Neutral Citation Number: [2022] EWCA Civ 305

Case No: CA-2021-000609
(formerly A3/2021/0949)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER
UT/2019/0156
Judge Timothy Herrington
Judge Swami Raghavan

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 March 2022

Before :

LORD JUSTICE LEWISON
LORD JUSTICE BAKER
and
LADY JUSTICE WHIPPLE

- -

Between :

(1) CHESHIRE CAVITY STORAGE 1 LIMITED **Appellants**

(2) EDF ENERGY (GAS STORAGE HOLE HOUSE) LIMITED

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondent**

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JONATHAN PEACOCK QC & SARAH BLACK (instructed by **Enyo Law LLP**) for the **Appellants**
APARNA NATHAN QC (instructed by **HMRC Solicitors Office**) for the **Respondent**

Hearing date : 1 March 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII. The date and time for hand-down is deemed to be 10am on Thursday 10 March 2022.

Lord Justice Lewison:

Introduction

1. The issue on this appeal is whether the taxpayers are entitled to capital allowances in respect of the expenditure incurred on the introduction of water into salt bearing rock so as to dissolve the rock and create an impervious cavity, typically in the shape of a teardrop ("leaching"), and the displacement of the resulting brine by the introduction of gas ("de-brining") so as to permit the storage of gas in the cavity.

2. The Upper Tribunal (Judge Herrington and Judge Raghavan) upholding the decision of the FTT held that they were not. The decision of the UT is at [2021] UKUT 50 (TCC), [2021] STC 675. The decision of the FTT (Judge Mosedale) is at [2019] UKFTT 0498 (TC).

3. In order to qualify for capital allowances, the expenditure must be expenditure on the provision of plant. It is clear from the authorities that a decision whether something is or is not plant is a question of fact, or a question of fact and degree. In some cases it is possible to take either view, and in such a case the decision of the fact-finding tribunal cannot be impugned. Since the question whether something is or is not plant is a question of fact, or a question of fact and degree, it is necessary to pay close attention to the facts of previous cases. In some cases the court has upheld the decision of the fact finding tribunal on the basis that it was entitled to find as it did. In such a case, it does not follow that the fact-finding tribunal would have made an error of law if it had decided the question differently.

4. Having heard argument from both sides on the question whether the cavities were "plant" in the sense in which that word has been interpreted in the case-law, we informed the parties that we would dismiss the appeal, with written reasons to follow. These are my reasons for joining in that decision.

The facts

5. I can take the relevant facts more or less verbatim from the UT's decision supplemented, where necessary, by additional findings made by the FTT.

6. The taxpayers' business is the development, construction, and operation of gas storage facilities in the UK. They operate gas storage facilities on adjoining sites in Cheshire. They are indirectly owned by EDF Energy PLC whose corporate group supplies gas to customers over the National Transmission System ("NTS") owned by National Grid. The corporate group stores gas as part of its business.

7. The cavities in issue in this appeal hold gas at high pressure. A single cavity can hold the same as about 300 gasometers (large cylindrical containers, now disused but a familiar feature in many towns) and are considered safer as they hold the gas underground. Gas cavities involve fewer contaminants than other storage methods allowing quick removal ("fast cycle") of gas. In order to use the cavities, the taxpayers incurred expenditure on boreholes, pipework, pumping and dehydration equipment, and on control mechanisms.

8. One of the natural features of the geology of this part of Cheshire is underground salt rock (or "halite"), which is suitable for mining for the purpose of extracting salt. The cavities are created by a process called "leaching". This involves drilling a borehole into naturally occurring salt rock underground. The water dissolves the rock, leaving saltwater (brine) eventually creating a tear shaped cavity underground full of brine. The borehole is designed to permit the extraction of the brine; and if the purpose of the operation is to obtain salt, then the salt can be extracted from the brine with a surface level operation. Some of the cavities were created in this way, as a result of salt mining. The cavity is converted to gas storage by exchanging the brine with gas via borehole pipes ("de-brining"). The capital expenditure in issue arises in relation to leaching and de-brining the cavities.

9. The brine cannot simply be removed from the cavity because that would risk collapse. So, over a period of about three months, a suitable salt cavity is converted to gas storage by the slow exchange of the brine with gas via pipes through the borehole. At the end of the process, marl (insolubles originally present in the halite) and a small amount of brine will remain at the bottom of the cavity; otherwise the cavity will hold gas. Once filled with gas, sufficient gas to fill the cavity at a certain minimum pressure must always be left in the chamber to avoid the risk of partial or total collapse of the cavity. The difference between the amount of gas which may be stored at the highest safe pressure, and the minimum amount of gas which must be stored to maintain integrity ("the cushion gas") was known as "working gas". It was the gas that could be stored in, and removed from, the cavity. In practice cushion and working gas were all the same gas stored in the cavity. Referring to gas as "cushion gas" was simply a shorthand method of referring to the minimum amount of gas that had to be left in the cavity for reasons of structural safety. The "cushion gas" cannot be sold into the NTS as it must remain in the cavity.

10. The halite in which each cavity was created naturally forms an impervious barrier to the gas. Therefore, the gas pumped in does not leak out of the cavity into the surrounding rock. So the cavities did not need to be, and were not, artificially lined in any way. The sides to the cavities were naturally occurring rock. The deeper the cavity, the higher the pressure at which the gas can be stored. The gas cavities were connected to the NTS. It was possible for gas to "free flow" (i.e. movement simply by virtue of a differential from high pressure to low pressure) in and out of the cavity, though whether this could happen was out of the taxpayers' control because it depended (in part) on the pressure in the NTS. Otherwise, gas would need to be moved by compressors. The cavity, by itself, was not a pump or compressor, and did not, by itself, act as a pump or compressor.

