Neutral Citation Number: [2022] EWCA Civ 1076

Case No: CA-2021-000620

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
Mr Justice Adam Johnson and Upper Tribunal Judge Jonathan Richards
[2021] UKUT 59 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2022

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE NEWEY
and
LADY JUSTICE WHIPPLE

- -

Between:

INMARSAT GLOBAL LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

Kevin Prosser QC and Barbara Belgrano (instructed by **Stephenson Harwood LLP**) for the **Appellant**
Michael Gibbon QC, Richard Vallat QC and Ronan Magee (instructed by **The General Counsel and Solicitor to HM Revenue and Customs**) for the **Respondents**

Hearing dates: 21 and 22 June 2022

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.
The date and time for hand-down is deemed to be 14:00 on 28 July 2022

Lord Justice Newey:

1. What is at issue in these proceedings is whether the appellant, Inmarsat Global Limited ("Inmarsat"), is entitled to capital allowances on costs incurred by the International Maritime Satellite Organisation ("IMSO"), to whose trade Inmarsat has succeeded, on the launch of certain satellites. The case raises questions as to the interpretation and application of sections 61(4) and 78 of the Capital Allowances Act 1990 ("the 1990 Act") and how those provisions interact.

Facts

2. IMSO was established by the Convention on the International Maritime Satellite Organization (INMARSAT) ("the Convention") which was entered into on 3 September 1976 and came into force on 16 July 1979. IMSO was headquartered in the United Kingdom and was a body corporate for United Kingdom tax purposes, but by the Inmarsat (Immunities and Privileges) Order 1980 it was exempt from taxes on income and gains.

3. The present proceedings concern three "second generation" (or "I-2") and three "third generation" (or "I-3") satellites which IMSO commissioned and launched in the course of its trade of operating a telecommunications satellite system. As the Upper Tribunal ("the UT") explained in paragraph 6 of its decision, the same basic contractual structure applied in relation to all six satellites:

> "(1) IMSO entered into agreements (the 'Construction Contracts') with a satellite construction company (British Aerospace Plc in the case of the I-2 Satellites and General Electric Technical Services Company Inc in the case of the I-3 Satellites) for the construction and sale of the Satellites.
>
> (2) However, IMSO never took delivery of the Satellites pursuant to those contracts. Instead financial lessors ('Lessors') ([North Sea Marine Leasing Company ('NSM')] in the case of the I-2 Satellites and [Abbey National December Leasing (3) Limited ('Abbey')] in the case of the I-3 Satellites) obtained, by means of novation, the benefit and burden of relevant aspects of the Construction Contracts so that the Lessors obtained the right to delivery of the Satellites and the obligation to pay for them.
>
> (3) The Lessors agreed to lease the Satellites to [IMSO] in return for periodic rental payments (the 'Leases'). The intentional ignition of any first stage engine of the launch vehicle would trigger the commencement of the term of the Leases.
>
> (4) The Satellites were entirely useless for their intended purposes until they were launched into orbit …. Accordingly, IMSO entered into contracts for the launch of the Satellites with various parties. IMSO paid the launch costs under those contracts."

4. The launch contracts in respect of the I-2 satellites were entered into before the contract for their construction was novated in favour of NSM. In contrast, the launch contracts relating to the I-3 satellites were concluded only after Abbey had acquired the benefit of the construction contract and agreed to lease the satellites to IMSO.

5. The UT said in paragraph 8 of its decision:

> "It is reasonable to infer that at some point after it entered into its final launch contract for the I-2 Satellites, on 31 March 1988, IMSO realised that its chosen structure would be inefficient from a tax perspective. IMSO, as a tax-exempt body, could not benefit from the significant capital allowances that capital expenditure on the Satellites would attract. By contrast, if that capital expenditure was incurred by Lessors, who were subject to tax, the Lessors could set capital allowances on the Satellites against their other tax liabilities or those of their respective groups with the tax benefit of those capital allowances shared with IMSO in the form of reduced lease rental payments. Accordingly, the decision was taken to novate the Construction Contracts to the Lessors, which would enable the Lessors to claim capital allowances on the costs of acquiring the I-2 Satellites and to enter into the Leases. The result of this change of course was that, at the time the Lessors became party to the arrangements relating to the I-2 Satellites, IMSO was already party to launch contracts."

6. The I-2 satellites were launched on dates between October 1990 and December 1991. The I-3 satellites were launched on various dates in 1996.

7. NSM and Abbey claimed capital allowances on the expenditure they incurred in acquiring the satellites for their (actual or deemed) leasing trades. No such allowances were, however, claimed in respect of the launch costs, those costs having been incurred and paid by IMSO and forming no part of the leasing arrangements.

8. In 1999, Inmarsat acquired the business and assets of IMSO's trade in exchange for shares in Inmarsat. As part of these arrangements, Inmarsat gained the benefit and burden of the satellite leases pursuant to novation agreements. It is common ground that Inmarsat thereby succeeded to IMSO's trade for the purposes of section 78 of the 1990 Act.

9. Following the succession, Inmarsat sought to claim writing-down allowances in relation to the launch costs which IMSO had incurred. The parties having been unable to agree on the claims, the question whether Inmarsat is entitled to capital allowances in respect of the satellites was eventually the subject of a reference to the First-tier Tribunal ("the FTT"). The FTT (Judge Kevin Poole) answered the question in favour of HM Revenue and Customs ("HMRC"), and the UT (Adam Johnson J and Upper Tribunal Judge Jonathan Richards) dismissed an appeal by Inmarsat. Inmarsat now, however, challenges the decisions of the FTT and UT in this Court.

The statutory framework

10. The statutory regime governing capital allowances is nowadays embodied in the Capital Allowances Act 2001. For the purposes of this judgment, however, I shall take the law to be as it was when IMSO's business was transferred to Inmarsat in 1999. At that stage, the law relating to capital allowances was primarily to be found in the 1990 Act.

11. Under the 1990 Act, a person who has incurred capital expenditure on machinery or plant for the purposes of their trade can potentially qualify for capital allowances. The allowances can be of two kinds: first-year allowances and writing-down allowances. Provision for the latter is made in section 24 of the 1990 Act, which is in chapter I of part II of the Act. Section 24 establishes a regime under which a person can become entitled to an allowance equal to 25% of the difference between "qualifying expenditure" and any relevant "disposal value". So far as relevant, section 24 provides:

> "**24. Writing-down allowances and balancing adjustments.**
>
> (1) Subject to the provisions of this Part, where—
>
> > (a) a person carrying on a trade has incurred capital expenditure on the provision of machinery or plant wholly and exclusively for the purposes of the trade, and
> >
> > (b) in consequence of his incurring that expenditure, the machinery or plant belongs or has belonged to him,
>
> allowances and charges shall be made to and on him in accordance with the following provisions of this section.
>
> …
>
> (2) … for any chargeable period for which a person within subsection (1) above has qualifying expenditure which exceeds any disposal value to be brought into account in accordance with subsection (6) below, there shall be made to him—
>
> > (a) unless the period is the chargeable period related to the permanent discontinuance of the trade, an allowance ('a writing-down allowance') equal to—
> >
> > > (i) 25 per cent of the excess, or
> > >
> > > (ii) …
> >
> > (b) if the period is the chargeable period related to the permanent discontinuance of the trade, an allowance ('a balancing allowance') equal to the whole of the excess.

…

(5) For any chargeable period for which a person's qualifying expenditure is less than the disposal value which he is to bring into account, there shall be made on him a charge ('a balancing charge'), and the amount on which the charge is made shall be an amount equal to the difference.

(6) … the disposal value to be brought into account by a person for any chargeable period is the disposal value of all machinery or plant—

(a) on the provision of which for the purposes of the trade he has incurred capital expenditure; and

(b) which belongs to him at some time in the chargeable period; and

(c) in respect of which, in the chargeable period, one of the following events occurs, namely—

(i) the machinery or plant ceases to belong to him;

(ii) he loses possession of the machinery or plant in circumstances where it is reasonable to assume that the loss is permanent or, in the case of machinery or plant which was in use for mineral exploration and access, he abandons the machinery or plant at the site where it was in use for that purpose;

(iii) the machinery or plant ceases to exist as such (as a result of destruction, dismantling or otherwise);

(iv) the machinery or plant begins to be used wholly or partly for purposes which are other than those of the trade;

(v) the trade is permanently discontinued (or is treated by virtue of any provision of the Tax Acts as permanently discontinued);

and that is the first such event to occur …."

12. "Disposal value" is explained in section 26 of the 1990 Act as follows:

"**26. The disposal value.**

(1) Subject to subsection (2) below, for the purposes of section 24 the disposal value of any machinery or plant depends upon

the event by reason of which it falls to be taken into account and—

(a) unless paragraph (b) below applies, if that event is the sale of the machinery or plant, equals the net proceeds to the person in question of the sale, together with any insurance moneys received by him in respect of the machinery or plant by reason of any event affecting the price obtainable on the sale, and, so far as it consists of capital sums, any other compensation of any description so received,

(b) if that event is the sale of the machinery or plant at a price lower than that which it would have fetched if sold in the open market, and otherwise than in circumstances such that—

(i) the buyer's expenditure on the acquisition of the machinery or plant can be taken into account in making allowances to him under this Part or under Part VII and the buyer is not a dual resident investing company which is connected with the seller within the terms of section 839 of the principal Act, or

(ii) there is a charge to tax under Schedule E,

equals the price which the machinery or plant would have fetched if sold in the open market,

(c) if that event is the demolition or destruction of the machinery or plant, equals the net amount received by the person in question for the remains of the machinery or plant, together with any insurance moneys received by him in respect of the demolition or destruction and, so far as it consists of capital sums, any other compensation of any description so received,

(d) if that event is the permanent loss of the machinery or plant otherwise than in consequence of its demolition or destruction, equals any insurance moneys received by him in respect of the loss, and, so far as it consists of capital sums, any other compensation of any description so received,

(e) if that event is the permanent discontinuance of the trade before the occurrence of an event within paragraph (a), (b), (c) or (d) above, is the same as the disposal value specified for the last-mentioned event,

…

> (f) in the case of any other event, equals the price which the machinery or plant would have fetched if sold in the open market at the time of the event.
>
> (2) The disposal value of any machinery or plant shall in no case exceed the capital expenditure incurred by the person in question on the provision of the machinery or plant for the purposes of the trade reduced by the aggregate amount of any additional VAT rebates made to him in respect of any of that capital expenditure ….”

