.

...

21. By clause 7.4(i), subject to clause 7.5 (dealing with subjects requiring the necessary prior consent of all partners) in conducting and managing the business and affairs of the partnership, the partners may exercise all the powers of the partnership, that is all the powers of the Appellant as an LLP.

22. Clause 23.1 provided for amendment as follows:

Amendments to this Agreement must be made in writing and be signed by each Partner.

23. Clause 23.3 of the LLP Agreement was an entire agreement provision as follows:

23.3 Entire Agreement

This Agreement and the documents contemplated by it constitute the entire Agreement between the parties.

24. Against this background, on 30 November 2017, Dr Bessedik and Mr Elwen expressly resolved and made a Resolution of the partnership (that is of the Appellant), as the founding (and only) members of the partnership, to approve the respective employment contracts of each of them with the Appellant

Our conclusion on what constitutes the LLP Agreement

25. Thus, the written and signed Resolution of the Appellant by its members constituted or evidenced an agreement (whether express or implied) between the members to pay remuneration by way of salary to each of Dr Bessedik and Mr Elwen in accordance with each agreement and that they be paid that remuneration, as well as an agreement between the Appellant as the LLP and each of its members to the same effect. As such, by the definition of “*Limited Liability Partnership*” in article 74 of the LLP Regulations, such agreement or agreements, constituted or evidenced by the Resolution, formed part of the LLP Agreement, together with the signed formal LLP Agreement.
26. Though it may not matter given the terms of the definition of “*Limited Liability Partnership Agreement*” in article 74 of the LLP Regulations as including the words “*express or implied*”, we consider that the agreements thus described were not implied but were express in that they emerge by inference as the parties’ mutual intention through a process of the construction of the language of the Resolution in its factual and legal context: see *Martin-Baker Aircraft Co Ltd v Canadian Flight Equipment* [1955] 2 QB 556 at 576-577 (McNair J); *Re Spenborough Urban District Council’s Agreement* [1968] Ch 139 at 146-147; *Staffordshire Area Health Authority v South Staffordshire Water Works* [1978] 1 WLR 1387 at 1399 (Goff LJ); and *Barro Group Pty Ltd v Fraser* [1985] VR 577 at 583 (Full Court of the Victorian Supreme Court).

The relevant propositions of the Appellant before the Regulatory Tribunal

27. The Appellant’s first position before the Regulatory Tribunal was that the authorisation in clause 7.3(i) of the LLP Agreement to “*employ such persons and engage such independent agents, lawyers, accountants, custodians and financial advisors as it considers necessary or desirable*” included employment of members. Thus, clause 7.3(i) was a provision in the LLP Agreement that overrode article 18(4) of the LLP Regulations (see paragraph 10 of the Regulatory Tribunal’s decision [2025] QIC (RT) 1).
28. This position of the Appellant before the Regulatory Tribunal had a variation to the effect that the Resolution authorising the employment of the members under the contracts, amended the LLP Agreement to include a provision regarding both the employment of

members and the payment of their salaries (see paragraph 12 of the Regulatory Tribunal's decision [2025] QIC (RT) 1).

29. The Appellant's second position before the Regulatory Tribunal was that even if there was no provision in the LLP Agreement that allowed members to be employed, the payments were still deductible under the Tax Regulations. This was so, it was said, because the payments were deductible as matters of accounting and were not disallowed by the Tax Regulations, in particular by reference to articles 19 and 21 (see paragraph 13 of the Regulatory Tribunal's decision [2025] QIC (RT) 1).
30. Bearing the Tax Regulations in mind, it was submitted that the list of matters in article 21 that were not deductible did not include a prohibition on deductions under void contractual arrangements. Implicit in that submission was that the payments of salary were expenses actually incurred for the purposes of paragraph (1)(a) of article 21 and were not connected with an "*unlawful act*" for the purposes of paragraph (1)(d) of article 21.
31. It can be seen from the above that though the Appellant (which was self-represented before the Regulatory Tribunal) did not apparently refer to article 74 of the LLP Regulations, the varied argument referred to in paragraph 27 above put the proposition that the Resolution amended the LLP Agreement. The Regulatory Tribunal was not, however, assisted with an argument that the agreement (express or implied) necessarily constituted or embodied within the Resolution of the Appellant was an LLP Agreement or formed part of an LLP Agreement together with the written LLP Agreement.

