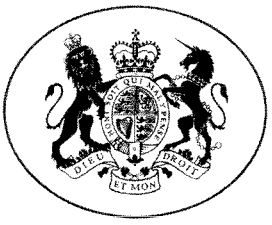

[2014] UKUT 0095 (TCC)

FTC/42/2013

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

BETWEEN:

THE COMMISSIONERS FOR HER MAJESTY' S REVENUE AND CUSTOMS

Appellants

- and –

(1) APOLLO FUELS LIMITED and others
(2) BRIAN EDWARDS and others

Respondents

Income tax – car leased to employee – mileage allowance payments – whether lease arrangement falling within section 114 Income Tax (Earnings and Pensions) Act 2003 – application of sections 114(3) and 62 ITEPA - whether National Insurance Contributions payable on car – whether car is a 'company vehicle' for the purpose of section 236(2) ITEPA

TRIBUNAL: The Hon Mrs Justice Rose

Sitting in public in London on 4 and 5 February 2014

David Yates instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Appellants

Rory Mullan and Oliver Marre instructed by GBAC Ltd for the Respondents

DECISION

The appeal of the Commissioners for Her Majesty's Revenue and Customs IS DISMISSED

REASONS

Introduction

1. This is an appeal from the decision of the First-tier Tribunal (Tax Chamber) dated 12 December 2012 (Judge David Demack and Ann Christian). In that decision the Tribunal determined that the arrangements entered into by a group of companies to provide cars to their employees and to pay them mileage allowances did not give rise to any liability to tax. The Tribunal also overturned HMRC's assessment that National Insurance Contributions ('NICs') were payable in respect of the use of the cars provided and on the payments made in respect of mileage allowances.

2. The corporate Respondents to this appeal are six companies in the Newell & Wright group. That group carries on a variety of trades and businesses including the distribution of fuel oils, transport contracting, tanker manufacturing fabrication and sales, freight forwarding and haulage, and vehicle hire and sales. I shall refer to the corporate Respondents as 'the Group'.

3. The Group historically provided cars to salesmen and managers employed by its subsidiaries both as a perquisite of their employment and to enable them to carry out their duties. The cars were mainly second-hand and purchased at auction. The duties of the employees concerned included visiting new and existing customers and suppliers, delivering freight to customers, travelling between various company sites and visiting the companies' banks, accountants, etc. The annual business mileage of each of the employees concerned varied between 5,000 and 25,000 miles.

4. From 6 April 2002 there was a change in the law relating to the taxation of the provision of company cars to employees. Before that date, employees were charged to income tax as if a sum equal to 35 per cent of the value of the car when new was added to their income, but the charge was reduced to 25 per cent for employees who travelled more than 2,000 business miles in the year, and to 15 per cent for those who travelled more than 18,000 business miles. Further, if the car were four or more years old, the tax charge was reduced by one quarter.

5. Following the change, there was no longer any reduction in the charge to tax based on the extent of an employee's business travel or for the age of the car. Instead employees were charged to tax in the sum of 15 per cent (since

reduced to 10 per cent) of the list price of the car if its CO_2 emissions were below a specified figure, with an addition of 1 per cent of the value charged for each 5g/km above that figure.

6. Following those changes, the Group decided it would move to an arrangement whereby it would lease the cars to the workforce for an arm's length hire rental. The original car provision scheme was ended in or about April 2003, and the new car leasing scheme implemented on its termination. All 26 employees who had previously been provided with a car agreed to the new arrangements and entered into car leases. Under the new arrangements, employees were told that they would be paid for business mileage at the same rate as other Group employees who used their own cars for business purposes. Sums due to the Employees as mileage allowance payments would be set off against the rentals they owed to the Group under the car leases. 20 of the Group's employees are also Respondents to this appeal ('the Employees').

7. Each lease entered into by the Employees was a one-page document setting out the make and registration number of the car, the monthly rental and the VAT charged. The lease provides that amounts due in respect of mileage payments can be set off against the rental and that:

> "Should you give notice to leave the company you will have to
>
> A) Complete a standing order mandate for future rentals should you wish to continue hiring the vehicle, or
>
> B) Return the vehicle and any money owing will be settled on your last day."

8. The lease also provided that the Employee could cancel the agreement at any time, subject to 7 days notice or mutual agreement. The lease did not confer on the Group the right to cancel and did not restrict in any way the use that could be made of the car by the Employee.

9. It is accepted by HMRC that the rental paid by the Employees under the individual leases is an arm's length commercial rental as would be paid for the particular car if the Employee had hired it from a third party car hire company. The Tribunal heard evidence from the Group about how the rental charges had been calculated and made this finding of fact. It is not challenged by HMRC in this appeal. HMRC argue, however, that the car is still a benefit that falls to be taxed under Chapter 6 of Part 3 of the Income Tax (Earnings and Pensions) Act 2003 ('ITEPA') because the arrangements falls within section 114 of that Act. The Respondents say that Chapter 6 has no application in the circumstances of this case.

10. Because the Respondents had formed the view that the provision of the cars was not a taxable benefit, they did not deduct the tax now alleged to be due from the Employees' pay under the PAYE scheme or notify HMRC that cars were being provided to the Employees under the leases. HMRC, having

concluded that the cars are subject to tax, served notices of assessment for that tax on the Employees rather than on the Group, under section 29 of the Taxes Management Act 1970. It was the Employees therefore who brought the appeal before the Tribunal in respect of the liability to tax on the car benefit. The Group's appeal related to HMRC's assertion that the Group was liable to pay NICs in respect of the use of the cars and in respect of the taxation and NIC liability for the mileage allowance payments.

11. The Tribunal found that no tax and no NICs were due to be paid in respect either of the cars or of the mileage allowance. HMRC do not challenge the finding that NIC contributions are not payable on the mileage allowance payments. Their appeal asserts that the Tribunal erred in finding that the Employees were not liable to pay tax on the cars and that the Group was not liable (i) to account for PAYE on the mileage allowance payments made to the Employees and (ii) to pay NICs on the cars under section 10 of the Social Security Contributions and Benefits Act 1992.

