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## DECISION

1. This is the appellants' appeal against the decision of the First-tier Tax Tribunal ("FTT") published with neutral citation ([2019] UKFTT 498 (TC)), an amended version of which was released on 19 September 2019.

2. The appellants are both companies in the EDF Energy Group whose business concerns energy generation and supply. Cheshire Cavity Storage 1 Limited ("CCS") was the first appellant and EDF Energy (Gas Storage Hole House) Limited ("EDF") was the second appellant. The appeals concern the availability of plant and machinery allowances under the Capital Allowance Act 2001 ("CAA 2001") on the expenditure incurred in relation to underground cavities for gas storage in Cheshire. The cavities are formed by injecting water into naturally occurring salt rock beneath the ground which, when the salt rock dissolves, leaves a hole filled with saltwater. Gas is then pumped into the hole and the saltwater in it is expelled. The rock all around the hole creates a barrier so the gas cannot escape. The cavity is connected by pipes to the national transmission system for gas, which is owned by National Grid, and which supplies gas to end users.

3. The issues before the FTT were 1) whether the cavities met the common law definition of "plant" and 2) if they did, whether various provisions in CAA 2001 nevertheless meant the expenditure was excluded ("the s 21/ s 23 CAA issues"). The FTT concluded the cavities were not "plant" according to the common law definition and thus dismissed the appellants' appeals. On the premise that it was wrong that the cavities were "plant", it then went on however to set out its views on the s21 and s23 CAA issues, agreeing with the appellants on some and HMRC on the remainder.

4. The appellants appeal to the Upper Tribunal on four grounds, three of which, with the permission of the FTT, and one with the permission of the UT. The first ground is that the FTT erred in law in its approach to the common law meaning of "plant". The remaining three grounds concern the s 21 / s 23 CAA issues and are only relevant if the appellant is successful on the first ground. As we have concluded that the appellants are unsuccessful on that ground, for the reasons we explain, we do not consider the remaining grounds on the s 21 /s 23 CAA issues. This decision therefore only considers the appellants' challenge to the FTT's decision that the cavities were not plant.

### **Background**

5. The general conditions for writing down allowances for capital expenditure on plant and machinery are set out s11 CAA 2001 which provides so far as relevant as follows:

“(1) Allowances are available under this Part if a person carries on a qualifying activity and incurs qualifying expenditure.

...

(4) The general rule is that expenditure is qualifying expenditure if –

(a) it is capital expenditure on the provision of plant or machinery wholly or partly for the purposes of the qualifying activity carried on by the person incurring the expenditure,

...

(5) But the general rule is affected by other provisions of this Act, and in particular by Chapter 3.”

6. There is no dispute that the appellants’ expenditure was capital or that it was incurred for the purposes of a trade which was a qualifying activity. The issue was whether the expenditure was qualifying expenditure and, in particular, whether it was expenditure on the provision of “plant”. Chapter 3 of CAA 2001, referred to at s11(5), contains s 21/s 23. Together those provide a scheme whereby in broad terms even if the expenditure is on plant it may be excluded, subject to exceptions. Those provisions are only relevant however once it is established that the item in question is “plant”. There is no statutory definition of “plant”. There is however a voluminous body of case-law on its meaning and the approach to determining that meaning. There is no dispute the meaning of “plant” as used in the statute has a largely “judge-made” meaning. That is what is meant by the “common-law” meaning of plant.

7. Before engaging with the cases we were referred to, it is useful to summarise the relevant facts and the reasons the FTT gave for its decision. Paragraph numbers refer to those in the FTT’s decision.

### **FTT Decision**

8. For the purposes of this ground, no challenge is made to the findings of fact the FTT made (which appear principally at [8] – [40]). For the purposes of this appeal, it is sufficient to note the following. (While the FTT referred to the cavities as “gas caverns” in various of its findings, nothing turns on that difference in terminology. For consistency we refer throughout to gas cavities or cavities.)

9. The appellants’ business is the development, construction, and operation of gas storage facilities in the UK. They operate gas storage facilities on adjoining sites in Cheshire. They are indirectly owned by EDF Energy PLC whose corporate group supplies gas to customers over the National Transmission System (“NTS”) owned by National Grid. The corporate group stores gas as part of its business ([6]).

10. The gas cavities at issue in this appeal hold gas at high pressure. A single cavity can hold the same as about 300 gasometers (large cylindrical containers, now disused but a familiar feature in many towns) and are considered safer as they hold the gas underground ([26]). Gas cavities involve fewer contaminants than other storage methods allowing quick removal (“fast cycle”) of gas ([27]).

11. The cavities are created by a process called “leaching”. This involves drilling a borehole into naturally occurring salt rock underground. The water dissolves the rock, leaving saltwater (brine) eventually creating a tear shaped cavity underground full of brine ([30]). The cavity is converted to gas storage by exchanging the brine with gas

via borehole pipes (“de-brining”) ([34]). The capital expenditure in issue arises in relation to leaching and de-brining the cavities.

