[2013] UKUT 0129 (TCC)
Appeal number FTC/02/2012

Taxation of Chargeable Gains Act 1992, sections 44 and 45 – whether a valuable painting displayed in Castle Howard was "plant" within section 44(1)(c) of the 1992 Act – whether the painting satisfied the test as to function – whether the painting satisfied the test as to permanence – whether the painting was not plant in the hands of the owner who disposed of it when the business in which the painting was used was not that of the owner of the painting but of a company, Castle Howard Estate Ltd – whether painting a "wasting asset" within section 44 of the 1992 Act – whether owner of painting entitled to exemption from capital gains tax pursuant to section 45(1) of the 1992 Act

IN THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
ON APPEAL FROM THE FIRST-TIER TRIBUNAL
(TAX CHAMBER)

Between :

THE EXECUTORS OF LORD HOWARD OF HENDERSKELFE (DECEASED)	**Appellants**
- AND -	
THE COMMISSIONERS OF HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

TRIBUNAL: MR JUSTICE MORGAN

Sitting in public at Royal Courts of Justice, Rolls Building, Fetter Lane, London, EC4A 1NL on 29th and 30th November 2012

William Massey QC (instructed by **Forsters LLP**) for the **Appellants**
Ms Aparna Nathan (instructed by **General Counsel and Solicitor for HM Revenue**) for the **Respondents**

DECISION

RELEASE DATE: MARCH 2013

Tribunal Judge: Mr Justice Morgan:

The Painting

1. On 29th November 2001, the Executors of Lord Howard of Henderskelfe sold at Sotheby's a painting by Sir Joshua Reynolds ("the Painting") of Omai, a South Sea islander. The Painting was painted shortly before 1776 and was exhibited at the Royal Academy in that year. It was sold to the 5th Earl of Carlisle in 1796 and it remained at Castle Howard, in Yorkshire, until its sale in 2001. The catalogue prepared by Sotheby's for the sale in 2001 described the Painting as one of the great icons of eighteenth-century art and a symbol of an age which saw unprecedented advances in areas of travel, commerce, the natural sciences and philosophical thought. It was said that the depiction of Omai owed much to Rousseau's idea of the Noble Savage. Omai was noticed by the officers of the *Discovery* and the *Adventure* when they anchored off Huahine during Captain Cook's second voyage in August 1773. Omai returned to England on the *Adventure* and on arrival he was the subject of considerable curiosity in London society. After two years in England, Omai returned to his native land. In 1789, when Captain Bligh visited Huahine in the *Bounty*, just before the mutiny, he learned that Omai had died.

The question in this case

2. The question in this case is whether the Painting was a "wasting asset" within section 44 of the Taxation of Chargeable Gains Act 1992 ("the 1992 Act"). In the absence of any statutory elaboration of the meaning of "wasting asset" it is agreed that it would not be possible to describe such a valuable painting, in good condition (as it was), as a "wasting asset". However, the term "wasting asset" is defined in section 44 of the 1992 Act. In particular, section 44(1)(c) of the 1992 Act provides that "plant and machinery" will be deemed to have a predictable life of less than 50 years and section 44(1) provides that an asset with a predictable life not exceeding 50 years will be a "wasting asset". Thus, the Painting will be a wasting asset if it was "plant and machinery" within section 44(1)(c) of the 1992 Act. If the Painting was a wasting asset, then the disposal will fall within section 45(1) of the 1992 Act, which (subject to the potential operation of section 45(2) or (3)) produces the result that no chargeable gain arose on the disposal of the Painting. It is agreed that neither section 45(2) nor (3) applies in the present case.

The appeal from the FTT

3. The above question came before the First-tier Tribunal (Tax Chamber) ("the FTT") for determination. In its decision released on 22nd July 2011, the FTT (Judge Radford and Ms Watts Davies) held that the Painting was not plant and machinery within section 44(1)(c) of the 1992 Act, and therefore was not a wasting asset within section 44 of the 1992 Act and therefore the gain made on

its disposal was not exempt pursuant to section 45(1) of the 1992 Act from being considered as a chargeable gain.

4. The Appellants now appeal to the Upper Tribunal with the permission of the FTT given on 12th December 2011. The appeal is on a point of law only pursuant to section 11(1) of the Tribunals, Courts and Enforcement Act 2007.

The facts

5. I will set out the facts as found by the FTT. Many of the following findings of fact were based upon a statement of facts which had been agreed by the parties. At paragraphs [6] – [29] of its decision, the FTT held as follows:

> **[6]** Lord Howard died on 27 November 1984.
>
> **[7]** He resided until his death at Castle Howard ('the House') in North Yorkshire. The House has been owned by Castle Howard Estate Ltd ('the Company') since 1950.
>
> **[8]** Since 1952, the Company's principal activity as stated in its accounts has been the carrying on of activities relating to land ownership. Specifically it has, inter alia, carried on the trade of opening the greater part of the House ('the Public Part') and the surrounding grounds, and the exhibiting of the works of art within the Public Part to members of the public, in consideration of admission fees ('the House-opening Trade').
>
> **[9]** The Public Part of the House is open all year round apart from certain off-season periods.
>
> **[10]** Lord Howard owned a number of works of art. During his life Lord Howard permitted the Company to use a large number of these, including the Painting, for exhibition in the Public Part in the House-opening Trade. The agreement or arrangement was that the Company would bear the costs of the insurance, maintenance, restoration and security of the works exhibited.
>
> **[11]** During Lord Howard's lifetime there was no formal lease, hire or loan in relation to the use of the Painting by the Company. There was no provision for the Company to pay any hire or rental fee to Lord Howard.
>
> **[12]** This arrangement continued after Lord Howard's death between the Appellants and the Company in relation to the works of art previously owned by Lord Howard and exhibited by the Company.
>
> **[13]** HMRC were told that the Appellants considered that formal loan/hire/lease arrangements were unnecessary given that the directors of the Company and the Executors of Lord Howard's Will (the Appellants) were the same individuals.