12. The issues raised by this appeal can be summarised as follows:

    a. Do the arrangements for leasing the cars to the Employees fall within Chapter 6 of Part 3 of the ITEPA? If so, then it is common ground both that tax and NIC contributions are payable in respect of the cars.

    b. Are the payments for mileage allowance exempt from income tax because they fall within the exemption provided by section 229 ITEPA?

    c. If tax is due on the provision of the cars, were HMRC entitled to assess the Employees for the tax on the cars under the Taxes Management Act 1970?

13. As regards HMRC's challenge to the Tribunal's decision in respect of NICs, there is an initial point on the adequacy of the Notice of Appeal. Permission to appeal was granted by Judge Demack on 20 February 2013 referring to the reasons set out in HMRC's grounds for applying for permission. No limit was placed on the scope of the appeal. The Respondents say that the Notice of Appeal then served did not challenge every aspect of the Tribunal's interpretation of the relevant statutory provisions and hence that certain aspects of the Tribunal's decision are not properly the subject of the appeal. Rule 23(3) and rule 21(4)(e) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (S.I. 2008/2698) provide that the Notice of Appeal must set out the grounds on which the appellant relies.

14. I disagree with the Respondents' analysis of the Notice of Appeal. The point they are now making was convincingly rebutted by HMRC's Reply to the Respondents' Response. It was clear from the Notice of Appeal that HMRC alleged that the Tribunal had erred in law in its interpretation of the various statutory provisions and the Notice of Appeal and Reply set out clearly which

findings HMRC accepted and which were challenged. I find that there is no inadequacy in the Notice of Appeal.

The application of section 114 of ITEPA

15. Section 63 ITEPA defines the 'benefits code' as Chapter 2 to 11 of Part 3 of the ITEPA. Each of Chapters 3 to 11 deals with a different kind of benefit - living accommodation (Chapter 5); loans (Chapter 7) and cars, vans and related benefits (Chapter 6). Chapter 6 comprises sections 114 to 172 setting out a comprehensive and detailed description of how cars, vans and related benefits (such as car accessories) are to be taxed.

16. If there is a benefit conferred on an employee which is not of a kind specifically dealt with in one of the Chapters in Part 3, then it is covered by the residual charge provisions in Chapter 10. Section 203 in Chapter 10 provides that the cash equivalent of an 'employment-related benefit' is to be treated as earnings and that the cash equivalent of that benefit is the cost of the benefit less any part of that cost made good by the employee to the employer. The term 'employment-related benefit' is defined as excluding any benefits covered by Chapters 3 to 9 of Part 3: see section 201(2) and section 202(1)(a). Sections 204 onwards then set out how to calculate the 'cost' of a benefit for the purposes of section 203.

17. Section 114 (as amended) at the start of Chapter 6 of the benefits code provides as follows:

> "**114 Cars, vans and related benefits**
>
> (1) This Chapter applies to a car or a van in relation to a particular tax year if in that year the car or van—
>
> (a) is made available (without any transfer of the property in it) to an employee or a member of the employee's family or household,
>
> (b) is so made available by reason of the employment (see section 117), and
>
> (c) is available for the employee's or member's private use (see section 118).
>
> (2) Where this Chapter applies to a car or van—
>
> (a) sections 120 to 148 provide for the cash equivalent of the benefit of the car to be treated as earnings,
>
> (b) sections 149 to 153 provide for the cash equivalent of the benefit of any fuel provided for the car to be treated as earnings,
>
> (c) sections 154 to 159 provide for the cash equivalent of the benefit of the van to be treated as earnings, and

(d) sections 160 to 164 provide for the cash equivalent of the benefit of any fuel provided for the van to be treated as earnings in certain circumstances.

(3) This Chapter does not apply if an amount constitutes earnings from the employment in respect of the benefit of the car or van by virtue of any other provision (see section 119).

..."

18. Section 120 ITEPA provides for the charge to be applied to a car benefit.

"120 Benefit of car treated as earnings

(1) If this Chapter applies to a car in relation to a particular tax year, the cash equivalent of the benefit of the car is to be treated as earnings from the employment for that year.

(2) In such a case the employee is referred to in this Chapter as being chargeable to tax in respect of the car in that year."

19. Thus, if the arrangements for the provision of a car to an employee fall within section 114(1) then according to section 120 the employee is taxed on the 'cash equivalent' of the benefit of the car because that cash equivalent is treated as earnings. The subsequent sections 121 onwards explain how to calculate that cash equivalent.

20. This appeal raises a number of issues as to the proper construction of section 114. They can be summarised as follows:

    a. Does the lease between the Group and its Employees involve a transfer of property in the car? If so, then the requirement in parentheses in subsection (1)(a) that the making available of the car has to be without any transfer of the property in it is not satisfied and the arrangements will fall outside Chapter 6. This raises two sub-issues:

        i. Do the leases transfer *any* property in the car to the Employees?

        ii. If so, is the transfer of a partial interest in the car enough to preclude the application of the subsection (1)(a) and hence take the arrangements outside the scope of Chapter 6?

    b. Is there another section of the ITEPA which treats an amount in respect of the cars here as earnings from the employment so that section 114(3) applies to take the arrangements outside Chapter 6? In particular, does section 62 apply even though it is accepted by the Respondents that the amount treated as earnings by section 62 would in the case of at least some of these Employees be nil?

c. Does the fact that, as HMRC accepts, the Employees paid the full market value for the cars mean that there is no 'benefit of the car' within the meaning of section 120 and hence nothing which can be liable to tax in this case?

21. Issues (a) and (b) depend on the proper construction of the wording of section 114. Issue (c) depends on whether one should imply into Chapter 6 (and in fact into the whole benefits code) a requirement that there be some benefit acquired by the Employees in the sense of some advantage over and above what they have paid for. The Respondents contend that such a requirement should be read into the Chapter because the Chapter, and the whole benefits code, is about taxing income and not about taxing things which the Employee has paid a market value for. HMRC deny that there is any such requirement read into the legislation.

(a) Is there a transfer of property in the car provided to the Employees?

22. The Tribunal concluded that there was a transfer of property in the car by the lease. In paragraph 75 of their decision, they held that the law of personalty had moved on and that lessees of goods have rights against third parties. They held that the car leases did create proprietary rights and there was a transfer of property in the cars the effect of which was that an employee had an exclusive right to the use of a car. The condition in parentheses in section 114(1)(a) was not satisfied and the car benefit charge could not apply to these leases.