11. The taxpayers' business was gas storage, not distribution or processing of gas. The facilities were used for fast cycling storage of gas. EDF did not own the gas but was paid by other gas owner customer(s) for moving and storing the gas so those customers could profit from gas price volatility. CCSI did own the gas and intended to profit from such volatility on their own account.

12. The function of the cavities was to store gas taken from the NTS safely (so that it did not dissipate) and in a condition that would allow it to be returned to the NTS (or at least in a state from which the taxpayers' processing plant would be able to restore it to a condition suitable to be returned to the NTS).

13. The FTT considered the question whether the cavities had a "plant-like function" in some detail. What Judge Mosedale said at [127] was this:

> "I am prepared to accept that the cavities did have a plant like function similar to that of a pump/compressor in that *the manner of construction* (a large hole in the ground connected by pipes to the NTS) meant *that when the pressures were right and the valves open, gas would free flow to or from the cavity*. However, I accept the evidence that *that was an incident of the construction and not the reason they were constructed in that manner*. The main reason gas was stored in salt cavities, as I understood it, was that that gas cavities were a safe method of storing very large amounts of gas in a way that would enable it to be fast-cycled, and thus opened up the possibility of arbitrage on gas prices. *I had no evidence that their plant-like ability to act like a pump/compressor was essential*: on the contrary, the evidence which I had was that *the appellants had little control over when they would be able to free flow gas* and they had compressors to move the gas when it was not possible. From the evidence I had I was unable to conclude how often free flow took place and the appellants have therefore failed to show that it was common let alone a main function of the cavities." (Emphasis added)

14. But she went on to say that the purpose of the cavities was to store gas; and not to "free flow" it. She then considered the temperature of the gas. She said of that point:

> "While the evidence was that the cavity itself might influence the temperature of the gas, it was not the main influence and, in any event, altering the temperature of the gas was clearly not a function of the cavity."

15. In fact basic physics tells us that if you increase the pressure of gas in an enclosed container its temperature rises. The next argument was that the function of the cavities was not merely to store gas but to store gas at high pressure, and the cavities should be compared to a cold room which allowed storage at low temperature. She rejected that argument at [133]. She said:

> "But I consider that the purpose of the high pressure was simply to store more gas. So, the ability of the cavities to store gas at high pressure was a premises like function as it meant that the cavities were just very good premises for storing gas. Merely being purpose built and very good at performing their premises-like function of storage did not make the cavities plant."

16. HMRC accept that boreholes, pipework, pumping and dehydration equipment, the control mechanisms and the cushion gas were all plant. What, then, is left of the alleged "plant-like" functions of the cavities themselves? The only possible one is that when pressures were right, gas could free flow; but that was an "incident" of construction and not "the reason" why they were constructed in that manner. Moreover, there was insufficient evidence to show how often that took place; and in any event pressure was largely outside the taxpayers' control.

The legislation

17. Section 11 of the Capital Allowances Act 2001 relevantly provides:

> "(1) Allowances are available under this Part if a person carries on a qualifying activity and incurs qualifying expenditure.
>
> …
>
> (4) The general rule is that expenditure is qualifying expenditure if –
>
> (a) it is capital expenditure on the provision of plant or machinery wholly or partly for the purposes of the qualifying activity carried on by the person incurring the expenditure, and
>
> (b) the person incurring the expenditure owns the plant or machinery as a result of incurring it.
>
> (5) But the general rule is affected by other provisions of this Act, and in particular by Chapter 3."

18. Thus the first question is whether the expenditure was incurred on "the provision of plant". If the answer to that question is "yes", then it becomes necessary to consider further provisions of the Act. If, on the other hand, the answer is "no" then the appeal fails at that stage.

The meaning of "plant"

19. There is no statutory definition of "plant," the meaning of which has been discussed in a large number of cases. It is common to start with the well-known statement of Lindley LJ in *Yarmouth v France* (1887) 19 QBD 647. The question in that case was whether a vicious horse was a "defect in the condition … of plant" used in the business of a wharfinger. The court held, by a majority, that it was. Lindley LJ said:

> "There is no definition of plant in the Act: but, in its ordinary sense, it includes whatever apparatus is used by a business man for carrying on his business,—not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or moveable, live or dead, which he keeps for permanent employment in his business…"

20. Applied to this case the gas which is stored in the cavities is the taxpayers' stock-in-trade, but the cushion gas is not.

21. As Lord Hailsham LC pointed out in *Cole Brothers Ltd v Phillips* [1982] 1 WLR 1450:

> "… the word "plant" in the relevant sense, although admittedly not a term of art, and therefore part of the general English tongue, is not, in this sense, an ordinary word, but one of imprecise application, and, so far as I can see, has been applied to industrial

> and commercial equipment in a highly analogical and metaphorical sense, borrowed…from the world of botany."

22. He went on to consider what that metaphorical sense was. He said:

> "But the word can mean a vegetable organism deliberately placed in an artificially prepared setting. A gardener can say "I am going to dig my flower beds in readiness for my plants" or: "I am going to buy some plants at my garden centre." It is this sense which gives it its analogical meanings, e.g. in medicine ("an organ transplant"), in crime ("it was planted on me"), or in industry, which is the sense we are now discussing, as the means by which a trade is carried on in an appropriately prepared setting. In each case, the contrast is between the thing implanted, i.e. the plant, and the prepared setting into which it is placed."

