O SRIANAN

Reference 1982/56CR

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S. O'SRIANAN

APPELLANT

and

LAKEVIEW LIMITED

RESPONDENT

Judgment of Mr. Justice Murphy delivered the 8th day of October 1984.

When this matter came before the learned President of the Circuit Court the question on which his decision was sought was whether Lakeview Limited, the Respondent company, was entitled to claim 100 % wear and tear allowance in respect of an expenditure of £45,955.00 on the provision of what was described as "a deep pit poultry-house and equipment" for the purpose of carrying on its business as egg producers. The learned trial Judge having decided that question in favour of the Respondent was required to state a case for the opinion of the High Court pursuant to Section 430 of the Income Tax Act 1967 and in that case having set out the various facts which were proved or admitted before him and the contentions of the respective parties arising therefrom together with his conclusion aforesaid expressed the question of law for the opinion of this Court in the following terms:-

"Whether on the facts as found by me and as set forth in this case stated, there was evidence upon which I could properly decide that

"the said house was an item of plant and that the company was entitled to claim the 100% wear and tear allowance on it as provided for by the Sections referred to in paragraph one hereof".

Of this question two things may be said. First it correctly recognises that provided that the decision is supported by evidence and not based on a mistaken view of the law that this Court will not intervene. Indeed it is well recognised that tax cases frequently involve matters of degree rather than matters of distinction and that conclusions based on matters of degree should not be disturbed even if the Court to which the case is stated did not agree with such conclusions unless it should be the case that the conclusions were such that no reasonable Judge could draw them or that they were based on a mistaken view of the law (see Mara and Hummingbird Limited 1982 I.L.R.M. 426).

Secondly, it may be said of the question posed for the opinion of this Court that it is expressed in a form which has become standardised in recent years. The Judge or tribunal stating the case expresses his ultimate conclusion as to the rights of the parties leaving room for some doubt as to what legal propositions he accepted or rejected with the result that there is frequently difficulty, as Lord Hailsham complained in Cole Brothers and Phillips 1982 STC 307 at 312, in identifying the particular question of law on which the guidance of this Court is sought. I infer

that the learned Judge accepted the legal proposition implicit in the contention made on behalf of the Respondent, in the following terms:-

"That the house in its entirety was an item of plant and was an apparatus or device designed specifically for the purpose of egg production with a view to enabling the trade of egg production to be carried on: the house was as much necessary for the purposes of the egg production as was the equipment (such as the cages) in the house, that one could not exist or be effective without the other: and that accordingly the 100% Capital Allowance claimed was properly allowable to the company".

However the task is approached it is a daunting one. The relevant legislation discloses the unwillingness of the Oireachtas to attempt a definition of the crucial word "plant" and that the innumerable authorities to which reference has been made disclose a regrettable inability on the part of the judiciary in several jurisdictions to provide one.

The crucial question is posed and the difficulty in answering it explained in the judgment of Stephenson L.J. in the Court of Appeal in Cole Brothers Limited and Phillips 1981 STC. 671 at page 678 in the following terms:-

"What is plant? that is the question that an Inspector of Taxes has had to answer, not for the first time, and that a dissatisfied

"taxpayer has asked the Special Commissioners of Income Tax and more than one Court, again not for the first time, to reconsider in order to answer the question whether this or that or the other is plant.

Parliament has not attempted to put an end, or a limit, to such litigation by defining plant. Many Judges have made the attempt. The more definitions multiply, the less enviable grows the task of Her Majesty's Inspectors of Taxes. If they traverse the whole gamut of reported cases crossing the border into Scotland and the sea to Australia in their search for guidance, they find plant in the most unlikely objects, from a horse to a swimming pool, from a dry dock to a mural decoration. Faced with such applications of the word, all supported by cogent reasoning, they may be pardoned for finding anything or almost anything, to be or not to be plant and may be justified in making any number or almost any number of inconsistent concessions and illogical distinctions. It all depends on the circumstances, especially the work of the particular taxpayer, and (I feel bound to add) on how it strikes the particular Judges of the question, whether in tax administration or on the judicial bench.---- The philosopher statesman, Balfour, is reported to have said it was unnecessary to define a great power because, like an elephant, you recognise it when you meet it. Unhappily plant in taxing and other

"statutes is no elephant (though I suppose an elephant might be plant). It has lost that resemblance to machinery it may once have had and any contrast with buildings or structure is now misleading, however strong the temptation to go back to those simple similarities and differences which the word might have suggested before repeated difficulties of application drove Judges to gloss them over".