13. Chapter VI of part II of the 1990 Act contains specific provisions in respect of fixtures. As section 51(1) explains, the chapter applies “to determine entitlement to an allowance under this Part in respect of expenditure on the provision of machinery or plant which is so installed or otherwise fixed in or to a building or any other description of land as to become, in law, part of that building or other land”.

14. Chapter VII of part II of the 1990 Act, headed “Miscellaneous expenditure”, includes section 61, dealing with “Machinery and plant on lease”. Section 61(4) states:

> “Where—
>
> (a) a lessee incurs capital expenditure on the provision for the purposes of a trade carried on by him of machinery or plant which he is required to provide under the terms of the lease, and
>
> (b) the machinery or plant is not so installed or otherwise fixed in or to a building or any other description of land as to become, in law, part of that building or other land,
>
> then, if the machinery or plant would not otherwise belong to him, the machinery or plant shall be treated for the purposes of this Part as belonging to him for so long as it continues to be used for the purposes of the trade; but, as from the determination of the lease, section 24(6) shall have effect as if the capital expenditure on providing the machinery or plant had been incurred by the lessor and not by the lessee.
>
> In relation to any lease entered into before 12th July 1984, and any lease entered into after 11th July 1984 pursuant to an agreement made before 12th July 1984, this subsection shall have effect with the omission of the words from ‘and’ (where it first occurs) to ‘belong to him’.”

By section 61(8), “lease” “includes an agreement for a lease where the term to be covered by the lease has begun” and “‘lessee’ and other cognate expressions shall be construed accordingly”.

15. The other provisions of the 1990 Act which are of particular relevance to the present appeal are to be found in chapter VIII of part II, which comprises sections 73-83 and is headed "Supplementary provisions". Sections 77 and 78 are concerned with succession to a trade. Section 77 is in point where "a person (referred to … as 'the successor') has succeeded to a trade which was until that time carried on by another person (referred to … as 'the predecessor')" and "the two persons are connected with each other". In such a case, the predecessor and successor may elect for machinery or plant to "be treated as sold by the predecessor to the successor at a price which does not give rise to a balancing allowance or balancing charge". In that respect, section 77 provides:

> "(4) In the event of an election under subsection (3) above—
>
> > (a) for the purpose of making allowances and charges under this Part, any machinery or plant which—
> >
> > > (i) immediately before the time when the succession took place, belonged to the predecessor and was in use for the purposes of the trade; and
> > >
> > > (ii) immediately after that time, belonged to the successor and was in use for those purposes,
> >
> > shall (notwithstanding any actual sale or transfer) be treated as sold by the predecessor to the successor at a price which does not give rise to a balancing allowance or balancing charge; and
> >
> > (b) allowances and charges shall be made under this Part to or on the successor as if everything done to or by the predecessor had been done to or by the successor."

16. Section 78 of the 1990 Act applies where there has been no election under section 77. So far as material, it provides:

> "**78. Succession to trades where no election made under section 77.**
>
> (1) Where a person succeeds to any trade which until that time was carried on by another person and, by virtue of section 113 or 337(1) of the principal Act [i.e. the Income and Corporation Taxes Act 1988] (changes in persons carrying on a trade, and special rules for corporation tax), the trade is to be treated as discontinued, any property which, immediately before the succession takes place, was either in use or provided and available for use for the purposes of the discontinued trade and, without being sold, is, immediately after the succession takes place, either in use or provided and available for use for

> the purposes of the new trade shall, for the purposes of this Part be treated as if—
>
> > (a) it had been sold to the successor when the succession takes place, and
> >
> > (b) the net proceeds of the sale had been the price which that property would have fetched if sold in the open market;
>
> but no first-year allowance shall be made by virtue of this subsection.
>
> (2) Where a person succeeds to a trade as a beneficiary under the will or on the intestacy of a deceased person who carried on that trade and the beneficiary by notice to the inspector so elects, then, in relation to any machinery or plant which passes to him together with the trade, being machinery or plant—
>
> > (a) previously owned by the deceased person, and
> >
> > (b) either used or provided and available for use by him for the purposes of that trade,
>
> the reference in subsection (1) above to the price which the machinery or plant would have fetched if sold in the open market shall, in relation to the succession and any previous succession occurring on or after the death of the deceased, be deemed to be a reference to that price or, if it is less than that price, any excess of qualifying expenditure over disposal value which would have been taken into account under sections 24, 25 and 26 for making an allowance for the chargeable period related to the permanent discontinuance of the deceased person's trade if the machinery or plant had had no disposal value …."

17. Sections 113 and 337(1) of the Income and Corporation Taxes Act 1988, to which there is reference in section 78 of the 1990 Act, address respectively a change in the persons carrying on a trade (section 113) and companies beginning or ceasing to carry on a trade (section 337(1)). Section 337(1), which it is common ground applied in the present case, reads:

> "Where a company begins or ceases to carry on a trade, or to be within the charge to corporation tax in respect of a trade, the company's income shall be computed as if that were the commencement or, as the case may be, discontinuance of the trade, whether or not the trade is in fact commenced or discontinued."

18. Reverting to the 1990 Act, section 81 concerns, among other things, the position where a trader uses machinery or plant which was the subject of a gift. So far as material, section 81 provides:

> "**81.— Effect of use after user not attracting capital allowances, or after receipt by way of gift.**
>
> (1) … where a person—
>
> > (a) …
> >
> > (b) brings into use for the purposes of a trade carried on by him machinery or plant which belongs to him in consequence of a disposition by way of gift,
>
> sections 24, 25 and 26 shall have effect as if that person had incurred capital expenditure on the provision of the machinery or plant for the purposes of the trade in the chargeable period related to its bringing into use for those purposes, the amount of that expenditure being taken as the price which the machinery or plant would have fetched if sold in the open market on the date when it was so brought into use, and the machinery or plant being treated as belonging to that person in consequence of his having incurred that expenditure.
>
> …
>
> (2) Where subsection (1) above applies, the question whether the provision of the machinery or plant is to be taken to be wholly and exclusively or only partly for the purposes of the trade shall be determined according to whether the use referred to in paragraph … (b) of that subsection is wholly and exclusively or only partly for those purposes …."

19. There was also reference in submissions to provisions relating to contributions which are contained in part VIII of the 1990 Act, headed "Supplementary provisions". Section 154 states:

> "**154. Allowances in respect of contributions to capital expenditure.**
>
> (1) Where a person, for the purposes of a trade carried on or to be carried on by him or by a tenant of land in which he has an interest, contributes a capital sum to expenditure on the provision of an asset, being expenditure which … would have been regarded as wholly incurred by another person and in respect of which, apart from that section, an allowance would have been made under Part I, IV or V, then, subject … to the following provisions of this section, such initial allowances and writing-down allowances, if any, shall be made to the contributor as would have been made to him if his contribution

> had been expenditure on the provision, for the purposes of that trade, of a similar asset.
>
> (2) Subsection (1) above shall have effect as if—
>
>> (a) the reference to expenditure in respect of which an allowance would have been made under Part I included a reference to expenditure in respect of which a first-year allowance would have been made under Part II or which would have been taken into account in determining qualifying expenditure for the purpose of any allowance or charge under section 24; and
>>
>> (b) the reference to the making to the contributor to expenditure on the provision of an asset of such initial and writing down allowances as would have been made to him if his contribution had been expenditure on the provision of a similar asset included a reference to his being treated under Part II as if his contribution had been expenditure on the provision of that asset;
>
> and for the purposes of any allowance under Part II given by virtue of subsection (1) above in respect of any asset, that asset shall be treated as belonging to the person making the contribution in respect of which the allowance is given at any time when it belongs, or is treated under Part II as belonging, to the recipient of the contribution …."

20. Section 155 of the 1990 Act, which has effect where section 154 applies, lays down further rules relating to capital contributions. Section 155(3) provides:

> "Where, when the contribution was made, the trade for the purposes of which it was made was carried on or to be carried on by the contributor, the following provisions shall have effect on any transfer of the trade or any part of the trade—
>
>> (a) where the transfer is of the whole trade, writing-down allowances for chargeable periods ending after the date of transfer shall be made to the transferee, and shall not be made to the transferor,
>>
>> (b) where the transfer is of part only of the trade, paragraph (a) above shall have effect with respect to so much of the allowance as is properly referable to the part of the trade transferred."