12. The salt rock surrounding the cavity forms an impervious barrier to the gas ([37]). The deeper the cavity, the higher pressure the gas can be stored at ([38]). The gas cavities were connected to the NTS. It was possible for gas to “free flow” (i.e. movement simply by virtue of a differential from high pressure to low pressure) in and out of the cavity, though whether this could happen was out of the appellants’ control because it depended (in part) on the pressure in the NTS. Otherwise, gas would need to be moved by compressors ([44]- [48]). The cavity, by itself was not a pump, and did not, by itself, act as a pump ([77]).

13. The appellants’ business was gas storage, not distribution or processing of gas ([62]). The facilities were used for fast cycling storage of gas. EDF did not own the gas but was paid by other gas owner customer(s) for moving and storing the gas so those customers could profit from gas price volatility. CCS did own the gas and intended to profit from such volatility on its own account ([57]).

14. The function of the cavities was to store gas taken from the NTS safely (so that it did not dissipate) and in a condition that would allow it to be returned to the NTS (or at least in a state from which the appellants’ processing plant would be able to restore it to a condition suitable to be returned to the NTS) ([125]).

15. The FTT then discussed the parties’ submissions and the authorities it was referred to. As those were also central to the issues before us, rather than rehearse the FTT’s treatment here, we will deal with that later after we have set out the relevant cases.

16. In summary, the FTT noted the case-law distinguished between the premises *in which* the business was carried on, and the plant *with which* the business was carried on ([95]). The question was whether the item functioned as premises and therefore could not qualify for capital allowances or as plant ([96]). Concerning immovable property structures used for storage, the FTT noted that providing shelter and protection to plant, stock-in trade or customer possessions was regarded as a premises function ([116]). Where premises had both plant and premises like functions the question, which was a matter of degree, was which of the functions predominated ([107]).

17. The FTT was prepared to accept the cavities did have a plant-like function similar to that of a pump/compressor ([127]) but determined that the premises function of storage, which the cavities had, was the predominant function ([130]). That meant the cavities were not plant and thus the capital allowances on the expenditure in relation to them (the “leaching” and “de-brining”) were not allowed.

### **Ground of Appeal**

18. The appellants were granted permission to appeal by the FTT in relation to the plant issue on the basis that it was arguable that the FTT erred in law in its approach to the common law meaning of “plant”.

19. The appellants' key submission, advanced by Mr Peacock, is that the FTT's approach of analysing the predominant function of the cavities, was flatly inconsistent with the relevant authorities of the House of Lords and the Court of Appeal. Those, Mr Peacock argues, make it clear the question is not whether an item "predominantly" functions as premises or plant, but whether the item *at least* functions as plant. In other words, as soon as it is established the item has *any* function as plant (which it is said the FTT did accept the cavities had), the item was plant. Ms Nathan, for HMRC, disagrees, arguing the FTT's approach was consistent with the case-law. We deal first therefore with the case-law the parties referred us to. As the reasoning in each case builds on the earlier ones it is helpful to consider them chronologically.

### **Case-law on plant**

20. The starting point is *Yarmouth v France* (1887) 19 QBD 64 ("*Yarmouth*") which was a decision of the Divisional Court. The question there was whether an employer's horse, which had injured an employee, was "plant" for the purposes of employer's liability legislation. Speaking of the term "plant" in its ordinary sense, Lindley LJ said (at page 72) that it included:

"...whatever apparatus is used by a business man for carrying on his business – not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or moveable, live or dead, which he keeps for permanent employment in his business."

21. In *Jarrold (Inspector of Taxes) v John Good & Sons Ltd* [1963] 1 WLR 214 ("*Jarrold*"), the issue was whether moveable office partitions were "plant" for the purposes of capital expenditure tax relief. The Court of Appeal held it was plant. Pearson LJ noted at page 224 that the *Yarmouth* definition of "goods and chattels" impliedly excluded the premises in which the business was carried on. He summarised the relevant question as whether the partitioning was "part of the premises in which the business is carried on or part of the plant with which the business is carried on". He went on to say that either view could have been taken but the appeal was dismissed on the basis it could not be said there was no evidence to support the commissioners' view or that there was any error of principle involved in their decision. The court agreed that premises and plant were not mutually exclusive but ultimately rejected the Crown's submission that the moveable partitions were "part of the setting" in which the trade could be carried out and therefore could not be regarded as "plant". Ormerod LJ, emphasising that each case depended on its own circumstances, held at page 221 that the partitions should be regarded as "something more than a mere setting for the carrying out of the trade, in other words as coming within the definition of "plant". Donovan LJ accepted at page 224 that there could be cases where an item was excluded because "it is more a part of the setting than part of the apparatus carrying on the trade" but this was not such a case.