[14] The Appellants continued the longstanding arrangement whereby the Company was responsible for the insurance, maintenance, restoration and security of the Painting.

[15] The Painting was conditionally exempted from inheritance tax on the death of Lord Howard on the basis of certain undertakings. In the event that the Painting was sold the exemption would be lost. The undertaking meant that the Painting had to be kept in the United Kingdom and seen by the public.

[16] The Painting was displayed by the Company throughout the Executors' period of ownership (November 1984 to November 2001) except for 3 periods totalling approximately 7 months in all when it was exhibited at three galleries in Paris, London and York respectively.

[17] During the tax year 2001–02 the Executors sold the Painting at auction at Sotheby's on 29 November 2001 to an unconnected purchaser for a hammer price of £9.4 million from which commission and value added tax ('VAT') totalling £220,900 was deducted.

[18] The Appellants' trust and estate tax return for the tax year 5 April 2002 was submitted on 29 January 2003 and included the gain accruing on the disposal of the Painting as a chargeable gain.

[19] By letter dated 10 June 2003 the Appellants sought to amend the return on the basis that the gain accruing on the sale of the Painting was exempt from capital gains tax by virtue of s 45 of the TCGA as a gain accruing on the disposal of a tangible movable property which was 'plant' and therefore, by virtue of s 44(1)(c) of the TCGA, a wasting asset.

[20] On 12 January 2004, HMRC opened an enquiry into the Appellants' trust and estate tax return. On 30 April 2010 after some lengthy correspondence HMRC issued a closure notice stating the conclusion that the gain accruing on the disposal of the Painting was a chargeable gain not exempted by s45 of the TCGA because the Painting was not 'plant'.

[21] The Appellants appealed the closure notice on 28 May 2010. They also notified HMRC that they required a statutory review of the matter in question.

[22] On 5 August 2010 the reviewing officer informed the Appellants of his conclusion which upheld the closure notice issued by HMRC on 30 April 2010 in full.

> **[23]** Mr Simon Howard gave evidence that the Executors had power under the will to license the Company to use any of the chattels forming part of the estate. There was however no formal agreement.
>
> **[24]** A focal point of the rooms on display was the room in which the Painting was hung.
>
> **[25]** He was required to live at the House in order to look after it and he has a lease with the Company.
>
> **[26]** On cross-examination he confirmed that the works of art were essential to the House-opening Trade. They were on a perpetual loan to the Company but there was nothing to stop the Appellants moving items away from the exhibits and they were at liberty to move them around from time to time. Items might be taken out of use and vice versa. This was arbitrary and there was nothing formal.
>
> **[27]** However Mr Howard said that in order to justify the admission fees the items were vital to the House-opening Trade. If you took away the number of visitors who came to see the works of art the Company would no longer have a viable business.
>
> **[28]** He believed that the reasons why members of the public visited the House were to appreciate its architectural qualities, to admire its historic contents, and to understand the range of historical narratives underpinning the history of the House. He believed that the art collections at the House were and had been, in his experience, central to bringing to life the House and the history surrounding it in the eyes of its visitors and for that reason proved a very considerable draw to the visiting public.
>
> **[29]** The Painting was sold because he needed the money for his divorce settlement. The proceeds went into the estate. There was no benefit to the Company and the proceeds were split equally between the beneficiaries."

Capital gains tax

6. By section 1 of the 1992 Act, tax is charged in accordance with the 1992 Act in respect of capital gains accruing to a person on the disposal of assets. In this case, the Painting was an asset within the 1992 Act: see section 21. Section 15 provides that the amount of a gain so accruing is to be computed in accordance with Part II of the 1992 Act. In the present case, if the gain on the disposal of the Painting in 2001 is taxable then the parties are not agreed as to the tax payable but the determination of that amount was not an issue before the FTT nor is it an issue on this appeal to the Upper Tribunal. By section 16 of the 1992 Act, the general position is that the amount of a loss accruing on a

disposal of an asset is computed in the same way as the amount of a gain so accruing. In calculating the amount of a gain on a disposal of an asset, section 38 provides for the appropriate treatment of acquisition and disposal costs.

7. Section 44 of the 1992 Act defines "wasting asset" and section 45 confers an exemption from tax in relation to certain wasting assets.

