Lloyds UDT Finance Ltd v Chartered Finance Trust Holdings plc and others (Britax International GmbH and another, Pt 20 defendants)

[2002] EWCA Civ 806

COURT OF APPEAL, CIVIL DIVISION

PETER GIBSON, JONATHAN PARKER AND LONGMORE LJJ

16, 17, 31 MAY 2002

Capital allowances – Expenditure on provision of a motor car – Reduction of allowance where expenditure incurred on the hiring of a motor car – Company carrying on car leasing business – Company entering into agreement with claimant whereunder claimant providing finance for purchase of cars by company – Whether sums payable under agreement by company to claimant expenditure incurred on hiring of a motor car – Meaning of 'hiring of a motor car' – Capital Allowances Act 1990, s 35(2).

A Ltd carried on business leasing motor vehicles to members of the public. It acquired the rights to enable it to do so under finance leases of the vehicles in question granted by a funder. The funder acquired and retained ownership of the vehicles. The rentals payable by A Ltd under the finance leases were geared to recovery of the funder's cost of acquiring the vehicles, plus finance charges. The finance leases not only transferred rights in the vehicle to A Ltd, they also provided a mechanism by which A Ltd's business was funded. L Ltd was one of the funders with which A Ltd entered into finance leases. The agreement between A Ltd and L Ltd was contained in a master purchase, lease and disposal agreement (the master agreement). Following L Ltd's acceptance in principle of a proposed purchase and lease, A Ltd provided L Ltd with, inter alia, a schedule showing details of the vehicle, the period of the lease and the rent to be paid in respect of it. A Ltd acquired the rights to the vehicle for which the master agreement provided and hired the vehicle to the public in accordance with its own contract hire agreement. The essential features of the arrangements made between A Ltd and other financial institutions were the same. In 1998 A Ltd, which was owned by another company, B, was sold to C plc. In 2000 A Ltd was sold by C plc to L Ltd. In each sale the vendor and associated companies gave tax warranties to the purchaser. In proceedings brought by L Ltd against C plc and four other companies a preliminary issue arose as to whether s 35(2)[a] of the Capital Allowances Act 1990, which restricted the extent to which 'any expenditure on the hiring of a motor car the retail price of which when new exceeded £12,000' might be deducted in computing for the purposes of tax the profits of any trade, applied to the rental payments made by A Ltd pursuant to its agreement with L Ltd and with the other financial institutions. Sir Andrew Morritt V-C held that there was nothing in the concept of a finance lease, such as that entered into by A Ltd with L Ltd, or in the terms of the 1990 Act, to suggest that the concept of hiring to which s 35(2) applied was so limited so as to exclude the payments made by A Ltd to L Ltd. B, which had been joined as a defendant in the proceedings, appealed contending: (i) that, applying the decision of the House of Lords in *MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* [2001] STC 237, in the context of s 35(2) the commercial concept of 'hiring', which differed from the technical legal meaning of the word, and meant an arrangement under which an owner

[a] Section 35, so far as material, is set out at [8], post

parted with possession of a vehicle who enjoyed the use of it for a specified period and specified consideration, applied, and the subsection was to be construed accordingly; (ii) that the words 'would be allowed to be deducted in computing for the purposes of tax the profits of any trade' in s 35(2) referred not to expenditure of a kind which, as a matter of accountancy practice, was taken into account in ascertaining the gross profits of a trade ('above-the-line' expenditure), but only to expenditure which was deductible from gross profits once ascertained in order to arrive at net profit ('below-the-line' expenditure) so that expenditure on rental payments for cars which were acquired by A Ltd under finance leases for onward hire constituted 'above-the-line' expenditure and fell outside s 35(2); (iii) that restricting the deduction of expenditure under s 35(2) gave rise to discrimination on grounds of status between one method of financing a contract-hire business and another, which was a breach of art 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the convention) (as set out in Sch 1 to the Human Rights Act 1998) read with art 1 of the First Protocol to the convention so that s 3(1)[b] of the 1998 Act, which provided that legislation had to be read in a way compatible with convention rights, therefore applied; and (iv) that the application of s 3(1) was not retrospective since the relevant act, which occurred after the coming into force of the 1998 Act, was the judgment of the court below.

Held – (1) In *MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* the House of Lords had emphasised the importance of identifying the relevant concept from an analysis of the statutory language read in its statutory context. Having identified the legal nature of the transaction, the courts must then relate that to the language of the statute. Their Lordships had not suggested that the court, in identifying the concept to which the statute had referred, should look beyond the statute to see how the statutory language would be understood by, for example, the commercial community. The court's task was to construe the statutory language. Where that language was capable of bearing more than one meaning, the court would look to construe it in a way which accorded with the purpose and spirit of the legislation. In the instant case the Vice-Chancellor had adopted the correct approach to the construction of s 35(2) as the question was as simple as what was meant by 'the hiring of a motor car' in the context of s 35(2). If it was the case that in the contract hire industry the word 'hiring' was used to denote only a hiring to an end-user that said nothing whatever as to the meaning of the word 'hiring' in the context of s 35(2). *MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* [2001] STC 237 considered.

(2) There was no justification for restricting the meaning of 'hiring' so as to exclude an intermediate hiring. If Parliament had intended to exclude intermediate hirings from the operation of s 35(2) it could have done so expressly. The fact that s 35(2) applied to hire-purchase agreements (subject only to an express exception for hire-purchase agreements where the option price was less that 1% of the retail price) suggested that 'hiring' was not intended to be given a restricted meaning but was intended to extend to arrangements entered into for the purposes of obtaining finance. Section 36(1)(c) expressly excepted from the operation of s 35(2) certain categories of short-term sub-hire to members of the public. That strongly suggested that Parliament intended s 35(2) to apply to long-term, intermediate hirings. The fact that finance leases were in the nature of funding arrangements did not, as a matter of construction of s 35(2), alter the nature of the 'expenditure' or the tax consequences which flowed from it.

(3) The distinction recognised by the ordinary principles of commercial accountancy between 'above-the-line' and 'below-the-line' expenditure could have

[b] Section 3, so far as material, is set out at p 980 *e*, post

no impact on the true construction of s 35(2). Expenditure which was brought into account in computing gross profits was just as much expenditure 'deducted in computing for the purposes of tax the profits of [the] trade' as expenditure which was deducted from gross profits once computed. In each case the expenditure was brought into account as a deduction in the computation of taxable profits. *Odeon Associated Theatres Ltd v Jones (Inspector of Taxes)* (1971) 48 TC 257 applied.

(4) The events in question were the trading activities of A Ltd during the accounting period ended 31 December 1999; the issue in the proceedings was as to the tax consequences of those trading activities. Reliance on the 1998 Act required that it should operate retrospectively in relation to those trading activities, and to that issue, so as to produce a result (in terms of the true construction of s 35(2)) which was not available under the law as it then stood. Moreover, it was impossible to regard the different treatment of a contract-hire company which had chosen to finance its business by means of finance leases as compared with a contract-hire company which had adopted other means of financing its business as constituting discrimination on grounds of status. *Wainwright v Home Office* [2001] EWCA Civ 2081 applied.

B's appeal would, accordingly, be dismissed.

Notes

For the restriction in the amount of the expenditure on the hiring of a car which can be allowed as a deduction in computing profits for tax purposes, see Simon's Direct Tax Service B2.333.

The Capital Allowances Act 1990 was repealed by the Capital Allowances Act 2001. Section 578A(1) to (4) of the Income and Corporation Taxes Act 1988, as inserted by para 52 of Sch 2 to the Capital Allowances Act 2001, provides, with effect for income tax purposes, as respects allowances and charges falling to be made for chargeable periods ending after 5 April 2001, and for corporation tax purposes, as respects allowances and charges falling to be made for chargeable periods ending after 31 March 2001, for a reduction in the amounts allowable as deductions in computing profits chargeable to tax under Case I or II of Sch D for expenditure on the hiring of a car which is not a qualifying hire car. For the Income and Corporation Taxes Act 1988, s 578A(1) to (4), see Simon's Direct Tax Service, Part G1.

Cases referred to in judgments

Darby v Sweden (1991) 13 EHRR 774, [1990] ECHR 11581/85, ECt HR.

Fleming v Associated Newspapers Ltd [1973] AC 628, [1972] 2 All ER 574, 48 TC 382, HL.

Frazer (Inspector of Taxes) v Trebilcock (t/a Vernons School of Motoring) (1964) 42 TC 217.

Furniss (Inspector of Taxes) v Dawson [1984] STC 153, [1984] AC 474, [1984] 1 All ER 530, 55 TC 324, HL.

Gallagher v Jones (Inspector of Taxes) [1993] STC 537, [1994] Ch 107, 66 TC 77, CA.

General Motors Acceptance Corp (United Kingdom) Ltd v IRC [1987] STC 122, 59 TC 651, CA.

Henriksen (Inspector of Taxes) v Grafton Hotel Ltd [1942] 2 KB 184, [1942] 1 All ER 678, 24 TC 453, CA.

IRC v Burmah Oil Co Ltd [1982] STC 30, 54 TC 200, HL.

IRC v McGuckian [1997] STC 908, [1997] 1 WLR 991, [1997] 3 All ER 817, 69 TC 1, HL.

Libman v A-G of Quebec [1997] 3 SCR 569, 151 DLR (4th) 385, [1998] 1 LRC 318, Can SC.

MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL 6, [2001] STC 237, [2001] 2 WLR 377, [2001] 1 All ER 865, 73 TC 1, HL.

National & Provincial Building Society v United Kingdom [1997] STC 1466, 25 EHRR 127, 69 TC 540, ECt HR.

Naval Colliery Co (1897) Ltd v IRC (1926) 12 TC 1017; *affd* (1926) 12 TC 1017, CA and HL.

Nordlinger v Hahn (1992) 505 US 1, US SC.

O'Rourke (Inspector of Taxes) v Binks [1992] STC 703, 65 TC 165, CA.