22. *IRC v Barclay, Curle & Co. Ltd.* (1969) 1 All ER 732 ("*Barclay Curle*") was an appeal to the House of Lords which concerned a shipbuilder's capital expenditure on 1) excavating a dock basin and 2) concrete work to the walls and bottom of it used for the construction of a dry dock. The function of the dry dock was "to lower ships into a

position where they [could] be securely held exposed out of the water and inspected and repaired and to raise them again to a level where they [were] free to sail away". The taxpayer was successful on the concrete works, but not the excavation costs, before the Special Commissioners, and on both sets of expenditure on appeal to the Divisional Court and before the House of Lords, where the Revenue's appeal was dismissed by the majority (Lords Reid, Guest and Donovan) with Lord Hodson and Lord Upjohn dissenting.

23. Lord Reid acknowledged the distinction drawn between premises and plant and that, as recognised in *Jarrold*, buildings and structures on the one hand and plant and machinery on the other were not mutually exclusive. He said at page 740H:

"Undoubtedly this concrete dry dock is a structure but is it also plant? The only reason why a structure should also be plant which has been suggested or which has occurred to me is that it fulfils the function of plant in the trader's operations. And, if that is so, no test has been suggested to distinguish one structure which fulfils such a function from another. I do not say that every structure which fulfils the function of plant must be regarded as plant, but I think that one would have to find some good reason for excluding such a structure. And I do not think that mere size is sufficient."

24. He went on to hold it was wrong to regard the concrete part of the dock as mere setting or part of the operation in which the important stage (of isolating the ship from the water) took place. The whole dock was "the means by which, or plant with which, the operation is performed".

25. Lord Guest's judgment also emphasised the importance of function. By reference to the relevant legislation, he pointed out that something which was a structure could also be plant. The question was whether notwithstanding that the dock may be also a structure the dry dock was plant. As regards "apparatus" in the *Yarmouth* definition he applied this to the facts of the case in the following way at page 746F to I:

"In order to decide whether a particular subject is apparatus it seems obvious that an enquiry has to be made as to what function it performs. The functional test is therefore essential, at any rate, as a preliminary". The function which the dry dock performs is that of an hydraulic lift taking ships from the water on to dry land, raising them and holding them in such position that inspection and repairs can conveniently be effected to their bottoms and sides"

26. He rejected a comparison with a factory; that by itself was a building in which trade might be carried on, whereas here the excavation and concrete work was useless without the rest of the equipment.

27. Lord Donovan also relied on a function test describing the statements of Lindley LJ in *Yarmouth* and Pearson LJ in *Jarrold* as such at page 751I. Applying that test at page 752A he said:

“...this dry dock, looked on as a unit, accommodates ships, separates them from their element, and thus exposes them for repair; holds them in position while repairs are effected, and when this is done returns them to the water. Thus the dry dock is, despite its size, in the nature of a tool of the taxpayer company’s a trade and therefore, in my view, “plant”.

28. Lords Hodson and Upjohn, in separate dissenting opinions, considered the functional test inconclusive. Lord Hodson considered whether an item was plant depended on all the circumstances of the case. He thought the dock could be split up so as to divide the main structure from the equipment therein even though together they formed one unit. He could not regard the walls and bottom of the dry dock as plant. That would mean all purpose-built premises would qualify as plant. Lord Upjohn considered the walls and the floor of the dry dock to provide the setting within which repair was carried out. Too much emphasis had been placed on the functional element. He acknowledged without the dock walls there would be no place to repair the ship and no way of getting it there but that did not make them plant. Function, even though it might be important, was no more than an element.

29. As regards the costs of excavation, the majority held, contrary to the Revenue’s case, that these costs could be claimed.

30. In *Cooke (Inspector of Taxes) v Beach Station Caravans* [1974] STC 402 (“*Beach Station Caravans*”) the taxpayer ran a caravan site with recreational facilities including two swimming pools. The issue was whether the expenditure on terracing, construction and excavation of the pools was expenditure on “plant”. The High Court considered *Barclay Curle* and *Jarrold*. Megarry J noted (at page 166 g) the difficulty of the subject area and that “To some extent the matter must be one of impression, though it is important that the impression should not be untutored.” Referring (at page 166 d-e) to Pearson LJ’s judgment in *Jarrold*, he said the pools were part of the means whereby the trade is carried on, and not merely the place at which it is carried on. Earlier in that passage he explained that “Nobody could suggest that the principal function of the pool was merely to protect the occupants from the elements”.

31. *Schofield (Inspector of Taxes) v R & H Hall Ltd* [1975] STC 353 (“*Schofield*”) concerned grain silos which a grain importer had built at the dockside from which customers took delivery. The Court of Appeal (Northern Ireland) held it was plant. Lowry CJ and Jones LJ gave reasoned opinions with which Curran LJ concurred. Lowry CJ identified the following principles at page 360 d-f:

“(1) is a question of law what meaning is to be given to the word “plant” in the 1968 Act, and it is for the courts to interpret its meaning, having regard to the context in which it occurs...

(2) the law does not supply a definition of plant or prescribe a detailed or exhaustive set of rules for application to any particular set of circumstances and there are cases, which on the facts found, are capable of decision either way.