8. Section 44 of the 1992 Act provides:

> "(1) In this Chapter "wasting asset" means an asset with a predictable life not exceeding 50 years but so that—
>
> (a) freehold land shall not be a wasting asset whatever its nature, and whatever the nature of the buildings or works on it;
>
> (b) "life", in relation to any tangible movable property, means useful life, having regard to the purpose for which the tangible assets were acquired or provided by the person making the disposal;
>
> (c) plant and machinery shall in every case be regarded as having a predictable life of less than 50 years, and in estimating that life it shall be assumed that its life will end when it is finally put out of use as being unfit for further use, and that it is going to be used in the normal manner and to the normal extent and is going to be so used throughout its life as so estimated;
>
> (d) a life interest in settled property shall not be a wasting asset until the predictable expectation of life of the life tenant is 50 years or less, and the predictable life of life interests in settled property and of annuities shall be ascertained from actuarial tables approved by the Board.
>
> (2) In this Chapter "the residual or scrap value", in relation to a wasting asset, means the predictable value, if any, which the wasting asset will have at the end of its predictable life as estimated in accordance with this section.
>
> (3) The question what is the predictable life of an asset, and the question what is its predictable residual or scrap value at the end of that life, if any, shall, so far as those questions are not immediately answered by the nature of the asset, be taken, in relation to any disposal of the asset, as they were known or ascertainable at the time when the asset was acquired or provided by the person making the disposal."

9. Section 45 of the 1992 Act provides:

> "(1) Subject to the provisions of this section, no chargeable gain shall accrue on the disposal of, or of an interest in, an asset

> which is tangible movable property and which is a wasting asset.
>
> (2) Subsection (1) above shall not apply to a disposal of, or of an interest in, an asset—
>
> (a) if, from the beginning of the period of ownership of the person making the disposal to the time when the disposal is made, the asset has been used and used solely for the purposes of a trade, profession or vocation and if that person has claimed or could have claimed any capital allowance in respect of any expenditure attributable to the asset or interest under paragraph (a) or paragraph (b) of section 38(1); or
>
> (b) if the person making the disposal has incurred any expenditure on the asset or interest which has otherwise qualified in full for any capital allowance.
>
> (3) In the case of the disposal of, or of an interest in, an asset which, in the period of ownership of the person making the disposal, has been used partly for the purposes of a trade, profession or vocation and partly for other purposes, or has been used for the purposes of a trade, profession or vocation for part of that period, or which has otherwise qualified in part only for capital allowances—
>
> (a) the consideration for the disposal, and any expenditure attributable to the asset or interest by virtue of section 38(1)(a) and (b), shall be apportioned by reference to the extent to which that expenditure qualified for capital allowances, and
>
> (b) the computation of the gain shall be made separately in relation to the apportioned parts of the expenditure and consideration, and
>
> (c) subsection (1) above shall not apply to any gain accruing by reference to the computation in relation to the part of the consideration apportioned to use for the purposes of the trade, profession or vocation, or to the expenditure qualifying for capital allowances … ."

The FTT decision

10. The FTT made the findings of fact which I have set out above. It then referred to the relevant legislation and set out in detail the submissions on behalf of the parties. It then made its findings, comparatively briefly, in paragraphs [96] – [102] in the following terms:

> "**[96]** We find that whilst the Painting owned by the Appellants and loaned to the Company was no doubt greatly admired by the visitors its sale did not cause any reduction in the visitor

numbers. In fact visitor numbers went up by 10% from 2001 when the Painting was sold.

[97] We find that the Painting was loaned to the Company on an informal basis and could be removed by the Appellants at any time. It lacked therefore any degree of permanence with the Company as described by Lord Reid in the case of *Hinton (Inspector of Taxes) v Maden and Ireland Ltd* [1959] 1 WLR 875.

[98] We considered Mr Massey's example at para [44], above but the Painting was not hired to the Company. Its use by the Company was on an informal basis. [*The example in para [44] was of the Appellants buying art in the market in 1984 and then hiring it to the Company for use in its trade.*]

[99] We find no reason to describe it as a wasting asset in the hands of the Appellants. We find that the Appellant Executors did not have a business and in order to be 'plant' and fall within the exemption provided by s44(1)(c) TCGA it is necessary for the asset to be owned by the business or at the very least leased formally to it.

[100] We find no reason for the Painting to be capital gains tax exempt in the Appellant's hands just because it might have a different character in someone else's hands. As stated by Vinelott J in the case of *Melluish (Inspector of Taxes*) *v BMI (No 3) Ltd and others*:

'It is not in question that the taxpayers are all persons carrying on a trade and that they incurred capital expenditure on the provision of plant for the purpose of that trade. The only question is whether in consequence of the incurring of the expenditure the plant could be said to belong or have belonged to them'.

[101] We find Mr Massey's submission that there was no policy reason to restrict the phrase 'plant and machinery' found in s 44(1)(c) to 'plant which is used in the trade of the disponor and machinery' to be difficult to accept on the basis that not to do so would open up all sorts of tax avoidance possibilities as described at para [94] above. [*In para [94], the FTT had recorded Ms Nathan's submission that if the owner of an asset could claim exemption from capital gains tax by simply lending the asset to a third party for use in the third party's business before the owner sold the asset, this would open up substantial tax avoidance possibilities.*]

[102] As submitted by Ms Nathan machinery is easily recognised and has an intrinsic character and quality that identifies it. However, 'plant' has no such innate quality: it is merely an asset that is put to a particular use in a particular context and acquires its colour from the context in which it is used."