The Regulatory Tribunal's decision

32. It is first necessary to say that the reasoning of the Regulatory Tribunal reflected the absence in the Appellant's submissions of reference to the definition of "*Limited Liability Partnership Agreement*" in article 74 of the LLP Regulations.
33. The Regulatory Tribunal first analysed article 18 of the LLP Regulations. It concluded at paragraph 18 that the salaries were remuneration designed to compensate members for performance of duties covered by article 18(4) of the LLP Regulations, that is "*acting in*

the business or management of the Limited Liability Partnership". This was not contested by the Appellant before the Regulatory Tribunal.

34. However, the Regulatory Tribunal then concluded (at paragraphs 19-20) that for the introductory paragraph of article 18 of the LLP Regulations to "*override*" article 18(4), there must be an express provision authorising the payment of members' salaries, set out in a "*clear and unambiguous manner*". The exception to any of the matters in article 18(1) to (10) of article 18 must be in a "*provision*" ("*in the absence of a provision in that regard*"). The qualifying phrase "*in that regard*" directs one to the specific terms of article 18(1) to (10) to which the "*provision*" is directed. Such a reading was consistent with the public policy of clarity ("*transparency and predictability*") in the application of the LLP regulatory framework.
35. So construing article 18 of the LLP Regulations, the Regulatory Tribunal concluded (at paragraph 21) that there was no express provision in the Appellant's LLP Agreement for the purposes of the introductory paragraph to article 18 concerned with (and so overriding) the provision in article 18(4). Clause 7.3 of the LLP Agreement did not expressly authorise the LLP to employ its members, but rather was a general authorisation to the entity to employ persons whom the LLP considers necessary or desirable.
36. Further, the Regulatory Tribunal concluded (also at paragraph 21) that the argument that the LLP Agreement should be deemed to be varied to include a provision for the purposes of the introductory paragraph to article 18 of the LLP Regulations by the Resolution approving the employment contracts should fail. Such a provision would be implied, not express, and would be in conflict with clause 23.1 of the LLP Agreement that amendments are to be in writing and signed by each partner.
37. The outcome of this reasoning is that despite payments on their face made pursuant to employment contracts, the members who receive such remuneration were not entitled to such remuneration given the terms article 18(4) of the LLP Regulations and the absence of a provision in the LLP Agreement providing for such remuneration to members. Nevertheless, the payments were made and were outgoings purporting to employ people

for work done referable to the business of the partnership and so referable to the earning of the profits of the partnership.

38. From paragraph 23 of the decision ([2025] QIC (RT) 1), the Regulatory Tribunal considered the taxation consequences of these conclusions.
39. The Regulatory Tribunal first turned to article 21 of the Tax Regulations dealing with deductions not allowable. The Regulatory Tribunal agreed with the Respondent's primary contention concerning article 21(1)(a) that because there was no "*legal or constructive obligation to make such payment*" because there was no entitlement to salary (despite the contract), the expenses should not be treated as incurred.
40. The Regulatory Tribunal also agreed with the Respondent's submission in relation to article 21(1)(d) of the Tax Regulations as precluding a deduction. At paragraph 25 of the decision the Regulatory Tribunal said:

... Article 21(1)(d) (doubtless reflecting the general law) does not allow for the deduction of costs "associated with unlawful acts". In our view, this reflects a public policy objective of preventing a deduction being made for an expense that is not consistent with QFC's legal framework. This objective arises out of a concern that, amongst other things, such a deduction would result in the QFC effectively subsidising an activity that is not permitted. While the impermissibility in this case might be described as "procedural", this does not make any more unlawful, at least to the extent that the payment is characterised as a payment of salary. We would note that Article 21(1)(c), reflects the same public policy concern in a different context: it precludes the deduction of "financial sanctions imposed by the Tax Department, and fines or penalties imposed by any other government agency, in Qatar or overseas.

41. Thus, both the Respondent and the Regulatory Tribunal disallowed the deductions because payments were not "*expenses actually incurred*" for the purposes of article 21(1)(a) of the Tax Regulations, because under the LLP Regulations and the LLP Agreement the two members were not entitled to the remuneration. The Regulatory Tribunal also disallowed the deduction because the payments were "*costs associated with unlawful acts*" for the purposes of article 21(1)(d) of the Tax Regulations.