23. The Respondents relied on a recent statement of the law in *Bristol Airport plc v Powdrill* [1990] Ch 744. *Bristol Airport* concerned an insolvent charter airline, Paramount Airways Ltd. Two of the airline's aircraft were parked at the Airport's premises and the Airport applied for permission to detain them under section 88 of the Civil Aviation Act 1982. The question arose whether the aircraft were the 'property' of the airline because section 11(3) of the Insolvency Act 1986 prevents steps being taken to enforce any security over the company's property otherwise than with the leave of the court. The Court held that by exercising their rights under the Civil Aviation Act, the Airport was taking steps to enforce its security so the leave of the court would be required if the aircraft were the airline's 'property'.

24. Sir Nicolas Browne-Wilkinson MR (with whom Woolf and Staughton LJJ agreed) posed the question: were the aircraft, notwithstanding the fact that they were only leased to the airline, 'property' of the airline for the purposes of section 11(3) of the 1986 Act? The Court held that 'property' was given a broad definition by section 436 of the 1986 Act – indeed it was hard to think of a wider definition. The Master of the Rolls held that the interest of the airline under a lease of the aircraft was plainly property within that definition: see page 759E of the Report. He said:

> 'In my judgment, the interest of Paramount under a lease of the aircraft is plainly property within that definition. It is true that, to date, concepts of concurrent interests in personal property have not been developed in the same way as they have over the centuries in relation to real property. But modern commercial methods have introduced chattel leasing. The 1986 Act refers expressly to such leases: see s.10(4). Although a chattel lease is a contract, it does not follow that no property interest is created in the chattel. The basic equitable principle is that if, under a contract, A has certain rights over property as against the legal owner, which rights are specifically enforceable in equity, A has an equitable interest in such property. I have no doubt that a court would order specific performance of a contract to lease an aircraft, since each aircraft has unique features peculiar to itself. Accordingly in my judgment the 'lessee' has at least an equitable right of some kind in that aircraft which falls within the statutory definition as being some "description of interest... arising out of, or incidental to" that aircraft.'

25. So far as the special nature of aircraft is concerned, the other members of the Court did not approach the matter on the basis that aircraft are in some special category for this purpose. Thus Woolf LJ noted that 'Different people can have an interest in an aircraft *or other goods*'. Staughton LJ referred in his judgment to the dilemma of a road haulage company in administration seeking to recover a lorry that has just been repaired by a garage which asserts a lien for payment of the bill. He considers the problems arising if it were not the road haulage company, but rather the finance company from which the lorry had been leased, that had gone into administration.

26. I agree with the Tribunal's conclusion that the *Bristol Airport* decision is not special to aircraft. I do not, however, accept that the case is authority for the proposition that a lease of a car or van transfers 'property' in that car or van within the meaning of section 114(1)(a) ITEPA just because it creates 'property' within the very broad meaning of that term defined in section 436 of the Insolvency Act 1986.

27. Mr Yates appearing for HMRC referred to authorities which consider whether the court has jurisdiction to grant relief from forfeiture. In *On Demand Information plc and another v Michael Gerson (Finance) plc and another* [2000] 1 WLR 155 the claimant had entered into finance leases with the defendant for video and editing equipment. The leases set a substantial rent for the first 3 years and then set a modest rent annually thereafter. The claimant went into receivership, triggering a termination clause in the leases. Robert Walker LJ described the non-statutory jurisdiction of the court to grant relief from forfeiture, in particular citing the House of Lords' decision in *The Scaptrade* [1983] 2 AC 694. In that case, Lord Wilberforce noted that the court's jurisdiction was to grant relief against the forfeiture of property and that it:

"was never meant to apply generally to contracts not involving any transfer of proprietary or possessory rights, but providing for a right to determine the contract in default of punctual payment of a sum of money payable under it."

28. Robert Walker LJ also cited the judgment of Dillon LJ in *BICC plc v Burndy Corpn* [1985] Ch 232 where Dillon LJ said (at pp 251-252 of *Burndy*):

"There is no clear authority, but for my part I find it difficult to see why the jurisdiction of equity to grant relief against forfeiture should only be available where what is liable to forfeiture is an interest in land and not an interest in personal property. Relief is only available where what is in question is forfeiture of proprietary or possessory rights, but I see no reason in principle for drawing a distinction as to the type of property in which the rights subsist. The fact that the right to forfeiture arises under a commercial agreement is highly relevant to the question whether relief against forfeiture should be granted, but I do not see that it can preclude the existence of the jurisdiction to grant relief, if forfeiture of proprietary or possessory rights, as opposed to merely contractual rights, is in question. I hold, therefore, that the court has jurisdiction to grant Burndy relief."

29. Applying that case law to the leasing agreement in question in *On Demand*, Robert Walker LJ held that:

"Contractual rights which entitle the hirer to indefinite possession of chattels so long as the hire payments are duly made, and which qualify and limit the owner's general property in the chattels, cannot aptly be described as purely contractual rights.

For these reasons I consider that ... a finance lease is in principle capable of attracting relief from forfeiture provided that the provision occasioning forfeiture satisfies one or other of the two relevant conditions stated by Lord Wilberforce in *Shiloh Spinners* (security for payment of money, or security for attaining a specific and attainable result). The fact that a finance lease is a commercial contract of a very familiar sort, and the fact that its subject-matter is chattels (not land) may be very material to the question whether relief should be granted. ... Moreover the impermanence of chattels such as video equipment and motor vehicles (as compared with land and buildings) does not to my mind go all one way."

30. I do not consider that Robert Walker LJ held in *On Demand* that the lease of the video equipment created a proprietary rather than a possessory right on the hirer. I accept HMRC's submission that the issue in that case was whether the rights were 'purely contractual' on the one hand or 'proprietary or possessory' on the other. Indeed, I note that Sir Murray Stuart-Smith in *On Demand* described the principal arguments put forward by the defendants as:

"(i) that the Court has no jurisdiction to grant relief from forfeiture in ordinary commercial contracts, unconnected with interests in land.

(ii) that if the Court does have jurisdiction in relation to contracts other than those involving interests in land, it is confined to cases where there is a grant of a proprietary interest; a possessory interest is not sufficient."