Odeon Associated Theatres Ltd v Jones (Inspector of Taxes) [1971] 1 WLR 442, [1971] 2 All ER 407, 48 TC 257; *affd* [1973 Ch 288, [1972] 1 All ER 681, 48 TC 257, CA.

Pearce v Governing Body of Mayfield Secondary School [2001] EWCA Civ 1347, [2002] ICR 198, [2001] IRLR 669.

Prinsloo v Van der Linde (1997) (3) SA 1012, SA CC.

R v A [2001] UKHL 25, [2002] 1 AC 45, [2001] 3 All ER 1.

R v DPP, ex p Kebilene [2000] 2 AC 326, [1999] 4 All ER 801, HL.

R v IRC, ex p Unilever plc [1996] STC 681, 68 TC 205, CA.

R v Kansal (No 2) [2001] UKHL 62, [2001] 3 WLR 1562, [2002] 1 All ER 257.

R v Lambert [2001] UKHL 37, [2001] 3 WLR 206, [2001] 3 All ER 577.

Ramsay (W T) Ltd v IRC [1981] STC 174, [1982] AC 300, [1981] 1 All ER 865, 54 TC 101, HL.

Shepherd v North West Securities Ltd 1991 SLT 499, CS.

Thibaudeau v Canada [1995] 2 SCR 627, 124 DLR 449, Can SC.

Usher's Wiltshire Brewery Ltd v Bruce (Surveyor of Taxes) [1915] AC 433, 6 TC 399, HL.

Wainwright v Home Office [2001] EWCA Civ 2081.

Walker (Inspector of Taxes) v Centaur Clothes Group Ltd [2000] STC 324, [2000] 1 WLR 799, [2000] 2 All ER 589, 72 TC 379, HL.

Wilson v First County Trust Ltd [2001] EWCA Civ 633, [2002] QB 74, [2001] 3 All ER 229.

Cases referred to in skeleton arguments

Abdulaziz, Cabales and Balkandali v United Kingdom (1985) 7 EHRR 471, [1985] ECHR 9214/80, 9473/81, 9474/81, ECt HR.

Chambers (G H) (Northiam Farms) Ltd v Watmough (Inspector of Taxes) [1956] 1 WLR 1483, [1956] 3 All ER 485, 36 TC 711.

Comr of Inland Revenue v Secan Ltd 2000 4 HKC 302, Ct of Final Appeal, Hong Kong.

IRC v John Lewis Properties plc [2001] STC 1118, [2002] 1 WLR 35.

James v United Kingdom (1986) 8 EHRR 123, [1986] ECHR 8793/79, ECt HR.

Kempster v McKenzie (Inspector of Taxes) (1952) 33 TC 193.

Kjeldsen, Busk Madsen and Pedeson v Denmark (1976) 1 EHRR 711, [1976] ECHR 5095/71, 5920/72, 5926/72, ECt HR.

National Union of Belgian Police v Belgium (1976) 1 EHRR 578, [1975] ECHR 4464/70, ECt HR.

R (on the application of Hooper) v Secretary of State for Work and Pensions [2002] EWHC 191 (Admin).

R v Benjafield [2002] UKHL 2, [2002] 2 WLR 235, [2002] 1 All ER 815.

Smith v Gardner Merchant Ltd [1999] ICR 134, [1998] 3 All ER 852, [1998] IRLR 510, CA.

Van der Mussele v Belgium (1983) 6 EHRR 163, [1983] ECHR 8919/80, ECt HR.

Vestey v IRC (No 2) [1980] STC 10, [1980] AC 1148, [1979] 3 All ER 976, HL.

Whimster & Co v IRC 1926 SC 20, 12 TC 813, CS.

Appeal

Britax International GmbH (Britax) appealed from an order of Sir Andrew Morritt V-C made on 22 November 2001 ([2001] STC 1652) whereby, in respect of proceedings brought by Lloyds UDT Finance Ltd (Lloyds) against the Standard Chartered Group (Standard Chartered), he determined, as a preliminary issue, that s 35(2) of the Capital Allowances Act 1990, which restricted the extent to which 'any expenditure on the hiring of a motor car, the retail price of which when new exceeded £12,000' might be deducted in computing for the purposes of tax the profits of any trade, applied to payments made by Autolease Ltd (which Lloyds had purchased in August 2000 from Standard Chartered and which Standard Chartered had purchased in August 1998 from Britax) pursuant to a financing agreement made between Autolease Ltd and Lloyds. The Commissioners of Inland Revenue, with their consent, had been joined to those proceedings as an additional party and Britax had been joined as a CPR Pt 20 defendant. Lloyds and Standard Chartered did not take any part in the appeal. The facts and grounds of the appeal are set out in the judgment of Jonathan Parker LJ.

John Walters QC and *Claire Simpson* (instructed by *Eversheds*, Birmingham) for Britax.

Rabinder Singh QC and *Karen Steyn* (instructed by the *Solicitor of Inland Revenue*) for the Revenue.

Cur adv vult

31 May. The following judgments were delivered.

JONATHAN PARKER LJ (delivering the first judgment at the invitation of Peter Gibson LJ).

Introduction

[1] This is an appeal by Britax International GmbH (Britax) against an order made by Sir Andrew Morritt V-C on 22 November 2001 (see [2001] STC 1652) on the hearing of preliminary issues in proceedings between Lloyds UDT Finance Ltd (now called Lloyds TSB Asset Finance Division Ltd) (Lloyds) as claimant and Standard Chartered Bank and four other companies in the Standard Chartered group (SCB) as defendants, to which proceedings Britax was joined as a defendant under CPR Pt 20. The Commissioners of Inland Revenue, the respondents to this appeal, were subsequently added as defendants.

[2] The issue in the appeal is as to the true construction of s 35(2) in Ch III of Pt II of the Capital Allowances Act 1990 (as amended) (the 1990 Act). Section 35(2) restricts the extent to which expenditure on the 'hiring' of an 'expensive motor car' (that is to say, a car the retail price of which when new exceeds a specified sum, currently £12,000) is deductible in computing the profits of a trade for tax purposes. The issue is whether (as Britax contends) 'hiring' in the context of s 35(2) is limited to contracts of hire under which the hirer is the end-user, in the sense that he (or, in the case of a company, its servants or agents) enjoys the physical use of the car: or whether (as the Revenue contend) it applies to all contracts of hire, whether or not the hirer may in turn have entered into a contract of sub-hire to a third party end-user.

The facts

[3] The relevant facts are non-contentious and may be shortly stated.

[4] Autolease Ltd (formerly Britax Autolease Ltd) (Autolease) carries on the business of hiring motor vehicles to members of the public (including corporate customers). It acquires the necessary rights to enable it to do so under finance

leases of the vehicles in question granted by a funder. The funder acquires, and retains ownership of, the vehicles. The rentals under the finance leases are geared to recovery of the funder's costs of acquiring the vehicle, plus finance charges. Thus, the finance lease serves not only to transfer rights in the vehicles to Autolease, it also provides a mechanism by which Autolease's business is funded. For obvious reasons, this mechanism for the provision of finance is known commercially as 'back to back' funding. It is a common method of funding where the contract-hire company is not, or is not associated with, a bank. At the material time Autolease was not associated with a bank (although it has since become part of Lloyds). Not all the vehicles leased to Autolease under finance leases are in turn hired out to third parties; some are retained for use by directors or employees of Autolease.

[5] Autolease entered into finance leases with a number of funders, including Lloyds. At the hearing before the Vice-Chancellor the parties were content to take the arrangements for finance leases between Lloyds and Autolease as typical for this purpose, and accordingly the argument before the Vice-Chancellor and on this appeal has focused on those arrangements. The relationship between Lloyds and Autolease in relation to the grant of finance leases is governed by an agreement dated 26 July 1996 and entered into between (1) United Dominions Trust Ltd (now part of Lloyds), (2) Autolease and (3) Autolease Fleets Ltd (Fleets), an associated company of Autolease. The agreement is entitled 'Master Purchase, Lease and Disposal Agreement' (I will refer to it hereafter as 'the master agreement'). As its title implies, the master agreement regulates (a) the purchase of vehicles by the lessor; (b) the leasing of the vehicles to Autolease; and (c) the disposal of vehicles which are no longer required by Autolease. Autolease in turn hires out vehicles acquired pursuant to the master agreement to third parties under a master contract hire agreement, the terms of which are not material for present purposes.

[6] In his judgment the Vice-Chancellor describes the operation of the master agreement, as follows ([2001] STC 1652 at [5]–[8]):

> '[5] ... The role of Fleets was to carry out the initial purchase of the vehicle and its sale to [Lloyds] and its subsequent disposal at the end of the financing period. Clause 1 of the Master Agreement dealt with the acquisition of the vehicle. The system was for Autolease to notify [Lloyds] of the vehicles it wished Fleets to buy and for Fleets to sell them to [Lloyds] so that [Lloyds] might lease them to Autolease. Following [Lloyds'] acceptance in principle of the proposed purchase and lease Autolease provided [Lloyds] with (1) a value added tax (VAT) invoice from Fleets in respect of the specific vehicle, (2) a schedule showing details of that vehicle, the period of the lease and the rent to be paid in respect of it by Autolease to [Lloyds], (3) a sub-hiring agreement in respect of that vehicle executed by a third party and (4) a copy of a signed acknowledgement of delivery of the vehicle. On receipt of those documents [Lloyds] reimbursed Fleets the cost of the vehicle. By cl 2 warranties from [Lloyds] which might otherwise arise were excluded.
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> [6] The rent payable by Autolease to [Lloyds] was that shown in the schedule referred to in [5](2) above as provided in cl 3 of the Master Agreement. Punctual payment of such rent was of the essence of the agreement. Clause 4 dealt with delivery and cl 5 with the risk in the vehicles.
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> [7] Clause 6 dealt with the use of the vehicles. Subject to cl 7 Autolease was obliged to keep the vehicle in its possession, to maintain it in a proper condition and to allow [Lloyds] a reasonable opportunity to inspect it. By cl 7 Autolease was permitted to let the vehicle to third parties for a fixed period on the terms of a hiring agreement in substantially the form of that which had

been approved by [Lloyds] from time to time. Clause 8 dealt with expenses and other outgoings.