(3) A decision in such a case is a decision on a question of fact and degree....

(4) The Commissioners err in point of law when they make a finding which there is no evidence to support...”

32. After considering the authorities, Lowry CJ concluded (at page 367b-c) that the silos were a complex whole. They were not in the nature of a general setting, or mere shelter. The buildings themselves played a part in the distributive processes of reception, distribution and discharge.

33. Jones LJ considered that the company’s activities, in which the silos participated, should be viewed as a whole and not piecemeal and that the functions of the silos in the company’s trade should be considered. He said (at page 370a) that storage was incidental to grain importing and distribution and (at page 370f) that the Commissioners were right to look at operations as a whole and regarded the silos as an essential part of the taxpayer’s overall trade activity.

34. ***Benson (Inspector of Taxes) v Yard Arm Club Ltd*** [1979] STC 266 (“*Benson*”) concerned a vessel and barge that were converted into a floating restaurant. The Court of Appeal upheld the High Court’s decision that these were not plant. Buckley LJ cited amongst other cases *Yarmouth, Jarrold* and the majority views in *Barclay Curle* noting (at page 271b) that all three of the majority in that case had relied on the way in which the dock had been used. He also cited *Schofield*. He made the following observations at page 272g to 273c:

“In all these cases the court had regard to the use which was made of the subject matter under consideration... This, is not the end of the matter... The building in which a business is carried on may accurately be described as being provided for the purposes of the business but again admittedly is not for that reason alone to be held to be plant... The distinction, I think, is that in the one case the structure is something by means of which the business activities are in part carried on; in the other case the structure plays no part in the carrying on of those activities, but is merely the place within which they are carried on. So, in the case at any rate of a subject-matter which is a building or some other kind of structure, regard must be paid to the way in which it is used to discover whether it can or cannot properly be described as plant. This is what has been referred to as the functional test. ... Is the subject matter the apparatus, or part of the apparatus, employed in carrying on the activities of the business?”

He concluded at page 275d that the vessel and barge, although used in the connection with the taxpayer’s restaurant business “were not part of the apparatus employed in the commercial activities of those businesses but were the structure within which the business was carried on”.

35. Shaw and Templeman LJ agreed. Templeman LJ noted (at page 276h) that there were borderline cases in which a structure forming part of business premises has been held to be plant because it does not merely consist of premises providing accommodation for the business but also performs a function in the carrying on of the business. He said at page 276h that “Premises or structures forming part of premises,

which have the characteristics and perform the functions of plant, merit the claim for capital allowances.” At page 277f he described *Barclay Curle* as “a classic case of a structure forming part of premises but also performing the functions of plant and therefore qualifying for capital allowances as plant.” He also quoted from Lord Reid’s judgment there: “the whole dock, is I think the means by which, or plant with which the operation is performed”. At page 278c *Schofield* was described as a case where the structure performed a function other than that merely of providing accommodation for the carrying on of a business. He went on to say at page 278d that: “it plainly appears, therefore that if, and only if, land, premises or structures in addition to their primary purpose perform the function of plant, in that they are the means by which a trading operation is carried out” then they are treated as plant.

36. In *Wimpy International Ltd v Warland (Inspector of Taxes)* [1989] STC 273 (“*Wimpy*”) the Court of Appeal held that the Special Commissioners were entitled to find various items the restaurant business spent on installing items when upgrading its premises (such as floor and wall tiles, floors, ballustrading and stairs) were not plant.

37. In the High Court, Hoffman J had set out that an item could be used for carrying on the business (passing what he termed a “business test”) but was nevertheless excluded if such use is as the premises or place in or on which the business is carried on (failing what he termed the “premises test”).

38. Fox LJ (at page 275j) described the competing approaches in the appeal. On the one hand there was Hoffman J’s view, based on his review of the authorities, that the question was “whether it would be more appropriate to describe the items as having become part of the premises rather than as having retained a separate identity.” On the other there was the taxpayers’ approach of “whether the item in dispute performs or is part of an item which performs the sole function of housing the business or whether it performs some other distinct business purpose. If it does it is plant even if, in ordinary terms, it would be described as part of premises.”

39. Fox LJ considered the authorities including *Jarrold, Barclay Curle, and Beach Station Caravans*. He considered that last case entirely in line with *Barclay Curle*, the pool not being the place where the trade was carried out but part of the means whereby the trade of a caravan park was carried on: see page 277f. He contrasted these cases with others, including *Benson*, illustrating the principle that the premises in which business was carried on were not themselves to be regarded as plant.

40. At page 279c Fox LJ took as authoritative the statement from Lord Lowry’s judgment in *IRC v Newcastle Scottish Breweries Ltd* [1982] STC 296 that something which becomes part of premises, instead of merely embellishing them, is not plant, except in the rare case where the premises are themselves plant, like the dry dock in *Barclay Curle*. Again (at page 279f) *Barclay Curle* was referred to as example of something which although premises was nevertheless plant.