<u>Inmarsat's case in brief outline</u>

21. Inmarsat's case is that it is entitled to writing-down allowances in relation to IMSO's expenditure on launch costs by virtue of sections 61(4) and 78 of the 1990 Act. It contends that, in paying those costs, IMSO incurred capital expenditure "on the

provision for the purposes of a trade carried on by [it]" of the satellites "which [IMSO was] required to provide under the terms of [their leases]" and, hence, that the satellites were to be "treated … as belonging to [IMSO]" pursuant to section 61(4). When, Inmarsat maintains, it acquired IMSO's business and assets in 1999, it succeeded to IMSO's trade for the purposes of section 78, with the result that property used for the purposes of IMSO's trade, including its deemed interest in the satellites, was to be "treated as if … it had been sold to" Inmarsat. That being so, Inmarsat was to be treated as having expended the open market value of the interest on acquiring it, and the interest was to be treated as belonging to Inmarsat in consequence of that expenditure. It follows, so the argument runs, that the requirements of section 24 were met and Inmarsat qualified for writing-down allowances.

The issues

22. In paragraph 28 of its decision, the UT identified the following issues as arising between the parties:

> "(1) Issue 1 - Whether s78 of CAA1990 [i.e. the 1990 Act] applied to deem IMSO to sell the Satellites to Inmarsat and, if so, with what effect.
>
> (2) Issue 2 - Whether IMSO incurred the launch costs 'on the provision of … plant' for the purposes of s61(4).
>
> (3) Issue 3 - Whether the other requirements of s61(4) of CAA1990 were satisfied so as to deem the Satellites to belong to IMSO as at 15 April 1999. That can be broken down into the following sub-issues:
>
>> (a) Issue 3(a) – whether there was any 'requirement' of the Leases for IMSO to 'provide' the Satellites.
>>
>> (b) Issue 3(b) – whether the fact that IMSO incurred launch costs before the terms of the Leases commenced failed to satisfy the 'chronological flow' of s61(4).
>>
>> (c) Issue 3(c) – whether the 'tailpiece' of s61(4) applied and, if so, with what consequence"

The decisions below

The FTT

23. The FTT decided Issue 1 in favour of HMRC. Judge Poole said in paragraph 59 of his decision:

> "Given the fact that (as the parties agreed) the draftsman [of section 78(1) of the 1990 Act] assumed (without feeling it necessary to state explicitly) that the assets would have belonged to the predecessor before the succession, I consider that the same implicit assumption is made in respect of the

> successor, so that the provisions only apply where the assets in question actually belong (or, potentially, are deemed by some other provision to belong) to the successor after the succession."

Judge Poole went on in paragraph 60:

> "It follows that since it is common ground the Satellites did not actually belong to Inmarsat after the succession on 15 April 1999, and I have been referred to no other provision which would confer on it a 'deemed' belonging of them, I do not consider s 78(1) operates in the way [counsel for Inmarsat] submits so as to confer entitlement to writing down allowances on Inmarsat based on the market value of the Satellites at the time of the succession on 15 April 1999."

24. On that basis, as Judge Poole noted in paragraph 61, it did not matter whether Inmarsat's contentions on section 61(4) of the 1990 Act were accepted, but he nevertheless proceeded to consider them. With regard to Issue 2, Judge Poole concluded in paragraph 67:

> "I do not consider IMSO to have incurred capital expenditure (in the form of its costs of launching the Satellites) on the provision for the purposes of its trade of those Satellites and … accordingly s 61(4) cannot assist Inmarsat's case, even if I am wrong about s 78(1) above."

In the previous paragraph, Judge Poole had said:

> "I acknowledge [counsel for Inmarsat's] argument that the Satellites were entirely useless for their intended purpose until they had been launched into orbit, however the question before me is whether IMSO incurred capital expenditure (in the form of the launch costs) 'on the provision for the purposes of a trade carried on by [it] of machinery or plant…'. Here I agree essentially with [counsel for HMRC's] argument. Any 'provision of plant' must have at its heart the plant itself; simply moving someone else's plant from A to B (even if B is the place at which it is to operate in your trade, and however complex and expensive the process of movement may be) cannot in my view amount to the 'provision' of that plant. All the cases to which I was referred were concerned with ancillary costs associated with an acquisition (or, in the case of *CIR v George Guthrie and Son* (1952) 33 TC 327, a proposed acquisition) of the plant itself (or of the materials from which the plant was to be created), and none of them would have had in mind a situation such as the present."

25. Turning to Issue 3(a), Judge Poole considered that a distinction fell to be drawn between the I-2 and I-3 satellites. So far as the I-2 satellites were concerned, clause 6 of the agreement to acquire and lease dated 28 September 1988 between NSM and

IMSO, with which the master lease agreement required IMSO to comply, included an undertaking by IMSO that it would "use all reasonable endeavours to achieve Successful Injection and Satisfactory Operation in a timely fashion". Judge Poole said in paragraph 104 that he agreed with counsel for Inmarsat that it was "necessary, in order to comply with that obligation, to incur the costs involved in procuring the launch services for those Satellites". Judge Poole continued, however:

> "One must remember … that the statutory language of s 61(4) refers to a lessee who 'incurs capital expenditure on the provision… of machinery or plant which he is required to provide under the terms of the lease'. On the basis of the reasoning set out at [66] above, I do not consider that expenditure incurred on launch costs can, in a case such as the present, be equated to expenditure incurred 'on the provision of' the Satellites themselves. Therefore, in spite of the existence of a specific obligation, I do not consider the nature or subject matter of the obligation to be of the right sort to fall within s 61(4)."

26. The documentation in respect of the I-3 satellites contained nothing comparable to clause 6 of the agreement to acquire and lease dated 28 September 1988 between NSM and IMSO, but Mr Kevin Prosser QC, who was appearing with Ms Barbara Belgrano for Inmarsat, as he also did before us, argued that a "requirement to provide" arose from a covenant in the master lease agreement dated 20 December 1991 to "satisfy all Pertinent Laws". Judge Poole rejected that submission, observing in paragraph 101 of his decision:

> "I cannot accept that a generalised obligation to comply with all relevant laws can be treated in the way Mr Prosser argues as giving rise to a specific obligation to incur expenditure on launching six specific satellites."

27. Judge Poole also decided Issue 3(b) in favour of HMRC. He said in paragraph 111 of his decision:

> "S 61(4) starts by referring to a 'lessee' incurring capital expenditure on the provision of machinery or plant, and it must be machinery or plant 'which he is required to provide under the terms of the lease'. It seems to me that there is a natural chronological flow about this provision, which necessarily implies that the lease must be in existence before the capital expenditure is incurred. This view is reinforced by the fact that the draftsman has felt it necessary, in s 61(8), to extend the provision so as to apply where there is an agreement for lease (but only where the agreed term of the lease has already begun), rather than an immediately effective lease. If Mr Prosser's argument were correct, this provision would effectively be unnecessary."

28. Turning finally to Issue 3(c) and the significance of the "tailpiece" of section 61(4) of the 1990 Act, Judge Poole concluded in paragraph 118:

> "whilst I do not consider the arguments around the tailpiece to be potentially determinative of the proceedings in their own right, I do consider that they feed into the analysis of s 78(1) set out at [59] above in favour of [counsel for HMRC's] view".

The UT

29. The UT differed from Judge Poole on Issues 2, 3(a) and 3(b), but agreed with him on Issue 1 and so upheld his decision.

30. The UT's conclusion on Issue 1 can be seen from paragraph 56 of its decision, where it said:

> "we prefer HMRC's interpretation of s78 to the effect that the section has no application in relation to a successor such as Inmarsat unless it becomes the actual owner of the relevant asset with s78 fixing, in such a case, the amount of expenditure on which the successor can claim plant and machinery allowances".

The UT had observed in paragraph 50:

> "The obvious objection to Inmarsat's argument is that s78 says nothing express about whether the successor satisfies the 'belonging' requirement. Moreover, in deeming the transaction to be a 'sale' and in specifying the 'net proceeds' of that sale, s78 appears to be focusing on the disposal event to be brought in for the predecessor, rather than the tax treatment of the successor."

The UT then addressed in turn arguments advanced on behalf of Inmarsat, explaining why it was not persuaded by them.

31. With regard to Issue 2, the UT said in paragraph 74:

> "if IMSO had been the owner, rather than merely a lessee of the Satellites, we do not consider that there could be much doubt that the launch costs it incurred would have been 'expenditure on the provision of' the Satellites given the FTT's finding that the Satellites were of no use whatsoever until they were launched into orbit".

The UT explained in paragraph 75 that HMRC argued that "the fact that the Satellites did not belong to IMSO makes all the difference", but it was not convinced. The UT commented in paragraph 76:

> "In effect that argument involves an assertion that IMSO's status as a person who did not own the Satellites converted expenditure that would, if incurred by an owner, have been on the 'provision' of those Satellites into expenditure that was not on provision. That involves a focus on IMSO rather than on the nature of the expenditure, contrary to Lord Wilberforce's

> approach as set out in *Ben-Odeco* [*Ltd v Powlson* [1978] 1 WLR 1093]."

In paragraph 79, the UT acknowledged that, under the 1990 Act, "a person who incurred what HMRC refer to as 'free-standing' expenditure on the costs of transporting plant and machinery which it does not own would not be entitled to capital allowances under s24", but the UT went on:

> "However, that is because such a person would not be able to satisfy the requirements of s24(1)(b), rather than because the expenditure is not on the provision of plant and machinery. That difficulty does not trouble Inmarsat in this case because, as Mr Prosser observed, if s61(4) applies, then the Satellites would be deemed to belong to IMSO."

The UT further rejected in paragraph 85 the submission that "the term 'capital expenditure … on the provision … of machinery or plant' in s61(4) of CAA1990 should be construed any differently from similar phrasing in statutory predecessors to s24".