[8] Clause 9 stipulated that nothing therein contained should be construed to imply that title to the vehicle passed to Autolease at any time. Autolease was not permitted to purport to be the owner, to sell or offer for sale, assign, pledge, charge or otherwise encumber either the vehicle or the benefit of the agreement between [Lloyds] and Autolease. Clause 10 enabled [Lloyds] to terminate the Master Agreement in certain specified events. Clause 11 dealt with the payments to be made by Autolease in consequence of any such determination. Clause 12 gave power to Autolease to terminate on early repayment of all sums due to [Lloyds] and made provision for the agency of Fleets for the disposal of the vehicle at the conclusion of the agreement with [Lloyds] in respect of that vehicle. Clause 14 reiterated the prohibition on Autolease from assigning or charging any of its rights under the agreement.'

[7] In August 1998 Britax, as the then owner of Autolease, sold Autolease to SCB. In August 2000 SCB in turn sold Autolease to Lloyds. In each case, the vendor gave to the purchaser a warranty in similar terms relating to the tax liability of Autolease. The issue as to the true construction of s 35(2) arises in the context of these warranties; the specific issue being as to the correct application of s 35(2) to the trading operations of Autolease for the accounting period ended 31 December 1999.

Ch III of Pt II of the 1990 Act

[8] The Chapter is headed 'Expensive Motor Cars'. It consists of three sections, ss 34, 35 and 36. Section 34 (as amended) restricts any writing-down allowance which would otherwise be available in respect of capital expenditure on the provision of a motor car to which Ch III applies. The relevant provisions of ss 35 and 36 (as amended), as they applied to Autolease's trading operations for the period ended 31 December 1999, were as follows:

'**35 Contributions to expenditure, and hiring of cars** ...

(2) Where, apart from this subsection, the amount of any expenditure on the hiring of a motor car the retail price of which when new exceeds £12,000 would be allowed to be deducted in computing for the purposes of tax the profits of any trade, that amount shall be reduced in the proportion which £12,000, together with one half of the excess, bears to that retail price; but this subsection shall have effect subject to subsection (3) below ...

(3) Subsection (2) above shall not apply where the hiring is under a hire-purchase agreement under which there is an option to purchase exercisable on the payment of a sum equal to not more than 1 per cent of the retail price of the motor car when new.

(4) In subsection (3) above "hire-purchase agreement" has the meaning given by section 784(6) of [the Income and Corporation Taxes Act 1988].

36 Definition of "motor car", etc

(1) In this Part "motor car" means any mechanically propelled road vehicle other than— ...

(c) subject to subsections (2) and (4) below, a vehicle provided wholly or mainly for hire to, or for the carriage of, members of the public in the ordinary course of a trade.

(2) Subsection (1)(c) applies to a vehicle only if—

(a) the following conditions are satisfied—

(i) the number of consecutive days for which it is on hire to, or used for the carriage of, the same person will normally be less

than 30; and
(ii) the total number of days for which it is on hire to, or used for the carriage of, the same person in any period of 12 months will normally be less than 90; or

(b) it is provided for hire to a person who will himself use it wholly or mainly for hire to, or the carriage of, members of the public in the ordinary course of a trade and in a manner complying with the conditions specified in paragraph (a) above …

(4) Subsection (2) does not affect vehicles provided wholly or mainly for the use of persons in receipt of—

(a) a disability living allowance [and certain other payments] …'

[9] Section 784(6) of the Income and Corporation Taxes Act 1988 (the 1988 Act) defines a hire-purchase agreement as 'an agreement … under which … goods are bailed … in return for periodical payments by the person to whom they are bailed …'.

The relevant statutory antecedents

[10] Section 35(2) derives from s 25 of the Finance Act 1961 (the 1961 Act), which was in the following terms:

'Where apart from this section the amount of any expenditure on the hiring of a vehicle (otherwise than by way of hire-purchase) to which this section applies would be allowed to be deducted or taken into account as mentioned in the foregoing section, and the retail price of the vehicle at the time when it was made exceeded two thousand pounds, the said amount shall be reduced in the proportion which two thousand pounds bears to the said price.'

[11] Section 24 of the 1961 Act (the 'foregoing section' referred to in s 25) limited the tax allowance available under Schs D and E in respect of capital expenditure on vehicles to vehicles costing £2,000 or less.

[12] As originally enacted, s 35(2) was in the following terms:

'Where, apart from this subsection, the amount of any expenditure on the hiring of a motor car the retail price of which when new exceeds £8,000 would be allowed to be deducted in computing for the purposes of tax the profits or gains of any trade, that amount shall be reduced in the proportion which £8,000, together with one half of the excess, bears to that retail price.'

[13] Section 35(2) has been amended on three occasions. First, the Finance Act 1991 added sub-s (3), to which sub-s (2) was expressed to be subject, together with sub-s (4). Second, the Finance (No 2) Act 1992 increased the figure of £8,000 to £12,000. Lastly, the Finance Act 1998 deleted the words 'or gains'.

[14] The forerunner of s 36(2) of the 1990 Act is s 27(2) of the 1961 Act, which provided that s 25 of that Act should not apply—

'… where a vehicle is provided, or as the case may be hired, wholly or mainly for the purpose of hire to, or the carriage of, members of the public in the ordinary course of trade.'

[15] Section 27(2) of the 1961 Act was substantially amended by the Finance (No 2) Act 1979, and s 36(2) of the 1990 Act reflects its amended form. It appears that the Revenue had understood s 27(2) to apply to short-term hire only. However, in 1975 the Special Commissioners held that it applied equally to long-term hire. In 1979, in the light of rapidly increasing expenditure on car

leasing, Parliament added what now appears as s 36(2) of the 1990 Act to s 27(2) of the 1961 Act, thereby limiting the exemption to short-term hire.

The hearing before the Vice-Chancellor

[16] Before the Vice-Chancellor, Lloyds and the Revenue contended that s 35(2) applied to *all* 'expensive' cars acquired by Lloyds and let to Autolease under finance leases pursuant to the master agreement, submitting that the rent payable by Autolease in respect of the vehicles was 'expenditure on the hiring of a motor car' within the meaning of the subsection. Britax and SCB, on the other hand, contended that s 35(2) applied only to those vehicles leased under the master agreement which were retained by Autolease for the personal use of its directors and employees, submitting that on its true construction s 35(2) applied only to contracts of hire under which the hirer is the end-user—in other words, that it did not apply to expenditure on vehicles which were acquired under finance leases for onward hire to end-users.

[17] The Vice-Chancellor summarised the arguments presented to him as follows ([2001] STC 1652 at [17]–[21]):

> '[17] The essence of the argument for Britax is that (1) the true nature of the expenditure incurred by Autolease under the Master Agreement and relevant schedule, described as rent, was not on the "hiring" of a motor car and (2) on its proper construction s 35(2) does not apply to such expenditure.
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> [18] With regard to the first proposition Britax emphasised that the bailment of the vehicle to Autolease, which it did not deny, was part of a larger composite transaction for the provision of back to back finance by [Lloyds] to Autolease to enable Autolease to contract hire the vehicle to its customer. It pointed out that by the time the contract of bailment between [Lloyds] and Autolease took effect there was already a contract of sub-hire in existence so that until the sub-hire determined Autolease never enjoyed possession and control of the vehicle. Thus, it was said, the Master Agreement and schedule did not confer exclusive possession and control of the vehicle on Autolease. It was submitted that the court should recognise the expenditure to be not on hiring but on obtaining back to back finance.
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> [19] With regard to the second proposition Britax contended that the concept of hiring to which s 35(2) referred was a commercial not a legal concept. It relied on *MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* [2001] UKHL 6, [2001] STC 237, [2001] 2 WLR 377; *General Motors Acceptance Corp (United Kingdom) Ltd v IRC* [1987] STC 122 and *Shepherd v North West Securities Ltd* 1991 SLT 499. The suggested distinction was that the legal concept would, but the commercial concept would not, include car purchase and car finance for the hirer's own use or for contract hire. In this connection it was submitted that the legislative purpose behind s 35(2) was to restrict business use of expensive cars, a purpose which was inapplicable to an intermediate lessor.
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> [20] Both propositions were supported by suggestions that the application of the restriction to an intermediate lessor, however many of them there were, would be unreasonable in unnecessarily increasing the cost to the ultimate user. It is suggested that it would be offensive to the ordinary notions of fiscal fairness to restrict the right to deduct the revenue costs of finance from the rental income it produced. In this connection reliance was placed on the judgment of Sir Thomas Bingham MR in *R v IRC, ex p Unilever plc* [1996] STC 681 at 690.
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> [21] The argument for Standard Chartered was slightly different. It was contended that s 35(2) should be construed (1) by excluding from the word "hiring" in s 35(2) funding arrangements by way of intermediate lease, and/or

(2) excluding from the class of motor car to which s 35(2) applies those which are acquired as either trading stock or plant. Standard Chartered contended that the first submission was supported by *MacNiven (Inspector of Taxes) v Westmoreland* [2001] STC 237, [2001] 2 WLR 377 and the second by all those authorities, such as *O'Rourke (Inspector of Taxes) v Binks* [1992] STC 703, which indicate that such limitations may be implied to avoid absurdity. The suggested absurdity is the application of the restriction to all the intermediate lessors, who have no opportunity to use the motor car, when the purpose of the provision was to discourage the use of expensive motor cars for business purposes.'