41. Returning to the taxpayer’s case, at page 280 a-b, Fox LJ agreed it was proper to look at the function but said the question was— what does the item function as? “If it

functions as part of the premises it was not plant”. At page 280g he noted that in most cases the question in the end depends on fact and degree. He upheld Hoffman J’s decision which had upheld the Special Commissioner’s decision in the Revenue’s favour.

42. Lloyd LJ proceeded (at page 286h) on the assumption that the strict functional test the taxpayer was arguing for was correct but found the Special Commissioners did adopt such a test. He went on however to reject the taxpayer’s argument that only the “business use” test was relevant and that the “premises test” (these were Hoffman J’s terms) had no basis in authority. He considered that the distinction that items forming part of the premises were not plant was implicit in the authorities from the start: see page 286j.

43. Glidewell LJ agreed adding Lord Lowry’s dictum in *Newcastle Scottish Breweries* provided ample authority for the Hoffman J’s premises test.

44. In *Carr (Inspector of Taxes) v Sayer* [1992] STC 396 (“*Carr v Sayer*”) the issue was whether immovable quarantine kennels were plant. The High Court held they were premises, at which, and in which, the taxpayer’s business was conducted. Sir Donald Nicholls VC identified a number of principles. We extract the ones relevant to this appeal here (at page 402d-f):

“...Second, the expression 'machinery or plant' is apt to include equipment of any size. If fixed, a large piece of equipment may readily be described as a structure, but that by itself does not take the equipment outside the range of what would normally be regarded as plant. The equipment does not cease to be plant because it is so substantial that, when fixed, it attracts the label of a structure or, even, a building. Thus a dry dock which affords the means for getting large vessels into a position where work on the outside of the hull can be done can properly be regarded as plant (see *IRC v Barclay, Curle & Co Ltd* [1969] 1 WLR 675, 45 TC 221). Likewise, a substantial concrete silo used as a means for loading grain into customers' lorries (see *Schofield (Inspector of Taxes) v R & H Hall Ltd* [1975] STC 353).

Third, and this follows from the above, equipment does not cease to be plant merely because it also discharges an additional function, such as providing the place in which the business is carried out. For example, when a ship is repaired in a dry dock, the dock also provides the place where the repair work is carried out. That is no more than the consequence of the extensive size of a piece of fixed plant.”

45. Applying the principles to the facts meant the kennels were not plant; they were the premises at which, and in which, the business was conducted. That was on the basis of the commissioners’ primary findings of fact that the kennels were permanent buildings or structures and were used as such: see page 402j.

46. In *Bradley (Inspector of Taxes) v London Electricity* [1996] STC 450 (“*London Electricity*”) the High Court held that an electricity substation was not plant. Blackburne J quoted Hoffman J’s judgment in *Wimpy*, which in turn referred to the *Barclay Curle*

majority holding that “even a building or structure (in that case a dry dock) could be plant if it was more appropriate to describe it as apparatus for carrying on the business or employed in the business than as the premises or place in or upon which the business was conducted”. Blackburne J noted the passage (which went on to state Hoffman J’s business and premises tests) was quoted with approval by Fox LJ in *Wimpy*. Blackburne J went on to quote Sir Donald Nicholls VC’s summary in *Carr v Sayer* (included above at [44] and reviewed Carnwath J’s decision in *Anduff* (which was later upheld by the Court of Appeal as we come on to)).

47. Blackburne J noted (at page 1080h) Nourse LJ’s judgment in *Gray (Inspector of Taxes) v Seymour Garden Centre (Horticulture) (a firm)* [1995] STC 706. In that case, where a glasshouse for keeping and laying out garden plants for sale in a garden centre was held to be plant, the essential question was “whether the disputed items could “reasonably be called apparatus with which [the taxpayer’s] business is carried on as opposed to the premises in which it is carried on...””.

48. Blackburne J explained at page 1082g that in concluding that it was “more appropriate to describe the structure as apparatus for carrying on the business than as the premises in which the business is conducted” the Special Commissioner had in mind Hoffman J’s premises test but, in concluding the item was plant, had failed to identify what plant like function it was that the structure as a single entity played in the taxpayer’s business other than that of housing the equipment within. He quoted from the judgment of Lord Reid and Lord Guest in *Barclay Curle* to highlight that it was the identification of the plant like function performed by the dry dock as a whole which enabled the dry dock to be characterised as plant.

49. Finally, *Attwood v Anduff Car Wash Ltd* [1997] STC 1167 (“*Anduff*”) concerned expenditure on the construction of car wash facilities. These comprised a wash hall where cars were pulled through mechanically to be washed dried and waxed. The wash hall including other rooms such a toilet, pump room and store-room and outside of which a tarmac area laid out with signage and bollards to direct the cars efficiently round the site, through the wash hall and to the exit. The Special Commissioners held in favour of the taxpayer that each part of the site was to be viewed as a single unit of plant. The High Court disagreed; it was not a single unit, and the site on which the business operated, and the wash hall were premises not plant. The taxpayer’s appeal to the Court of Appeal, arguing the facility was one unit of plant, or if not, then the wash hall was plant, was dismissed.