The submissions for the Appellants

11. Mr Massey QC on behalf of the Appellants submitted that the Painting was plant. He submitted that whether an object is plant is answered by looking at its function, and asking the question: is the object part of the apparatus used by a trader for permanent employment in his business? For an object to be plant, it does not have to be employed in a trade carried on by the owner of the object. It is sufficient if, for example, it is owned by one person but is part of the permanent apparatus used in the trade of another, whether under a formal lease or a less formal licence. He suggested that the FTT had held that an object had not only to satisfy a functional test but also had to satisfy an ownership test so that the object had to be owned by the person carrying on the trade in which the object was used or at any rate be leased by that person under a formal lease.

12. Mr Massey relied on the well known cases (to some of which I will later refer) which laid down a functional test to determine whether an object was plant. The Painting satisfied that test. It did not fail the test because it was a valuable painting rather than more prosaic objects used in a trade such as office furniture or office equipment. The concept of "plant and machinery" was not limited by reference to the value of the items and could extend to high value items.

13. Mr Massey then followed through these submissions when considering the reasoning of the FTT to the contrary. In relation to the FTT's finding in paragraph [97] that the Painting lacked any degree of permanence because it was loaned to the Company on an informal basis, Mr Massey submitted that this finding was contradicted by the FTT's findings of fact as to the history of the matter and involved a misunderstanding of the cases which referred to the concept of permanence in relation to the test for plant.

14. Mr Massey concluded by submitting that the Painting was plant for the following reasons: (1) it functioned as a prominent exhibit in the trade carried on by the Company throughout the entirety of the 17 year period of its ownership by the Executors (1984 to 2001) and for some 32 years before that, in accordance with the intentions of the owner and of the Company; (2) the Painting had the necessary quality of permanence to be regarded as kept by the trader for permanent employment in its business; and (3) the Painting was not part of the premises.

The submissions for the Respondents

15. Ms Nathan on behalf of the Respondents submitted that the Painting was not plant. In support of her submissions as to the test to be applied to determine whether an asset was plant, she cited essentially the same cases as were relied upon by the Appellants. She stressed that an asset was not automatically plant from the moment it was created nor was its character immutable. An asset could be stock in trade in the hands of a supplier to a taxpayer and then plant in the hands of the taxpayer. An asset which is held in private hands is not plant whereas if the same asset were used in the business of its owner it would be plant. What transforms the asset into plant is the use to which it is put in the

owner's business. For the purposes of capital gains tax, in order for an asset to have the character of plant in the hands of the person disposing of it, it is necessary for that asset to be used in a business carried on by that person. This follows from the scheme of the tax which is to charge the tax on the gain accruing to a person from the disposal of assets. Accordingly, in the present case, the Painting must be plant in relation to the Executors; it is not sufficient that it is plant in relation to the Company. Further, the FTT was right to conclude that the Painting did not have the required degree of permanence because it was not owned by the Company and the Company had no enforceable right to retain it as against its owner. In summary, it was submitted that the FTT was right for the reasons which it had given.

16. Ms Nathan accepted that if the Painting was plant within section 44(1)(c) of the 1992 Act, then it was a wasting asset within section 44 and the gain made on its disposal was exempt within section 45(1). She did not argue that the case came within section 45(2) or (3).

The authorities as to the meaning of "plant"

17. The word "plant" is not defined in the 1992 Act. In Yarmouth v France (1887) 19 QBD 647 at 658, Lindley LJ referred to the ordinary meaning of the word in these terms:

> "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: see Blake v Shaw (1860) Johns. 732."

18. Blake v Shaw concerned the meaning of "plant" in a will. The principal distinction drawn was between stock and plant. Plant was described as consisting of items permanently used for the purposes of a trade as distinguished from fluctuating stock.

19. Yarmouth v France did not involve a taxing statute but Lindley LJ's definition has been adopted and applied in relation to various taxing statutes: see, in particular, the three House of Lords decisions in Hinton v Maden and Ireland Ltd [1959] 1 WLR 875, Commissioners of Inland Revenue v Barclay Curle & Co Ltd (1969) 45 TC 221 and Commissioners of Inland Revenue v Scottish & Newcastle Breweries Ltd [1982] 1 WLR 322. In the last of these cases, the position was described by Lord Wilberforce in these terms at pages 324 - 326:

> "The word "plant" has frequently been used in fiscal and other legislation. It is one of a fairly large category of words as to which no statutory definition is provided ("trade," "office," even "income" are others), so that it is left to the court to interpret them. It naturally happens that as case follows case, and one extension leads to another, the meaning of the word gradually diverges from its natural or dictionary meaning. This

is certainly true of "plant." No ordinary man, literate or semi-literate, would think that a horse, a swimming pool, moveable partitions, or even a dry-dock was plant — yet each of these has been held to be so: so why not such equally improbable items as murals, or tapestries, or chandeliers? The courts have, over the years, provided themselves with some guidance in principle, starting with Lindley L.J. in Yarmouth v. France (1887) 19 Q.B.D. 647, 658. Plant, he said

"in its ordinary sense … 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."