23. In many cases this has led to a debate about whether the expenditure in question has been incurred in providing the setting (i.e. the place in which the business is carried on) or "plant" (i.e. the means by which the business is carried on in appropriately prepared setting).

24. Mr Peacock QC, for the taxpayers, submitted that the key to determining whether a building or structure could constitute plant or machinery requires an enquiry into what operation it performs (i.e. a functional test). When an asset has both plant and premises/setting functions, the asset should be classified as plant unless it is *merely* premises/setting. It is not a question whether the asset predominantly performs a premises function rather than a plant-like function. Nor is it a question whether an asset is more appropriately described as premises or setting on the one hand, or plant on the other. As soon as it is found that an asset has *any* plant-like function, it qualifies as plant without more, unless it is specifically excluded by legislation.

25. The argument concentrates on the cavities themselves. Mr Peacock did not argue that the entire ensemble of cavities, boreholes, pipework, pumping and dehydration equipment, control mechanisms and cushion gas should be regarded as a single item of plant. The FTT recorded at [94] that "neither party was advocating an entireties approach." That remained the case in this court.

Previous cases

26. *Jarrold v John Good & Sons Ltd* [1963] 1 WLR 214 concerned demountable partitioning in offices occupied by shipping agents. The nature of the business required it to be carried on in a flexible building. The partitions were capable of being fixed to the floor and ceiling without using nails or screws; and even if held in place by screws, were capable of being easily moved. The General Commissioners held that the partitions qualified as plant. Their decision was upheld by this court. Donovan LJ referred to *Yarmouth v France* and said:

> "I would agree, however, that there may be cases, like *J Lyons & Co Ltd v A-G*, where an asset or some article can be excluded from the definition because it is *more a part of the setting than*

> *part of the apparatus* for carrying on the trade. In the present case, however, the contrary is found." (Emphasis added)

27. That observation presupposes some form of qualitative assessment of both "plant-like" and "premises-like" functions. It, in my judgment, is inconsistent with Mr Peacock's stark submission that *any* "plant-like function" is enough to qualify.

28. Pearson LJ said:

> There can be no doubt, therefore, as to the main principles to be applied, and the short question in this case is whether the partitioning is part of the premises in which the business is carried on or part of the plant with which the business is carried on. *Either view could have been taken*. It could have been said that the so-called partitioning, when erected, constitutes the internal walls of the building…. So regarded, the partitioning would be part of the premises and not plant. The other possible view is that the respondent company, instead of having internal walls in their office building, need to have, and do have, for the special requirements of their business, movable partitioning … On that view of the facts, the partitioning undoubtedly can be regarded as "plant." I think the commissioners have, in effect, preferred the second view, and it cannot be said that there was no evidence to support it, or that any error of principle was involved." (Emphasis added)

29. If either view could have been taken, then in my judgment, it necessarily follows that the mere fact that the asset in question performs some "plant-like function" is not determinative.

30. In *IRC v Barclay Curle & Co Ltd* [1969] 1 WLR 675 the taxpayers incurred expenditure on the construction of a dry dock. The expenditure consisted of the cost of excavating a specially shaped new basin having direct access to the Clyde and a floor below the level of high tide to enable ships to float in and out. The expenditure also included the cost of lining the excavation with concrete and installing valves, pumps, electricity generators and other machinery needed for the operation of the dock. What was in issue was the cost of excavation and lining the excavation with concrete. The key findings of fact were these. The dock could not be used to repair ships without the valves and pumps. The dock could not have fulfilled its purpose unless there had been excavated a depth sufficient to enable ships of the contemplated draught to enter and leave it. The valves, the machinery for the provision of electricity and the pumps were an integral part of the dock as a functioning entity. The remainder of the dock would have been useless to the company without them and, similarly, they would have been useless without the remainder of the dock. The House of Lord held, by a majority, that the whole of the expenditure qualified.

31. Lord Reid said:

> "As the commissioners observed, buildings or structure and machinery and plant are not mutually exclusive… Undoubtedly this concrete dry dock is a structure but is it also plant? The only

> reason why a structure should also be plant which has been suggested or which has occurred to me is that it fulfils the function of plant in the trader's operations. And, if that is so, no test has been suggested to distinguish one structure which fulfils such a function from another. *I do not say that every structure which fulfils the function of plant must be regarded as plant, but I think that one would have to find some good reason for excluding such a structure.* And I do not think that mere size is sufficient." (Emphasis added)

32. Pausing at that point, if Lord Reid had accepted the test that Mr Peacock proposes (i.e. that if a structure has *any* "plant-like function" it qualifies as plant), then Lord Reid would not have qualified his statement in the way that he did. He did not, however, explain what he would have regarded as a "good reason".

33. He went on to say:

> "Here it is apparent that there are two stages in the respondents' operations. First the ship must be isolated from the water and then the inspection and necessary repairs must be carried out. *If one looks only at the second stage it would not be difficult to say that the dry dock is merely the setting in which it takes place.* But I think that the first stage is equally important, and it is obvious that it requires massive and complicated equipment. … It seems to me that every part of this dry dock plays an essential part in getting large vessels into a position where work on the outside of the hull can begin, and that it is wrong to regard either the concrete or any other part of the dock as a mere setting or part of the premises in which this operation takes place. The whole dock is, I think, the means by which, or plant with which, the operation is performed." (Emphasis added)

34. Although Mr Peacock stressed Lord Reid's use of the words "merely" and "mere," in my judgment they were simply part of Lord Reid's description of the facts. The key to his decision, as I understand it, was that the dry dock was to be viewed as a whole; and that the whole dock was the means by which the operation of ship repair was performed. That is the "entireties" argument, which the taxpayers disavow in this case.