It has been said (see Benson Inspector of Taxes .v. Yard Arms Club Limited 1979 STC 268 at 269) that the expression "plant" in the relevant tax code is to be interpreted:-

"As a man who speaks English and understands English accurately but not pedantically would interpret it in (the) context applying it to the particular subject-matter in question in the circumstances of the particular case".

However having quoted that guidance from the decision of Buckley Lord Justice, Lord Hailsham in Dale and Phillips (above) went on to quote from a judgment of the Court of Appeal in that case in the following terms (at page 309):-

"To this admirable precept however Oliver L.J. in delivering the judgment of the Court of Appeal in the instant case warily and perhaps wearily, added the cautionary rider that 'the English speaker must, I think, be assumed to have studied the authorities". Those

"however, as he cautiously admitted in an earlier passage at page 675, cannot be pretended to be at all easy to reconcile and, as he said in a still earlier passage at page 675, "it is now beyond doubt that the word "plant" is used in the relevant section in an artificial and largely judge-made sense".

Indeed if those warnings were not enough, it may be noted that a simple but dramatic revolution took place when section 45 of the Finance Act 1959 extended the wear and tear allowance available in respect of plant and machinery used for the purposes of trade by virtue of Rule 6 of the Rules applicable to cases 1 and 2 of Schedule D to the Income Tax Act 1918 to plant and machinery used for the purpose of a profession. Whilst this amendment was no doubt highly desirable, the fact that the relevant plant and machinery was such as might be used in a profession as well as in a trade must have caused a very considerable revision as to what the man who speaks English accurately would have understood by that term.

The best known definition of "plant" is to be found in the judgment of Lindley L.J. in Yarmouth and France 1887 at 19 Q.B.D. 647. In that judgment (at page 658) he states the position as follows:-

"There is no definition of 'plant' in the Act: but, in its ordinary sense, it includes whatever apparatus is used by a businessman for carrying on his business - not his stock in trade which he makes or

"buys for sale; but all goods and chattels, fixed or moveable, live or dead, which he keeps for permanent employment in his business".

In fact Yarmouth and France was wholly unrelated to fiscal legislation. It concerned the interpretation of a section in the Employers Liability Act 1880. In particular it was necessary for the Court to decide whether or not a horse which injured the Plaintiff was "plant" within the meaning of the relevant section. It was held - applying the definition aforesaid afforded by Lindley L.J. that it was. In practice the Lindley definition has been accepted in the United Kingdom and in other jurisdictions as providing a helpful definition of the word "plant" in legislation similar to that which arises in the instant case. However as the point had not previously arisen here and it is well settled that the scope of a word in one statute may be no guide to the true meaning of that word in another statute, it is important to note that in the case of Breathnach and McCann (in an unreported decision of Mr. Justice McWilliam delivered on the 3rd of October, 1983) it was held that the definition of plant in Yarmouth and France was equally applicable to a definition of plant in tax cases.

The Lindley definition expressly excluded stock-in-trade and, perhaps, it might be said by implication excluded buildings. Indeed in J. Lyons and Co. Limited and Attorney General [1944] Ch. D. Uthwatt J. at page 237 had no hesitation, having accepted the Lindley definition for the purposes

of the legislation which he had under consideration in that case, in going on to say (at page 226/227):-

"The term does not include stock-in-trade nor does it include the place in which the business is carried on".

The question, therefore, which the learned President of the Circuit Court had to decide was whether the poultry-house in question was apparatus used by the Respondent Company in the carrying on of its business of egg production or whether the house in question was the place at which that business was carried on.