Later cases have revealed that a permanent structure may be plant (Inland Revenue Commissioners v Barclay, Curle & Co Ltd [1969] 1 WLR 675) and argument has ranged over the question whether, to constitute plant, an item of property must fulfil an active role or whether a passive role will suffice — a distinction which led to some agreeable casuistry in relation to a swimming pool (Cooke v Beach Station Caravans Ltd[1974] 1 WLR 1398). Perhaps the most useful discrimen, for present purposes, where we are concerned with something done to premises, is to be found in that of "setting": to provide a setting for the conduct of a trade or business is not to provide plant — J. Lyons & Co Ltd v Attorney-General [1944] Ch 281, concerning electric lamps, sockets and cords for lighting a tea shop. But this, too, is not without difficulty. In the Lyons case itself Uthwatt J. thought that different considerations (so that they might qualify as apparatus) might apply to certain specific lamps because they might be connected with the needs of the particular trade carried on upon the premises. In Jarrold v John Good & Sons Ltd [1963] 1 WLR 214, some fixed but moveable partitions though in a sense "setting" were thought capable of being also "apparatus." And in Schofield v R & H Hall Ltd [1975] N.I. 12, the same argument was applied to the external walls of grain silos, as well as to the connected machinery.

Another much used test word is "functional" — this is useful as expanding the notion of "apparatus"; it was used by Lord Reid in Barclay, Curle [1969] 1 WLR 675. But this, too, must be considered, in itself, as inconclusive. Functional for what? Does the item serve a functional purpose in providing a setting? Or one for use in the trade?

It is easy, without excessive imagination, to devise perplexing cases. A false ceiling designed to hide unsightly pipes is not plant, though the pipes themselves may be (Hampton v Fortes Autogrill Ltd [1980] STC 80). Is a tapestry hung on an unsightly wall any different from a painted mural? And does it

> make a difference whether there was a damp patch underneath? What limit can be placed on attractions, interior or exterior, designed to make premises more pleasing, to the eye or other senses? There is no universal formula which can solve these puzzles.
>
> In the end each case must be resolved, in my opinion, by considering carefully the nature of the particular trade being carried on, and the relation of the expenditure to the promotion of the trade. I do not think that the courts should shrink, as a backstop, from asking whether it can really be supposed that Parliament desired to encourage a particular expenditure out of, in effect, tax-payers' money, and perhaps ultimately, in extreme cases, to say that this is too much to stomach. It seems to me, on the commissioners' findings, which are clear and emphatic, that the respondents' trade includes, and is intended to be furthered by, the provision of what may be called "atmosphere" or "ambience," which (rightly or wrongly) they think may attract customers. Such intangibles may in a very real and concrete sense be part of what the trader sets out, and spends money, to achieve. A good example might be a private clinic or hospital, where quiet and seclusion are provided, and charged for accordingly. One can well apply the "setting" test to these situations. The amenities and decoration in such a case as the present are not, by contrast with the Lyons case [1944] Ch 281, the setting in which the trader carries on his business, but the setting which he offers to his customers for them to resort to and enjoy. That it is setting in the latter and not the former sense for which the money was spent is proved beyond doubt by the commissioners' findings.
>
> I do not find it impossible to attribute to Parliament an intention to encourage by fiscal inducement the improvement of hotel amenity."

20. The word "permanent" was used in Blake v Shaw and Yarmouth v France to distinguish plant from stock in trade. The concept of "permanence" was also referred to in Hinton v Maden & Ireland Ltd [1959] 1 WLR 875. The question in that case was whether certain items used in the taxpayer's trade were plant. It was held that the expenditure on the items in question was capital expenditure and that, even though the items had a relatively short life, they were sufficiently durable to be called plant. Lord Reid said at page 890:

> "When Lindley L.J. used the phrase "permanent employment in the business" he was using it in contrast to stock-in-trade which comes and goes, and I do not think that he meant that only very long-lasting articles should be regarded as plant. But the word does, I think, connote some degree of durability and I would find it difficult to include articles which are quickly consumed or worn out in the course of a few operations. There may well be many borderline cases, but these articles have an average

> life of three years, and if their cost can fairly be called capital expenditure I cannot refuse to them the description of "plant" unless the Act discloses some special reason for doing so."

21. Lindley LJ's definition in Yarmouth v France was the subject of further analysis by Hoffmann J in Wimpy International Ltd v Warland [1988)] STC 149 (whose decision was later upheld by the Court of Appeal, reported at [1989] STC 273). Hoffmann J referred to Lindley LJ's definition and then said at pages 170 - 171:

> "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 [1969] 1 WLR 675, 45 TC 221. 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.
> …
>
> It will be seen, therefore, that although the three distinctions in Yarmouth v France (1887) 19 QB 647 each involves a test which can be called functional, they are subtly different from each other. If the item is neither stock-in-trade nor the premises upon which the business is conducted, the only question is whether it is used for carrying on the business. I shall call this the 'business use' test. However, under the second distinction, an article which passes the 'business use' test is excluded if such use is as stock-in-trade. And under the third distinction, an item used in carrying on the business is excluded if such use is as the premises or place upon which the business is conducted. The fact that an item may pass the 'business use' test but fail what I may call the 'premises' test is central to this case."

