Case No: A3/2013/1568

Neutral Citation Number: [2014] EWCA Civ 278

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
Mr Justice Morgan
[2013] UKUT 129 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/03/2014

Before :

LORD JUSTICE RIMER
LORD JUSTICE McCOMBE
and
LORD JUSTICE BRIGGS

- -

Between :

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

- -
- -

Mr David Goy QC and **Ms Aparna Nathan** (instructed by the **Solicitor's Office of HM Revenue & Customs**) for the **Appellants**
Mr William Massey QC (instructed by **Forsters LLP**) for the **Respondents**

Hearing dates: 3 and 4 March 2014

- -

Judgment

Lord Justice Rimer :

Introduction

1. Lord Howard of Henderskelfe died on 27 November 1984. Included in the personal estate that devolved onto his executors was a valuable portrait painted by Sir Joshua Reynolds in about 1775. The picture was of Omai, a South Sea islander. On 29 November 2001, the executors sold the picture at auction at Sotheby's to an unconnected purchaser for a hammer price of £9.4m, from which commission and value added tax totalling £220,900 was deducted. The price represented a substantial gain over the value of the picture at Lord Howard's death 17 years before.

2. The question for us is whether the executors are chargeable to capital gains tax ('CGT') on the gain. The reasonable man would ask: why not? If he had been skilful enough to acquire an iconic picture (as this was) that he was later able to sell for a price representing a gain, he would have to pay CGT. Why should the executors be in a different position?

3. The answer, say the executors, is that although the picture was a valuable asset that was likely to, and did, increase in value, it was deemed by section 44 of the Taxation of Chargeable Gains Act 1992 ('the TCGA') to be a 'wasting asset with a predictable life not exceeding 50 years'. That is because during Lord Howard's lifetime, and also after his death until the sale in 2001, it had been included for exhibition in that part of Lord Howard's residence, Castle Howard, North Yorkshire, that was open to the public. Castle Howard has, since 1950, been owned by Castle Howard Estate Limited ('the company') and still is so owned, and it is the company that ran and runs the trade of so opening the house. In these circumstances, the executors say the picture was 'plant' within the meaning of section 44, and so deemed to be a 'wasting asset' even though, statutory deeming apart, it was nothing of the sort. If they are right, they say it follows from section 45(1) that no chargeable gain accrued on the disposal of the picture in November 2001.

4. The question whether the picture was such a 'wasting asset', and the executors were entitled to the section 45(1) exemption, came for determination before the First-tier Tribunal (Tax Chamber) ('the FTT'). By a decision released on 22 July 2011, the FTT (Judge Radford and Ms Watts Davies) held that the picture was not 'plant', nor therefore a 'wasting asset', with the result that the gain made on its disposal in 2001 was not exempt under section 45(1) from a charge to CGT.

5. The executors appealed to the Upper Tribunal. By a decision released on 11 March 2013, the Upper Tribunal (Tax and Chancery Chamber) (Morgan J) ('the UT') allowed the appeal and held that the picture was 'plant', and was thus a 'wasting asset' the disposal of which enjoyed the CGT exemption provided by section 45(1).

6. With the permission of the UT, the Commissioners of Her Majesty's Revenue and Customs ('HMRC') appeal to this court in a bid to restore the decision of the FTT. Mr Goy QC and Ms Nathan represented HMRC, and Mr Massey QC represented the executors.

More facts

7. I have summarised the essence of the relevant facts. The facts as found by the FTT are set out in [5] of the UT's judgment. The company has carried on the trade of opening part of Castle Howard and its grounds to the public since 1952, and the trade includes the exhibiting of the works of art to the visiting public. Lord Howard owned several works of art. During his life he permitted the company to use many of them, including the picture, for such exhibition. He arranged with the company that it would bear the costs of the insurance, maintenance, restoration and security of the works. There was, however, no formal lease or licence under which the company was permitted to exhibit them, nor was there any provision for the payment by the company to Lord Howard of any hire or rental fee. The arrangement was terminable by Lord Howard at will. Following his death, the executors continued the arrangement on the same terms. The picture was displayed by the company throughout the period of the executors' ownership save for three periods totalling about seven months when it was exhibited in Paris, London and York. Apart from a short period after Lord Howard's death, and the period from 1997 onwards when only two of the three executors were the directors, the executors were the same individuals who were the directors of the company.