35. Importantly, for the present case, he continued:

> "Clearly land in its natural state is not plant although its configuration may be such that its use is an essential element in a trading operation. The soil on a farm is not plant although cultivation has greatly improved it. So a loch which impounds water is not plant although a trader uses it as the source of the water he needs. And a dam is generally simply an improvement of the loch giving a better supply. But I could imagine circumstances in which a dam would be such an integral part of the means required for a trading operation that it should be regarded as plant."

36. In our case, the cavities impound gas which the taxpayers use as the source of the gas with which they trade. Thus far, Lord Reid was dealing with the cost of lining the excavation, which was the installation of a man-made structure into a specially prepared setting. What about the cost of the excavation itself? Lord Reid held that the costs of the excavation did qualify, but it is important to understand why. He explained:

> "So the question is whether, if the dock is plant, the cost of making room for it is expenditure on the provision of the plant for the purposes of the trade of the dock owner. In my view, this can include more than the cost of the plant itself because plant cannot be said to have been provided for the purposes of the trade until it is installed: until then it is of no use for the purposes of the trade. *This plant, the dock, could not even be made until the necessary excavating had been done*. All the commissioners say in refusing this part of the claim is that this expenditure was too remote from the provision of the dry dock. There, I think, they misdirected themselves. If the cost of the provision of plant can include more than the cost of the plant itself, I do not see how expenditure, which must be incurred before the plant can be provided, can be too remote." (Emphasis added)

37. As I read this, the cost of excavating the dock, if it stood alone, would not have qualified as plant. It was because the excavation was necessary before the plant was installed, that it was qualifying expenditure.

38. Lord Guest said:

> "The conjunction of "machinery" and "plant" suggest to me that they both must perform some active function. In order to decide whether a particular subject is an "apparatus" it seems obvious that an inquiry has to be made as to what operation it performs. The functional test is, therefore, essential at any rate *as a preliminary*." (Emphasis added)

39. Since the functional test is a preliminary, it seems to me to follow that it is not the only test. This, too, is inconsistent with Mr Peacock's submission. If the only test was the functional test, Lord Guest would not have described it as "a preliminary". Lord Guest justified the inclusion of the cost of excavation on a similar basis to Lord Reid. He said:

> "The function which the dry dock performs is that of a hydraulic lift taking ships from the water onto dry land, raising them and holding them in such a position that inspection and repairs can conveniently be effected to their bottoms and sides. It is unrealistic, in my view, to consider the concrete work in isolation from the rest of the dry dock. It is the level of the bottom of the basin in conjunction with the river level which enables the function of dry docking to be performed by the use of dock gates, valves and pumps. To effect this purpose excavation and concrete work were necessary."

40. Once again, the focus is on the function of the dry docking being performed by the dock gates, valves and pumps, with the excavation being necessary to enable that function to be performed. The whole ensemble, including the dock itself, had to be seen as an integral whole. He added:

> "The excavation was a necessary preliminary to the construction of the dry dock…. "Provision" must cover something more than the actual supply. In this case it includes the excavation of the hole in which the concrete is laid."

41. Lord Donovan (the third of their Lordships in the majority) began by saying:

> "The dry dock ought, I think, for present purposes to be regarded as a whole with all its appurtenances of operating machinery, power installations, keel blocks, tubular side shores, and so on. So regarded, is it "plant" or not?"

42. He continued:

> "But in the present case this dry dock, looked upon as a unit, accommodates ships, separates them from their element and thus exposes them for repair; holds them in position while repairs are effected, and when this is done returns them to the water. Thus the dry dock is, despite its size, in the nature of a tool of the respondents' trade and, therefore, in my view, "plant." I think it differs from a dam which, for the moment at least, I regard more as a storehouse for water."

43. The cavities, in our case, are a storehouse for gas. Lord Donovan then turned to the cost of excavation. He said:

> "As regards the cost of the necessary excavation, I think this comes within the words "expenditure on the provision of machinery or plant" in section 279 (1), again regarding the dry dock as a whole. Similar expenditure incurred in relation to a building or structure is now regarded as "expenditure on the construction" of such building or structure for the purposes of section 265 (1) without any further or more express provision, and I think rightly so."

44. So yet again the expenditure on excavation qualifies only because it is part of a whole which includes the machinery necessary for the dry dock operation.

45. This reasoning is, in my judgment, consistent with Lord Hailsham's explanation of the essential nature of plant. The operating machinery, power installations, keel blocks, tubular side shores, and so on were all "implanted" into the land; and the excavation and concreting were both necessary in order to enable that plant to function. Once completed, the dry dock was to be treated as an integral whole. I emphasise that that is not the way in which the taxpayers put their case on this appeal.

46. In my view, the same is true of *Cooke v Beach Stations Caravans Ltd* [1974] 1 WLR 1398. That case concerned a swimming pool constructed at a caravan park. HMRC accepted that expenditure on the provisions for filtration, heating and recirculation of water, the plumbing, the fittings such as steps and diving boards, etc., and the electrical installations were plant; but contested the cost of excavating and constructing the pool itself. Megarry J held that the pool was to be regarded as a single unit, because it was both constructed and operated as such. The purpose of the pool was to provide and retain a suitable body of water which was circulated, cleansed and heated, and so would provide a medium which the visitors to the caravan park could enjoy. The water that the pool was designed to contain could not be divorced from the structure of the pool and its apparatus. It was, therefore, treated as an integral whole. The whole, therefore, qualified as plant. That decision sheds no light on what the answer would have been if the basin had been considered on its own, rather than in conjunction with the remainder of the equipment; still less if the basin had simply been an unlined hole in the ground.