Discussion

22. The issue in this case is whether the asset which the Appellants disposed of by sale in 2001 was within the phrase "plant and machinery" in section 44(1)(c) of the 1992 Act. No one submitted that the Painting was "machinery". The Appellants say that the Painting was "plant". The Respondents say that the Painting was not plant for essentially three reasons. The first is that the use of the Painting by the Company did not satisfy the test as to function identified in the above authorities. The second reason is that the use of the Painting by the Company did not satisfy the test as to permanence identified in the above authorities. The third reason is that the trade in which the Painting was arguably used was the trade of the Company not the trade of the owner who disposed of the Painting.

23. There was no dispute as to the relevant test as to function. That test is described by Lord Wilberforce in the Scottish & Newcastle case. It is necessary to focus on the nature of the particular trade being carried on and the relation of the object to the promotion of that trade. The trade in the present case is an unusual or specialised trade and the object has a considerable value. Nonetheless, it appears to me to be relatively straightforward to say, on the findings of fact made by the FTT, that the Painting was being used for the promotion of the trade carried on by the Company.

24. I next consider whether the Painting is not to be considered as plant because it fails the test as to permanence. That test was first stated for the purpose of distinguishing plant from fluctuating stock in trade. The Respondents say that the Painting was not plant because it was not "kept for permanent employment" in the Company's business. This is said to be because the Company did not have an interest in the Painting which gave it a legal entitlement to keep it permanently or, at any rate, for a sufficiently long period of time. So far as the cases show, the concept of permanence has not been invoked in this way in the past. The concept of permanence has been used to distinguish fluctuating stock in trade from plant or to distinguish consumables from plant. On the FTT's findings of fact, I would hold that the Painting was kept for permanent employment in the Company's business until it was taken back by the Executors for the purposes of sale. The Painting was used in that business from 1952 to 2001. The Painting was loaned to the Company by Lord Howard between 1952 and 1984 and by the Executors between 1984 and 2001. The Painting was displayed in an established setting within the House. Although the Company's legal entitlement to use the Painting in its business was subject to the possibility that the owner of the Painting might terminate that right by notice to the Company, both the owner of the Painting and the Company considered that the Painting would be available to the Company for a considerable, albeit indefinite, period and that is what happened. The trigger for the owner's decision to take back the Painting was the need to raise capital in connection with a divorce settlement.

25. The principal challenge made by the Respondents to the idea that the Painting was plant within section 44(1)(c) of the 1992 Act was based on the fact that the trade in which the Painting was used was the trade of the Company, whereas the Painting was owned by the Executors, and it was the Executors who disposed of the Painting and made the relevant gain on such disposal. The

Respondents submitted that, for the purposes of capital gains tax, in order for an asset to be plant in the hands of the person disposing of it, it was necessary for that asset to be used in a business carried on by that person. This submission was made on the basis that even though the Company could say the Painting was plant in its hands, the Executors could not say that the Painting was plant in their hands when they disposed of it.

26. The distinction sought to be made by the Respondents could arise in any case where an object is owned by one person and made available for use by another person. It is commonplace for an owner of an object which has the physical character of plant to hire or lease that object to a trader who uses the object for the purposes of its business. If the Respondents are right in their submission, then that object will be considered to be plant in the hands of the trader but not plant in the hands of the owner.

27. The distinction contended for by the Respondents does not appear to have surfaced in any of the many cases over the years which have discussed the ordinary meaning of plant. Nor does the distinction appear explicitly in the 1992 Act. Section 44 deals with the predictable life of an asset. Although section 44(1)(a) and (d) refer to a freehold interest and a life interest respectively, the other provisions of section 44 appear to be concerned with the physical character of the object and the nature of its use, rather than the terms on which there is conferred a legal entitlement to use the object. Thus section 44 refers to the predictable life of plant and machinery in terms which refer only to the physical features of the object. The Respondents accepted that their submission as to plant did not apply to the word "machinery" in the phrase "plant and machinery". Thus, if the Executors had lent to the Company something which could properly be described in physical terms as machinery and if the Executors later disposed of that machinery making a capital gain, that gain would be exempt under section 45(1). There is no explicit indication in the language of sections 44 and 45 of the 1992 Act of a distinction of this kind between plant and machinery.

28. Sections 45 and 47 of the 1992 Act do refer to "the period of ownership" of the asset. Sections 45(3) and 47(2) refer to the possibility that during the period of ownership of the person making the disposal, the asset was used for the purposes of a trade, profession or vocation for only part of that period. The sub-section then makes provision for apportionment of the consideration for the disposal and of any expenditure in relation to the asset. The Respondents did not submit that these provisions were incapable of applying to a case where an owner of an asset hires the asset to another person who then returns the asset to the owner who then disposes of it making a capital gain.

29. The Respondents correctly submitted that an asset could acquire and could later lose the character of plant. The example was given of law reports by reference to the decision in Munby v Furlong (1977) 50 TC 491. Law reports in the bookseller's shop are stock in trade and not plant. When the law reports are sold to the practising barrister, they are then plant. If the barrister later sells a particular volume of a law report to a private collector of rare books, then that law report is neither stock in trade nor plant. This allowed the Respondents to argue that the law report was not plant "in the hands" of the

bookseller and the private collector but was plant "in the hands of" the barrister. The Respondents then submitted that this example showed that an asset could be plant in the hands of one person and not plant in the hands of another person. However, there is an important distinction between that example and the present case. In the example, there is a sequence of ownership and use. The asset changes into plant when it ceases to be stock in trade and satisfies the test as to function when used by the barrister; it ceases to be plant when it fails to satisfy the test as to function when owned by the private collector. What the Respondents submit in the present case is that the Painting was plant and was not plant at the same time. It was to be regarded as plant "in the hands of" the Company but not plant "in the hands of" the Executors.