8. Following the sale in 2001, the executors' trust and estate return for the tax year ended 5 April 2002 included as a chargeable gain the gain accruing on the disposal of the picture. In June 2003, the executors sought to amend the return on the basis that the disposal was exempt from CGT under section 45(1). This led to an HMRC inquiry into the return, resulting on 30 April 2010 in a closure notice stating that the gain on the disposal was a chargeable gain: that was on the basis that the section 45(1) exemption did not apply because the picture was not 'plant'. That notice led to the appeals to the tribunals below and to this court.

The legislation

9. Section 1 of the TCGA charges tax on chargeable gains accruing to a person on the disposal of assets. The picture was an asset. The amount of any chargeable gain accruing on a disposal is, by section 15, computed in accordance with Part II of the TCGA. Section 16 provides that allowable losses are computed in the same way.

10. Sections 44 and 45, in Part II, under the heading 'Wasting assets', provide:

> '44. Meaning of "wasting asset"
>
> (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.

45. Exemption for certain wasting assets

(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 (b) of section 38(1) [being acquisition and disposal costs]; 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.

(4) Subsection (1) above shall not apply to a disposal of commodities of any description by a person dealing on a terminal market or dealing with or through a person ordinarily engaged in dealing on a terminal market.'

11. Section 46 provides, materially:

'46. Straightline restriction of allowable expenditure

(1) In the computation of the gain accruing on the disposal of a wasting asset it shall be assumed –

(a) that any expenditure attributable to the asset under section 38(1)(a) after deducting the residual or scrap value, if any, of the asset, is written off at a uniform rate from its full amount at the time when the asset is acquired or provided to nothing at the end of its life, and

(b) that any expenditure attributable to the asset under section 38(1)(b) is written off from the full amount of that expenditure at the time when that expenditure is first reflected in the state or nature of the asset to nothing at the end of its life,

so that an equal daily amount is written off day by day. …'

12. Section 47 provides, materially:

'47. Wasting assets qualifying for capital allowances

(1) Section 46 shall not apply in relation to a disposal of an asset –

(a) which, from the beginning of the period of ownership of the person making the disposal to the time when the disposal is made, is used and used solely for the purposes of a trade, profession or vocation and in respect of which that person has claimed or could have claimed any capital allowance in respect of any expenditure attributable to the asset under paragraph (a) or paragraph (b) of section 38(1), or

(b) on which the person making the disposal has incurred any expenditure which has otherwise qualified in full for any capital allowance. …'

(2) In the case of the disposal of 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 for capital allowances –

(a) the consideration for the disposal, and any expenditure attributable to the asset by paragraph (a) or paragraph (b) of section 38(1) shall be apportioned by reference to the extent to which that expenditure qualified for capital allowances,

(b) the computation of the gain shall be made separately in relation to the apportioned parts of the expenditure and consideration,

(c) section 46 shall not apply for the purposes of 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, and

(d) if an apportionment of the consideration for the disposal has been made for the purposes of making any capital allowance to the person making the disposal or for the purpose of making any balancing charge on him, that apportionment shall be employed for the purposes of this section, and

(e) subject to paragraph (d) above, the consideration for the disposal shall be apportioned for the purposes of this section in the same proportions as the expenditure attributable to the asset is apportioned under paragraph (a) above.'