47. *Schofield v R & H Hall Ltd* [1975] NI 12 is a decision of the Court of Appeal in Northern Ireland. What was in issue were grain silos consisting broadly of a large concrete structure into which were built concrete bins, a small structure ("the workhouse") containing machinery, and plant and machinery consisting of gantries, conveyor belts, mobile chutes etc. The walls of the bins were either party walls with the next bin or the exterior walls of the silo. The case stated by the Special Commissioners (which is set out in the report) contained detailed findings about precisely how the silos operated. They held that the silos, viewed as a whole, qualified as plant. Their essential conclusion was:

> "Considering the function of the silos in relation to this trade, we found that they served an essential part of the overall trade activity. Their own separate function was to hold grain in a position from which it could conveniently be discharged in varying quantities."

48. As Sir Robert Lowry LCJ commented, the Special Commissioners' description:

> "… illuminates their function of reception and distribution, cooling and turning over, and, if necessary, fumigation, in connection with the company's trade of grain importing, in which, as the commissioners have found in para 16, 'storage played only a trifling part'."

49. He went on to say:

> "I conclude, accepting Mr. Nolan's argument for the company, (1) that the commissioners were entitled to find that the silos, which were admittedly structures, were also plant, (2) that plant does not require to be mechanically active in its operation (although, to the extent that it is so, the distinction from a mere structure is easier to appreciate), and (3) that the question for decision must be considered in relation to the trading activities as a whole, in the same way as the courts in *Barclay, Curle* looked at the concrete sides and bed of the dry dock in the light of the mechanical plant with which they were combined. I also

> accept his submission that the commissioners' decision gains support from the analogy of the water tower and the dry dock and that the silos were not mere shelters for men or gain.
>
> If I may borrow Lord Guthrie's expression in *Barclay, Curle* at p. 274E, in my opinion the commissioners addressed themselves to the correct legal issue and properly applied the law to the facts found by them. In those circumstances their decision of a question which I regard as *one of fact and degree* should stand." (Emphasis added)

50. The Crown advanced an alternative argument to the effect that the exterior walls and roof of the silos were not plant, even if the interior was. Lowry LCJ said of that argument:

> "My opinion on the point as it is now presented to us is that the workhouse and the rest of the silo have to be considered as one unit and that, according to the decision we have reached in affirmance of the commissioners, the former takes its colour from the character of the entire silo and is therefore plant. It would, moreover, be in my view unrealistic to regard the three external walls and the roof of the warehouse as a building capable of a rational existence independently of the fourth wall and of the hoisting machinery within the workhouse. *To say that they constituted the mere setting within which the trade was carried on appears to be less appropriate than to regard them as a part of the apparatus with which it is carried on*. This part of the apparatus is a covered hoist forming a portion of the entire plant." (Emphasis added)

51. In the result, he held that the Special Commissioners were entitled to find as a fact that the silos qualified as plant; and that they had made no error of law in so concluding. Whether it was "less appropriate" to describe the walls as mere setting also requires an evaluative assessment.

52. *Benson v Yard Arm Club Ltd* [1979] 1 WLR 347 concerned a floating restaurant in an old ship moored on the Thames. This court held that it was not "plant". Buckley LJ said that the ship was simply the setting in which the restaurant business was carried on; and that its attractiveness as a venue did not turn it into plant. Templeman LJ said:

> "It plainly appears, therefore, that if, and only if, land, premises or structures in addition to their primary purpose perform the function of plant, in that they are the means by which a trading operation is carried out, then for the purposes of income tax and corporation tax the land, premises or structures are treated as plant…. If land, premises or structures operate as the means by which a trading operation is carried out, then they rank as plant."

53. He concluded by saying:

> "Premises only become plant if they perform the function of plant."

54. Mr Peacock relied strongly on these observations. But I do not think that Templeman LJ was saying that *any* "plant-like function", no matter how insignificant, would turn premises into plant. If that is what he meant, he would have said so in terms.

55. *IRC v Scottish and Newcastle Breweries Ltd* [1982] 1 WLR 322 concerned fixtures in hotels. Lord Lowry, building on his earlier decision in *Schofield*, set out a number of principles governing an appeal in cases of this kind. They included:

> "(2) The law does not supply a definition of plant or prescribe a detailed or exhaustive set of rules for application to any particular set of circumstances, and there are cases which, on the facts found, *are capable of decision either way*. (3) A decision in such a case is a decision on *a question of fact and degree* and cannot be upset as being erroneous in point of law unless the commissioners show by some reason they give or statement they make in the case stated that they have misunderstood or misapplied the law in some relevant particular." (Emphasis added)

56. The way that he expressed the third of these numbered propositions is particularly important. To describe something as a decision on a "question of fact" is one thing. In our legal system a judge will often have to decide whether something did or did not happen. That is a classic decision on a question of fact, which is a binary question. Either the thing did happen or it did not. So if the question is simply whether an asset has a "plant-like function", that might well be a question of fact. Either it does or it does not. But to describe something as a "question of degree" is different. That question requires a qualitative assessment of the *degree to which* the asset has a "plant-like function". Lord Lowry's test is, in my judgment, inconsistent with Mr Peacock's submission. The description of the question as one "of fact and degree" was also the description given by Lord Hailsham and Lord Russell in *Cole Brothers*.