The Regulatory Tribunal's reasoning and the consequences of the Appellant's and Regulatory Tribunal's lack of adversion to article 74 of the LLP Regulations

42. The Resolution of the Appellant constituted or embodied an agreement between the members and between the members and the Appellant as to the rights of members identified to receive salary and the duty of the LLP to pay salary. As such, the Resolution constituted or embodied an express agreement (in the sense that we have explained) falling within the meaning of the defined phrase “*Limited Liability Partnership Agreement*” in article 74 of the LLP Regulations, either standing alone or when considered with the subject LLP Agreement. It met the description “*any agreement express or implied...*”. It provided for the very subject matter of article 18(4) of the LLP Regulations.
43. As the agreement was express, it met the requirements of clause 23.3 of the subject LLP Agreement if it were to be viewed as a variation, and any argument that the introductory paragraph to article 18 of the LLP Regulations required an express provision. If (contrary to our view) the agreements were implied, it was still an LLP Agreement in accordance with the LLP Regulations, even though they had not varied the subject formal LLP Agreement by reason of clause 23.1 of the LLP Agreement.
44. If the nature of the Resolution as constituting or embodying a “*Limited Liability Partnership Agreement*” as defined in article 74 of the LLP Regulations of itself, or sitting with or adding to, the subject written LLP Agreement, had been put to the Regulatory Tribunal its reasoning would likely have been different.
45. In simple terms and at the heart of its argument the Appellant only contended that article 18(4) of the LLP Regulations had been overridden by clause 7.3(i) of the LLP Agreement.
46. If the argument were to be so limited we may well (for reasons such as the following) have agreed with the Regulatory Tribunal that the LLP Agreement (that is the subject LLP Agreement alone) does not contain a provision, in particular clause 7.3(i), in regard to article 18(4) of the LLP Regulations. Clause 7.3(i) of the LLP Agreement is directed to the subject of authority to employ such persons and engage such independent agents, lawyers, etc., as are considered necessary or desirable in the performance of duties and functions under the agreements (that is, under the LLP Agreement). It may be called a “*general*”

provision”, but it is best characterised as being concerned with employing or retaining persons necessary or desirable in connection with the partnership business.

47. The very terms of clause 7.3(i) of the LLP Agreement reinforce the textual construction to which the Regulatory Tribunal came. The Regulatory Tribunal at paragraph 10 of its decision stated the first few words of clause 7.3(i) as: “*The Partnership may employ such persons...*”. In fact, the LLP Agreement in English provided: “*The Partners may employ such persons...*”. This was under a heading “*Partners’ power to engage employees and agents*” (we recognise, however, clause 1.2 of the LLP Agreement that provides: “*Headings...are inserted for convenience only and do not effect interpretations...*”). Of course, the partners and the partnership can for many purposes be equated. But this is a question of construction and interpretation. The word “*Partnership*” was not used; the word “*Partners*” was. The text of clause 7.3(i) makes clear that the power of the partners in the clause is to employ persons other than the partners themselves. In an agreement where the word “*Partners*” is used whenever necessary, the meaning of clause 7.3(i) is plainly the authorisation in the partners to employ others where necessary. In an agreement that used the word “*Partners*” carefully when that was considered appropriate, there is no call to stretch the words “*such persons*” to include employing themselves, quite apart from the legal gymnastics in such a proposition.
48. Article 18 is one of eight provisions in Part 4 of the LLP Regulations concerned with membership of an unincorporated entity. It is concerned with the important subject of the mutual rights and duties of members (to each other) and the mutual rights and duties of the Limited Liability Partnership and its members. It sets out ten rules, recognising that such rules may be qualified by the LLP Agreement. Thus, if such rules are not to apply there must be a provision in the LLP Agreement that is directed to or qualifies the relevant rule.
49. To take rules (1) and (4) in article 18 of the LLP Regulations, if some members are to share other than equally in the capital and profits of the partnership, there must be a “*provision in that regard*”; and if any members are to be remunerated for acting in the business or management of the partnership there must be a “*provision in that regard*”. Such provisions must be found in the LLP Agreement. Though it can be accepted that members are or

include persons, the phrase “*such persons*” in clause 7.3(i) of the LLP Agreement is not found in a clause (or “*provision*”) for the purposes of article 18 of the LLP Regulations (that is directed to or that “*has regard to*” the subject of article 18(4)). It is not a matter of excluding members from the wording of clause 7.3(i). It is to be recognised that clause 7.3(i) is directed to the partners having authority to employ persons and engage agents to carry on the partnership business in the ordinary course. This is a different subject to that dealt with by the rules, such as rule (1) and rule (4) in article 18 of the LLP Regulations. There is no provision in the subject formal LLP Agreement (other than the Resolution and its constituent or embodied agreements that were not the subject of argument) in regard to remuneration of members. Throughout the LLP Agreement the position of members, whether as to rights or duties or obligations is cast in terms of “*members*”. A provision in regard to the subject of article 18(4) of the LLP Regulations would, consistently with the text and structure of the whole LLP Agreement, be directed to that subject. There is no such provision. The Appellant was left, in the argument that it propounded, to rely on a provision of the LLP Agreement (clause 7.3(i)) dealing with another subject entirely: permitting employment of persons or engaging agents necessary or desirable for the carrying on of a business.