The conclusions of the Vice-Chancellor

[18] After considering a number of authorities, including *MacNiven*, the Vice-Chancellor continued ([2001] STC 1652 at [27]–[34]):

'[27] The normal meaning of hire is, in my judgment, to obtain from another the temporary use of a chattel for a stipulated payment (see the *New Shorter Oxford English Dictionary* (1993)). The concept involves obtaining the right to possession of the chattel for the period of the hire to the exclusion of the hirer [sic: I understand the Vice-Chancellor to be intending to refer to the owner] (see the definition quoted in [26]). I can see nothing in the terms of Ch III of Pt II of the 1990 Act to suggest that the concept of hiring to which s 35(2) applies is so limited as to give rise to any of the exclusions for which Britax or Standard Chartered contend.

[28] First, Ch III only applies to motor cars of a specific description acquired wholly and exclusively for the purposes of a trade (see ss 34(1) and 35(2) of the 1990 Act and s 74(1)(a) of the 1988 Act). If it is acquired for that purpose then I see no justification for importing any further more limited purpose such as for use rather than sub-hire or otherwise than as stock in trade or plant.

[29] Second, it is common ground that had Autolease bought the motor cars with funds borrowed from its bank or found from its own resources any claim for writing down allowances would have been restricted in accordance with s 34(3). It is obvious that one of the purposes of s 35(2) is to prevent the avoidance of the statutory restrictions in respect of "expensive motor cars" by the simple expedient of paying by instalments the price for the car with interest on the unpaid balance for the time being. It would be odd if an implied limitation by reference to the use to be made of the motor car by the acquirer should be implicit in s 35(2) but not in s 34(1).

[30] Third, the terms of s 35(3) recognise that hiring under a hire-purchase agreement is, generally, a hiring for the purposes of s 35(2). This is a necessary implication from the fact that it is only certain types of hire-purchase, that is where the option to purchase is for less than 1% of the retail price, which are excluded by s 35(3). All others are included. It was suggested by counsel for Britax that this was an argument from redundancy and so of little weight (see *Walker (Inspector of Taxes) v Centaur Clothes Group Ltd* [2000] STC 324 at 331, [2000] 1 WLR 799 at 805). I do not agree. The terms of s 35(3), being of limited application, confirm Parliamentary recognition of the inclusion in s 35(2) of hire-purchase agreements generally. It was also suggested that in the case of hire-purchase agreements only the revenue element in the instalment is deductible anyway. This seems to me to be beside the point which is the recognition that hire-purchase is hiring for the purpose of s 35(2).

[31] Fourth, s 36(1)(c) recognises that but for that provision a motor vehicle acquired wholly or mainly for hire to the public would be subject to the restriction imposed by s 35(2). Thus a sub-hire would not exclude the hiring

from the operation of s 35(2) unless it was of the limited duration specified in s 36(2). But that duration is something less than a permanent sub-hire. It follows that s 36(1)(c) and (2) specifically recognise that a permanent sub-hire of a motor car does not preclude the deductibility of the costs of its acquisition or of the rights necessary for the sub-hire being subject to the restrictions imposed by s 34(3) or s 35(2). In addition s 36(4) contains provisions for the different treatment of expensive motor cars in the light of their intended use. The restrictions Britax and Standard Chartered seek to imply are also dependent on intended use. I see no reason to make any such implication in the face of the express limitation for use by the disabled.

[32] Fifth, the terms of a funding lease do confer on the person to whom the motor car is let the right to exclusive possession as against the funder. It is this aspect of the transaction which enables that person to confer the appropriate rights on the sub-hirer. The sub-hire cannot take effect until the transaction between the funder and the hirer has been effected, the former is the exploitation of the rights acquired under the latter. It would be absurd if the operation of the restriction imposed by s 35(2) depended on the interposition of a period of use by the hirer between the transaction with the funder and the commencement of the sub-hire.

[33] Sixth, if the transaction under which the relevant expenditure is incurred is a hiring within the meaning of that word in s 35(2), as I consider that it is, it is irrelevant that the hiring is part of a larger composite transaction. Again it would be absurd if the restriction could be avoided by incorporating the transaction into some larger composite arrangement.

[34] Seventh, the fact that Autolease is an intermediate lessor appears to me to be immaterial if, as I believe, the purpose of s 35(2) is to limit the deductibility of expenditure incurred in hiring an expensive motor car for the purposes of a trade. It may be that the effect is to increase the cost to the end-user; but the provisions of Ch III are not directed to increasing or minimising cost to an end-user. The object of the Chapter is to limit the contribution made by the general body of taxpayers to the acquisition for the purposes of a trade by whatever means and for whatever more limited purpose of what Parliament defined as "expensive motor cars". If that restriction is imposed with sufficient clarity, as I believe it is, then the objection based on ordinary notions of fiscal fairness (see [20] above) are misplaced for it is always open to Parliament to provide otherwise.'

[19] The Vice-Chancellor accordingly concluded that there was nothing in the concept of a finance lease to justify the restriction on the application of s 35(2) contended for by SCB and Britax, and that the subsection applied to all rental payments made by Autolease under finance leases granted pursuant to the master agreement in respect of 'expensive' motor cars.

The appeal

[20] Although separately represented before the Vice-Chancellor, SCB and Lloyds have not taken any part in this appeal: the only parties who appear on this appeal are Britax and the Revenue.

[21] For Britax, Mr John Walters QC makes three submissions.

[22] First, he repeats the submission which he made to the Vice-Chancellor that a 'hiring' for the purposes of s 35(2) does not include a finance lease granted to a contract-hire company in respect of vehicles acquired by the contract-hire company for onward hire to an end-user.

[23] Second, he makes a submission not made below, to the effect that the words 'would be allowed to be deducted in computing for the purposes of tax the profits of any trade' in s 35(2) refer not to expenditure of a kind which, as a matter of

accountancy practice, is taken into account in ascertaining the gross profits of a trade ('above-the-line' expenditure), but only to expenditure which is deductible from gross profits once ascertained in order to arrive at net profit ('below-the-line' expenditure). He submits that expenditure on rental payments for cars which are acquired by Autolease under finance leases for onward hire to end-users constitutes 'above-the-line' expenditure for this purpose and thus falls outside s 35(2).

[24] Third, he submits, in so far as it may be necessary for him to do so, that the application of the interpretative obligation in s 3 of the Human Rights Act 1998 (the 1998 Act) requires that s 35(2) be construed in the limited way for which he contends, since the wider construction adopted by the Vice-Chancellor gives rise to a breach of art 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the convention) (as set out in Sch 1 to the 1998 Act) when read with art 1 of the First Protocol to the convention. This again is a new submission, not made below. For convenience, the relevant provisions of the 1998 Act and of the convention are set out in an appendix to this judgment.

[25] In support of his first submission, Mr Walters relies strongly on dicta of Lord Hoffmann in *MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* [2001] UKHL 6, [2001] STC 237, [2001] 2 WLR 377. In *MacNiven*, the issue was whether there had been a payment of interest by a borrower to a lender which fell to be deducted in computing the borrower's profits for tax purposes, in circumstances where the lender had provided the borrower with the funds with which the payment was made. Given the circular nature of the transaction, questions of tax avoidance also arose. Addressing these questions, the House of Lords took the opportunity to review the principle established by *W T Ramsay Ltd v IRC* [1981] STC 174, [1982] AC 300 and subsequent cases in which that principle has been further expounded and developed. In the course of his speech in *MacNiven*, Lord Hoffmann, with whom the other members of the Appellate Committee agreed, identified the innovation in *Ramsay* as being that of giving the statutory concepts of 'disposal' and 'loss' a commercial meaning. Lord Hoffmann continued ([2001] STC 237 at [32], [2001] 2 WLR 377):

> 'The new principle of construction was a recognition that the statutory language was intended to refer to commercial concepts, so that in the case of a concept such as a "disposal", the court was required to take a view of the facts which transcended the juristic individuality of the various parts of a preplanned series of transactions.'

[26] Lord Hoffmann also stressed the limitations of the *Ramsay* principle. Thus, he said ([2001] STC 237 at [58], [2001] 2 WLR 377):

> 'The limitations of the *Ramsay* principle therefore arise out of the paramount necessity of giving effect to the statutory language. One cannot elide the first and fundamental step in the process of construction, namely to identify the concept to which the statute refers. I readily accept that many expressions used in tax legislation (and not only in tax legislation) can be construed as referring to commercial concepts and that the courts are today readier to give them such a construction than they were before *Ramsay*. But that is not always the case. Taxing statutes often refer to purely legal concepts. They use expressions of which a commercial man, asked what they meant, would say "You had better ask a lawyer". For example, stamp duty is payable upon a "conveyance or transfer on sale" (see para 1(1) of Sch 13 to the Finance Act 1999). Although slightly expanded by a definition in para 1(2), the statutory language defines the document subject to duty essentially by reference to external legal concepts such as "conveyance" and "sale". If a transaction falls within the legal description, it makes no difference that it has no business purpose. Having a business purpose is not part of the relevant

concept. If the "disregarded" steps in *Furniss (Inspector of Taxes) v. Dawson* had involved the use of documents of a legal description which attracted stamp duty, duty would have been payable.'

[27] Mr Walters submits that in the context of s 35(2) the concept of 'hiring' is not to be given its technical meaning in law (which, he accepts, includes a hiring under a finance lease); rather, the word 'hiring' is to be given the meaning which, he asserts, it bears when used in a commercial context. In such a context, he submits, 'hiring' means an arrangement under which the owner parts with possession of a vehicle to a hirer who enjoys the use of the vehicle for a specified period and for a specified consideration. He submits that the Vice-Chancellor was wrong to suggest ([2001] STC 1652 at [23]) that the concept of 'hiring' in the context of s 35(2) has the same meaning in a legal context as in a commercial context. He relies on *General Motors Acceptance Corp (United Kingdom) Ltd v IRC* [1987] STC 122 and *Shepherd v North West Securities Ltd* 1991 SLT 499 as authority for the proposition that the commercial concept of 'hire' differs from its legal concept. He relies on *Frazer (Inspector of Taxes) v Trebilcock (t/a Vernons School of Motoring)* (1964) 42 TC 217 as demonstrating that it does not necessarily follow from the fact that a transaction may include an element of hire that the transaction is one of hire. He also relies on a passage in *Chitty on Contracts* (28th edn, 1999), para 33-078 where the bailment element of a finance lease is described as 'only a device to provide the finance company with a security interest (its reversionary right)'.