31. It was that second proposition that the Court of Appeal rejected. The court clearly did not determine that the leases created proprietary interests in the chattels. The decision of the Court of Appeal was overturned by the House of Lords on a different point: see *On Demand Information plc (in Administrative Receivership) v Michael Gerson (Finance) plc* [2003] 1 AC 368.

32. The more recent case of *Celestial Aviation Trading 71 Ltd v Paramount Airways Pte Ltd* [2010] EWHC 185 (Comm) concerned the court's jurisdiction to grant relief against forfeiture in respect of three aircraft lease agreements. Hamblen J started his analysis with the finding that the leases in that case did not involve the transfer of any proprietary rights but they did involve the transfer of possessory rights during their term: see paragraph 49. He distinguished *On Demand* as a case involving a right to 'indefinite' possession of the chattels. The aircraft leases in issue in *Celestial Aviation* were not indefinite but only for a proportion of the economic life of the aircraft. Hamblen J held that although possessory rights were transferred under the aircraft leases, it would 'represent a major extension of existing authority' to hold that the jurisdiction to grant relief applied to contracts transferring bare possessory rights for only a proportion of the economic life of the chattel: see paragraph 57. Hamblen J did not regard *On Demand* as authority for the proposition that a lease involved the creation of a proprietary right in the hands of the lessee, even though the leases in *On Demand* entitled the lessee to indefinite possession for a nominal annual rent.

33. In concluding that the Employees here did acquire a proprietary interest under the car hire arrangements, the First-tier Tribunal also relied on a passage in the *Proprietary Rights and Insolvency* by Richard Calnan (2009). The learned author said (at paragraph 2.34 of the book):

"Although there is still controversy about the position, it is suggested that a lease of goods does, in fact, create a proprietary interest. The cases do establish that a lessee of goods has rights against third parties. If a lessee has a contractual right to continue in possession, the cases show that:

- The lessor cannot sue third parties for converting the goods (because although their owner, he does not have an immediate right to possess them) *Gordon v Harper* (1976) 7 TR 9;

- The lessee can sue third parties in conversion (which indicates that the lessee does have an immediate right to possess based on a proprietary interest) *Burton v Hughes* (1884) 2 Bing 173;

- The lessor cannot recover the goods from the lessee (because he has contracted to allow them to remain in the possession of the

lessee) *North General Wagon & Finance Co v Graham* [1950] 2 KB 7, 11;

- If the lessor wrongfully recovers the goods from the lessee, the lessee can sue him in conversion, *Roberts v Wyatt* (1810) 2 Taunt 268; *Brierly v Kendall* (1852) 17 QB 397; *City Motors (1933) v Southern Aerial Super Service* (1961) 106 CLR 477."

34. HMRC argue that this passage goes further than is justified by the case law. Mr Yates said that he has examined the case law referred to by Mr Calnan and found that the earlier cases concern the right to bring an action in trover – a right that does not depend on the claimant having a proprietary right in the goods. Mr Mullan did not demur from that analysis.

35. I agree with Mr Yates that the case law on forfeiture refers to three kinds of rights that can be created by a contract relating to a chattel: proprietary rights, possessory rights and purely contractual rights. Mr Calnan's book elides the first two and treats all contracts which appear to confer on the transferee of the chattel some rights to defend the chattel against third parties as proprietary rights. That conclusion is not supported by the case law.

36. In my judgment there is no authority for the proposition that the lease of a chattel confers a proprietary right on the lessee. The forfeiture cases appear to proceed on the basis that the leases did not create such rights so that the court has to grapple with whether the possessory rights conferred by a particular contract are sufficient to trigger the court's jurisdiction to grant relief.

37. Finally, Mr Mullan pointed to section 5 of the Income Tax and Pre-owned Assets Guidance issued by HMRC on the application of the 'pre-owned asset' tax provisions in the context of inheritance tax. This guidance explains the effect of section 102A Finance Act 1986 and in particular that it applies only to land (my emphasis):

> "If the subject matter of the scheme referred to above is chattels rather than land, therefore, the provisions of this section do not bite. The **property** will not be subject to a reservation for inheritance tax regardless of when the scheme was actually effected".

38. The use of the word 'property' there does not, in my judgment, indicate that HMRC is accepting that leases of chattels create a proprietary interest for all purposes. In any event, guidance, however useful and carefully drafted cannot create an interest which the law does not otherwise recognise.

39. I hold therefore that the Tribunal was wrong to conclude that the car leases created proprietary rights which were transferred to the Employees for the purposes of section 114(1)(a) ITEPA. I reject the submission therefore that the words in parentheses in section 114(1)(a) exclude from Chapter 6 a situation where the car is leased to the employee.

(b) Is the transfer of partial proprietary rights enough to take the arrangements outside section 114(1)(a)?

40. In case I am wrong on that point, I will consider the alternative argument raised by HMRC. They submit that the words in parentheses apply only where the *entire* ownership of the car is transferred to the Employee not where some partial right is transferred. They rely on the judgment of Pumfrey J in *Christensen (Inspector of Taxes) v Vasili* [2004] EWHC 476 (Ch). In that case the court considered the application of the car benefit charge in circumstances where the employee had acquired a 5 per cent interest in the car. Pumfrey J held that this was not enough to prevent the car being made available to him by his employer. He said:

> "12. ...I consider that the words "made available (without any transfer of the property in it)" are not to be construed in a manner which has the result that the conferring of any interest upon the employee sufficient to give the employee an independent right to possess and use the asset is sufficient to prevent the car from being 'made available'. My reasons are these.
>
> 13. First, the words 'without any transfer of the property in it' are not apt to cover the conferring of a part interest only on the employee. There is some force in the submission that to construe them in any other sense involves the introduction of the words 'any of' before the words 'the property'. But that is not my principal reason. In their ordinary sense, the question 'who made the car available to Mr Vasili?' must be answered in the sense that his employer did so, and has not been paid for it. To the extent to which the purchase price is paid by Mr Vasili to the employer, this construction will only be acceptable if a proper allowance can be made so as to reduce the 'cash equivalent' under s.157."