32. Turning to Issue 3(a), the UT stated in paragraph 93 that it "accept[ed] Inmarsat's submission that, if the I-3 Satellites had not been launched, IMSO would have been in breach of its obligations under the applicable Lease", saying among other things:

> "the I-3 Satellites were ultimately launched under those contracts, so a point must have come at which it would have made no commercial sense for IMSO to decide not to launch. At that point, whenever it came, IMSO would have been in breach of Clause 7.03 [of the master lease agreement] if it had not launched the I-3 Satellites".

The UT said, moreover, in paragraph 96:

> "Our conclusion on [Issue 2] means that expenditure incurred on launching the Satellites was expenditure on the 'provision' of those Satellites. It follows that the requirement imposed on IMSO to launch the Satellites was a requirement to 'provide' those Satellites."

33. The UT also determined Issue 3(b) in favour of Inmarsat. It explained as follows:

> "100. … In our judgment, the focus in s61(4)(a) is on whether the necessary requirement 'under the terms of the lease' is present. The section does not make any express provision as to when that requirement must be honoured. As we have noted, it is not at all clear why Parliament wished to make special provision for persons required to provide plant and machinery under the terms of the lease. However, having done so it is not obvious why Parliament would have wished persons who incur expenditure before their lease has begun to be in a

> different position from persons who incur their expenditure afterwards.
>
> 101. We also agree with the interpretation of s61(8) that Inmarsat put forward. Parliament recognises that leases are often preceded by agreements for lease (particularly in the context of real estate transactions). Accordingly, an agreement for lease can be a source of a 'requirement' to provide plant and machinery as well as the lease itself. However if, a requirement is imposed in an agreement for lease but for whatever reason, no lease is ever granted, Parliament did not wish the obligation in the agreement for lease to count. That is achieved by providing that an agreement for lease is only within the scope of s61(8) where it culminates in the grant of an actual lease. Accordingly, in using the phrase 'where the term covered by the lease has begun', s61(8) is not emphasising the presence of any 'temporal flow'. Rather, the word 'where' should be understood as meaning 'in a situation where'."

34. The UT did not find it necessary to determine Issue 3(c).

The application of section 78 of the 1990 Act: Issue 1

35. Issue 1 raises a question as to the implications of the deeming for which section 78(1) of the 1990 Act provides. Under section 78(1), property which was in use for a trade before a succession and is then used for the purposes of the new trade is to "be treated as if … it had been sold to the successor". Does that mean, as Mr Prosser contends, that the property is to be deemed to belong to the successor regardless of whether it in fact does so? Or is the position rather, as was maintained by Mr Michael Gibbon QC, who appeared for HMRC with Mr Richard Vallat QC and Mr Ronan Magee, that section 78(1) is concerned merely with valuation and that it has no application unless the successor comes to own the property?

36. We were referred to various cases in which the Courts have considered the implications of deeming provisions. It is sufficient, I think, to cite from the most recent of them, the decision of the Supreme Court in *Fowler v Revenue and Customs Commissioners* [2020] UKSC 22, [2020] 1 WLR 2227. Lord Briggs there said at paragraph 27:

> "There are useful but not conclusive dicta in reported authorities about the way in which, in general, statutory deeming provisions ought to be interpreted and applied. They are not conclusive because they may fairly be said to point in different directions, even if not actually contradictory. The relevant dicta are mainly collected in a summary by Lord Walker of Gestingthorpe JSC in *DCC Holdings (UK) Ltd v Revenue and Customs Comrs* [2011] 1 WLR 44, paras 37–39, collected from *Inland Revenue Comrs v Metrolands (Property Finance) Ltd* [1981] 1 WLR 637, *Marshall v Kerr* [1995] 1 AC 148 and *Jenks v Dickinson* [1997] STC 853. They include the

> following guidance, which has remained consistent over many years:
>
> (1) The extent of the fiction created by a deeming provision is primarily a matter of construction of the statute in which it appears.
>
> (2) For that purpose the court should ascertain, if it can, the purposes for which and the persons between whom the statutory fiction is to be resorted to, and then apply the deeming provision that far, but not where it would produce effects clearly outside those purposes.
>
> (3) But those purposes may be difficult to ascertain, and Parliament may not find it easy to prescribe with precision the intended limits of the artificial assumption which the deeming provision requires to be made.
>
> (4) A deeming provision should not be applied so far as to produce unjust, absurd or anomalous results, unless the court is compelled to do so by clear language.
>
> (5) But the court should not shrink from applying the fiction created by the deeming provision to the consequences which would inevitably flow from the fiction being real. As Lord Asquith memorably put it in *East End Dwellings Co Ltd v Finsbury Borough Council* [1952] AC 109, 133:
>
>> 'The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.'"

37. In the present case, Mr Prosser argued that it is an inevitable corollary of treating property "as if … it had been sold" that the recipient must be considered to have acquired ownership. A "sale" involves by definition a transfer of title. In circumstances, therefore, where the previous trader owned the relevant property or, independently of section 78, is deemed to have done so, he is necessarily considered to have passed that ownership to the successor. Mr Prosser recognised that that would not be the case if section 78 had said otherwise, but he pointed out that the provision nowhere states that it applies only where the property at issue has come to belong to the successor.

38. Mr Prosser drew a distinction between the successor's position and that of the predecessor. He and Mr Gibbon agreed that, for section 78(1) to be applicable, the relevant property must have belonged, or be deemed to have belonged, to the predecessor immediately before the succession. Mr Prosser gave two reasons for this. The first was that a predecessor cannot sensibly be deemed to sell what it does not own. The second was that section 78(1) is designed to achieve tax neutrality, by enabling the successor to step into the predecessor's shoes for capital allowance

purposes. The policy, Mr Prosser argued, is that the successor should qualify for capital allowances where a deemed discontinuance of the predecessor's trade has given rise to a disposal event requiring the predecessor to bring a disposal value into account, but a deemed discontinuance will be a disposal event only if the property belongs, or is deemed to belong, to the predecessor.

39. Mr Prosser is of course correct that, for the predecessor to have to bring into account a disposal value, it must be the case not just that the trade has been permanently discontinued, but that the property in question "belong[ed] to [the predecessor] at some time in the chargeable period": see section 24(6)(b) of the 1990 Act. Nor could it make sense for the predecessor to have to bring into account a disposal value for property which had not belonged to it merely because it had used the property in its trade and the property was now being used by the successor. What, however, is striking is Mr Prosser's acceptance that section 78(1) applies only where the predecessor owned, or is deemed to have owned independently of section 78(1), the material property when, first, the section does not say so and, secondly, the section deems the property to have been "sold". It is Mr Prosser's case, as I have said, that a sale necessarily involves a transfer of title. He contends on that footing that the successor has to be seen as acquiring ownership, but it could equally well be argued that the predecessor must be assumed to have had ownership to pass. Yet, for very good reason, Mr Prosser does not suggest that the deemed sale has the consequence that the predecessor must be taken to have had title and so to have to bring a disposal value into account for property which was never his. A conventional sale would involve a transfer of property from A to B. On the basis of Mr Prosser's submissions, however, the hypothetical sale posited by section 78(1) would have the consequence that B would be deemed to have gained title but A would not be assumed to have had it.

40. The true position, I think, is that the successor is no more to be taken to have obtained ownership than the predecessor is to be assumed to have had it in the first place. The role of section 78(1) is to explain how property should be valued where it has passed from the predecessor to the successor without a sale. It is not to deem property to have passed or, more specifically, to deem the predecessor to have had ownership or the successor to have achieved it. The provision does not state that property is to be deemed to belong to the successor, and no such inference can be drawn from property's being treated "as if … it had been sold". Section 78(1) has a valuation function. It says nothing about whether section 24(1)(b) is satisfied.

41. I am reinforced in that view by section 78's failure to deal with matters which it might have been expected to address if the effect of that provision had been to deem ownership to transfer to the successor. The UT said this on the subject:

> "54. In this regard, we consider that HMRC are correct to emphasise the point that, if s78(1) were intended to establish a deemed 'belonging' of plant and machinery, in the absence of a real 'belonging', it might have been expected to deal with further matters such as when the deemed belonging comes to an end and what is to happen when it does. Yet s78 does not address such points. That is in contrast with other provisions that deem machinery to belong to someone other than the real owner. For example, the tailpiece to s61(4) prescribes what is

to happen when the relevant lease is terminated. The 'contributions' code in s154 and s155 of CAA1990 treats a person who contributes to another's capital expenditure on plant and machinery as having an entitlement to allowances and as satisfying the 'belonging' condition. That code stipulates, in s155(3) what is to happen on a transfer of the contributor's trade.

55. Inmarsat argues that it is not necessary for s78 to deal with the future since the ordinary provisions set out in s24 and s26 of CAA1990 can apply to the deemed belonging established by s78. We do not accept that submission. To take an obvious example, suppose that after the Succession, Inmarsat had sold its entire business for market value in cash. The scheme of the legislation would suggest that Inmarsat should not be entitled to continue to claim capital allowances on the Satellites. But it is not straightforward to derive that result from the provisions of s24 and s26. Even the conclusion that there is a disposal event under s24(c)(i) of CAA1990 on the grounds that the Satellites 'ceased to belong' to Inmarsat would not be entirely secure as Inmarsat's ownership would only be deemed to exist for tax purposes and it is not obvious how Inmarsat's sale of its 'actual' assets would necessarily bring to an end its ownership of deemed assets. Moreover, there would be difficulties in fixing the amount of disposal value to be brought into account. Logic suggests that the disposal value should be calculated by reference to deemed market value (since Inmarsat, not having actually sold the Satellites, could not attribute any part of the actual purchase price received to the Satellites). But if the 'real' sale was at market value, Inmarsat's disposal value would be fixed by s26(1)(a) by reference to proceeds that it actually receives. If none of the actual proceeds are referable to the Satellites, it is not obvious to see how the legislation could produce a sensible disposal value in relation to the Satellites."