50. The proper question of construction is whether there appears in the LLP Agreement a provision in regard to article 18(4) of the LLP Regulations: that is a rule concerned with the payment or entitlement to payment of remuneration by members for acting in the business or management of the LLP. Clause 7.3(i) of the LLP Agreement is not in regard to that subject matter it concerns the general authorisation of the partners to employ persons and engage agents in the performance of the partnership business. The agreements constituted by or embodied within the Resolution were such agreements direct to or in regard to the subject of article 18(4).
51. As such, there was a provision in the LLP Agreement that dealt with the very subject of article 18(4) of the LLP Regulations. Whether the agreement containing the “*provision*” for the purposes of the introductory paragraph to article 18 was express or implied did not matter, given the definition of “*Limited Liability Partnership Agreement*” in article 74 of

the LLP Regulations. In this context a “*provision*” could necessarily be express or implied, though we consider it was express in the way we have explained.

52. The Regulatory Tribunal may have been correct to conclude, on the submissions put to them, that there was no such provision, without considering article 74 of the LLP Regulations and in that context the Resolution and the necessary agreements within it as a subject LLP or as part of the subject LLP.

53. There was thus an entitlement in the members to receive salary and there was an obligation on the Appellant to pay salary.

Our conclusion on the Tax Regulations

54. The above concludes the issues under the Tax Regulations: there was an obligation to pay and an entitlement to receive the salaries and thus they were expenses incurred on the Respondent’s arguments as to article 21(1)(a) of the Tax Regulations; and there was no lack of compliance with the LLP Regulations to found an argument of unlawfulness for the purposes of article 21(1)(d) of the Tax Regulations.

The operation of the Tax Regulations; “*incurred*”

55. Notwithstanding the above, given the importance of the matters (for different reasons), it is helpful and appropriate to add some observations as to paragraphs (a) and (d) of article 21(1) of the Tax Regulations as to the meaning of “*incurred*” and the issue of unlawfulness.

56. As to article 21(1)(a) of the Tax Regulations, the QFCA and the Regulatory Tribunal state that for an expense to be “*incurred*”, even if it had been paid, there must have been an obligation to pay. Whilst it is unnecessary to finally decide that question, it is one of some importance. There is good reason to consider this to be the correct approach.

57. The word “*incur*” or “*incurred*” has a broad usage. As Dixon J (as he then was) said in *New Zealand Flax Investments Ltd v Federal Commissioner of Taxation* (1938) 61 CLR 179 at 207:

Incurred does not mean only defrayed, discharged, or borne, but rather it includes encumbered, run into, fallen upon. It is unsafe to attempt exhaustive definition of a conception intended to have such a various or multifarious application. But it

does not include a loss or expenditure which is no more than impending, threatened or expected.

58. In *Coles Myer Finance Ltd v Federal Commissioner of Taxation* (1993) 176 CLR 640 at 677, Deane J expressed the relationship of the word “*incur*” with legal obligation as follows:

... authorities establish [for the purposes of deductibility as an outgoing] a loss is only incurred in the year of income if, during that year, the tax payer has become liable to pay a pecuniary sum.

59. For the above proposition Deane J cited a passage from the judgment of Barwick CJ in *Nilsen Development Laboratories Pty Ltd v Federal Commissioner of Taxation* (1980-1981) 144 CLR 616 at 623-624:

... the language of Dixon in New Zealand Flax... needs to be carefully perused and applied. Granted that exhaustive definition of what may be denoted by the word “incurred” ... may not be possible, there can be no warrant for treating a liability that has not “come home” in the year of income, as having been incurred in that year. Sir John Latham’s language in Emu Bay Railway Co Ltd v Federal Commissioner of Taxation (1944) 71 CLR 596 at 606 clearly enough indicates that to satisfy the word “incurred” in s51(1) [the provision regarding deductions] the liability must be “presently incurred” and due though not yet discharged.” The “liability” of which Sir John speaks is of necessity a pecuniary liability...