41. The Respondents argue that Pumfrey J was not saying that transfers of property were excluded only if the whole of the property in the car was transferred rather than only some partial interest. The learned judge was considering whether the car was 'made available' by the employer to the employee even though the employee had a 5 per cent share in the car. He held that there was still a 'making available' of the car by the 95 per cent owner to the 5 per cent owner because in fact the car was used exclusively by the employee for 100 per cent of the time not just for 5 per cent of the time.

42. On this point I agree with Mr Mullan's interpretation of the judgment in *Vasili*. Pumfrey J was not addressing whether the transfer of *any* or only the whole of the property in the car was sufficient to oust the application of section 114(1). He did not need to address that issue. He decided that where the employee owns 5 per cent of the car but still has 100 per cent use of it, the car is still made available to him by the employer. The case is not authority for the proposition that nothing short of total ownership is sufficient to take the arrangement outside section 114(1)(a).

43. The Respondents assert that the situation is different here from the position in *Vasili*. In the present case the Employees are entitled, as an incident of the rights they acquire under the car lease to 100 per cent of the use of the car to the exclusion of the lessor. In this case, the Respondents argue there is no 'making available' of the car by the Group once the car has been leased by the Group to the Employee at least where, as here, the contract does not entitle the Group to terminate the lease at any time.

44. My conclusion on this point is therefore that if I am wrong and these leases do transfer a proprietary interest in the car for the purposes of section 114(1)(a), then the incidents of the interest transferred in this case is an exclusive right to the use of the car. That then means that the car is not being made available by the Group to the Employees. The making available of the car refers to an on-going activity and that on-going activity must be by reason of the employment. Here, the on-going availability of the car to the Employee derives not from the employment relationship but from the incidents of the lease – the car can still be used by the Employee after he leaves the Group's employment provided that he signs a standing order for the rental payments.

45. I therefore hold that if the lease does transfer a proprietary interest in the car to the Employee under the lease, then the scope of that interest is sufficient to mean that the condition in parentheses in section 114(1)(a) is not satisfied and the car will not fall within section 114.

46. HMRC also points to an earlier version of the legislation, section 156 of the Income and Corporation Taxes Act 1988. That provided as follows (emphasis added):

> "**156 Cash equivalents of benefits charged under section 154**
>
> (1) The cash equivalent of any benefit chargeable to tax under section 154 is an amount equal to the cost of the benefit, less so much (if any) of it as is made good by the employee to those providing the benefit.
>
> (2) ...
>
> (3) Where the benefit **consists in the transfer of an asset by any person**, and since that person acquired or produced the asset it has been used or has depreciated, the cost of the benefit is deemed to be the market value of the asset at the time of transfer.
>
> (4) ...
>
> (5) Where the benefit consists in an asset being placed at the employee's disposal, or at the disposal of others being members of his family or household, for his or their use **(without any transfer of the property in the asset)**, or of its being used wholly or partly for his or their purposes, then the cost of the benefit in any year is deemed to be—

(a) the annual value of the use of the asset ascertained under subsection (6) below; plus

(b) the total of any expense incurred in or in connection with the provision of the benefit excluding—

(i) the expense of acquiring or producing it incurred by the person to whom the asset belongs; and

(ii) any rent or hire charge payable for the asset by those providing the benefit.

(6) Subject to subsection (7) below, the annual value of the use of the asset, for the purposes of subsection (5) above—

(a) ...

(b) in any other case is 20 per cent. of its market value at the time when it was first applied (by those providing the benefit in question) in the provision of any benefit for a person, or for members of his family or household, by reason of his employment."

47. HMRC argue that this provision seems to posit only two situations. The first, covered by subsections (1), (2) and (3) is where there has been a transfer of the property in which event subsections (1) and (2) deal with the valuation of the cash equivalent and subsection (3) provides for how to adjust the value if the asset has been used before being transferred over to the employee. The other situation is that covered by subsection (5) where there is no transfer of property in the asset and the value then is, broadly, 20 per cent of its market value plus some other expenses. The section does not, HMRC say, contemplate a third situation where the property in the asset is split between the employer and the employee.

48. The Respondents say that the wording of this provision supports their position because subsection (3) refers to 'the transfer of an asset' whereas subsection (5) refers to 'without any transfer of the property in the asset' – a difference in wording which must indicate a difference in meaning.

49. Having considered the rival submissions on this earlier legislation I have concluded that the earlier provisions do not in fact assist me in construing the current provisions.

(c) Does section 114(3) apply?

50. The interaction of the benefits code and the other provisions regarding the taxation of earnings is complex. For some kinds of benefits, the position is governed by section 64 which provides, broadly, that if the same benefit gives rise to an amount of earnings and also an amount to be treated as earnings

under the benefits code then the amount of earnings is taxed as earnings and the additional benefit is taxed as a benefit under the code. The parties to this appeal accept, however, that a prior question to whether section 64 applies is whether section 114 is disapplied by virtue of section 114(3). I set out section 114(3) again here:

> "114(3) This Chapter does not apply if an amount constitutes earnings from the employment in respect of the benefit of the car or van by virtue of any other provision (see section 119)."

51. They also agree that (i) the reference to section 119 is not relevant here and that (ii) the prime candidate for being the 'any other provision' by virtue of which an amount constitutes earnings from the employment in respect of the benefit of the car is section 62 ITEPA.

52. Section 62 ITEPA provides:

> **"62 Earnings**
>
> (1) This section explains what is meant by "earnings" in the employment income Parts.
>
> (2) In those Parts "earnings", in relation to an employment, means—
>
> (a) any salary, wages or fee,
>
> (b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or
>
> (c) anything else that constitutes an emolument of the employment.
>
> (3) For the purposes of subsection (2) "money's worth" means something that is—
>
> (a) of direct monetary value to the employee, or
>
> (b) capable of being converted into money or something of direct monetary value to the employee."

53. It is accepted by HMRC that the car here is 'money's worth' in the hands of these Employees because the rights that they have to the car under the leases entitle them, if they so choose, to lease the car out themselves to someone else and hence in effect convert the car into money for the purposes of section 62(3)(b). This follows from the decision of the House of Lords in *Heaton v Bell* [1970] AC 728 where a majority of their Lordships held that a car could be converted by the employee into money because if he surrendered the car he did not have to forego part of his wages. The car therefore counted as a 'perquisite' and hence fell within the definition of emoluments for the purpose

of the taxing statute. This conclusion takes the situation here out of the normal run since an employee using a company fleet vehicle is not usually permitted to hire the car out and keep the money for himself.