A little history

13. Section 44 of the TCGA derives from paragraph 9 of Schedule 6 to the Finance Act 1965, the Act that introduced CGT; section 46 of the TCGA derives from paragraph 10; and section 47 derives from paragraph 11. The Finance Act 1965 did not, however, include any provision equivalent to section 45. The origin of section 45 is paragraph 1 of Schedule 12 to the Finance Act 1968. As for capital allowances, referred to in section 45(2) and (3) of the TCGA, they have had a long legislative history but were consolidated into the Capital Allowances Act 1968, which came into force prior to the Finance Act 1968. Sections 19, 42 and 43 provide, so far as material:

'19. – (1) Subject to the provisions of this Act, where the person carrying on a trade in any chargeable period has incurred capital expenditure on the provision of machinery or plant for the purposes of the trade, an allowance (in this Chapter referred to as a "writing down allowance") shall be made to him for that chargeable period on account of the wear and tear of any of the machinery or plant which belongs to him and is in use for the purposes of the trade at the end of that chargeable period or its basis period. …

42. – (1) Where machinery or plant is let upon such terms that the burden of the wear and tear thereof falls directly upon the lessor, there shall be made to him, for each chargeable period, an allowance on account of the wear and tear of so much of the machinery or plant as is in use at the end of the chargeable period;

> Provided that if the letting continues for part only of the chargeable period, the allowance, as computed in accordance with the preceding provisions of this Chapter, shall be proportionately reduced.
>
> (2) The provisions of this Chapter shall apply in relation to any such lessor of machinery or plant as is mentioned in subsection (1) of this section as if the machinery or plant were, during the period of the letting, in use for the purposes of a trade carried on by him, and as if any reference to writing-down allowances included a reference to any allowance made under this section.
>
> 43. –(1) Where machinery or plant is let to the person by whom the trade is being carried on, on the terms of his being bound to maintain the same and deliver it over in good condition at the end of the lease, the machinery or plant shall be deemed to belong to that person for the purpose of section 19 of this Act and that person shall be deemed for those purposes to have incurred, at the time of the letting, capital expenditure equal to so much of the capital expenditure on the provision of the machinery or plant as may appear to the inspector to be just and reasonable:
>
> Provided that this subsection shall not apply to any machinery or plant unless the inspector is satisfied, having regard to all the relevant circumstances of the case, that the burden of the wear and tear of the machinery or plant will in fact fall directly upon that person. …'

Sections 19, 42 and 43 substantially reproduce sections 280, 298 and 299 of the Income Tax Act 1952.

14. Paragraphs 9 to 11 of Schedule 6 to the Finance Act 1965 were part of a scheme for computing capital gains that applied to the disposal of 'wasting assets' as defined in paragraph 9, a definition which excluded freehold land and also animals so long as they were immature. Section 44 of the TCGA is in identical terms save that it no longer excludes any animals from the category of wasting assets. Paragraph 9 of course included 'plant and machinery', which 'in every case' it deemed to be wasting assets. By paragraph 10 (now section 46 of the TCGA), the effect of an asset being a wasting asset was that its acquisition cost, and the costs of improvements, had to be written down over the predicted life of the asset, which could not exceed 50 years, starting with the actual acquisition cost and ending with the residual or scrap value. The effect of the writing down requirement was that an asset acquired for more than its disposal price could, upon disposal, still give rise to a charge to CGT. It was, therefore, in the interests of taxpayers to argue that a particular asset was not a wasting asset – meaning a need to demonstrate a predictable life of more than 50 years. That option was, however, closed to those disposing of 'plant and machinery', since 'in every case' that was deemed to have a predictable life of less than 50 years. Paragraph 11 of Schedule 6 (now section 47 of the TCGA) either excluded, or in cases covered by what is now section 47(2) provided (inter alia) for a proportionate reduction of, the application of the writing down provisions to a wasting asset. The effect of the application of paragraph 11(1), now section 47(1), was to limit the chargeable gain on the disposal of the asset to the excess of the disposal consideration over the acquisition cost.