42. With regard to the contrast with sections 61(4) and 155(3) to which the UT referred in paragraph 54 of its decision:

i) Section 61(4) provides for machinery or plant to be treated as belonging to a lessee "for so long as it continues to be used for the purposes of the trade" and explains that, "as from the determination of the lease, section 24(6) shall have effect as if the capital expenditure on providing the machinery or plant had been incurred by the lessor and not by the lessee"; and

ii) Section 155(3) is explicit that, where the trade is transferred, writing-down allowances are in future to be "made to the transferee, and shall not be made to the transferor".

Nothing comparable is to be found in section 78.

43. Mr Prosser argued that this does not matter. The position, he suggested, is simply that the draftsman saw no need to add to the disposal events for which section 24(6)(c) provides. Under that provision, there is a disposal event if, among other things, a trader loses possession of machinery or plant (section 24(6)(c)(ii)), machinery or plant begins to be used for purposes other than those of the trade (section 24(6)(c)(iv)) or the trade is permanently discontinued (section 24(6)(c)(v)). In the circumstances, Mr Prosser said, the fact that section 78 does not itself spell out when a disposal event is to occur does not reveal a gap in the legislation. It was not necessary for section 78 to specify a point at which machinery or plant is to be treated as ceasing to belong to a successor.

44. Doubtless, the legislation could be read in the way Mr Prosser suggested if section 78(1) were understood to deem machinery and plant to belong to a successor. However, the fact that section 78(1) says nothing about when any deemed "belonging" is to terminate is still, I think, telling: the draftsman would, as it seems to me, be likely to have said something on the topic if section 78(1) had been intended to deem a successor to have title to property which he did not in fact own, a point to which comparison with sections 61(4) and 155(3) gives extra weight. Further, the draftsman would probably have addressed the valuation issues which could arise. Suppose, for example, that B has continued a trade previously carried on by A using plant to which A retained title and that the plant now ceases to be used for the purposes of the trade on its sale by A to a third party. Would B be required to bring into account the full "price which the … plant would have fetched if sold in the open market" pursuant to section 26(1)(f) regardless of the extent to which he has had the benefit of writing-down allowances and despite the fact that the proceeds of sale will all have gone to A? Or what?

45. Mr Prosser, however, advanced a number of arguments for reading section 78(1) as deeming machinery and plant to belong to the successor. In the first place, he contrasted section 78(1) with section 77(4), which is stated to apply to property which after a succession "*belonged to the successor* and was in use for [the purposes of the trade]" (emphasis added). That, Mr Prosser submitted, shows that the draftsman said so in terms where the intention was that property had to belong to the successor. In a similar vein, Mr Prosser pointed out that in section 78(1) the draftsman had spelt out the need for property to be "either in use or provided and available for use for the purposes of the new trade". If, Mr Prosser argued, it had been intended that the successor should have to own the property as well as use it, the draftsman would have said as much.

46. However, section 77(4) stipulates not only that the relevant property must have "belonged to the successor" after the succession but that it has to have "belonged to the predecessor" previously and section 78(1) omits any reference to ownership by either the successor or the predecessor. Mr Prosser nonetheless accepts that section 78(1) will not apply unless the property in question belonged to the predecessor or is deemed to have done so independently of section 78. By the same token, it cannot be inferred that the draftsman would have said so if it had been intended that the successor should have to acquire ownership. Further, the fact that section 77(4) differs from section 78(1) in expressing "belonging" requirements is unsurprising in circumstances where the wording of section 78(1) can be traced back to section 60 of

the Income Tax Act 1945 whereas that of section 77(4) derives from the Finance Act 1988. Different hands were at work.

47. Another contention advanced by Mr Prosser was that HMRC's interpretation of section 78(1) renders it of little use. Where, Mr Prosser said, the trade for the purposes of which capital expenditure has been incurred on the provision of machinery or plant is deemed to have been permanently discontinued without the machinery or plant being sold, there will be a disposal event under section 24(6) with, by virtue of section 26(1)(f), a disposal value equal to "the price which the machinery or plant would have fetched in the open market". Since section 78(1) deems there to have been a sale netting "the price which that property would have fetched if sold in the open market", it would add nothing in this respect. Turning to the position of the successor, Mr Prosser pointed out that section 81 addresses a situation where a person "brings into use for the purposes of a trade carried on by him machinery or plant which belongs to him in consequence of a disposition by way of gift" and that, by its own terms, section 78(1) has no application where property is "sold" (including where property is the subject of an "exchange": see section 150(4)). It follows (so Mr Prosser said) that, were section 78(1) inapplicable unless property were actually transferred to the successor, the provision would apply only in "very narrow and highly unusual circumstances": where the successor either (a) gives actual consideration otherwise than in the form of money or other property or (b) gives no consideration at all but the transaction is nevertheless not a gift.

48. For his part, Mr Gibbon, while accepting that section 78(1) would operate only in relatively unusual circumstances, suggested that bankruptcy provided an example. When a bankruptcy order is made, the bankrupt's estate, including goodwill, vests in the trustee under section 306 of the Insolvency Act 1986 ("the 1986 Act"), and the trustee has power to carry on any business of the bankrupt so far as may be necessary for winding it up beneficially pursuant to section 314(1) of the 1986 Act and paragraph 1 of schedule 5 to that Act. The bankrupt will retain "such tools, books, vehicles and other items of equipment as are necessary to the bankrupt for use personally by him in his employment, business or vocation" (see section 283(2) of the 1986 Act) and "cannot be restrained from carrying on in his own name a similar business, nor from soliciting former customers, nor compelled to covenant not to compete with his former business": see *Muir Hunter on Personal Insolvency* at paragraph 3-619. Even so, it may well be that, if a trustee chooses to carry on the bankrupt's business, section 78(1) will apply in relation to property used in the business. Mr Prosser suggested that the trustee would need the permission of the creditors' committee or the Court to carry on the bankrupt's business, but the requirement to that effect formerly to be found in section 314(1) of the 1986 Act was removed by the Small Business, Enterprise and Employment Act 2015 and, even before that, the creditors' committee could potentially ratify continued trading after the event: see section 314(2) as it was in force up to May 2015.

49. In any case, Mr Prosser fairly accepted that he could not go so far as to say that HMRC's interpretation would render section 78(1) entirely redundant. While, therefore, the provision might be applicable no more than rarely, it would not be superfluous.

50. Turning to the policy underlying section 78(1), Mr Prosser maintained that the purpose of the provision is to ensure that succession is tax neutral and, accordingly,

that a successor to a trade can step into the predecessor's shoes so far as capital allowances are concerned. I agree with Mr Gibbon, however, that it is not evident that Parliament intended a successor to a trade to qualify for capital allowances in respect of property which he has never owned and on which he has incurred no capital expenditure.

51. In all the circumstances, I agree with Judge Poole and the UT that section 78(1) has no application unless the successor becomes the *actual* owner of the relevant property (or potentially, as Judge Poole said, is deemed by some other provision to become its owner). Since, in the present case, Inmarsat never acquired ownership of the satellites, Issue 1 and, with it, the appeal as a whole fall to be determined in favour of HMRC. Section 78(1) cannot entitle Inmarsat to writing-down allowances.

The application of section 61(4) of the 1990 Act

52. The conclusions I have arrived at thus far suffice to dispose of the appeal. The issues relating to section 61(4) of the 1990 Act having, however, been the subject of full argument, I think I should address them.

The origins of section 61(4)

53. The UT noted that "neither party was able to provide any satisfactory explanation of the underlying overall policy behind [section 61(4) of the 1990 Act]" and that, as a result, it had "been unable … to derive as much assistance from submissions on the policy or purpose of s61(4) as [it] might have hoped": see paragraphs 61 and 62 of the decision. In response, Mr Gibbon took us through the origins of section 61(4). As he explained, a provision in comparable terms was introduced by the Finance Act 1971 ("the 1971 Act"). Section 46(2) of the 1971 Act provided:

> "Where a lessee incurs capital expenditure on the provision for the purposes of a trade carried on by him of machinery or plant which he is required to provide under the terms of the lease, the machinery or plant shall be treated for the purposes of this Chapter as belonging to him for so long as it continues to be used for the purposes of the trade; but, as from the determination of the lease, section 44(5) above shall have effect as if the capital expenditure on providing the machinery or plant had been incurred by the lessor and not by the lessee."

54. At that stage, therefore, the legislation did not include, as section 61(4) of the 1990 Act came to, the words "and … the machinery or plant is not so installed or otherwise fixed in or to a building or any other description of land as to become, in law, part of that building or other land, then, if the machinery or plant would not otherwise belong to him". Those words were inserted into section 46(2) of the 1971 Act by section 59(5) of the Finance Act 1985 ("the 1985 Act"), while section 59(1) of the 1985 Act provided for schedule 17 to the Act to apply to determine entitlement to capital allowances "in respect of expenditure on the provision of machinery or plant which is so installed or otherwise fixed in or to a building or any other description of land as to become, in law, part of that building or other land". Section 46(2) of the 1971 thus ceased to apply to expenditure on fixtures, which must hitherto have been its prime focus.