50. Peter Gibson LJ (with whom Waller LJ and Beldam LJ agreed) referred at page 1172 to Pearson LJ’s “short question” in *Jarrold*, that is “whether the [item] is part of premises in which the business is carried on or part of the plant with which the business is carried on” and Nourse LJ’s formulation in *Gray v Seymours Garden Centre*, that is whether items could “... reasonably be called apparatus with which trade is carried on as opposed to premises in which it is carried on [it] being established law that a large structure used for the purposes of the trade may be [plant]”. Dealing with *Wimpy* Peter Gibson LJ noted what Hoffman J had said of *Barclay Curle*: “that the majority held even a building or a structure...could be plant if it was more appropriate to describe it

as apparatus for carrying on the business...than as the premises or place in or upon which the business was conducted”.

51. He referred at page 1174a to Fox LJ’s formulation in *Wimpy*: “...But the question is what does it function as?...” and also to the Vice Chancellor’s summary of principles in *Carr v Sayer*. He noted the rarity of cases where premises were themselves plant including *Barclay Curle* in relation to which he noted Lord Guest’s description of the plant function of the structure. That case, as well as *Beach Stations* and *Schofield* were all noted as examples of cases where Hoffman J’s “premises test” was satisfied.

52. He then explained (at page 1176b ) why Templeman LJ’s judgment in *Benson* in referring to land went beyond the authorities (it was hard to see how land could ever be apparatus functioning as plant) and referred to Buckley LJ’s contrast in the same case between a structure “by means of which business activities are in part carried on with a structure which plays no part in the carrying on of those activities but is merely the place within which they are carried on” which he said was too stark a distinction. He continued:

“The question in each case is, as Fox LJ said (in *Wimpy* [1989] STC 273 at 280): does the item function as premises or plant? To answer this may involve deciding whether it is more appropriate to describe the item as apparatus for carrying on the business or as the premises in or upon which the business is conducted. Thus in *Carr v Sayer* there can be no doubt but that the kennels were an essential part of the business of providing quarantine kennels for dogs and cats brought into the United Kingdom and thus were part of the means by which the trading operation was carried out. Yet the premises test was not satisfied because the kennels performed a typical premises function, providing shelter.”

53. Peter Gibson LJ went on to conclude the Commissioners could not, on the basis of the primary facts, have arrived at the conclusions which they did consistently with the premises test. The part outside the wash hall functioned as an area over which cars were driven and parked; it functioned as premises. All of the elements functioned as premises. Regarding the argument that the purpose of the building was to function as plant (where the roof enabled collection of rainwater for use in washing and where car wash water was recycled), Peter Gibson LJ held that quite plainly the building functioned as premises.

54. We can summarise the principles to be derived from our review of the authorities as follows:

- (1) The starting point is that plant is the apparatus used for the carrying on of a business (*Yarmouth*).
- (2) The question is whether the item is part of the premises in which the business is carried on or part of the plant with which the business is carried on. Even though premises are usually to be regarded as the setting in which the trade is carried out and therefore not plant, premises and plant are not mutually exclusive and each case depends on its own

circumstances. There can be cases where an item is excluded from being plant on the basis that it is more part of the setting than part of the apparatus for carrying on the trade (*Jarrold*).

(3) The function of an item is an important consideration. The functional test is a preliminary to the assessment of whether a particular item is apparatus. A structure can also be plant if it fulfils the function of plant in a trader's operations, but not every structure which fulfils the function of plant must be regarded as plant if there is a good reason to exclude such a structure (*Barclay Curle, Benson*).

(4) A decision on whether or not an item is plant is a decision on a question of fact and degree and there are cases which on the facts found are capable of being decided either way. It is too stark a distinction to draw a contrast between a structure which is the means by which business activities are in part carried on with a structure which plays no part in the carrying on of those activities but is merely the place within which they are carried on (*Schofield, Anduff*).

(5) Although a building in which a business is carried on can accurately be described as being provided for the purposes of the business it is not for that reason alone to be held to be plant (*Benson*).

(6) Where premises also perform a plant-like function the question is whether it is more appropriate to describe the item as having become part of the premises rather than as having retained a separate identity. If the item functions as part of the premises it is not plant (*Wimpy, London Electricity*).

(7) Equipment does not cease to be plant merely because it discharges an additional function such as providing the place in which the business is carried on (*Carr v Sayer*).

(8) The question in each case is whether the item functions as premises or plant. To answer this may involve deciding whether it is more appropriate to describe the item as apparatus for carrying on the business or as the premises in or upon which the business is conducted (*Wimpy, Anduff*).