15. The CGT exemption for wasting assets, now in section 45(1) of the TCGA, was first introduced by the Finance Act 1968. The exemption related only to wasting assets which were 'tangible movable property'. It did not apply to fixed assets. There was also, as now in section 45(2) and (3), an exception from the exemption in relation to such assets as had qualified in whole or in part for capital allowances in respect of any expenditure on the assets. The exception reflected the like provisions in paragraph 11 of Schedule 6 to the Finance Act 1965, and now in section 47. The effect of the exception is that, in a case to which it applies, the section 45(1) exemption from CGT is excluded in whole or in part. The likely explanation for the introduction of the exemption was probably not so much with a view to benefiting taxpayers with a new exemption on gains on the disposal of tangible movables as to foreclose their opportunity of achieving allowable losses on such disposals.

The appeal

16. This case is concerned with 'plant and machinery', a phrase which either in that form or in variants ('plant or machinery' and 'machinery or plant') has a long history. It is in particular concerned with 'plant', the classic explanation of which is to be found in *Yarmouth v. France* (1887) 19 QBD 647. The question there was whether a vicious horse owned by an employer was 'plant' within the meaning of section 1(1) of the Employers' Liability Act 1880, a question that had to be answered affirmatively if the employee whose leg the horse had broken was to be entitled to compensation from his employer. Lindley LJ said, at 658:

> '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 movable, live or dead, which he keeps for permanent employment in his business …'.

17. No-one suggested in the tribunals below that the picture was 'machinery' within the meaning of the phrase 'plant and machinery'. What the executors asserted, and HMRC denied, was that the picture was 'plant'. The UT held that, on the facts found by the FTT, the picture was being used for the promotion of the company's trade and that in the company's hands it passed the 'permanence' test referred to by Lindley LJ. Differing from the FTT, the UT held, therefore, that the picture was 'plant' within section 44(1)(c) and thus a deemed 'wasting asset' within the meaning of section 44.

18. Did this entitle the executors to make good their claim that the gain realised on their disposal of the picture in November 2001 was exempted by section 45(1) from being treated as a chargeable gain? The UT held it did. The central argument deployed by HMRC to the UT against that conclusion was that if (which they disputed) the picture *was* 'plant' in the hands of the company whilst used for the purposes of the company's business, it was not plant in the hands of the executors since they carried on no trade or business; and it was said to be of the essence of the right to the claimed exemption that the disposal of the plant must be by the person carrying on the business that used the plant.

19. The UT rejected that submission, saying of it:

> '34. … in the context of the [TCGA], 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.'
>
> And:
>
> 43. … the meaning of plant in section 44(1)(c) of the [TCGA] 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 owner of the asset. … the Painting was plant within section 44(1)(c) of the [TCGA] 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 [TCGA].'

20. In challenging that conclusion, Mr Goy submitted that even if the picture was plant in the hands of the company, it was not plant in the hands of the executors since they were not carrying on the trade that engaged its use. When they sold the picture they were not, therefore, selling any plant, nor therefore were they selling a 'wasting asset' within the meaning of sections 44 and 45(1). It is, he said, central to the interpretation of section 44(1)(c) that the reference to 'plant' is only to plant in the hands of the trader making use of it in a business; and it follows, he said, that the exemption in section 45(1) is conferred only upon a disposal by such trader. In this case, the executors were not the traders, the picture was not plant in their hands and so their disposal fell outside the section 45(1) exemption.

21. Both Mr Goy and Mr Massey acknowledged that the scheme of the legislation inevitably raises potential difficulties in, for example, a case in which there is a significant temporal gap between the use of the plant in a trade and the disposal in question: the TCGA does not cater for such circumstances by, for example, providing any time apportionment provisions. In this case, so far as the factual findings go, there was, however, no significant temporal gap. For all practical purposes, the picture was simply recovered from the company and sold. At the moment of sale, it was no longer being used in the company's business and was therefore, on one view, strictly no longer 'plant', but this will likely be the case in every sale of 'plant', whether the sale is by the trader or, if the trader does not own the plant, its owner. No point was made to us that at the moment of sale the picture had ceased for temporal reasons to be plant. The point made by HMRC was that only a disposal by the trader who had used the asset as plant was capable of enjoying the section 45(1) exemption.