30. I asked the Respondents whether it was open to them to apply their example of sequential ownership and use to the present case. I inquired whether it was open to them to say that during the period that the Painting was used by the Company in its trade, the Painting was plant but when the Painting was returned to the Executors for the purposes of its sale, it ceased to be plant and so that, at the moment of disposal, the Painting was no longer plant. The Respondents had not put forward any argument to this effect before the FTT. Accordingly, there were no findings as to the sequence of events in relation to the return of the Painting to the Executors nor as to the sale of the Painting at auction. As I understood the Respondents, they contended that I should uphold the decision of the FTT on the wider ground that in the period from 1984 to 2001 the Painting was not plant in the hands of the Executors rather than that I should consider upholding the FTT on a point which the FTT did not itself decide, namely, the narrow ground that the Painting was not plant just before, and at the moment of, its sale by the Executors.

31. The Appellants submitted that other legislation in the field of tax referred to plant in a way which proceeded on the basis that the Respondents were wrong in suggesting that an object could be plant in the hands of a person using the object in its trade and at the same time not plant in the hands of the owner of that object. The Appellants referred to section 105(1)(d) of the Inheritance Tax Act 1984 which provided a relief from inheritance tax in relation to relevant business property, which included any machinery or plant which immediately before its transfer was used wholly or mainly for the purposes of a business carried on by a company of which the transferor then had control or a partnership of which he then was a member. This provision would apply to a transferor who owned an object and allowed it to be used for the business of a company of which he had control. Certainly in that statutory context the object could be described as plant for the purposes of the relief to the transferor even though the transferor did not use the object in the transferor's business but instead made the object available to a company under his control for use in the company's business.

32. The Appellants also pointed to the statutory provisions dealing with capital allowances in relation to capital expenditure on plant. They referred in particular to the Capital Allowances Act 1968, section 18(1), the Finance Act 1971, section 41(1) and the Capital Allowances Act 1990, section 22(1). Each

of these provisions referred to a person carrying on a trade and incurring capital expenditure on the provision of machinery or plant wholly and exclusively for the purposes of the trade and in consequence of his incurring the expenditure the machinery of plant "belongs to him". It was pointed out that section 44(1)(c) of the 1992 Act does not express any requirement that the person who disposes of the plant had carried on the trade in which the object was used as plant. The history of the legislation relating to capital allowances in respect of plant and the significance of the requirement that the plant "belongs" to the person incurring the expenditure was traced by Fox LJ in his judgment in Stokes v Costain Property Investments Ltd (1984) 57 TC 688 (see at pages 701 – 703) and the decision of the Court of Appeal in that case was approved by the House of Lords in Mellhuish v BMI (No. 3) Ltd (1995) 68 TC 1.

33. The word "plant" must be construed in the context of the 1992 Act and that context is not necessarily the same as the context of the Inheritance Tax Act 1984 nor the legislation dealing with capital allowances. In the 1992 Act, section 44(1)(c) uses the term "plant" and does not in terms say that the object must have been used by the owner of the object in his trade. The 1984 Act proceeds on the basis that an object can be called plant even if it is used in the trade of a company controlled by the owner of the object rather than used by the owner in his trade. The capital allowances legislation expressly provides that the plant must belong to the person who incurs capital expenditure on the object for the purposes of his trade. These other statutory provisions are consistent with the Appellant's submission that the ordinary meaning of plant, when it is not elaborated or restricted by further express provisions, can apply to an item which its owner makes available to another for use in that other's trade. However, because the statutes are expressed in different terms and their context is different from that of the 1992 Act, I think it would be wrong to place too much weight on the way in which these other statutes are expressed.

34. Having considered the rival submissions and, in particular, the three arguments put forward by the Respondents, my provisional view is that the Painting satisfies the established test as to plant, both as regards the test as to function and the test as to permanence. Further, my provisional view is that in the context of the 1992 Act, the question whether an object is plant is to be answered by applying the established test to the object. If the object is plant on that basis then it is to be regarded as plant whether one is considering the position of the trader using the plant or the owner of the plant and no distinction is to be made between these persons.

35. Having reached a provisional conclusion based on the findings of fact made by the FTT and the submissions made to me, I now need to consider the reasoning of the FTT in support of its conclusion.

36. In paragraph [96] of its decision, the FTT referred to visitor numbers before and after the sale of the Painting. It is not clear whether the FTT regarded that matter as being of any significance. In favour of the conclusion that it regarded the matter as significant is the fact that paragraph [96] is one of only seven paragraphs in which the FTT expresses its conclusions. On the other hand, the FTT does not explain in what way this fact could be significant. It seems

unlikely that the FTT was purporting to find that the Painting was a positive disadvantage in the context of the Company's trade so that when the Painting was removed from the House, the Company's trade improved. In any case, the mere fact that the Painting was removed from the House in a period when visitor numbers declined proves nothing as to any link between the presence of the Painting in the House and visitor numbers. The FTT do not appear to have carried out any exercise as to the reasons for the decline in visitor numbers at that point. It seems to me to be very unlikely that one could identify any specific effect on visitor numbers caused by the presence or the absence of a particular painting in the House.