55. Lord Browne-Wilkinson touched on the reasons for the change in *Melluish v B.M.I. (No. 3) Ltd* [1996] 1 AC 454. He noted at 477 that in *Stokes v Costain Property Investments Ltd* [1984] 1 WLR 763 the Court of Appeal had "expressed the view that the law as they had found it was not satisfactory" and that, "[a]s a result, Parliament enacted further provisions regulating the right to capital allowances in relation to fixtures in the Act of 1985". He added, however, at 479 that, "although *Stokes v. Costain Property Investments Ltd.* was the initiating event, on any view Schedule 17 [to the 1985 Act] goes much wider".

56. When the 1990 Act was passed, section 46(2) of the 1971 Act, as amended in 1985, became section 61(4) of the 1990 Act and the fixtures code found in schedule 17 to the 1985 Act was carried forward into chapter VI of part II of the 1990 Act.

57. Mr Gibbon suggested that it can be inferred that section 61(4) was included in the 1990 Act "just in case it still covered things". That seems likely to me. At any rate, the explanatory notes in respect of what was enacted as section 70 of the Capital Allowances Act 2001 as part of the Tax Law Rewrite Project explained that the clause was "based mainly on section 61(4) and (8) of the [1990 Act]" and provided "for the *rare circumstances* in which a lessee has to provide plant or machinery under the terms of a lease but does not own it" (emphasis added).

Issue 2: "the provision ... of ... plant"

58. It can be seen from section 61(4)(a) of the 1990 Act that, for the subsection to apply, a lessee must incur "capital expenditure on the provision for the purposes of a trade carried on by him of machinery or plant". In this respect, section 61(4) reflects section 24(1)(a), which refers to "a person carrying on a trade [who] has incurred capital expenditure on the provision of machinery or plant wholly and exclusively for the purposes of the trade".

59. The question raised by Issue 2 is whether IMSO's expenditure on launch costs was incurred on "the provision … of … plant" within the meaning of section 61(4)(a). It is common ground both that the launch costs represented capital expenditure and that the satellites were "plant" used for the purposes of IMSO's trade.

60. Judge Poole and the UT differed on the point. Judge Poole distinguished the cases to which he had been referred as all "concerned with ancillary costs associated with an acquisition" and observed that any "provision of plant" "must have at its heart the plant itself" and that "simply moving someone else's plant from A to B … cannot … amount to the 'provision' of that plant": see paragraph 66 of his decision. He therefore did "not consider IMSO to have incurred capital expenditure (in the form of its costs of launching the Satellites) on the provision for the purposes of its trade of those Satellites": paragraph 67. In contrast, the UT took the view that there could not have been much doubt that the launch costs would have been "expenditure on the provision of" the satellites if IMSO had been the owner and that it made no difference that the satellites were not in the ownership of IMSO: see e.g. paragraphs 74 and 76 of its decision.

61. We were taken in this context to two decisions of the House of Lords: *Inland Revenue Commissioners v Barclay, Curle & Co Ltd* [1969] 1 WLR 675 ("*Barclay, Curle*") and *Ben-Odeco Ltd v Powlson* [1978] 1 WLR 1093 ("*Ben-Odeco*"). In *Barclay, Curle,* the

taxpayer had incurred capital expenditure on the construction of a dry dock and excavation to accommodate it. The House of Lords held by a majority that the dry dock was "plant" (as the taxpayer had contended) rather than an "industrial … structure" (as the Inland Revenue had suggested). It was further held that the excavation costs were expenditure on "the provision of … plant". As to that, Lord Reid said at 680:

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

In the same vein, Lord Guest said at 686:

> "It only remains to deal with the second point raised by the appellants. This is that even if the concrete work were 'plant' the cost of excavation did not qualify under Chapter II. The commissioners upheld the contention of the revenue upon this point, their view being that the expenditure was 'too remote' from the provision of the dry dock. In my view, they were wrong in excluding this expenditure. The excavation was a necessary preliminary to the construction of the dry dock and, in my view, was covered by the provision of plant under section 279. 'Provision' must cover something more than the actual supply. In this case it includes the excavation of the hole in which the concrete is laid."

62. In *Ben-Odeco*, the taxpayer, whose trade consisted in hiring out an oil rig, had incurred commitment fees and interest in respect of loans which it had taken out to finance the construction of the oil rig and the fees and interest were rightly charged to capital. The taxpayer claimed that the expenditure qualified for capital allowances, but the House of Lords, by a majority, decided otherwise. Having cited a Canadian case concerned with a statute referring to the "capital cost to the taxpayer", Lord Wilberforce said at 1097:

> "The expression 'capital cost to the taxpayer' makes it easier to include within deductible expenditure costs which the particular taxpayer incurs, whereas the U.K. words, more objectively, focus on expenditure directly related to the plant. The one draws a line round the taxpayer and the plant; the other confines the limiting curve to the plant itself."

Lord Wilberforce went on at 1098:

> "An important principle of the laws of taxation is that, in the absence of clear contrary direction, taxpayers in, objectively, similar situations should receive similar tax treatment. The taxpayer's argument in the present case does not bring this about. On the contrary a different result would follow according as he pays for the provision of plant out of his own resources, or borrows it. In the latter case he would get an allowance, in the former he would not — this may amount to treating an investor worse than a speculator. Moreover, on the same argument, a different allowance in respect of identical plant would result according as he (i) borrows from a bank, (ii) raises money by a public issue of debentures, (iii) obtains money from his shareholders. And, again, a different result would follow according as (i) he is able to capitalise the interest on the money borrowed or (ii) (because he is carrying on a profit-making trade or for other reasons) does not or cannot capitalise it. If the law is such that it offers the taxpayer these options, he is of course entitled to select that which suits him best, but an interpretation which introduces such a large element of subjectivity is to be avoided. The words 'expenditure on the provision of' do not appear to me to be designed for this purpose. They focus attention on the plant and the expenditure on the plant — not limiting it necessarily to the bare purchase price, but including such items as transport and installation, in any event not extending to expenditure more remote in purpose. In the end the issue remains whether it is correct to say that the interest and commitment fees were expenditure on the provision of money to be used on the provision of plant, but not expenditure on the provision of plant and so not within the subsection. This was the brief but clear opinion of the special commissioners and of the judge and little more is possible than after reflection to express agreement or disagreement. For me, only agreement is possible."

For his part, Lord Russell said at 1106:

> "In my view the question to be asked is, what is the effect of particular capital expenditure? Is it the provision of finance to the taxpayer, or is it the provision of plant to the taxpayer? In my opinion the effect of the expenditure was the provision of finance and not the provision of plant. I would add that I do not seek to confine qualifying capital expenditure to the price paid to the supplier of the plant. I should have thought, for example, that if the cost of transport from the supplier to the place of user is directly borne by the taxpayer it would be expenditure on the provision of plant for the purposes of the taxpayer's trade. And there may well be other examples of expenditure, additional to

> the price paid to the supplier, which would qualify on similar grounds. But such matters are not for decision in this appeal."

63. In the light of these authorities, it is not surprising that Mr Gibbon accepted before us, as he had below, that the costs of launching the satellites would have constituted capital expenditure on "the provision … of … plant" within the meaning of section 61(4) if they had been incurred by NSM and Abbey as the satellites' lessors. However, Mr Gibbon submitted that, where a person spends money only on the transport or installation of something (which he does not even own), the expenditure would not naturally be described as "the provision … of… plant" and would anyway be "too remote" having regard to the legislation's purpose. In the present case, Mr Gibbon argued, the payments which IMSO made in respect of launch costs lacked the necessary nexus with "belonging"/ownership. To be relevant, Mr Gibbon said, expenditure has to be on something that is "leading towards ownership in due course": "freestanding" expenditure will not do, there must be a sufficient connection with acquisition of ownership.

64. For his part, Mr Prosser asked rhetorically how, say, transport costs could be incurred "on the provision … of … plant" if incurred by an owner but not if incurred by someone else. The nature of the expenditure, Mr Prosser said, is the same in either case. Expenditure on the "provision … of … plant" is not limited to purchase costs, Mr Prosser submitted, regardless of whether the money is spent by an owner, though the legislation imposes a separate "belonging" condition. When considering whether something involved "provision … of … plant", the focus with both section 61(4) and section 24(1)(a) is on the effect or function of the expenditure, on what it does in connection with the provision of the plant, not on the identity of the person paying.

65. Plainly, expenditure relating to plant will not give rise to capital allowances unless it results in the plant belonging, or being deemed to belong, to the person incurring it. Section 24(1)(b) imposes a requirement that, "in consequence of [the taxpayer's] incurring that expenditure, the machinery or plant belongs or has belonged to him", and section 61(4), where it applies, deems machinery or plant to belong to the lessee. Expenditure on plant must, moreover, be incurred for the purposes of a trade carried on by the taxpayer if allowances are to be available. There is therefore no question of wholly freestanding expenditure qualifying for allowances. Someone who incurs costs without thereby gaining (or being deemed to gain) ownership will not obtain allowances.

66. On the other hand, I do not see the need for expenditure to be on the "provision … of machinery or plant" as itself imposing any requirement that expenditure should "lead towards ownership". As Lord Wilberforce explained in *Ben-Odeco*, the UK legislation focuses "on the plant and the expenditure on the plant", "confin[ing] the limiting curve to the plant itself". What matters for the purposes of sections 24(1)(a) and 61(4)(a) of the 1990 Act is thus what role the expenditure played in relation to the relevant plant. To give rise to capital allowances, expenditure must facilitate the "provision" of machinery or plant, but there is no reason to read "provision" as limited to acquiring ownership. Neither section 24(1)(a) nor section 61(4)(a) says anything to that effect, and *Barclay, Curle* affords authority that "provision" "must cover something more than the actual supply" and, in particular, can cover costs of installation without which plant would be "of no use for the purposes of the trade". The terms of sections 24(1)(a) and 61(4)(a) indicate that attention should be directed

at whether "the provision of machinery or plant" was for the purposes of the taxpayer's trade, not at whether it was such as to "lead to ownership". In the circumstances, I agree with Mr Prosser that it is hard to see how costs could be incurred "on the provision … of … plant" if incurred by an owner but not if incurred by someone else.