54. Here, HMRC say, because the Employees have paid market value for the car, there are no 'earnings' arising to be taxed from the provision of the car under section 62. There is therefore no 'amount which constitutes earnings' by virtue of section 114(3) because the earnings falling to be assessed under section 62 are nil because the Employees have paid full value for them. Section 114(3) therefore has no application.

55. The Respondents say that even though the amount falling to be taxed under section 62 is nil, that is still an 'amount' which constitutes earnings by virtue of section 62. There is nothing incongruous about treating nil as an 'amount' for this purpose they submit. Indeed, they say that in relation to another issue in the case, namely whether for the purposes of applying section 236 to the mileage allowance payments there is a cash equivalent to be treated as earnings under section 120, HMRC takes the same view. HMRC argues that, when applying the definition of 'company vehicle' in section 236(2), I should hold that there is a 'cash equivalent of the benefit of the car to be treated as earnings' for the purposes of section 236(2)(b) even though in some of the Employees' cases here, that cash equivalent is in fact nil (because of the contributions they have paid under the lease). The Respondents say that if a cash equivalent can be treated as 'earnings' for the purposes of section 236(2)(b) even if that cash equivalent is nil, then there is no reason why there cannot be 'earnings' within the meaning of section 62 even if the amount of the earnings is nil.

56. Further the Respondents argue that HMRC's construction leads to an absurdity in the relationship between section 62 and section 114. If the Employees had paid less than full market value for the lease of the cars then HMRC accept that there would be something that falls to be taxed as earnings under section 62 and section 114(3) would apply to take the car provision outside Chapter 6 – a situation which is greatly preferable from the Respondents' point of view. It is only because HMRC acknowledges that the Employees have paid full market value for the car rental that the earnings are nil and the question of the application of Chapter 6 arises.

57. On this point I prefer the submissions of the Respondents. I hold that on the proper construction of section 114(3), if the arrangement falls to be considered under section 62 ITEPA because the car is money or money's worth then it falls outside section 114. That is the case even if, because of the payments made by the employee in return for receiving the asset that constitutes 'money's worth', the amount of the earnings that falls to be taxed under section 62 is in fact nil in a particular case. Section 114(3) is intended to settle the interrelation between Chapter 6 and section 62 and that does not depend on

the happenstance of whether in a particular case there is a small excess of the money's worth.

58. I therefore hold that the cars leased to the Employees do not fall within section 114 because an amount constitutes earnings from the employment in respect of the benefit of the car because the car is under these leases 'money's worth' for the purposes of section 62 and hence falls to be taxed under section 62, even if that amount is in fact nil.

(d) Does there have to be a 'benefit' in the sense of an advantage over what has been paid for in order for section 114 to apply?

59. The Respondents submit that it is important to step back from these provisions and the detailed argument about their construction and consider what the purpose of this legislation is and how HMRC is trying to use it.

60. First, the Respondents point to the number of times the word 'benefit' is used in these provisions. The draftsman must be intended to use the word in its ordinary meaning. Mr Mullan referred to the passage in the judgment of Lewison LJ in *Pollen Estate Trustee Co Ltd v Revenue & Customs Commissioners* [2013] EWCA Civ 753 on the approach to the construction of taxing statutes:

> "In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole: *WT Ramsay Ltd v Commissioners of Inland Revenue* [1982] AC 300, 323; *Barclays Mercantile Business Finance Ltd v Mawson* (§ 29). The essence of this approach is to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of statute, upon its true construction, applies to the facts as found: (*Barclays Mercantile Business Finance Ltd v Mawson* (§ 32)."

61. Mr Mullan argues that the intention of the statute here is to tax benefits conferred on the employee by the employer because they do not otherwise count as income brought into charge. It is not the intention to tax something which has been acquired by the employee in return for payment by him of its value. These leases are not the kind of transaction which should be subject to tax. He also referred to *MacDonald (Inspector of Taxes) v Dextra Accessories Ltd and others* [2005] UKHL 47 where the issue before the court was the

meaning of the term 'potential emoluments'. Lord Hoffmann, with whom the rest of their Lordships agreed, stated that that term was a defined expression in the Act and that that could give the term a meaning other than the ordinary meaning:

> "But that does not mean that the choice of words adopted by Parliament must be wholly ignored. If the terms of the definition are ambiguous, the choice of the terms to be defined may throw some light on what they mean."

62. Mr Mullan argues that even if the term 'benefit' here is in some respects a term of art, the fact that Parliament repeatedly referred to a 'benefit' has significance when considering what kinds of transactions fall to be taxed under these provisions.

63. HMRC say that that is not the correct approach. The benefits code attaches to the provision of the kinds of benefits there – cars, vans, loans, living accommodation. If one of those is provided in circumstances covered by the relevant Chapter of Part 3 then a benefit is provided. How much is paid for it by the employee is relevant to the computation of the cash equivalent but it is not relevant to the basic question of whether a benefit has been made available. Any other construction would lead to an untenable situation where HMRC would, before being able to apply the already complicated provisions to calculate the cash benefit, have to undertake an assessment as to whether the contribution that the employee has paid for the car entirely removed any 'benefit' to him. HMRC point to the fact that the tax charge imposed by Chapter 6 is calculated in a way which does not reflect the actual economic benefit that the employee receives since it is based on the list price of the new car and the level of CO_2 emissions.

64. I agree with the Respondents that the use of the word 'benefit' in the benefits code is an indicator that what is intended to be caught is something which benefits the employee and that there is no such 'benefit' if the employee has paid the market rate for the asset which is provided. It is true that the way that the benefit is calculated under the current provisions (taking into account the list price and the level of CO_2 emissions) reflects other policy considerations. But that cannot, in my judgment, affect the more fundamental point of whether there is a benefit to which those current provisions should be applied.