60. Likewise, Gibbs J (as he then was) said in *Nilsen Developments* at 628 that an actual entitlement to payment was necessary to sustain the conclusion that an obligation was incurred (see also *Commissioner of Taxation v Citylink Melbourne Ltd* (2006) 228 CLR 1 at paragraphs 61-63 and 134).
61. Further, in *Coles Myer* 176 CLR at 62, Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ stated unequivocally that the case of *Federal Commissioner of Taxation v James Flood Pty Ltd* (1953) 88 CLR 492 at 507 “stands as authority for the proposition that a liability must be presently existing in order to be “incurred” within the meaning of s51(1)”.
62. These are judgments of an ultimate appellate court of another jurisdiction, Australia. The expression of principle is clear and enunciated, if we may respectfully say so, by judges of

an undoubted practised mastery of income tax law: Dixon CJ, Latham CJ, Mason CJ, Gibbs CJ, Deane J and Crennan J.

63. The notion of “*expenses not actually incurred*” can be seen as wide enough to encompass circumstances where (unlike here) there was no expenditure at all, and where there was an expenditure was in fact bona fide made but it was not pursuant to a legal obligation and was not a payment to which the payee was in law entitled.
64. The word “*incurred*” is apt to encompass the raising of, or coming under, a liability. As the expression of the matter (sometimes in metaphor) by Dixon J in *New Zealand Flax* and the later Australian cases clarifying his words make clear, there is one element of the arising or accruing of a legal obligation in the word “*incurred*”.
65. A distinction can be made between paying a sum believing mistakenly that it is owed and paying pursuant to an existing obligation. The payment in respect of the first circumstance, however, can be seen to be expended in fact, but it has been expended by reason of a mistake of fact or law that the payee was obliged to pay it, not by reason of the existence of an accrued legal obligation to pay. The first is an expense paid under a mistake of fact or law that the recipient was entitled to receive it. The second is an expense paid in discharge of a legal obligation to pay it. The latter is an expense made and incurred. The former may not have been incurred.

The issue of unlawfulness

66. Finally, as to article 21(1)(d) of the Tax Regulations, we disagree that the payment was unlawful on the hypothesis that it was approached by the Regulatory Tribunal of article 18(4) of the LLP Regulations governing the circumstances: that there was no entitlement in the members to receive the remuneration. We disagree because there was a genuine, honest and bona fide belief in the LLP and in the partners to the contrary and the mistaken payment was made on that basis. Such circumstances do not in our view bespeak any unlawful act. It was not a criminal act in any way. It was an honest mistake, giving rise, possibly, to civil responsibility of repayment, at worst. Unlawfulness of an act generally requires that the act be “*forbidden by some definite law*”: *R v Clarence* (1888) 22 QBD 23 (Stephen J). In context it may be used to mean something lesser as giving rise to

unenforceability: see for example *Mogul SS Co v McGregor, Gow & Co* [1892] AC 25 at 39 (Lord Halsbury). We think the context here bespeaks acts forbidden by law. This is not a fully reasoned expression of view, but because of the position of Dr Bessedik and Mr Elwen as legal practitioners, we consider it appropriate and helpful to express our view on the matter.

The procedure for an appeal

67. There was an issue when the Appellant wished to appeal from the decision of the Regulatory Tribunal as to whether the appeal should be brought under the procedure set out in article 36 of the Rules and Procedures of the Court (the ‘**2025 Rules**’) or under the procedure for a cases stated set out in article 135(7) of the Tax Regulations. In the result, the Appellant brought the appeal both by way of the ordinary procedure under article 36 of the 2025 Rules and by way of case stated under article 135(7) of the Tax Regulations.
68. We understand that the QFCA proposes to repeal article 135(7) and is consulting on that. As the case stated procedure set out in article 135(7) is not a procedure that is used in other proceedings in the QFC Court, we would welcome its repeal. In the expectation that it will be repealed, we do not propose to lengthen this judgment by resolving the issue as to the correct form of appeal under the current procedural provisions as it is an academic issue for this appeal and should not arise in the future.

By the Court,



[signed]

Lord Thomas of Cwmgiedd, President

A signed copy of this Judgment has been filed with the Registry.

Representation

The Appellant was self-represented.

The Respondent was self-represented.