The numerous authorities opened to the Court demonstrate the very real difficulty that exists in ascertaining the legal principles to be applied in answering this deceptively simple question. No doubt in the vast majority of cases the distinction between the factory or other premises which houses perhaps numerous employees in some measure of comfort and safety and the plant which the employees operate or supervise there, is quite apparent. Moreover it may be true that in many cases the factory, premises, structure or other designation of the location of the business could be distinguished from the plant or apparatus used in the business by reference to factors including size, cost and durability. However, no such factors have provided any criterion of general application. The massive expenditure incurred in the excavation and construction of dry-docks in

C.I.R. and Barclay, Curle and Co. Ltd. (1969 1 I.L.R. 675) did not, in the circumstances of that case, prevent the dock from constituting plant rather than premises. Similarly, the very substantial dockside silos which were the subject-matter of the decision of the Court of Appeal in Northern Ireland in Schofield .v. R. and H. Hall Limited 49 T.C. 538 were held to constitute plant used in the business rather than the place at which the business was carried on. Indeed even the contention that plant, unlike premises, of necessity played an active part in the business of the tax-payer needs to be qualified by the decision reached in I.R.C. and Newcastle Breweries Limited 1982 S.T.C. 296 where it was held that murals erected in the tax-payers hotel constituted plant and not merely the premises within which the hotel business was carried on. In that case the subtle distinction was made that whilst the murals might form part of the setting of the tax-payers business, the trade involved dealing in that setting inasmuch as it formed part of the atmosphere or ambience which attracted the tax-payers customers.

The decision in Carroll and Dodi 1963 1 I.L.R. 214 that partitions which could be erected or removed so as to adjust the office accomodation available to the tax-payer in that case who carried on the business of shipping agents constituted plant is perhaps surprising at first sight. However, what was pointed out in that case by Pennycuick J. in the High Court

and approved in the Court of Appeal (expressly by Donovan L.J.) was that setting and plant were not necessarily mutually exclusive concepts. You cannot as Donovan L.J. pointed out answer the question "Is this plant?" by asking "Is this part of the setting or not?". That Lord Justice then went on to point out that the Commissioners had made a finding of fact that the partitions were necessary to cope with the vicissitudes of the business carried on by the tax-payer and to that extent were distinguishable from other office accommodation or indeed office accommodation occupied by other tax-payers. Moreover, as was pointed out in St. John's School and Ward 49 T.C. 524 what was under consideration in the Jarrold case was the partitions rather than the premises and that the gymnasium and laboratory which were under consideration there, although prefabricated and susceptible to re-arrangement, would always remain buildings (see the decision of Templeman J. page 532, paragraph (g)).

In addition to the problems which arise by reason of structures which have a dual function, attention has been drawn to cases which demonstrate the difficulty of resolving the problem of what is and is not plant where the item under consideration is composed in part of equipment which is by any criterion plant and in part - and perhaps the greater part - of a structure or building which would appear to be the premises at which the business is carried on. For example, in the Barclay, Curle and Co. Ltd.

case a variety of valves, gates, machinery, pumps and hydraulic capstans were found to be "an integral part of the lock as a functioning entity". Similarly, in Schofield's case the silos consisted in part of a large concrete structure into which were built concrete bins and in part of a smaller structure which was in effect the lift-shaft together with the machinery consisting of gantries , conveyor belts and mobile chutes. In cases of that nature it is possible to approach the problem either by examining the separate items (the piecemeal approach) to see whether or not they constitute plant or alternatively to view the equipment in its entirety (the single entity approach) and evaluate the purpose and function of the equipment on that basis. In Cole Brothers Limited and Phillips 1982 S.T.C. 307 the House of Lords (and in particular Lord Hailsham L.C.) upheld the decision of the Special Commissioners to reject the single entity approach in the circumstances of that case but would not accept - as the Commissioners appear to have implied - that the single entity approach might not be the correct procedure in other circumstances. Indeed it is clear that in the Barclay, Curle case it was applied with very satisfactory results from the tax-payers point of view. In that case what would appear to have been a relatively small proportion of equipment which of its nature was clearly identifiable as plant or machinery when incorporated in a far more substantial structure gave to the entire of the

entity a purpose and function which was itself plant-like. At the end of the day the function and purpose of the dry-docks was to take the ships out of the water and, as Lord Kinclale pointed out in the first division of the Court of Session, "it also acted like a large vice for holding them (the ships) in position while they were repaired or cleaned".