65. That textual indicator is strongly supported by two appellate decisions on which the Respondents also rely. In *Mairs (Inspector of Taxes) v Haughey* [1992] STC 495, the Court of Appeal in Northern Ireland was considering a payment made to employees of Harland and Wolff on the privatisation of that company. The payment was made to compensate the workforce for the loss of contingent rights under a redundancy scheme that had been available to the company's employees but would no longer be available after privatisation. One of the issues considered was whether the payment could be regarded as a

'benefit' within the meaning of section 154 ICTA 1988. Hutton LCJ approved the conclusion of the Special Commissioner in that case who had held:

> "Section 154 brings benefits into charge. All kinds of benefits are covered; but whatever they are, they must still be capable of being described as "benefits". The legislation is aimed at profits (in a broad sense) which escape taxation under the mainstream Sch E provisions for one reason or another. It is not aimed at receipts resulting from fair bargains."

66. Hutton LCJ held that this decision was correct. He held that the taxpayer had not received a 'benefit' within the meaning of section 154 where the money received was paid to him, by way of fair valuation, in consideration of his surrender to a right to receive a larger sum in the event of the contingency of redundancy occurring. This was the case although section 156 referred, as does section 203 to a deduction from the cost of the benefit received of 'any part of that cost made good by the employee'. In other words, Hutton LCJ did not regard the requirement to set off sums paid by the employee against the cost of the benefit (potentially reducing the benefit to nil) as preventing him from arriving at the conclusion that a benefit did not include something for which a fair valuation has been paid.

67. The decision of the Northern Irish Court of Appeal in *Haughey* was considered and approved by the Court of Appeal of England and Wales in *Wilson v Clayton* [2005] STC 157. That concerned compensation payments made to employees following the compromise of their claims for unfair dismissal. Peter Gibson LJ considered whether that payment was a benefit for the purposes of section 154 of ICTA (which is broadly equivalent to section 203 of ITEPA). He referred to the dispute over whether section 154 applied as depending on the exception which the Crown accepted was implicit in the wording of section 154 namely an exception for 'receipts for fair bargains'. He cited the judgment of Lord Hutton LCJ in *Mairs v Haughey*, including his approval of the passage in the decision of the Special Commissioners in the Northern Irish case. Peter Gibson LJ (with whom Arden and Clarke LJJ agreed) held that the judgment of the Northern Irish Court of Appeal made good sense since:

> "[t]he justice of excluding from the scope of s 154 a payment made by an employer to an employee pursuant to a fair bargain seems to me self-evident".

68. Mr Yates contrasted the judgment of Peter Gibson LJ in the *Wilson* case with his earlier judgment at first instance in *Williams (Inspector of Taxes) v Todd* [1988] STC 676. In that case Peter Gibson J (as he then was) considered an interest-free loan made to the taxpayer as an advance on salary in order to determine whether it was a benefit within the meaning of section 66 of the Finance Act 1976 or whether it was, as the General Commissioner had found 'a douceur to soften the disadvantages' of the compulsory removal of the

taxpayer from Wigan to the more expensive south of the country. He held that it was a benefit and that it was not necessary for there to be a benefit in terms of 'something advantageous to the employee' for section 66 to apply; the section would apply to all loans, even if a loan was for a full commercial rate of interest.

69. HMRC submit that this establishes that the requirement for a 'benefit' (in the sense of something over and above what is paid for) is limited to the application of section 203 ITEPA and does not apply to the specific Chapters of the benefits code. They submit that although for the application of the general provision in section 203 there needs to be a benefit in the sense described by the Court of Appeal in *Wilson v Clayton*, there does not need to be such a benefit for the other Chapters of the benefits code. For those Chapters, the legislation itself describes the benefit as being the making available of the car, or van or living accommodation or voucher without the need to consider whether it has been fully paid for.

70. I do not see that the decision in *Williams v Todd* can bear the weight that HMRC seek to place on it. That case was decided before *Mairs v Haughey* and *Wilson v Clayton*. Peter Gibson J's remarks about whether a loan at a commercial rate of interest would be a benefit were clearly obiter since the agreed facts show that the loan made to the tax payer was interest free and so not at a commercial rate. Further, I agree with Mr Mullan that the word 'benefit' cannot mean something different in section 114 from its meaning in section 203. On the contrary, section 63 ITEPA indicates that they are to be regarded as part of the same scheme and not to bear a different meaning.

71. I therefore consider that *Mairs v Haughey* and *Wilson v Clayton* are authorities establishing that fair bargains are excluded from the regime for taxing benefits conferred on employees because there is no benefit which is properly subject to tax. Since HMRC accept that the leases between the Group and the Employees were at arm's length, there is no benefit here which is subject to tax under Chapter 6.

(e) Overall conclusion on the application of section 114 and the PAYE point

72. I therefore find that on its true construction section 114 does not apply to the lease arrangements in this case for two reasons:

    a. First because its application is excluded by section 114(3) and section 62 ITEPA and

    b. Secondly because there is no 'benefit' here within the meaning of section 113.

73. This conclusion means that the cars did not fall to be taxed under section 114 and that National Insurance Contributions are not due in respect of the cars.

74. In the light of that finding I do not need to consider the application of the PAYE regulations and whether HMRC were entitled to assess the Employees rather than the Group to tax on the cars under the Taxes Management Act 1970.

The mileage allowance payments

75. People who use their own private car for business journeys can usually claim a mileage allowance from their employer to reimburse them for the fuel they use and a contribution to the other costs of running the car. Provided that the mileage allowance does not exceed an amount specified in the ITEPA, the employee does not have to pay tax on those payments. Section 229 of the ITEPA falls within the Part of the Act dealing with exemptions from income tax for a variety of things including education and training, office parties and travel and subsistence during public transport strikes.

76. Section 229 ITEPA provides as follows:

> "**229 Mileage allowance payments**
>
> (1) No liability to income tax arises in respect of approved mileage allowance payments for a vehicle to which this Chapter applies (see section 235).
>
> (2) Mileage allowance payments are amounts, other than passenger payments (see section 233), paid to an employee for expenses related to the employee's use of such a vehicle for business travel (see section 236(1)).
>
> (3) Mileage allowance payments are approved if, or to the extent that, for a tax year, the total amount of all such payments made to the employee for the kind of vehicle in question does not exceed the approved amount for such payments applicable to that kind of vehicle (see section 230).
>
> (4) Subsection (1) does not apply if—
>
> (a) the employee is a passenger in the vehicle, or
>
> (b) the vehicle is a company vehicle (see section 236(2))."