57. *Wimpy International Ltd v Warland* concerned the installation of fixtures in fast food restaurants. They included shop fronts, floor and wall tiles, wall finishes, suspended ceilings, raised floors, fire doors and fire proofing. At first instance ([1988] STC 149), Hoffmann J pointed out that in the familiar quotation from *Yarmouth v France* there were three relevant distinctions. He said:

> "It is important to notice the various discriminations which are stated or implied in this description. First, it excludes anything which is not used for carrying on the business. Secondly, it excludes stock-in-trade both expressly and because, although used for the purposes of the business, its use lacks permanence. Thirdly, it excludes things which are not "apparatus … goods and chattels, fixed or moveable, live or dead" or not employed in the business. This excludes the premises or place in or upon which the business is conducted.

> Before going any further I must say something about the third distinction and the way in which the courts in subsequent cases have refined the boundary between plant and premises. The words 'apparatus ... goods and chattels, fixed or moveable, live or dead' might suggest that the distinction turns upon whether the item is a chattel or fixture on the one hand or a building or structure on the other. This was the view of the minority in the House of Lords in *IRC v Barclay, Curle & Co Ltd*… But the majority held that even a building or a structure (in that case a dry dock) could be plant *if it was more appropriate* to describe it as apparatus for carrying on the business or employed in the business than as the premises or place in or upon which the business was conducted. By this test a swimming pool used in connection with the operation of a caravan park has been held to be plant, in *Cooke (Inspector of Taxes) v Beach Station Caravans Ltd*…, while conversely, in *Benson (Inspector of Taxes) v Yard Arm Club*…, a ship used as a floating restaurant, although a chattel, was held not to be plant because it was the place in which the business was conducted: see Lord Lowry in *IRC v Scottish Newcastle Breweries Ltd*…." (Emphasis added)

58. He described the second of these distinctions as "the business test" and the third as "the premises test". These shorthand descriptions of the relevant tests have been picked up and applied in later cases. Mr Peacock objected that "the premises test" that Hoffmann J formulated was not in fact how the majority had decided *Barclay Curle*. It may be that Hoffmann J was advancing an interpretation of *Barclay Curle* rather than a simple precis of it; but I do not regard what he said as inconsistent with previous authority.

59. In this court ([1989] STC 273), having referred to a number of authorities, Fox LJ said:

> "There is a well established distinction, in general terms, between the premises in which the business is carried on and the plant with which the business is carried on. The premises are not plant. In its simplest form that is illustrated by Lord Lowry's example of the creation of atmosphere in a hotel by beautiful buildings and gardens on the one hand and fine china, glass and other tableware on the other. The latter are plant; the former are not. The former are simply the premises in which the business is conducted.
>
> The distinction, however, needs to be elaborated, for present purposes, by reference to Lord Lowry's further formulation, namely that *the fact that different things may perform the same function of creating atmosphere is not relevant: one thing may function as part of the premises and the other as part of the plant*. Thus, "something which becomes part of the premises instead of merely embellishing them is not plant except in the rare case where the premises are themselves plant". The latter part of those observations is a reminder that it is not sufficient to say that something is part of the real property. It can still be plant as the *Barclay Curle* and *Beach Station Caravan* cases show.

> Moreover, the test is not whether the item is a fixture. Central heating apparatus must, I think, be plant. But there may be cases in which the degree of affixation is a matter to be taken into consideration." (Emphasis added)

60. Fox LJ's statement (borrowed from Lord Lowry) that two things may perform "the same function" yet not both be plant again seems to me to be inconsistent with Mr Peacock's submission. He added:

> "It is proper to consider the function of the item in dispute. But the question is what does it function as? If it functions as part of the premises it is not plant. *The fact that the building in which a business is carried on is, by its construction particularly well-suited to the business, or indeed was specially built for that business, does not make it plant.* Its suitability is simply the reason why the business is carried on there. But it remains the place in which the business is carried on and is not something with which the business is carried on." (Emphasis added)

61. In our case, the cavities (when not formed by salt mining) are formed to be particularly well-suited to the storage of gas; and in some cases were specially formed for that purpose. But that does not make them plant. Finally, on the question of principle, Fox LJ said:

> "I would agree with Hoffmann J that the question is whether it would be *more appropriate* to describe the item as part of the premises rather than as having retained a separate identity." (Emphasis added)

62. On the facts, none of the fixtures (apart from items of electrical equipment) qualified as plant.

63. *Carr v Sayer* [1992] STC 396 concerned expenditure incurred on constructing specialised quarantine kennels for cats and dogs brought into the UK. The taxpayer had some mobile kennels and some fixed kennels, but as far as it is possible to tell both kinds of kennel performed the same function. The General Commissioners allowed the claim for capital allowances in relation to the mobile kennels; and allowed it in part in relation to the permanent ones. Although the Crown expressed dissatisfaction with the decision about the mobile kennels, it did not pursue an appeal on that point. The appeal therefore dealt only with the permanent kennels. Nicholls V-C summarised the law at 402 in a number of propositions:

    i) Plant carries with it a connotation of equipment or apparatus, either fixed or unfixed. It does not convey a meaning wide enough to include buildings in general.

    ii) The expression "machinery or plant" is apt to include equipment of any size. The equipment does not cease to be plant because it is so substantial that, when fixed, it attracts the label of a structure or, even, a building.

iii) Equipment does not cease to be plant merely because it also discharges an additional function, such as providing the place in which the business is carried out. For example, when a ship is repaired in a dry dock, the dock also provides the place where the repair work is carried out.

iv) Buildings, which are not normally be regarded as plant, do not cease to be buildings and become plant simply because they are purpose-built for a particular trading activity.

v) One of the functions of a building is to provide shelter and security for people using it and for goods inside it. A building used for those purposes is being used as a building. Thus a building does not partake of the character of plant simply, for example, because it is used for storage by a trader carrying on a storage business.