22. Attractively though Mr Goy advanced the argument, I would not accept it. First, whilst it is true that only items used in a trade, profession or vocation can constitute 'plant' within the meaning of section 44(1)(c), and therefore the plant must have been in the possession of the trader whose business it is, I cannot derive from section 44, upon which Mr Goy placed primary reliance, a legislative intention that the only disposal of plant to which the section 45(1) exemption can be claimed to apply is a disposal by the trader who has used the plant. Section 44 does not address that question. That is not surprising because it derives from a provision in the Finance Act 1965 which included no equivalent of section 45(1). All that section 44 tells us is

what a ‘wasting asset’ is. It tells us nothing more that is relevant to the question before us.

23. The assistance that Mr Goy did seek to enlist from section 44 was based on the references in section 44(1)(b) and (3) to ‘… acquired or provided by the person making the disposal.’ The context of those provisions is apparent from the language of the section; and it relates, so far as inquiry is necessary, to the predictable life of an asset and its residual or scrap value at the end of that life. Of course section 44 is concerned not just with ‘plant’, or ‘plant and machinery’, which is deemed to be a wasting asset, but also with other types of wasting asset as well. I see, however, nothing in the language of section 44(1)(b) and/or (3) justifying a conclusion that the only person contemplated by the section as a potential disponor of the asset is the person who has used the asset or, in the case of ‘plant’, is the trader in whose business it was used. On the contrary, and for like reasons to which I shall come when considering the essentially identical provisions of section 45(2), section 47(1) contemplates the possibility of a disposal by a person other than the user or trader.

24. In my view, the critical provision is section 45. This is the section providing the CGT exemption and so it is in this section that Mr Goy must, if he can, identify an intention that, in the case of plant, only disposals by the trader who has used it are disposals capable of enjoying the exemption. In my view, not only is there nothing in section 45 that supports that conclusion, it in fact points away from it.

25. First, section 45(1) plainly includes no *express* limitation of its application to disposals of plant by the trader, as opposed, for example, to disposals by the lessor or licensor of the plant. The focus is not on the identity of the disponor but on the subject matter of the disposal, namely tangible movable property which is a wasting asset. If the picture was plant, it was such an asset.

26. Secondly, section 45(1) shows that there is no such limitation. It applies not just to a disposal of (in this case) the plant, but also to a disposal of ‘an interest’ in the plant. If the executors had sold a half share in the picture, that would have been a disposal of ‘an interest’ in it which would have been within the section 45(1) exemption; and it would have been a disposal by someone other than the trader. How, therefore, can it be said that there is a problem in the enjoyment by the executors of the section 45(1) exemption when they disposed of the picture itself?

27. Thirdly, I agree with Mr Massey that the exceptions from the exemption in section 45(2) and (3) (which it is agreed have, on the facts, no application to this case) show that the exemption was not intended to be confined, in the case of the disposal of plant, to a disposal by the trader. The carefully drafted, generalised language of section 45(2)(a), far from showing that only a disposal by the trader will be one to which section 45(1) is capable of applying, indicates a clear recognition that the disposal may not be by the trader. What it is interested in (with a view to seeing whether the section 45(1) exemption is available) is whether the disponor, whoever he may be, has claimed or could have claimed any capital allowance in respect of expenditure attributable to the asset; and if the disponor is the lessor of the plant, he might have been able to do so under section 42 of the Capital Allowances Act 1968, which was in force when the predecessor of section 45 was first enacted. The language of section 45(2) shows, in my view, that in the case of disposals of plant, the draftsman had in mind that the disponor might be someone other than the trader but

that such disponor could still enjoy the exemption. I regard this as marking the end of HMRC's point that section 45(1) is directed only at disposals by the trader. I consider that there is no substance in the argument.