67. Mr Gibbon, however, submitted that the approach espoused by Inmarsat would involve "read[ing] into the statute provisions for apportioning the market value between the lessor and lessee which are simply not there" (to borrow words from paragraph 59 of Judge Poole's decision). In the same vein, as the UT explained in paragraph 83 of its decision, HMRC argued below that section 61(4) "did not operate to create ownership of a part or share in the plant and machinery" but "either deemed the plant and machinery to belong (exclusively) to the lessee, or it did not" and that "since s61(4) contains no mechanism to ascertain the comparative extent of each person's ownership of the relevant plant, that was a strong indication that it did not envisage any deemed division of ownership of the kind for which Inmarsat argues".

68. The UT explained in paragraph 84 of its decision why it saw difficulties with HMRC's submission:

> "(1) As we have noted, no 'division of ownership' is needed to make s61(4) workable, at least insofar as the obtaining of allowances prior to a disposal event is concerned. It is quite straightforward to interpret s61(4) as enabling a lessee to claim allowances on the expenditure it has incurred on the 'provision' of the asset (with the assistance of a deemed satisfaction of the belonging condition) and for the lessor, if it is also the actual owner of the asset, to claim allowances on any expenditure it has incurred on provision.
>
> (2) We agree with HMRC that matters become much more complicated on a disposal of the asset. If there is a sale of the asset, for example and both lessor and lessee have been claiming allowances on the expenditure that they have respectively incurred, s61(4) contains no mechanism spelling out the effect of that sale. In such a case, the lessor being the 'real owner' would no doubt receive the 'real' disposal proceeds, but s61(4) leaves unanswered the question whether the lessor would need to bring into account the entirety of the resulting disposal value, or whether some of the disposal proceeds should be treated as received by the lessee, so as to result in the lessee bringing into account a disposal value as well. Still less does the legislation contain any mechanism for apportioning the disposal values.
>
> (3) We acknowledge that, conceptually, this lacuna in the legislation might indicate that Parliament did not intend s61(4) to result in a 'division of ownership'. But the force of that point is significantly diminished by the fact that a similar lacuna exists in the 'contributions code' contained in s154 and s155 CAA1990 which quite clearly is intended to result in a division

> of deemed ownership. HMRC and Inmarsat put forward different analyses of how the lacuna might be resolved in the context of s154 and s155 by reference to the situation where a contributor, C, contributes 50 to a recipient, R, who acquires plant and machinery for 100 with the plant and machinery subsequently being sold for 50, or C subsequently ceasing to trade. We do not need to determine which party's analysis of these various situations was correct. The fact that neither s154 nor s155 offered any guidance as to how relatively straightforward situations as this should be analysed suggests to us that the capital allowances code contains at least one other instance where the consequences of deemed co-ownership are not fully spelled out. It follows that we attach little weight to HMRC's argument to the effect that the presence of this lacuna in s61(4) indicates that Parliament cannot have intended it to result in deemed co-ownership of an asset.
>
> (4) Moreover, once it is accepted that s61(4) applies to leases of chattels, it is difficult to think of a real-world situation where s61(4) would wish to treat the lessee's ownership as being exclusive. Of course, if the lessee incurred all of the expenditure on provision of the asset, it might make sense for the lessee alone to be treated as the owner. But it is difficult to see how such a situation could ever come within s61(4) since it is not obvious why a person who has provided all of the expenditure on the asset would then agree to lease it from another."

69. The UT said in paragraph 85 of its decision that, in the circumstances, "HMRC's arguments as to the presence of anomalies have not persuaded us that the term 'capital expenditure … on the provision … of machinery or plant' in s61(4) of CAA1990 should be construed any differently from similar phrasing in statutory predecessors to s24". Likewise, I do not think the fact that Mr Prosser's approach to section 61(4) could generate doubt as to how a lessee's "disposal value" should be assessed can justify the adoption of HMRC's interpretation of section 61(4)(a). In the first place, it seems to me, as I have mentioned, that other considerations favour Mr Prosser's construction of section 61(4)(a). Secondly, section 61(4)(a)'s reference to capital expenditure on the "provision for the purposes of a trade carried on by him of machinery or plant" reflects the similar wording in section 24(1)(a), but the latter provision has much older origins and I cannot see why any issue which might arise in relation to section 61(4) should dictate how a concept which was already well-established by the time a predecessor of section 61(4) was first introduced should be understood. Thirdly, as the UT pointed out, the "contributions code" to be found in sections 154 and 155 of the 1990 Act could give rise to comparable debates. Fourthly, again to echo the UT, with fixtures excluded from section 61(4) "it is difficult to think of a real-world situation where s61(4) would wish to treat the lessee's ownership as being exclusive".

70. In all the circumstances, I agree with the UT's conclusions on Issue 2.

Issue 3(a): "required to provide under the terms of the lease"

71. For relevant purposes, Issue 3(a) can be taken to be whether IMSO was "required" under the terms of the leases relating to them to procure the launch of the I-3 satellites. Before the FTT, HMRC also disputed whether IMSO was under such an obligation in respect of the I-2 satellites, but Judge Poole found in favour of Inmarsat on the point and HMRC did not appeal against the finding. By the time the matter was before the UT, therefore, HMRC did "not challenge the FTT's conclusion that there was such a 'requirement' in relation to the I-2 Satellites" (as the UT noted in paragraph 86 of its decision).

72. To explain the rival arguments, I need to say more about the contractual documentation relating to the I-3 satellites.

73. IMSO entered into a contract with General Electric Technical Services Company, Inc ("GETSCO") on 1 February 1991 for the satellites' construction and purchase. On 20 December 1991, a novation agreement was concluded as between GETSCO, IMSO and Abbey under which Abbey agreed to buy the satellites in IMSO's place. On the same day, Abbey and IMSO entered into further contractual documents: a lease facility agreement, a master lease agreement and, in respect of each of the satellites, a lease schedule.

74. A recital to the lease facility agreement explained that it set out "the terms and conditions and principles and assumptions on and subject to which the Owner [i.e. Abbey] will make a commitment to the Lessee [i.e. IMSO] to purchase Assets and lease them to the Lessee". The lease facility agreement entitled IMSO to require Abbey to enter into, among other things, the novation agreement, the master lease agreement and lease schedules on the basis that the leasing of each satellite would "commence forthwith upon the Owner acquiring title to and property in, and risk of loss of, that Asset" under the novation agreement. The lease facility agreement defined "Delivery" and "Delivered" to refer to "intentional ignition of the first stage engine of the launch vehicle" for a satellite and, by clause 9.05, if a satellite was not "Delivered" on or before 31 December 1998:

> "the Lessee [i.e. IMSO] shall, by notice to the Owner [i.e. Abbey], thereupon immediately terminate the Owner's obligation to purchase that [satellite] and lease that [satellite] to the Lessee with effect from that date and, if it fails so to terminate, the Owner shall, at any time after 31st December, 1998, be entitled so to terminate, and following termination pursuant to this Clause 9.05(a) the procedure described in Clause 9.02(2) shall apply".

Clause 9.02(2) in turn provided for Abbey to re-novate the relevant purchase contract to IMSO and to be paid a "Re-Novation Sum".

75. The original contract for the purchase of the I-3 satellites from GETSCO had, by article 28, given IMSO a right to terminate the contract in whole or in part, for its convenience, at any time prior to completion. Under the novation agreement, that right remained with IMSO rather than passing to Abbey. The novation agreement

further contained an acknowledgment by the parties that Abbey would not acquire title to any satellite until "Intentional Ignition".

76. The master lease agreement provided for the I-3 satellites to be leased by Abbey to IMSO on the terms and conditions contained in the master lease agreement and lease schedules. By clause 4.01, "[t]he leasing of each [satellite] … under this Agreement shall commence on its Delivery", and "Delivery" was once again defined by reference to "intentional ignition of the first stage engine of the launch vehicle". Clause 7, headed "OPERATION; MAINTENANCE; COMPLIANCE WITH LAW", included at clause 7.03 a provision with the heading "Compliance with Law" which stipulated:

> "The Lessee [i.e. IMSO] shall have and maintain all permits, licences and approvals required under any Pertinent Laws and shall satisfy the requirements of all Pertinent Laws."

The definition of "Pertinent Laws" extended to "Applicable Laws", a term which itself encompassed the Convention.

77. The lease schedules in respect of the I-3 satellites reflected the master lease agreement. Each of them stated that Abbey agreed to lease and IMSO agreed to take on lease the satellite in question "on the Delivery Date for that Spacecraft and on and subject to the terms and conditions of the Master Lease Agreement, this Lease Schedule and other Relevant Documents".

78. In his oral submissions on Issue 3(a), Mr Prosser pinned his colours to the mast of clause 7.03 of the master lease agreement. As he pointed out, clause 7.03 required IMSO to satisfy the requirements of the Convention, which included the following provisions:

i) As article 3:

> "**Purpose**
>
> (1) The purpose of the Organization [i.e. IMSO] is to make provision for the space segment necessary for improving maritime communications and, as practicable, aeronautical communications, thereby assisting in improving communications for distress and safety of life, communications for air traffic services, the efficiency and management of ships and aircraft, maritime and aeronautical public correspondence services and radiodetermination capabilities.
>
> (2) The Organization shall seek to serve all areas where there is need for maritime and aeronautical communications.
>
> (3) The Organization shall act exclusively for peaceful purposes"; and

ii) As article 5:

"**Operational and Financial Principles of the Organization**

(1) The Organization shall be financed by the contributions of Signatories. Each Signatory shall have a financial interest in the Organization in proportion to its investment share which shall be determined in accordance with the Operating Agreement.