64. The cavities in our case provide shelter and security for the gas stored within them.

65. Nicholls V-C held, applying those principles, that the permanent kennels were not plant. He continued:

> "I recognise that the consequence of this is to draw a stark contrast in the present case between the temporary movable kennels and the permanent immovable kennels. The former are plant, and the latter are not. I do not find this odd. Both perform a similar function, of housing and segregating the animals. But the latter, unlike the former, have been constructed in such a way that they are on the buildings or premises side of the boundary line drawn by the legislation."

66. Once again, different items performed similar functions, yet some qualified as plant and others did not. In *Carr* it was the manner of construction that proved decisive. That is consistent with what Fox LJ said in *Wimpy*.

67. *Gray v Seymours Garden Centre (Horticulture)* concerned a "planteria". This was a structure which housed ornamental plants. Such a structure protected growing plants from the weather but also created an environment in which plants would grow and maintain their quality of growth which could not be achieved in any other structure. The taxpayer argued that it was a "tool in the growing of plants and regarded in the trade as a very good tool." The Crown, on the other hand, argued that it was part of the setting in which the business was carried on. The General Commissioners found for the taxpayer; but Vinelott J reversed their decision; and his decision was upheld by this court. In reaching his decision ([1993] STC 354), Vinelott J held that the Commissioners had overlooked the "crucial distinction" identified by Hoffmann J in *Wimpy* between "the business test" and "the premises test". This then is a case in which the "premises test" as formulated by Hoffmann J was directly applied. On appeal to this court ([1995] STC 706) Nourse LJ described the judgment of Hoffmann J in *Wimpy* as "valuable". Having referred to the three distinctions that Hoffmann J had drawn in *Wimpy*, Nourse LJ went on to say:

> "Here there is no doubt that the planteria passes the business use test and is not used as stock-in-trade. So the question is whether it can reasonably be held to pass the premises test."

68. This court therefore applied the very "premises test" that Hoffmann J had formulated; and held on the facts that the Commissioners' decision could not be supported. Two further points are particularly important. First, Nourse LJ accepted that cold frames performing the same functions as the planteria might well have been plant, but it did not follow that the planteria was. Once again this seems to me to a rejection of the pure functionality test that Mr Peacock advocates. Second, he said:

> "The fact that the planteria provides the function of nurturing and preserving the plants while they are there cannot transform it into something other than part of the premises in which the business is carried on. The highest it can be put is that it functions as a purpose-built structure. But as Fox LJ and Sir Donald Nicholls V-C make clear, that is not enough to make the structure plant."

69. Thus even though the planteria had a functional aspect, that did not mean that it was plant. I regard this case as another one in which the "premises test" as formulated by Hoffmann J was directly applied by this court.

70. *Bradley v London Electricity plc* [1996] STC 1054 concerned an electricity sub-station underneath Leicester Square. The sub-station was in effect a specially designed underground concrete box holding electrical equipment. The Special Commissioner held that it was unrealistic to divorce the structure from the electrical equipment within it; and that it was more appropriate to describe the structure as apparatus for carrying on the business than as the premises in which the business is conducted. In reversing that decision, Blackburne J began with the passage from the judgment of Hoffmann J in *Wimpy* that I have quoted which, he said, had since "been accepted as accurate". The difficulty that he found with the Special Commissioner's decision was that he had not identified what was the "plant-like function" which the structure performed. The features that the Commissioner had identified did no more than indicate that the substation was purpose built to enable the plant within to function. Of particular importance, Blackburne J said:

> "It is not enough, in my view, to point to particular features of parts of the structure which perform plant-like functions in London Electricity's business, and conclude from those features that it is more appropriate to describe the structure as a whole, (i.e. the entity rather than its parts), as apparatus for carrying on London Electricity's business than as the premises in which the business is carried on."

71. This case demonstrates two points. First, the "premises test" is an accurate summary of the law. Second, in the application of that test it is not enough to point to some "plant-like function" in order to conclude that the whole of the asset in question is plant. I do not regard this case as supporting Mr Peacock's submission. If anything, it contradicts it.

72. *Attwood v Anduff Car Wash Ltd* [1997] STC 1167 concerned a car wash. The car wash system encompassed not only the machinery inside the wash hall, which carried out the actual washing operation, but also the whole concept and design of each car wash site which ensured that the maximum number of cars could be processed efficiently and safely in the shortest possible time. Outside the wash hall each site was covered in tarmac or a similar material and was laid out with signs and bollards to ensure the smooth progress of customers' cars from the entrance, round the site, through the wash hall and back to the entrance/exit. The wash hall, in which cars were washed, dried and waxed, contained a lobby, a toilet, a pump room, an inspection area and a store room. This court held that it was not possible to regard the whole of the car wash as a single item of plant. In the course of his review of earlier authorities, Peter Gibson LJ said:

> "It is hard to see how land, as distinct from a structure, could ever be apparatus functioning as plant."

73. In formulating the test, he said:

> "The question in each case is, as Fox LJ said (in *Wimpy* [1989] STC 273 at 280): does the item function as premises or plant? To answer this may involve deciding *whether it is more appropriate to describe the item as apparatus for carrying on the business or as the premises* in or upon which the business is conducted." (Emphasis added)

74. He held, therefore, that neither the tarmac areas nor the wash hall (taken as a whole) qualified as expenditure on plant. Although not explicitly labelled as such, that is plainly "the premises test" as formulated by Hoffmann J.