### **FTT's analysis on case law and the application to the facts.**

55. On the back of the above it is now convenient to look at how the FTT dealt with the case-law and the way in which it stated its approach, which is subject to challenge by the appellants. After considering *Anduff* the FTT noted:

“104. So the test is one of function and it can be difficult to apply where the thing in question has both plant-like and premises-like functions. Mr Peacock's view was that if a thing had any plant-like function, it was plant; it was only if it was 'mere premises' and without a plant-like function that it would not be plant. That view does not seem consistent with *Attwood v Anduff* where the wash-hall did have a plant-like function

(the recycling of water) but it was insufficient to outweigh its premises-like nature of providing shelter.

#### Dry Dock

105. The appellant relied on a leading but older case of *IRC v Barclay Curle* (1969) 45 TC 221 which decided that the work of excavation and concreting of a dry dock was allowable as the dry dock itself was plant. It might be thought that the dry dock, which comprised the entire premises on which the taxpayer operated its business of ship repair, was premises as the car wash site was later found to be in *Attwood v Anduff*, as it provided the place where the work was carried out, which is a premises function.

106. However, the dry dock also had plant-like functions, firstly because its function was to hold the ships in place while they were worked on; but secondly and even more significantly, it seems to me, was its critical ability of isolating the ship from the water. Its function was compared to that of a crane hoisting a boat out of water for repairs; a crane removed the boat from the water: the dry dock removed the water from around the ship.

107. The Lords ruled that those plant-like functions made the entire dry dock plant. But while the Lords said buildings and structures could be plant if they had plant-like functions, there is nothing in their decision which implied that any plant-like function would automatically make any building and structure plant. And the later case of *Anduff* shows that this is not so. I conclude that it is a matter of degree where premises have both plant and premises like functions: the question must be which of the functions predominates. With *Barclay Curle*, the plant-like function of the elimination of the water was critical to the business. In *Attwood v Anduff*, the premises-like function of the wash hall predominated over its re-cycling of water.”

56. The FTT applied its test as follows: The cavities were clearly part of the premises from which the appellants carried on their businesses ([122]). That did not mean they could not be plant (*Barclay Curle*, *Beach Station Caravans* which also concerned “holes in the ground” but the items were found to be plant). Whether the cavities were plant depended on whether they functioned as premises or whether they functioned as plant ([123]). The appellants’ business was the short-term storage of gas ([124]). The function of the cavity was to store gas taken from the NTS safely and to allow it to be returned there ([125]). The FTT noted the appellants saw the cavities as equivalent to pumps/compressors, using natural forces in their plant-like function ([126]). The FTT went on:

“127. However, I think it clear (particularly from *Attwood*) that a plant-like function does not necessarily make premises plant, in circumstances where the premises also functions as premises. It is a matter of degree. I am prepared to accept that the cavities did have a plant like function similar to that of a pump/compressor in that the manner of construction (a large hole in the ground connected by pipes to the NTS) meant that when the pressures were right and the valves open, gas would free flow

to or from the cavity. However, I accept the evidence that that was an incident of the construction and not the reason they were constructed in that manner. The main reason gas was stored in salt cavities, as I understood it, was that that gas cavities were a safe method of storing very large amounts of gas in a way that would enable it to be fast-cycled, and thus opened up the possibility of arbitrage on gas prices. I had no evidence that their plant-like ability to act like a pump/compressor was essential: on the contrary, the evidence which I had was that the appellants had little control over when they would be able to free flow gas and they had compressors to move the gas when it was not possible. From the evidence I had I was unable to conclude how often free flow took place and the appellants have therefore failed to show that it was common let alone a main function of the cavities.”

57. The FTT considered the purpose of the cavities was to store gas and not to free flow it and that where premises have a function of storage, that was a premises-like function and not a plant-like function ([128]). The FTT continued:

“129. I did not understand the appellants to be arguing that a function of fast-cycle storage was a plant-like function. *Schofield* might suggest it was, as the grain was put into and discharged from the silos in short order, but I do not think that was the ratio of the case. In *Schofield* the taxpayer’s business was distribution and not storage. I consider that in this appeal, the appellant’s business was storage, for however short a term. They were not, unlike in *Schofield* or in the case involving a cold store, buying and importing for immediate sale on arrival, but deliberately storing the product (in this case, gas) in order to profit from a price increase while the gas was stored (in the case of CCS) or to profit by allowing another company to profit from a price increase while the gas was stored (in the case of EDF).”

58. Thus, the FTT found (at [130]): “the premises-like function of shelter and containment [were] the significant and predominant function of the cavities. As to the purpose of storing the gas at high pressure that simply enabled more gas to be stored. That ability was a premises-like function; “... it meant that the cavities were just very good premises for storing gas”.

## **Discussion**

59. The appellants’ central challenge on the plant issue (its first ground), is that an item is plant if the item *at least* functions as plant. As is clear from the FTT Decision ([124]) that was an argument that the FTT considered but then rejected. Mr Peacock argues the FTT was wrong to do so on the basis of the authorities. He also mentions that the authorities establish that an item will be excluded from plant if it “merely” has a premises or setting function and has no other plant-like function. We first consider whether the principles Mr Peacock advances are borne out by the principles that we have derived from the authorities we set out earlier.