Similarly Lowry, C.J. in Schofield's case saw the silos in question as being "in the nature of a tool in the trade" carried on by the tax-payer and "much more than a convenient setting for the company's operations".

It seems to me that the most helpful statement with regard to the law on this difficult topic and a useful example of how it is applied to the circumstances of a case which bears some similarity to the present is to be found in the Judgment of Kitto J. in the Australian case of Broken Hill Property Company Limited and Commissioner of Taxation 41 A.L.J.R. 377 at 321 in the following terms:-

"....(the word "plant") includes any chattel or fixture which is kept for use in the carrying on of the mining operations, not being (in the case of a building) merely in the nature of a general setting in which a part of those operations are carried on ... I do not include buildings simply because they are places where operations are carried on. I do exclude those which merely provide shelter for persons as they work and for their equipment, e.g. offices, the prefabricated rigid frame

"building which houses the new pipe shop, the construction store, the blacksmith's store, and the painters and lubrication engineers workshop: the change-houses and the works-canteen: but I regard as plant the buildings which are more than convenient housing for working equipment and (considered as a whole, i.e., without treating as separate subjects for consideration the iron roofing and cladding of buildings which are the main structural members or specifically adapted to the needs of the processes to be carried on inside) play a part themselves in the manufacturing processes, e.g. the holding bay for the basic oxygen steel-making installation as well as the very specialised building which because of its inbuilt equipment forms part of that installation, and also the casting pit (but not the slag pit)".

The foregoing extract was cited in full by Lord Lowry then sitting as the Chief Justice in the Court of Appeal (Northern Ireland) in the Schofield case when the statement was approved by him and its reasoning applied to the circumstances of the case then under consideration. I too would adopt the statement of Kitto J. as establishing as far as one can in the many different circumstances which can arise, some principle or criterion to be applied in identifying what is plant particularly where the equipment under consideration consists of or possesses the characteristics of a structure or building.

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Turning then to the facts of the present case, it is clear that the learned President of the Circuit Court had to consider whether the item under consideration, namely, the poultry-house was plant or not. Clearly the house was a building but again as a matter of law that did not preclude the possibility that it was also plant. The learned Judge had to determine whether the "poultry-house" played a part in the manufacturing process of the tax-payer and he concluded that it did. It seems to me that the two crucial findings by the Court in the first instance are contained in paragraph 3 (d) of the case stated in the following terms, the first:-

> "The house is approximately 156 feet long by 36 feet wide and is specially designed to ensure a controlled environment with thermostatically controlled heating and lighting: the walls, roof and floor of the house are an essential feature in securing this controlle environment. Fans are so located in the house as to blow hot air around the inside and extract harmful ammonia fumes".

If the findings of fact had concluded at that point perhaps the proper inference would be that the building in question merely provided a suitable and hygienic setting within which the tax-paper or his employees carried on their work but further on in the same paragraph is to be found the further finding in the following terms:-

> "The entire design is so made up as to create the most conducive and

"efficient environment in which hens will lay eggs and without this design the hens would not lay as many eggs".

It follows that the environment is designed for the benefit of the hens (and not the humans) and for the purpose of increasing the egg production which is in fact the business carried on by the tax-payer. In those circumstances it seems to me that the learned Trial Judge was entitled to find as a fact (or indeed as a matter of degree) that the building in question was plant within the meaning and for the purposes of the Income Tax Acts. It is neither relevant nor appropriate for me to express any view as to whether or not I would have reached a similar conclusion. The authority which was traditionally cited in support of this proposition was the decision of the House of Lords in Edwards and Bairstow 1956 A.C. 14 and was confirmed and approved by Kenny J. when delivering the decision of the Supreme Court in Mara and Hummingbird Limited to which I have already referred.

In the circumstances it seems to me that the question raised in the case to advise should be answered in the affirmative.