77. It is accepted by HMRC that if the cars leased to the Employees by the Group are not company vehicles within the meaning of section 236(2) then the mileage allowance payments made by the Group to the Employees would be exempt from income tax pursuant to this provision. But HMRC submit that these are company vehicles so that the exemption in section 229 does not apply. The mileage allowance payments therefore fall to be taxed as earnings if they exceed the amount that could be paid for business fuel under what is known as the 'advisory fuel rate'.

78. Section 236 ITEPA provides so far as relevant:

"**236 Interpretation of this Chapter**

(1) In this Chapter—

"business travel" means travelling the expenses of which, if incurred and paid by the employee in question, would (if this Chapter did not apply) be deductible under sections 337 to 342;

"mileage allowance payments" has the meaning given by section 229(2);

"passenger payments" has the meaning given by section 233(3).

(2) For the purposes of this Chapter a vehicle is a "company vehicle" in a tax year if in that year—

(a) the vehicle is made available to the employee by reason of the employment and is not available for the employee's private use, or

(b) the cash equivalent of the benefit of the vehicle is to be treated as the employee's earnings for the tax year by virtue of—

(i) section 120 (benefit of car treated as earnings),

(ii) ... or

(iii) section 203 (residual liability to charge: benefit treated as earnings), ..."

79. I have held that section 114 does not apply to these arrangements because of section 114(3). As a result of that finding, section 120 also does not apply to treat the cash equivalent of the benefit of the car as earnings. So section 236(2)(b)(i) also cannot apply to make these cars 'company vehicles' and they are not, therefore, outside the exemption granted for mileage allowance payments in section 229.

80. Further, because I have held that the term 'benefit' used in the benefit code requires the conferral of some advantage over and above what has been paid for by the Employees, section 203 also does not apply to these arrangements. So section 236(2)(b)(iii) also cannot apply to make these cars 'company vehicles' and they are not, therefore, outside the exemption granted for mileage allowance payments in section 229

81. But in case I am wrong about either or both of those points, I need to consider an additional point raised about the proper construction of section 236(2)(b). If in fact the cash benefit of the cars leased to the Employees is to be treated as earnings under either section 120 or under section 203, does it matter for the purpose of applying section 236(2)(b) that that cash equivalent of the earnings is nil in some or all of the cases covered by this appeal?

82. In respect of some (at least) of the Employees, the cash equivalent of the benefit to be treated as earnings under section 120 will be nil. This is because that cash equivalent must be calculated in accordance with the steps set out in section 121 and step 8 requires a deduction from the provisional sum thus far arrived at in respect of any payments by the employee for the private use of the car. This deduction is made pursuant to section 144 which provides:

> "**144 Deduction for payments for private use**
>
> (1) A deduction is to be made from the provisional sum calculated under step 7 of section 121(1) if, as a condition of the car being available for the employee's private use, the employee—
>
> > (a) is required in the tax year in question to pay (whether by way of deduction from earnings or otherwise) an amount of money **for that use**, and
> >
> > (b) makes such payment.
>
> (2) If the amount paid by the employee in respect of that year is equal to or exceeds the provisional sum, the provisional sum is reduced so that the **cash equivalent of the benefit of the car for that year is nil**.
>
> (3) In any other case the amount paid by the employee in respect of the year is deducted from the provisional sum in order to give the cash equivalent of the benefit of the car for that year."

83. This section does, therefore contemplate that a cash equivalent can be nil, or to put it the other way round, a nil amount can still be a 'cash equivalent' within the meaning of section 120 so that it is the amount of nil that is treated as earnings from the employment for that year. HMRC have accepted that the rental paid by the Employees in respect of the cars falls to be deducted from the provisional sum calculated in accordance with the steps specified in section 121. Before the Tribunal, Counsel for HMRC described this as a 'concession' on HMRC's part because the leases did not provide for these payments to be made in respect of the private use of the car but for all use.

84. On this point I hold that the cash equivalent is still to be treated as earnings under section 120 for the purposes of section 236(2)(b) even if it is nil in a particular case. I agree with HMRC that the subsection is concerned with identifying vehicles which fall within the scope either of Chapter 6 or of Chapter 10 as opposed to whether an actual tax liability arises for the employee. It is intended to have the effect that if the car or van is within Chapter 6 or within the residual charge in Chapter 10, it is treated as a company car and different rules apply to any payments made for mileage from the rules which apply when an employee uses his own car. This does not depend on whether the cash equivalent is a positive value or nil.

85. This means that, if I am wrong and section 114 does apply to these leasing arrangements, then the mileage allowance payments made to the Employees do not benefit from the exemption in section 229 and do fall to be taxed.

Summary of overall conclusions

86. I have therefore arrived at the same ultimate result as the First-tier Tribunal, albeit not for all the same reasons. I hold that:

- The car leases do not create proprietary rights and there is no transfer of any property in the car to the Employees. The arrangements are not therefore excluded from section 114 by the wording in parentheses in subsection (1)(a).

- If I am wrong on that and the lease does transfer a proprietary interest in the car to the Employee, then the scope of that interest is sufficient in this case to mean that the condition in parentheses in section 114(1)(a) is not satisfied and the car will not fall within section 114.

- Further, the cars leased to the Employees do not fall within section 114 because an amount constitutes earnings from the employment in respect of the benefit of the car because the car is under these leases 'money's worth' for the purposes of section 62 and hence falls to be taxed under section 62, even if that amount is in fact nil. The application of section 114 is therefore excluded by section 114(3).

- Further, the cars leased to the Employees do not fall within section 114 because fair bargains are excluded from the regime for taxing benefits conferred on employees because there is no benefit which is properly subject to tax. Since HMRC accept that the leases between the Group and the Employees were at arm's length, there is no benefit here which is subject to tax under Chapter 6.

- If I am wrong and section 114 does apply to these leasing arrangements, then these cars are 'company cars' within the meaning of section 236(2) ITEPA and so the mileage allowance payments made to the Employees do not benefit from the exemption in section 229 and do fall to be taxed

87. I therefore dismiss the appeal.

Signed

Mrs Justice Rose

RELEASE DATE 26 FEB 2014