28. If wrong on that, Mr Goy submitted that the picture was anyway not plant at all. He said its enjoyment by the company was not sufficiently 'permanent' to pass Lindley LJ's test of plant in *Yarmouth v. France*. The company had at most a precarious right to use it, one that was terminable at will by the executors. That, he said, did not give the picture the requisite degree of permanence for it to be characterised as plant.

29. In my view, there is nothing in this either. Lindley LJ, when referring to plant as apparatus kept for 'permanent employment' in the business, was simply contrasting it with the circulating nature of a trader's stock in trade, which the trader buys and sells. He was not purporting to identify the type of tenure of the putative plant to which the trader must be entitled in order for it to qualify as plant. It is true that, formally, the company's tenure was terminable at will. In fact, the company had had the use of the picture from 1952 to 2001; and, as the UT put it:

> '24. … 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.'

30. There was no error of law in the UT's conclusion that the company had a sufficient interest in the picture for it to qualify as plant. Counsel agreed that the question has to be answered by looking at the matter prospectively rather than retrospectively with the benefit of hindsight, and I would agree with them. In this case, if one takes the death of Lord Howard in 1984 as the relevant starting point, the findings were that the company's understanding was that the picture could be used by it in its trade for an indefinite period. I do not understand why that did not give the company a sufficient interest in the picture for it to be classified as plant.

31. Mr Goy's third point was that there was no relevant identity between the interest in the plant held by the company and the interest in the asset sold by the executors. It was, he said, only if the interests held and sold were identical that the executors could claim the CGT exemption. He submitted that there was no such identity of interest here because the only plant to which the company was entitled was a limited *interest* in the picture (i.e. one terminable at will), whereas what the executors sold was the picture itself.

32. There is in my view nothing in this either. The plant kept by the company for use in its trade was not such a limited interest, it was the picture itself. A limited interest in a chattel cannot constitute plant. There was, therefore, a complete identity between the asset used by the company and the asset sold by the executors. In any event, the submission that there needs to be such identity of interest is mistaken. Section 45(1) shows that the disposal of a limited interest in plant held by the trader will entitle the disponor to the exemption.

33. Finally, Mr Goy submitted that the picture could not be 'plant' within the meaning of section 44 because the section contemplates that what is plant is an asset with a

limited life that wastes away with use. An 'old master' such as the picture, which on its 226th birthday proves to be worth £9.4m, cannot fit such a description.

34. This was a new point not argued below. I would reject it. The problem with it is that what is 'plant' is not identified by the predictable life of a chattel. It is identified by whether or not the chattel passes the *Yarmouth v. France* test; and an item is capable of doing so whatever its predictable life. Once an item qualifies as 'plant', it is '*in every case'* deemed by section 44(1)(c) to be a wasting asset; and for HMRC to argue that an item of plant enjoying unusual longevity is not plant at all is to advance an argument that the section expressly excludes and which amounts to no more than a pointless beating of the air. On the facts of this case, section 44 may have proved inconvenient to HMRC. They must, however, take the rough with the smooth; and this case may be an example of the rough.

35. I record finally that it was part of Mr Goy's submissions that there is a distinction between 'plant' and 'machinery' in the phrase 'plant and machinery' in section 44(1)(c). Whereas a chattel other than one in the nature of machinery will only be plant if it passes the *Yarmouth v. France* test, an item of 'machinery' will be deemed to be a wasting asset whether or not it is plant. Whilst we do not have to decide that point, nor am I deciding it, I do at least express my provisional surprise at the proposition. I would regard it as tolerably obvious that 'plant and machinery' is a composite phrase and that the *Yarmouth v. France* test applies to all of it.