[28] Mr Walters submits that on a true analysis a finance lease is, as a matter of commercial reality (his expression), a finance transaction clothed with the attributes of a lease. He points out that the Vice-Chancellor referred ([2001] STC 1652 at [10]) to the arrangements between Lloyds and Autolease as being 'in substance funding arrangements'.

[29] Mr Walters also draws our attention to the distinction recognised in the Statement of Standard Accounting Practice 21 (SSAP 21) between rentals under finance leases and rentals under contracts of simple hire (referred to in SSAP 21 as 'operating leases'). SSAP 21 requires that, in contrast to rentals under operating leases, rentals under finance leases are to be accounted for as payments for the acquisition of a chattel, and apportioned for accounting purposes between a finance charge and a reduction of the outstanding obligation for future amounts payable (see SSAP 21, para 35).

[30] On the footing, therefore, that the commercial concept of 'hiring' differs from the technical legal meaning of that word, Mr Walters submits that the Vice-Chancellor fell into error in failing to take what Lord Hoffmann in *MacNiven* called 'the first and fundamental step in the process of construction' (see the passage from his speech quoted in [26] above), viz that of identifying the concept to which s 35(2) refers. Had the Vice-Chancellor addressed that question, submits Mr Walters, he ought to have concluded that s 35(2) refers to the commercial concept and not to the technical legal concept of 'hiring'.

[31] Mr Walters submits that once that approach is adopted, the Vice-Chancellor's objections to the construction of s 35(2) for which Mr Walters contends (see ([2001] STC 1652 at [28]–[34]) all fall away. In particular, he submits that there is no longer any question of an implied 'exclusion' from the concept of 'hiring' since the concept itself is limited. As to the Vice-Chancellor's first objection ([2001] STC 1652 at [28]), Mr Walters submits that once it is recognised that 'hiring' excludes finance leases, there is no need to search for any 'more limited purpose'. As to the Vice-Chancellor's second objection ([2001] STC 1652 at [29]), Mr Walters submits that the commercial concept of 'hiring' is to be distinguished from 'acquisition', which is the relevant concept for the purposes of s 34 (which, as noted earlier, restricts writing-down allowances in

respect of capital expenditure on 'expensive' motor cars). As to the Vice-Chancellor's third objection ([2001] STC 1652 at [30]) Mr Walters submits that once it is accepted that s 35(2) refers to the commercial concept of 'hiring', the exemption (by s 35(3)) from the operation of the restriction imposed by s 35(2) of the revenue element in payment under hire purchase contracts where the option price is not more than 1% of the retail price of the car simply confirms what the position would be without s 35(3), since a hire-purchase contract with such a low option price is, as a commercial matter, a means of 'acquiring' the car rather than of 'hiring' it. As to the Vice-Chancellor's fourth objection ([2001] STC 1652 at [31]), Mr Walters submits that if there is a 'hiring' within the commercial concept of hiring, then a permanent or long-term sub-hire will not take the hiring outside s 35(2), although s 36(1)(c) expressly provides that short-term sub-hirings may do so and s 36(4) provides that long-term sub-hirings to persons in receipt of disability allowances will do so. As to the Vice-Chancellor's fifth and sixth objections ([2001] STC 1652 at [32] and[33]) Mr Walters submits that the absurdities identified by the Vice-Chancellor no longer exist if 'hiring' is given its commercial meaning. As to the Vice-Chancellor's seventh and last objection ([2001] STC 1652 at [34]) Mr Walters would accept the Vice-Chancellor's definition of the object of the Chapter, but only on the basis that 'hiring' is given its commercial meaning. Otherwise, he submits, fiscal unfairness results.

[32] In support of his second submission, Mr Walters submits that the words 'which ... would be allowed to be deducted in computing for the purposes of tax the profits of any trade' in s 35(2) echo s 74(1) of the 1988 Act, which provides as follows (so far as material):

> 'Subject to the provisions of the Tax Acts, in computing the amount of the profits to be charged under Case I or Case II of Schedule D, no sum shall be deducted in respect of—(a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade ...'

[33] Mr Walters submits that since the trade of Autolease is that of hiring out cars to the public, expenditure which it incurs in acquiring the necessary rights to enable it to do so (that is to say, the rental payments under the finance leases) is expenditure which has been laid out to earn its receipts during the relevant accounting period (see *Naval Colliery Co (1897) Ltd v IRC* (1926) 12 TC 1017 at 1027 per Rowlatt J), and is accordingly to be taken into account in computing its gross trading profits, in contrast to expenditure in the nature of administrative expenses, which falls to be deducted from gross profits (ie 'above-the-line' expenditure as opposed to 'below-the-line' expenditure). Mr Walters submits that support for this approach can be found in the decision of the House of Lords in *Fleming v Associated Newspapers Ltd* [1973] AC 628, 48 TC 382, a case concerning the deductibility of business entertainment expenses. Mr Walters submits that *Fleming* makes clear that in the context of business entertainment expenditure the general prohibition against deduction contained in s 577 of the 1988 Act does not prevent such expenditure being brought into account in computing gross profits. He submits that the position is the same in relation to s 35(2).

[34] Laying the ground for his third submission, Mr Walters submits that the Vice-Chancellor's construction of s 35(2) gives rise to what he describes as a 'disproportionate counter-mischief' which cannot have been intended by Parliament, in that it renders wholly uneconomic one method of financing a contract-hire business which deals in 'expensive' cars, whilst leaving untouched other methods of financing such a business, eg by intra-group bank finance or by becoming the agent of the funder. He reminds us that the funder's capital allowance in respect of the expenditure which it incurs in acquiring an 'expensive' car is already restricted by s 34. He submits that there can be no commercial rationale for an end-user of such a car having to pay more by way of hire charges so

as to compensate the contract-hire company for the additional layer of restriction on deductibility which is created by applying s 35(2) to the rental payments under a finance lease.

[35] Mr Walters submits that this 'counter-mischief' constitutes discrimination, contrary to art 14 of the convention when read in conjunction with art 1 of the First Protocol.

[36] However, before making good the substance of his third submission Mr Walters has first to meet a preliminary point taken by the Revenue that the 1998 Act is not retrospective, and that accordingly the interpretative obligation imposed on courts by s 3(1) is not engaged in the instant case.

[37] On this issue (which I will call 'the retrospectivity issue'), Mr Walters submits that to interpret s 35(2) in accordance with s 3(1) of the 1998 Act does not require the retrospective application of the 1998 Act since no relevant 'act' occurred in the instant case prior to the coming into force of the 1998 Act on 2 October 2000 (the commencement date). The first relevant 'act' for this purpose, he submits, is the Vice-Chancellor's judgment, which was delivered after the commencement date.

[38] He submits that the Vice-Chancellor's judgment was an unlawful 'act' for the purposes of s 6(1) of the 1998 Act, in that the Vice-Chancellor construed s 35(2) in a manner which was incompatible with the convention (specifically, with Autolease's rights under art 14 when read with art 1 of the First Protocol), notwithstanding that there is an alternative construction which is compatible with the convention and which, pursuant to s 3(1) of the 1998 Act, the Vice-Chancellor was obliged to adopt.

[39] In support of this submission Mr Walters relies on passages from the speeches of Lord Steyn and Lord Hope of Craighead in *R v Lambert* [2001] UKHL 37, [2001] 3 WLR 206. In *Lambert*, the House of Lords decided by a majority that, on the true construction of ss 7(1), (6) and 22(4) of the 1998 Act, the 1998 Act is retrospective in respect of proceedings brought by or at the instigation of a public authority but not in respect of appeals in those proceedings. Mr Walters also referred us to *R v Kansal (No 2)* [2001] UKHL 62, [2001] 3 WLR 1562, in which the House of Lords doubted whether the majority decision in *Lambert* was correct but declined to depart from it.

[40] Mr Walters submits that s 6(1) of the 1998 Act applies to the judgment of the Vice-Chancellor in the instant case notwithstanding that its effect, when so applied, is to give retrospective effect to the 1998 Act.

[41] He further submits that in the instant case there is no relevant act or decision prior to the commencement date which was lawful when performed but which would be rendered unlawful by the retrospective application of the 1998 Act.

[42] Accordingly he submits that his third submission does not fail for retrospectivity.

[43] Turning to the substance of his third submission, Mr Walters submits that the Vice-Chancellor's construction of s 35(2) gives rise to a breach of art 14 in that s 35(2), so construed, discriminates on grounds of 'status' against Autolease and other contract-hire companies which choose to finance their acquisition of 'expensive' motor cars through the medium of finance leases (he describes such companies as 'the disadvantaged class'), in comparison with other legal persons in an analogous economic situation who finance their acquisition of 'expensive' motor cars by other methods (the advantaged class).

[44] Mr Walters relies on *Darby v Sweden* (1991) 13 EHRR 774, a case involving the alleged discriminatory effects of Swedish tax legislation. In its judgment the European Court of Human Rights said ((1991) 13 EHRR 774, para 31):

> 'Article 14 protects individuals placed in similar situations from discrimination in their enjoyment of their rights under the Convention and its

Protocols. However, a difference in the treatment of one of these individuals will only be discriminatory if it "has no objective and reasonably justification", that is if it does not pursue a "legitimate aim" and if there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realised".'

[45] Mr Walters submits that there is no objective or reasonable justification, within the meaning of that paragraph, for the discrimination which he identifies in the instant case.

[46] Mr Walters also relies on *National & Provincial Building Society v United Kingdom* [1997] STC 1466. In that case three building societies contended that their convention rights had been violated by the enactment of statutory provisions having retrospective effect relating to taxation on interest paid to investors. In its judgment the Court of Human Rights said ([1997] STC 1466, para 88):

'The court reiterates that art 14 of the convention affords protection against discrimination in the enjoyment of the rights and freedoms safeguarded by the other substantive provisions of the convention. However, not every difference in treatment will amount to a violation of this article. Instead, it must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment, and that there is no reasonable or objective justification for this distinction. Furthermore, contracting states enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law ...'