75. *Shove v Lingfield Park 1991 Ltd* [2004] EWCA Civ 391, [2004] STC 805 concerned an all-weather race track (an "AWT") at a racecourse. The foundations of the AWT consisted of a trench filled with limestone chips. That was capped with a layer of compacted limestone screening. Drainage was also installed in the form of a series of drains running across the site of the track, under the foundations. The surfacing of the AWT was installed on top of the limestone by using special "equitrack" material consisting of graded silicas and particles, to which a synthetic binder or oil had been applied. The equitrack surfacing incorporated a camber and there was a safety fence around the outside of it. It is clear on the facts that a considerable amount of work was done both in excavating the land in its natural state and also in introducing new material into the excavation. This court, upholding Hart J, and reversing the decision of the General Commissioners, held that the AWT was not plant. Mummery LJ said at [5] that the case could be decided on the basis of "the business test" and "the premises test". Each of those shorthand labels was a reference to the test as formulated by Hoffmann J in *Wimpy*. Mummery LJ went on to say at [24]:

> "I agree with Mr Milne that the AWT is not land in its natural state. It is synthetic in nature. It has a limited life, unlike land in its natural state. I also agree with him that the AWT is not a building affording shelter or security. Those features of the AWT do not, however, prevent the AWT from functioning as premises on or in which the trade of horse racing is conducted. The effect of the AWT is to enlarge the area of the racecourse space

> available to Lingfield to function as premises, on which more frequent horse racing can take place."

76. In reaching its conclusion it is clear that the court applied "the premises test" as described above.

Are the cavities plant?

77. The taxpayers argue in this case that the cavities themselves are plant. There is, in my view, a fundamental preliminary hurdle in the path of this argument. Before leaching the rock salt is an integral part of the land itself. After leaching and de-brining the resulting cavities are also part of the land in the same way as a worked out quarry or mine. A worked out quarry may be filled with water and used for a variety of recreational or commercial activities. I cannot see that the happenstance that these cavities are underground makes any significant difference. No man-made structure or equipment is introduced ("planted") into the cavities. None of the cavities was artificially lined. None of the cases to which we were referred say that land on its own can amount to plant without the introduction of some man-made artefact. Those cases show that in order for expenditure on land to qualify as expenditure on plant, it must be associated with something that is itself recognisable as plant ("equipment" or "apparatus"). Thus the dry dock in *Barclay Curle* had its operating machinery, power installations, keel blocks, tubular side shores, and so on; the swimming pool in *Beach Stations* was integral with machinery for the filtration, heating and recirculation of water, the plumbing, and the fittings such as steps and diving boards; and the grain silos in *Schofield* were integral with plant and machinery consisting of gantries, conveyor belts, mobile chutes etc. No similar items were introduced into the de-brined cavities.

78. The only element introduced into the de-brined cavities (apart from the taxpayers' stock-in-trade) was the cushion gas. The purpose of introducing that gas was, on the findings of the FTT, to prevent a partial or total collapse of the cavity. Its function was therefore no different to that of a beam, brace or strut giving stability to a man-made structure. Although the land was no longer in its natural state, the alterations to it were not carried out for the purpose of receiving plant; they were carried out for the purpose of receiving the taxpayers' stock-in-trade. Moreover, even after the de-brining, the land is still land.

79. Just as buildings do not cease to be buildings and become plant just because they are specially designed for a particular trade, so also these cavities do not lose their character simply because they have been formed in order to receive gas consisting of the taxpayers' stock in trade.

80. Let me assume, however, that that hurdle can be surmounted. On the findings of the FTT, any "plant-like function" was not only incidental to the manner in which the cavities were created, but it was also largely outside the taxpayers' control, and not a common use. If that clears the bar for a "plant-like function", it only just scrapes over. The cavities themselves are little more than receptacles in which gas can be stored at high pressure. It is true, as the FTT found, when circumstances were right (which was outside the taxpayers' control) gas could move to or from the cavities by means of free flow, but that was no more than an incident of the formation of the cavities.

81. But even if that is a "plant-like function", I do not find in the authorities solid support for Mr Peacock's submission that if something performs *any* "plant-like function" it is necessarily plant. On the contrary it is a question of fact and degree; that is to say an evaluative exercise. One applicable test in performing that exercise is "the premises test" as formulated by Hoffmann J.

82. Thus I do not consider that he is right to say that the UT were wrong in directing themselves at [54] (8):

> "The question in each case is whether the item functions as premises or plant. To answer this may involve deciding whether it is more appropriate to describe the item as apparatus for carrying on the business or as the premises in or upon which the business is conducted."

83. This is "the premises test". That test is amply supported by *Wimpy* (both at first instance and this court) *Gray*, *Anduff*, *Bradley* and *Lingfield Park*. The UT held that the FTT had not erred in law because the FTT had, in essence, applied that test in reaching the conclusion that the cavities were not plant.

The test in this court

84. Whether it is "more appropriate" to describe the item as apparatus or premises is clearly a value judgment. As Jacob LJ said in *HMRC v Procter & Gamble UK* [2009] EWCA Civ 407, [2009] STC 1990 at [9]:

> "Often a statutory test will require a multi-factorial assessment based on a number of primary facts. Where that it so, an appeal court (whether first or second) should be slow to interfere with that overall assessment – what is commonly called a value-judgment."

85. Similarly, in *Re Sprintroom Ltd* [2019] EWCA Civ 932, [2019] BCC 1031 this court said at [76]:

> "So, on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, "such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion"."

86. I cannot see that the UT's answer to the question that they posed reveals any legal error.

Result

87. It was for these reasons that I joined in the decision to dismiss the appeal.

Lord Justice Baker:

88. I agree.

Lady Justice Whipple:

89. I also agree.