37. In paragraph [97] of its decision, the FTT referred to the fact that the Executors could ask the Company to return the Painting at any time. It then said that the Painting lacked the degree of permanence described in Hinton v Maden & Ireland Ltd. I have already considered the test as to permanence in the judicial definitions of plant as well as the facts as found by the FTT. I consider that the Painting had sufficient permanence for the purposes of the relevant test.

38. In paragraph [98] of its decision, the FTT seemed to make a distinction between the hiring of a work of art (in the example given by the Appellants as recorded in paragraph [44] of the FTT's decision) and the use of the Painting by the Company "on an informal basis". The FTT does not say whether it considered that a hiring by the Company of the Painting would have sufficed and what was different between a hiring and the informal basis on which the Painting was made available by the Executors to the Company.

39. In paragraph [99] of its decision, the FTT stated that it saw no reason to describe the Painting as a wasting asset in the hands of the Appellants. Of course, but for the express provision in section 44(1)(c) of the 1992 Act, the Painting was not a wasting asset; it was a highly valuable asset with a predicted life of more than 50 years and liable to appreciate in value. The FTT then laid down the requirement that for an asset to be plant, it had to be owned by the business in which it was used or at the very least leased formally to that business. That finding appears to me to be inconsistent with the FTT's apparent conclusion that the Painting was plant in the hands of the Company when the Painting was not owned by the Company nor formally leased to the Company. What the FTT appears to have been trying to express was a requirement that an asset would only be plant if the person who owned it carried on the trade in which it was used. In my judgment, this was a considerable restriction on the ordinary meaning of plant. That restriction was not part of the ordinary meaning of plant as defined in the case law; neither was it a restriction expressly imposed by the 1992 Act. In my judgment, there is no proper basis on which one could hold that this restriction was implicit although unexpressed in the language of, or the scheme of, the 1992 Act. Further, if one were to impose such a restriction on the meaning of plant in section 44(1)(c) of the 1992 Act, I do not see why it should matter if the asset was leased "formally" or informally.

40. In paragraph [100] of its decision, the FTT referred to a statement by Vinelott J at first instance in Mellhuish v BMI (No. 3) Ltd 68 TC 1 at 44. Vinelott J

was not, in that statement, identifying what was required for an object to come within the ordinary meaning of plant. He was simply stating the question which was posed in that case by the language of section 44(1) of the Finance Act 1971 which contained an express requirement that the plant belonged to the person incurring the capital expenditure.

41. In paragraph [101] of its decision, the FTT appeared to consider that there was a policy reason to restrict the meaning of "plant and machinery" in order to prevent the possibility of tax avoidance. However, the Respondents had accepted before the FTT that their contention that an asset could be plant in the hands of a person who used the asset in his trade and at the same time not plant in the hands of the owner of the object did not apply to machinery. In any case, if an asset meets the established tests as to plant and if it therefore comes within the ordinary meaning of plant in the context of section 44(1)(c) of the 1992 Act, the FTT did not explain what process of statutory interpretation allowed it to read in an unexpressed restriction on the meaning of plant in order to prevent the provision being used for tax avoidance purposes.

42. In paragraph [102] of its decision, the FTT appeared to distinguish between plant and machinery so that the restriction it imposed on the meaning of plant did not apply to machinery.

Conclusion

43. Having considered the general submissions which were made to me and the reasoning of the FTT in this case, I have concluded that I am unable to agree with the decision of the FTT which in my judgment was wrong in law. In this case, on the findings of fact made by the FTT, the Painting satisfied the tests as to function and as to permanence in the established test as to the meaning of plant. Further, the meaning of plant in section 44(1)(c) of the 1992 Act does not permit a finding that an asset is plant in the hands of a person using the asset in his business but, at the same time, not plant in the hands of the owner of the asset. I conclude that the Painting was plant within section 44(1)(c) of the 1992 Act and in the absence of any argument that the Painting had ceased to be plant a short time before it was disposed of by the Executors, the Executors are entitled to the exemption conferred by section 45(1) of the 1992 Act.

44. The FTT plainly resisted the conclusion that the Painting was a wasting asset. I accept that there is something surprising in holding that an asset of high value, and one liable to appreciate in value, with a predicted life of more than 50 years, was a wasting asset. However, the Painting was only a wasting asset for the purposes of section 44 of the 1992 Act because it satisfied the established test as to plant and therefore came within section 44(1)(c) which deems something to be a wasting asset even though it would not otherwise be thought of as a wasting asset.

The result

45. The result is that the appeal is allowed.

Costs

46. If the parties are unable to agree any issue as to costs, then I direct that, within 21 days of the release of this decision, they are to serve on each other and on the Upper Tribunal written submissions on any remaining issue as to costs.

MR JUSTICE MORGAN

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

RELEASE DATE: 11 MARCH 2013