36. I would dismiss HMRC's appeal.

Lord Justice McCombe :

37. I agree with both judgments.

Lord Justice Briggs :

38. I also agree. It is, and despite these judgments will probably remain, surprising to those unfamiliar with the workings of Capital Gains Tax, that a famous Old Master like Omai should qualify for exemption from tax on the ground that it is either 'plant' or a wasting asset, with a deemed predictable life of less than 50 years. But this is the occasional consequence of the working of definitions and exclusions which, while aimed successfully at one potential inroad into the charge to tax, unavoidably allow others by what the legislators appear to permit as an acceptable if unwelcome side-wind. Section 263 TCGA provides that passenger road vehicles are not chargeable assets, and its predecessor did from 1965. The intended result was to prevent the disposals of assets like cars which almost always deteriorate in value from generating allowable losses but, as Mr Goy ruefully acknowledged, the result is that a tiny number of owners of fabulously valuable classic cars enjoy a tax free gain when they dispose of them in a rising collectors' market. The public purse takes the rough with the smooth, as Rimer LJ has said.

39. In such cases it is essential to address an issue of interpretation not by reference to the oddball example, like an Old Master used as plant, or by the vintage car rather than the deteriorating hatchback, but by focusing upon the purpose for which the provision being construed was introduced. In the present case the reference to 'plant and machinery' in what is now section 44(1)(c) was introduced in 1965 for a limited

purpose which had nothing to do with exemption from chargeable gains, or even exclusion of allowable losses. It was simply designed to prevent those disposing of plant and machinery from seeking to argue that, because it had a predictable life of more than 50 years, the computation of gains or losses on its disposal should admit the deduction of the full acquisition cost, rather than the written down cost attributable to wasting assets. Thus for example, the dry-dock held to be plant in *Commissioners of Inland Revenue v Barclay, Curle & Co* (1969) 45 TC 221 had a predictable life of 80 to 100 years, but a disposal of it would (but for the availability of capital allowances) have attracted the writing down of its acquisition cost over 50 years, even after the section 45 exclusion was introduced in 1968, because it was not a tangible movable.

40. The central problem with Mr Goy's main argument is that it is impossible in my view to see why the legislature should have wanted to treat a disposal of such an asset differently, depending upon whether the disposer was or was not the person actually using it as part of its trade. The dry-dock might be acquired or built by a holding company and leased to, or licensed for use by, an operating subsidiary or an unconnected third party. Why should the holding company (on Mr Goy's case) be able to use the full acquisition cost, on the basis that the dry dock was not plant, whereas a company which had both acquired and used the asset be restricted to an acquisition cost written down over 50 years, on the basis that it was plant? The asset would be plant in both cases.

41. The distinction proposed by Mr Goy becomes no more explicable once movable plant and machinery became swept up in the section 45 exemption for wasting assets in 1968. Fixed plant and machinery continued to be subjected to the writing down of acquisition cost just as before, since section 45 only applies to tangible movables. Furthermore the real reason for what is called in section 45 an exemption from chargeable gains was, as the editors of Whiteman and Sherry on Capital Gains Tax (5th ed.) say at para 8-81, (and counsel did not suggest otherwise), not a kindly disposition by the government of the day to allow the very occasional gainer from the disposal of a wasting asset to keep the gain tax-free, but to stop the widespread disposal of movable wasting assets generating allowable losses: see section 16(2) of the TCGA. Again, it is hard to envisage any reason why the owner of plant should be prohibited from doing so if he used the asset himself in trade, but permitted to do so if he leased or licensed the same asset to a trade user. The fact that, in this wholly extraordinary case, section 45(1) exempts a large gain from charge rather than prohibits the generation of an allowable loss merely obstructs a purposive analysis.

42. For those reasons, as well as the detailed analysis provided by Rimer LJ with which I entirely agree, I would dismiss this appeal.