[47] As to whether the alleged discrimination is on a convention ground, Mr Walters submits that the discrimination is on the ground of Autolease's 'status'. Its 'status' for this purpose, he submits, is that of a contract-hire company dealing in 'expensive' cars which chooses to finance its business by means of finance leases; and the discrimination consists in the different tax treatment which (on the Vice-Chancellor's construction of s 35(2)) is accorded to contract-hire companies which carry on a similar business but finance it in other ways.

[48] He submits, however, that the perceived discrimination can legitimately be avoided by construing s 35(2) compatibly with Autolease's convention rights, as required by s 3(1) of the 1998 Act. In support of this submission, he has referred us to the much-cited passage in Lord Steyn's speech in *R v A* [2001] UKHL 25 at [44], [2002] 1 AC 45 where Lord Steyn stresses the wide scope of s 3(1).

[49] Mr Rabinder Singh QC, for the Revenue, responding to Mr Walters' first submission, submits that the Vice-Chancellor's approach to the construction of s 35(2) accords with that of the House of Lords in *MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* [2001] STC 237, [2001] 2 WLR 377. He points out that in *MacNiven* the House of Lords held that payment of interest in s 338 of the 1988 Act has 'its normal legal meaning' (see [2001] STC 237 at [14], [2001] 2 WLR 377 per Lord Nicholls of Birkenhead. Lord Hoffmann said ([2001] STC 237 at [69], [2001] 2 WLR 377) that 'paid' was a 'legal concept and did not have some other commercial meaning'. Thus, there was no basis on which Parliament could be taken to have intended that s 338 should not apply to a case in which interest was paid with money borrowed for the purpose from the creditor. The question was one of construction of the relevant statutory provision.

[50] He submits that the Vice-Chancellor correctly identified a number of features of ss 35 and 36 which pointed clearly in the direction of the construction which he adopted.

[51] He further submits that the suggestion that there is a commercial concept of 'hiring' which would exclude finance leases is manifestly false; the ordinary and natural meaning of the word 'hiring' in s 35(2) is, he submits, entirely apt to include a hiring under a finance lease.

[52] As to Mr Walters' second submission, Mr Singh submits that the submission is wrong both in principle and on authority. He relies on *Odeon Associated Theatres Ltd v Jones (Inspector of Taxes)* [1971] 1 WLR 442 at 453, 48 TC 257 at 272–273, where Sir John Pennycuick V-C explained the process whereby the profits of a company are computed for corporation tax purposes. He submits that, on the clear wording of s 35(2), a specified proportion of rental payments in respect of the hire of 'expensive' cars is not deductible in computing Autolease's taxable profits. He submits that accountancy practice in relation to 'above-the-line' and 'below-the-line' expenditure has no bearing whatever on the true construction of s 35(2).

[53] Mr Singh submits that Autolease can derive no assistance in this respect from the decision of the House of Lords in *Fleming v Associated Newspapers Ltd* [1973] AC 628, 48 TC 382, which was not concerned with the difference between 'above-the-line' and 'below-the-line' expenditure.

[54] Turning to Mr Walters' submissions based on the 1998 Act, Mr Singh submits firstly, on the retrospectivity issue, that Autolease cannot rely on the interpretative obligation in s 3(1) of the 1998 Act in the instant case since the events in issue took place in 1999 and s 3(1) does not take effect retrospectively.

[55] He reminds us that the issue which arises on the warranties given by Britax and SCB relates to the tax liability of Autolease for the accounting period which ended on 31 December 1999. He prays in aid the well-established principle of statutory construction to the effect that Parliament will not be taken to have intended a statute to have retrospective effect unless such an intention is expressed by clear words. He further points out that the 1998 Act itself contains an express provision for retrospectivity (see s 22(4)), which is in strictly limited terms—and which does not apply in the instant case since the present proceedings were not brought 'by or at the instigation of' the Revenue.

[56] Turning to the authorities, Mr Singh points out that in *R v Lambert* [2001] 3 WLR 206 the majority of the appellate committee considered that the 1998 Act had no retrospective effect save as expressly provided by s 22(4). Mr Singh also relies on two decisions of the Court of Appeal, viz *Pearce v Governing Body of Mayfield Secondary School* [2001] EWCA Civ 1347, [2002] ICR 198 and *Wainwright v Home Office* [2001] EWCA Civ 2081, as decisions binding on the Court of Appeal to the effect that s 3(1) of the 1998 Act does not have retrospective effect.

[57] Accordingly, Mr Singh submits, the court on this appeal must construe s 35(2) in accordance with ordinary principles of statutory interpretation, and on the footing that s 3(1) of the 1998 Act has no application to events occurring prior to the commencement date.

[58] Turning to the substance of Mr Walters' submission, viz that the construction urged by the Revenue (and adopted by the Vice-Chancellor) gives rise to a breach of art 14 when read with art 1 of the First Protocol, Mr Singh accepts that art 14 is engaged in the instant case but submits that it is not infringed.

[59] He submits that for art 14 to be infringed there must be: (a) a difference in treatment on a prohibited ground (the alleged ground in the instant case being that of 'status'); (b) between persons in analogous situations; (c) having no objective or reasonable justification.

[60] As to (a) above, he submits that 'status' for the purposes of art 14 does not include 'financial status'. In support of this submission he cites *Thibaudeau v Canada* [1995] 2 SCR 627, 124 DLR 449. In that case, as in the instant case, the issue was whether a taxing provision had a discriminatory effect. Gonthier J observed ([1995] 2 SCR 627, 124 DLR 449, para 106) that in considering whether there was a discriminatory effect it must be determined whether the distinction created is based on an irrelevant personal characteristic, relevance being determined in the light of the underlying objectives of the legislation. In the result,

he held ([1995] 2 SCR 627, 124 DLR 449, para 122) that the group could not be subdivided by income level since that was not a characteristic attaching to the individual.

[61] As to (b) above, Mr Singh submits that the fact that Autolease chose to finance its business by means of finance leases rather than by some other means does not provide a context for discrimination. Mr Singh relies on an observation of Lord Greene MR in *Henriksen (Inspector of Taxes) v Grafton Hotel Ltd* [1942] 2 KB 184 at 193, 24 TC 453 at 460 to the effect that the fact that the taxpayer has chosen to enter into a transaction which attracts tax, as opposed to one which does not, is no justification for saying that he should be treated as having chosen the latter.

[62] As to (c) above, Mr Singh submits that even if there is a difference in treatment between (legal) persons in a relevantly similar situation, such treatment will only be discriminatory within the meaning of art 14 if it has no objective and reasonable justification; that is to say, if it does not pursue a legitimate aim and there is no reasonable relationship of proportionality between the means used and the aim envisaged.

[63] Further, he submits that it is appropriate for the courts to give due deference to Parliament in enacting fiscal legislation by affording Parliament a wide discretionary area of judgment in an area which is concerned with striking a balance in economic and social matters. In support of this submission, he relies on observations of Lord Hope in *R v DPP, ex p Kebilene* [2000] 2 AC 326 at 381 and of the Supreme Court of Canada in *Libman v A-G of Quebec* [1997] 3 SCR 569, para 59. As further examples of a similar approach, he cites the decision of the Supreme Court of the United States in *Nordlinger v Hahn* (1992) 505 US 1 and the decision of the Constitutional Court of South Africa in *Prinsloo v Van der Linde* 1997 (3) SA 1012, paras 23–31.

[64] Mr Singh further submits that the statutory provisions relating to 'expensive' motor cars, which were originally introduced in 1961, have a legitimate aim, in that Parliament plainly considered that it was in the general public interest that tax relief for expenditure incurred in the provision of such cars should be restricted.

[65] As to proportionality, Mr Singh submits that it is of the essence of taxing statutes to make distinctions, including distinctions on the ground of financial status, and that there is no basis for concluding that s 35(2) is in any sense disproportionate.

Conclusions

[66] In my judgment, Mr Walters' first submission betrays a fundamental misunderstanding of the decision of the House of Lords in *MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* [2001] STC 237, [2001] 2 WLR 377. In *MacNiven*, both Lord Nicholls and Lord Hoffmann emphasised the importance of identifying the relevant concept *from an analysis of the statutory language read in its statutory context*. In his speech Lord Nicholls said ([2001] STC 237 at [5]–[6], [2001] 2 WLR 377)—

> '[5] ... having identified the legal nature of the transaction, the courts must then relate this to the language of the statute. For instance, if the scheme has the apparently magical result of creating a loss without the taxpayer suffering any detriment, is this artificial loss a loss *within the meaning of the statutory provision*? Thus, in *W T Ramsay v IRC* ... the taxpayer company sought to create an allowable loss to offset against a chargeable gain it had made on a sale-leaseback transaction. It sought to do so without suffering any financial detriment, by embarking on and carrying through a scheme which created both a loss which was allowable for tax purposes and a matching gain which

was not chargeable. In rejecting the efficacy of this contrived "loss-creating" scheme, Lord Wilberforce observed that a loss which comes and goes as part of a preplanned, single continuous operation "is not such a loss (or gain) as the legislation is dealing with" ... In *IRC v Burmah Oil Co Ltd* Lord Fraser of Tullybelton described this passage as the ratio of the decision in *Ramsay.*

[6] As noted by Lord Steyn in *IRC v McGuckian* ... this is an exemplification of the established purposive approach to the interpretation of statutes. When searching for the meaning with which Parliament has used the statutory language in question, courts have regard to the underlying purpose that the statutory language is seeking to achieve. Likewise, Lord Cooke of Thorndon regarded *Ramsay* as an application to taxing Acts of the general approach to statutory interpretation whereby, in determining the natural meaning of particular expressions in their context, weight is given to the purpose and spirit of the legislation ...'