(2) Each Signatory shall contribute to the capital requirements of the Organization and shall receive capital repayment and compensation for use of capital in accordance with the Operating Agreement.

(3) The Organization shall operate on a sound economic and financial basis having regard to accepted financial principles."

Mr Prosser argued that the I-3 satellites were needed for the "space segment" and also that it would not have been consistent with operation "on a sound economic and financial basis" for IMSO not to have proceeded with their launch. In the circumstances, so Mr Prosser submitted, IMSO had to procure the launch of the satellites, or at least to use all reasonable endeavours to do so, to satisfy the requirements of the Convention and so was required to do so, too, by clause 7.03 of the master lease agreement.

79. The UT agreed, taking the view, as I have mentioned, that "a point must have come at which it would have made no commercial sense for IMSO to decide not to launch" and that IMSO would at that point have been in breach of clause 7.03 of the master lease agreement if it had not launched the satellites. Judge Poole had disagreed, on the footing that "a generalised obligation to comply with all relevant laws" could not give rise to "a specific obligation to incur expenditure on launching six specific satellites".

80. It is not clear to me that clause 7.03 of the master lease agreement applied in advance of a lease taking effect. The master lease agreement provided for the terms and conditions contained in it, including clause 7.03, to be those on which an I-3 satellite "is leased", and each lease schedule stated that a satellite was to be taken on lease "on and subject to the terms and conditions of the Master Lease Agreement" "on the Delivery Date for that Spacecraft". It strikes me as well arguable, therefore, that clause 7.03 was to be one of the terms on which a satellite would be leased once it was "Delivered" and that it had no application until then. Were that right, clause 7.03 could not assist Inmarsat since "Delivery" was to take place only on "intentional ignition of the first stage engine of the launch vehicle" or, in other words, when the satellite was launched. On that basis, clause 7.03 would not have operated to oblige IMSO to satisfy the requirements of the Convention until launch had already happened and could not have required IMSO to procure the launch.

81. Even assuming, however, that clause 7.03 of the master lease agreement was applicable before a satellite was "Delivered", I do not see it as having imposed on IMSO a requirement to launch the satellites. To my mind, it is implausible to suppose that Abbey would, or could, have invoked clause 7.03 and the Convention if IMSO had not proceeded with the launch of the 1-3 satellites. The Convention brought

IMSO into being and served as its constitution, dealing with matters such as its organs, the composition, functions and procedure of each of them, audit requirements and privileges and immunities. In theory at least, there could doubtless have been circumstances in which Abbey might have wished to complain, relying on clause 7.03 of the master lease agreement, that IMSO, or an organ of it, was exceeding its powers. I find it hard to conceive, however, that Abbey could have hoped to establish a breach of clause 7.03 on the basis that IMSO was operating otherwise than "on a sound economic and financial basis". As I have said, the UT concluded from the fact that the I-3 satellites were ultimately launched that "a point must have come at which it would have made no commercial sense for IMSO to decide not to launch", but I do not think that is right. At most, it can be inferred that IMSO saw launch as *consistent with* its purpose and operation "on a sound economic and financial basis". It cannot be deduced that launch was the *only* course open to IMSO which could be squared with the Convention, and it strikes me as unreal to imagine that it would have occurred to Abbey to try to show that IMSO's *sole* option was to proceed with launch. HMRC submitted that the "generalised obligations described in the … Convention can be satisfied in a myriad of different ways", adding that it might have been "more in accordance with a requirement to 'operate on a sound economic and financial basis' for the lessors to incur the launch costs and reduce the lease rental payments yet further by reference to the capital allowances available to the lessors on these". I agree that it cannot be assumed, and has not been demonstrated, that operating "on a sound economic and financial basis" in pursuit of its purpose necessarily obliged IMSO to incur the launch costs.

82. The reality, in my view, is that Abbey would have looked elsewhere for a remedy if launch had not taken place. More specifically, it would have relied on clause 9.05 of the lease facility agreement, under which, if launch of a satellite did not happen on or before 31 December 1998, IMSO was obliged to terminate Abbey's obligations (in default of which, Abbey could), with the consequence, pursuant to clause 9.02(2), that the purchase contract would be re-novated to IMSO and a "Re-Novation Sum" would be payable.

83. In short, I have not been persuaded that the terms of the leases of the I-3 satellites "required" IMSO to procure their launch.

Issue 3(b): "chronological flow"

84. The question raised by Issue 3(b) is whether, for section 61(4) of the 1990 Act to apply, expenditure must have been incurred only after the term of the relevant lease had begun. Judge Poole's answer was in the affirmative, on the basis, as he explained in paragraph 111 of his decision, that "there is a natural chronological flow about [section 61(4)], which necessarily implies that the lease must be in existence before the capital expenditure is incurred". In this respect, however, the UT differed from Judge Poole, concluding that Issue 3(b) should be determined in Inmarsat's favour.

85. Arguing that Judge Poole had been correct, Mr Gibbon pointed out that section 61(4) speaks of a "lessee" incurring capital expenditure. Mr Gibbon relied, too, on section 61(8), which states that "lease" "includes an agreement for a lease *where the term to be covered by the lease has begun*" (emphasis added) and that "lessee" is to be "construed accordingly". The word "where", Mr Gibbon submitted, imposes a

temporal requirement and confirms the need for the term to have started before expenditure is incurred.

86. For his part, Mr Prosser supported the UT's decision. As used in section 61(8), Mr Prosser said, "where" means "in a case where", not "when". While, therefore, section 61(4) will not be in point unless the term of a lease has commenced, the subsection is, Mr Prosser maintained, capable of applying to expenditure incurred before then.

87. I prefer Mr Prosser's submissions. The better view, I think, is that section 61(4) operates only if the term of a lease has begun and so the "lessee" has become such, but that expenditure incurred earlier can potentially be relied on. Were the position otherwise, a "lessee" could not claim any allowance in respect of, say, capital expenditure which he had been required by an agreement for a lease to make in advance of the start of the term, which would appear to make little sense. In fact, a "lessee" might not be able to invoke section 61(4) even in relation to sums spent on capital expenditure during the term. By section 159(3), "an amount of capital expenditure is to be taken to be incurred on the date on which the obligation to pay that amount becomes unconditional (whether or not there is a later date on or before which the whole or any part of that amount is required to be paid)". If, therefore, an agreement for a lease imposed an unconditional obligation to make capital expenditure, it would be deemed to be incurred at that stage, and so before the term, even if the relevant plant or machinery were not in fact provided until later.

Issue 3(c): the significance of the "tailpiece" of section 61(4)

88. The "tailpiece" of section 61(4) of the 1990 Act states:

> "but, as from the determination of the lease, section 24(6) shall have effect as if the capital expenditure on providing the machinery or plant has been incurred by the lessor and not by the lessee".

89. Mr Gibbon pointed out that, when Inmarsat succeeded to IMSO's trade, the leases of the satellites were novated and that novation "typically extinguishes the original contract (between A and B) and replaces it by another (between A and C)": see *Chitty on Contracts*, 34th ed., at paragraph 22-092. That being so, Mr Gibbon said, each satellite lease will have been determined for the purposes of section 61(4).

90. Since, however, section 78 looks to the position "immediately before the succession takes place", Mr Gibbon did not suggest that section 78 had been rendered inapplicable in the present case by operation of the tailpiece. He rather relied on the tailpiece as a factor bearing on how section 78 should be interpreted (i.e. in relation to Issue 1).

91. In the circumstances, the UT did not express a view on Issue 3(c). It said in paragraph 106 of its decision, "given the way in which HMRC seek to rely on the tailpiece to s61(4), we do not consider that we need to decide the question of whether the novation of the Leases was a 'determination' for the purposes of that tailpiece and we will not do so".

92. I, too, see no necessity to comment on Issue 3(c) and prefer not to do so.

Overall conclusion

93. I would dismiss the appeal. Had it mattered, I would respectfully have agreed with the UT on Issues 2 and 3(b), but with Judge Poole on Issue 3(a). However, I agree with both Judge Poole and the UT that Issue 1 should be decided in favour of HMRC and that is determinative of the outcome of the appeal.

Lady Justice Whipple:

94. I am grateful to my Lord, Lord Justice Newey for his clear exposition of the issues in this case. I agree with his conclusions and add only this in relation to Issue 1. The purpose of section 78(1) is to value property which has passed from a predecessor to a successor without a sale (see paragraph 40 above). The mechanism to achieve that valuation is an assumed (but fictitious) sale of that property at open market value by the predecessor to the successor. The central error in Inmarsat's case lies in seeking to press that statutory fiction further, to deem ownership of the property to have passed to the successor. That is not what section 78(1) provides and is not what the statutory fiction created by section 78(1) was intended to do; nor is it an inevitable corollary of that statutory fiction. Inmarsat's case offends the principles summarised in *Fowler,* set out at paragraph 36 above.

95. Because the satellites do not belong (and never did belong) to Inmarsat, the expenditure in question cannot qualify for capital allowances (section 24(1)(b) of the 1990 Act) and this appeal must be dismissed.

Lord Justice Underhill:

96. I agree with both judgments.