[67] In similar vein, Lord Hoffmann said ([2001] STC 237 at [29], [2001] 2 WLR 377):

'There is ultimately only one principle of construction, namely to ascertain what Parliament meant by using the language of the statute. All other "principles of construction" can be no more than guides which past judges have put forward, some more helpful or insightful than others, to assist in the task of interpretation.'

[68] Thus, when Lord Hoffmann refers ([2001] STC 237 at [58], [2001] 2 WLR 377) to the 'first and fundamental step in the process of construction' as being that of identifying 'the concept to which the statute refers', I do not understand him to be suggesting that the court should look beyond the statute to see how the statutory language would be understood by, for example, the commercial community. In particular, the suggestion (which seems to me to be implicit in Mr Walters' submission) that in order to identify the relevant concept the court should have regard to anecdotal evidence as to how similar language would be understood by particular sections of society, or (as in the instant case) by the commercial community, seems to me to be contrary to principle. The court's task is to construe the statutory language; and where that language is capable of bearing more than one meaning, the court will look to construe it in a way which accords with 'the purpose and the spirit of the legislation'.

[69] Accordingly, I consider that the Vice-Chancellor adopted the correct approach to the construction of s 35(2) when he said ([2001] STC 1652 at [23]): 'The question is what is meant by "the hiring of a motor car" in the context of s 35(2).'

[70] The question is, indeed, as simple as that. And if it be the case that in the contract-hire industry the word 'hiring' is used to denote only a hiring to an end-user, that (to my mind) says nothing whatever as to the meaning of the word 'hiring' in the context of s 35(2).

[71] I turn, then, to the statutory language. It being conceded by Britax (an inevitable concession, in my judgment) that an intermediate lease such as a finance lease is in legal terms a 'hiring', the question is, in substance, whether the word 'hiring' in s 35(2) is to be construed so as to exclude intermediate hirings.

[72] I agree with the Vice-Chancellor that there is no justification for so restricting the meaning of the word 'hiring' in s 35(2). In the first place, if Parliament had intended to exclude intermediate hirings from the operation of s 35(2) there is no reason why it could not have done so expressly. Secondly, the fact that s 35(2) applies to hire-purchase agreements (subject only to an express exception for hire-purchase agreements where the option price is less than 1% of the retail price) suggests to me that the word 'hiring' was not intended to be given

a restricted meaning but was intended to extend to arrangements entered into for the purposes of obtaining finance. Thirdly, as the Vice-Chancellor pointed out (as his fourth reason, (see ([2001] STC 1652 at [31])) s 36(1)(c) expressly excepts from the operation of s 35(2) certain categories of short-term sub-hire to members of the public. This strongly suggests to me that Parliament intended s 35(2) to apply to long-term, intermediate, hirings. I also bear in mind that the concept of 'expenditure' is wide enough to include payments which may not strictly be regarded as rentals.

[73] In my judgment, the decision of the Court of Appeal in *General Motors Acceptance Corp (United Kingdom) Ltd v IRC* [1987] STC 122 does not assist Mr Walters. The issue in that case was whether vehicles purchased by a finance company formed part of its trading stock and thus qualified for tax relief. The Revenue contended that the vehicles did not fall within the definition of 'trading stock' in the relevant statutory provision (para 29(1) of Sch 5 to the Finance Act 1976) since the company did not trade in vehicles, and that in any event they did not qualify for relief as they were 'let on hire'. The Court of Appeal held that the vehicles fell within the definition, since (a) they were 'sold in the ordinary course of trade' and (b) they were not 'let on hire'. Thus, the issues were as to the true construction of the relevant statutory provision.

[74] The same applies, in my judgment, to the Scottish case of *Shepherd v North West Securities Ltd* 1991 SLT 499, where the issue was a different one, viz whether a particular contract of hire was subject to an implied condition as to hireworthiness.

[75] In my judgment, the short answer to Mr Walters' first submission is that the fact that finance leases are in the nature of funding arrangements does not, as a matter of construction of s 35(2), alter the nature of the 'expenditure' or the tax consequences which flow from it. In addition, in so far as I have not expressly referred to them I respectfully agree with, and adopt, the remaining reasons given by the Vice-Chancellor for rejecting the restricted meaning of s 35(2) contended for by Mr Walters.

[76] I turn, then, to Mr Walters' second submission. Once again, the question is one of construction of the statutory language. This time, the words to be construed are: 'would be allowed to be deducted in computing for the purposes of tax the profits of any trade'. Once again, however, it seems to me that the approach to the construction of these words urged on us by Mr Walters is contrary to principle.

[77] In *Odeon Associated Theatres Ltd v Jones (Inspector of Taxes)* [1971] 1 WLR 442 at 453, 48 TC 257 at 272–273, Pennycuick V-C said:

> 'It is necessary to consider first the principle upon which the profit of a trader falls to be ascertained for the purpose of income tax and in particular how expenditure should be dealt with by way of deduction in the computation of profit. On this point there is a good deal of authority. I propose only to refer to the well-known statements in *Usher's Wiltshire Brewery Ltd.* v. *Bruce* [1915] A.C. 433. Lord Parker said, at p. 458: "The expression 'balance of profits or gains' implies, as has often been pointed out, something in the nature of a credit and debit account, in which the receipts appear on the one side and the costs and expenditure necessary for earning these receipts appear on the other side. Indeed, without such an account it would be impossible to ascertain whether there were really any profits on which the tax could be assessed. But the rule proceeds to provide that the duty 'shall be assessed, charged, and paid without other deduction than is hereinafter allowed.'" Lord Sumner said, at p. 468: "The effect of this structure, I think, is this, that the direction to compute the full amount of the balance of the profits must be read as subject to certain allowances and to certain prohibitions of deductions, but that a

deduction, if there be such, which is neither within the terms of the prohibition nor such that the expressed allowance must be taken as the exclusive definition of its area, is to be made or not to be made according as it is or is not, on the facts of the case, a proper debit item to be charged against incomings of the trade when computing the balance of profits of it." The expression "ordinary principles of commercial accountancy" is not contained in that paragraph but it is contained in other passages of high authority. I will endeavour in a moment to explain in rather more detail what that expression means. The effect of the principles laid down in *Usher's Wiltshire Brewery Ltd.* v. *Bruce* and other cases, including those in which the expression "ordinary principles of commercial accountancy" is used is this: first one must ascertain the profits of the trade in accordance with ordinary principles of commercial accountancy. That, of course, involves bringing in as items of expenditure such items as would be treated as proper items of expenditure in a revenue account made up in accordance with the ordinary principles of commercial accountancy. Secondly, one must adjust this account by reference to the express prohibitions contained in the relevant statute ... That is to say, an item of expenditure, even if it would be allowed as a deduction in accordance with the ordinary principles of commercial accountancy, must be struck out if it falls within any of those statutory prohibitions. I believe that to be the true principle upon which the profit of the taxpayer's trade must be ascertained for the present purpose. Mr Watson, who appeared for the Crown, contended that there is a third and distinct requirement, namely, that the profit of the trade must be ascertained for the purpose of income tax. It was not clear to me ... precisely what standard the court should adopt, apart from that of the ordinary principles of commercial accountancy, in arriving at the profit of a trade for the purpose of income tax. Mr Watson used the word "logic". If by that he intended no more than to say that one must apply the correct principles of commercial accountancy, I agree with that, as I will explain in a moment. I think, however, he intended to go beyond that, and meant that the court must ascertain the profit of a trade on some theoretical basis divorced from the principles of commercial accountancy. If that is what is intended, I am unable to accept the contention, which I believe to be entirely novel. I think that in deference to the arguments of Mr Watson and also of Mr Medd and to the authorities which were cited I ought to say a few words by way of explanation of the time-honoured expression "ordinary principles of commercial accountancy". The concern of the court in this connection is to ascertain the true profit of the taxpayer. That and nothing else, apart from express statutory adjustments, is the subject of taxation in respect of a trade. In so ascertaining the true profit of a trade the court applies the correct principles of the prevailing system of commercial accountancy. I use the word "correct" deliberately. In order to ascertain what are the correct principles it has recourse to the evidence of accountants. That evidence is conclusive on the practice of accountants in the sense of the principles on which accountants act in practice. That is a question of pure fact, but the court itself has to make a final decision as to whether that practice corresponds to the correct principles of commercial accountancy. No doubt in the vast proportion of cases the court will agree with the accountants but it will not necessarily do so. Again, there may be a divergency of view between the accountants, or there may be alternative principles, none of which can be said to be incorrect, or, of course, there may be no accountancy evidence at all. The cases illustrate these various points. At the end of the day the court must determine what is the correct principle of commercial accountancy to be applied. Having done so, it will ascertain the true profit of the trade according to that principle, and the profit so ascertained is the subject of taxation. The expression "ordinary principles

> of commercial accountancy" is, as I understand it, employed to denote what is involved in this composite process. Properly understood it presents no difficulty, and I would not be at all disposed to attempt any alternative label.'

[78] In *Gallagher v Jones (Inspector of Taxes)* [1993] STC 537 at 555, [1994] Ch 107 at 133 Sir Thomas Bingham MR described the above passage as defining 'with great clarity the task on which the court is engaged and the way in which it should set about it'.

[79] As noted earlier, the question for the court in the instant case is simply whether, as a matter of construction of s 35(2), rental payments under finance leases constitute expenditure to which that subsection applies. The subsection is not expressly limited to expenditure which is brought into account by way of a deduction from gross profits (ie 'below-the-line' expenditure), and I can for my part see no grounds for implying such a limitation. Applying the principles explained by Pennycuick V-C in *Odeon Associated Theatres Ltd v Jones (Inspector of Taxes)* [1971] 1 WLR 442, 48 TC 257, it follows, in my judgment, that the distinction recognised by the application of 'ordinary principles of commercial accountancy' between 'above-the-line' and 'below-the-line' expenditure can have no impact on the true construction of s 35(2). As I read the subsection, expenditure which is brought into account in computing gross profits is just as much expenditure 'deducted in computing for the purposes of tax the profits of [the] trade' as expenditure which is deducted from gross profits once computed. In each case, the expenditure is brought into account as a deduction in the computation of taxable profits.

[80] In my judgment, the decision of the House of Lords in *Fleming v Associated Newspapers Ltd* [1973] AC 628, 48 TC 382 provides no support for Mr Walters' second submission. The issue in *Fleming* was as to the true construction of a statutory provision (s 15(9) of the Finance Act 1965) which exempted from the non-deductibility of business entertainment expenses 'expenses incurred in ... the provision by any person of anything which it is his trade to provide ...'. The Court of Appeal, allowing an appeal from the High Court, held that the expenses in question were not deductible since it was no part of the taxpayer's business to provide entertainment. The House of Lords upheld the Court of Appeal's decision. Mr Walters relies in particular on a passage in the speech of Lord Simon of Glaisdale ([1973] AC 628 at 646, 48 TC 382 at 410) in which he observes that—

> '... it is very much part of the duty of the courts, in their task of statutory interpretation, to ascertain as best they can what was the mischief as conceived by Parliament for which a statutory remedy was being provided; nor is it necessary nowadays for court to affect ignorance of what is notorious.'

[81] But that is no warrant for superimposing on the words of the statutory provision the perceptions of the commercial community as to the mischief at which the provision ought to have been aimed. The question remains one of construction, as Lord Simon makes clear in the sentence immediately following the passage quoted above, where he says ([1973] AC 628 at 646, 48 TC 382 at 410–411):

> 'But a mere reading of section 15 of the Act of 1965 against the background of the preceding law can leave no doubt that it was Parliament's conception that expenditure on business entertainment charged as a deduction against gross trading income was being fiscally abused, or that Parliament in section 15 was seeking a remedy for what it conceived as such abuse.'

[82] In any event, in *Fleming* in the House of Lords was not concerned with any distinction between 'above-the-line' and 'below-the-line' expenditure.

[83] Accordingly, I reject Mr Walters' second submission.

[84] I turn therefore, to Mr Walters' third submission, based on the 1998 Act and the convention. I address first the retrospectivity issue.

[85] In so far as Mr Walters' third submission is dependent on the contention that s 3(1) has retrospective operation, that issue has in my judgment been effectively laid to rest (at least so far as the Court of Appeal is concerned) by the decisions of the Court of Appeal in *Pearce v Governing Body of Mayfield Secondary School* [2001] EWCA Civ 1347, [2002] ICR 198 and in *Wainwright v Home Office* [2001] EWCA Civ 2081.

[86] In *Pearce* a teacher complained of unlawful discrimination on grounds of sex, within the meaning of s 1(1) of the Sex Discrimination Act 1975. The employment tribunal rejected her complaint, and the Employment Appeal Tribunal dismissed her appeal. On her appeal to the Court of Appeal, the complainant contended that the employment tribunal ought to have construed s 1(1) pursuant to s 3(1) of the 1998 Act, notwithstanding that the 1998 Act was not then in force. However, the Court of Appeal held that it would be wrong to construe the relevant legislation pursuant to s 3(1) of the 1998 Act so as to create a liability prior to 2 October 2000 where none previously existed. In the course of her judgment, Hale LJ said ([2002] ICR 198 at [33]):

> 'The employment tribunal on 1 April 1999 and the Employment Appeal Tribunal on 7 April 2000 construed the Sex Discrimination Act 1975 in accordance with the law as it then stood. We are being asked to construe the 1975 Act differently in accordance with the courts' obligations following the implementation of the 1998 Act on 2 October 2000. Furthermore, we are being asked to do so in order to impose liability where none existed previously. This would, as the House of Lords has intimated, be wrong in principle.'

[87] Judge LJ, after referring to the decision of the Vice-Chancellor in *Wilson v First County Trust Ltd* [2001] EWCA Civ 633, [2002] QB 74, said ([2002] ICR 198 at [79]):

> 'That approach has recently been expressly approved in the House of Lords in [*Lambert*]. I shall not repeat the relevant passages from the opinions cited by Hale LJ. Lord Clyde, at p 253, para 142, summarised what I believe to have been the conclusion of the House of Lords: "There is nothing to show that it was intended by section 3 that the meaning given to a statutory provision by a court prior to 2 October 2000 should be changed in the event of an appeal against that decision being heard on or after that date."'

[88] In *Wainwright*, a mother and son claimed damages as compensation for a breach of art 8 of the convention (right to respect for private and family life) by reason of the manner in which they were strip-searched by prison officers when visiting another member of the family in prison. One of the issues in the case was whether the complainants were entitled to rely on s 3 of the 1998 Act notwithstanding that the conduct complained of took place before the 1998 Act came into force. Lord Woolf MR said ([2001] EWCA Civ 2081 at [22]):

> 'There has been considerable uncertainty as to whether the [1998] Act can apply retrospectively in situations where the conduct complained of occurred before the Act came into force. The position was considered by the House of Lords in *R v Lambert* ... After the hearing of this appeal the decision was given by the House of Lords in *R v Kansal* ... In *Kansal* the actual decision in *Lambert* was subject to considerable criticism but because *Lambert* had only been recently decided and the decision only concerned a transitional situation the case of *Lambert* was not overruled.'

[89] Later in his judgment ([2001] EWCA Civ 2081 at [27]–[29]) Lord Woolf MR said this with reference to s 3 of the 1998 Act:

> '[27] *Lambert* and *Kansal* do not directly decide this point. They did not concern s 3. In those cases, unlike the position here, the decision under appeal was given before the Act came into force. In addition there was no appeal by a public authority as there is here by the Home Office. However the decision in both cases is consistent with the general presumption that legislation should not be treated as changing the substantive law in relation to events taking place prior to legislation coming into force. But the whole purpose of this part of the claimants' argument is to rely on s 3 to assist in establishing liability on the Home Office for causing humiliation and distress where without s 3 it would not exist. This is therefore an attempt by Mr Wilby to rely on s 3 to achieve an interpretation of r 86 [of the Prison Rules 1964, SI 1964/388] which is then to be applied retrospectively to a situation when the Act was not in force.
>
> [28] Of course, legislation can expressly provide that it is to apply retrospectively and if it does so the legislation is retrospective in accordance with the terms of the legislation. This is the position with regard to s 22(4) of the [1998] Act ...
>
> [29] Section 22(4) has no application to s 3. However, this does not mean that s 22(4) is not relevant. On the contrary, it is highly significant since it demonstrates that when Parliament wanted the Act to operate retrospectively it says so.'

[90] In the course of his judgment in *Wainwright*, Buxton LJ said ([2001] EWCA Civ 2081 at [122]):

> 'I respectfully agree with what the Lord Chief Justice says ... in para 29 and following of his judgment. I would also venture to add that in my view any liberty for this court to hold that s 3(1) of the 1998 Act has retrospective force has been put to rest by the decision in [*Pearce*], as expressed in the judgment of Judge LJ at para 79. Nothing in [*Kansal*] undermines the binding authority for this court of [*Pearce*].'

[91] Thus, it is no longer open to argument in this court that s 3(1) of the 1998 Act operates retrospectively.

[92] Further, I cannot accept Mr Walters submission that in order to give rise to the retrospectivity issue there must have been some act or decision prior to the commencement date which was valid when performed but which would be rendered invalid if the 1998 Act were to apply retrospectively, and that there was no such act or decision in the instant case. The events in question were the trading activities of Autolease during the accounting period ended 31 December 1999; the issue in the proceedings is as to the tax consequences of those trading activities. Plainly, Mr Walters' reliance on the 1998 Act requires that it should operate retrospectively in relation to those trading activities, and to that issue, so as to produce a result (in terms of the true construction of s 35(2)) which was not available under the law as it then stood.

[93] Accordingly, in my judgment Mr Walters' third submission fails on the retrospectivity issue.

[94] In the light of that conclusion, it is strictly unnecessary to address his substantive submission based on art 14 of the convention and s 3(1) of the 1998 Act. I merely content myself with saying that, on the assumption that I am wrong on the retrospectivity issue, I am very far from convinced that there is any substance in Mr Walters' submission that the Vice-Chancellor's judgment gives rise to a breach of art 14. In the first place, I would find it impossible to regard the different treatment of a contract-hire company which has chosen to finance its business by means of finance leases as compared with a contract-hire company which has

adopted other means of financing its business as constituting discrimination on grounds of 'status'. Secondly, even if (absent s 3(1)) s 35(2) gives rise to 'discrimination', it seems to me, for the reasons advanced by Mr Singh, that there is a very strong case for concluding that such discrimination is justifiable and proportionate, and accordingly does not constitute a breach of art 14. However, it is unnecessary to decide these points, given my conclusion on the retrospectivity issue.

[95] In my judgment, therefore, each of Mr Walters' three submissions fails. I would accordingly dismiss this appeal.

LONGMORE LJ.

[96] I agree.

PETER GIBSON LJ.

[97] I also agree.

Appeal dismissed with costs.

Karen Widdicombe Solicitor.

Appendix

The Human Rights Act 1998

'**3 Interpretation of legislation**

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights.

(2) This section—(a) applies to primary legislation … whenever enacted …

6 Acts of public authorities

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right…

(3) In this section "public authority" includes—(a) a court or tribunal …

7 Proceedings

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by s 6(1) may—

> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
>
> (b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act …

(6) In subsection 1(b) "legal proceedings" includes—

> (a) proceedings brought by or at the instigation of a public authority; and
>
> (b) an appeal against the decision of a court or tribunal …

22 Short title, commencement, application and extent …

(4) Paragraph (b) of subsection (1) of section 7 applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but otherwise that subsection does not apply to an act taking place before the coming into force of that section …'

The Convention for the Protection of Human Rights and Fundamental Freedoms 1950

'*Article 14*

Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status …

THE FIRST PROTOCOL

Article 1

Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'