60. The proposition that something which is mere setting is not plant cannot be controversial. It is an expression of the conclusion which follows from the distinction



drawn in the authorities between plant and premises or setting discussed in *Jarrold*. Such a distinction was on a number of occasions in the cases we have reviewed observed to be implicit in Lindley LJ's definition of "plant" in *Yarmouth v France*. Where the premises are themselves plant, then the item will be plant. In that case the item is clearly not "merely" premises. None of this however deals one way or other with the approach that may be taken when both premises and plant functions are in contention. The more difficult proposition is whether it is correct that there is a principle that where the item has *any* plant-like function that means the item is plant.

61. Mr Peacock relies on *Barclay Curle* as the source of that proposition. However, in agreement with the FTT, we are not persuaded the House of Lords did lay down the principle Mr Peacock says it did. The core of the majority reasoning was simply that the dock had a plant like function when looked at from the perspective of the taxpayer's trade as a whole, rather than when looking at the activity of ship repair in isolation. The fact that the dry dock could, when looking at the repair stage in isolation, be viewed as premises, in that it was the place where repairs were carried out, did not stop the dry dock as a whole being plant.

62. The proposition advocated for also does not sit well with Lord Reid's concession quoted at [23] above that "I do not say that every structure which fulfils the function of plant must be regarded as plant..." and Lord Guest's statement quoted at [25] above that the functional test was "therefore essential, at any rate, as a preliminary" (emphasis added).

63. Mr Peacock submits the dissenting opinions in the case are instructive. Those proposed a test which went wider than a functional test, more consistent with the one the FTT used, but one which was not adopted. We can see that on the face of it the dissenting judges' rejection of the decisiveness of a purely functional test, might imply that the majority was saying that all that was required was to establish any plant like function. But when those dissents are properly considered it is plain they do not have that implication. Lord Hodson saw the fact the dock was used for the purposes of the business as not enough – it would catch purpose-built factories which were clearly premises and excluded. Lord Upjohn was talking of functional test in the sense of the item being necessary for the business. His point also was that was not enough (he acknowledged that, without the dock walls, there would be no place to repair the ship and no way of getting it there but that did not make them plant). Neither judge viewed the functional test as asking whether the item functioned as plant (that it was the means with which the trade was carried out) which was the test the majority used. In other words, the wider functional test of purpose or necessity, which the dissenters objected to as inconclusive, did not reflect the narrower functional test the majority actually used.

64. We therefore reject the argument that *Barclay Curle* established the proposition Mr Peacock maintains it did.

65. We are reinforced in that view by the fact that there is nothing in the way the case has subsequently been treated in the authorities argued before us which supports Mr Peacock's proposition. We have set out above what subsequent cases have taken from

*Barclay Curle*. Notably, Hoffman J’s judgment in *Wimpy* (cited with approval by Fox LJ in the Court of Appeal in that case and cited by Peter Gibson LJ in *Anduff*) referred to the *Barclay Curle* majority as holding that “even a building or structure (in that case a dry dock) could be plant if it was more appropriate to describe it as apparatus for carrying on the business or employed in the business than as the premises or place in or upon which the business was conducted”. The subsequent cases consistently refer to *Barclay Curle* as an example of something which although premises (in the ordinary understanding of that word) can nevertheless, because of its plant like function, be plant. To the extent any principle is drawn it is that just because an item is premises does not mean it may nevertheless not be plant.

66. In addition, the proposition Mr Peacock advances is a simple and straightforward one to state. That it has not ever been explicitly drawn out is surprising given the level of judicial consideration given in the many subsequent cases to extracting the relevant principles.

67. Mr Peacock submits his formulation is evident in *Jarrold* where it was sufficient that the court found a plant like function and there was then no further enquiry into whether it functioned as plant or premises. We do not accept that depiction. Pearson LJ explained the issue was whether the partitioning was part of the premises in which the business is carried on, or part of the plant with which the business was carried on. It was therefore necessary to conclude whether the function was plant or whether it was premises. Once that conclusion was made there was no need for further enquiry because that was the end of the analysis. The case did not deal with the approach to be taken before the conclusion to the question posed was reached.

68. Mr Peacock also relied on the third principle which the Vice Chancellor extracted from the authorities in *Carr v Sayer*. The FTT summarised this at [100] as saying “equipment does not cease to be plant merely because it also discharges an additional function, such as providing the place in which the business is carried out”. We have set out the full passage from *Carr v Sayer* at [44] above. It is clear that the third principle stated there does not assist the appellants’ case. All it is saying is that once it is concluded, after analysis, that an item is plant, as it was in *Barclay Curle* and *Schofield*, the item does not stop being plant because it also has another function. The principle has nothing to say about the analysis which precedes the making of the conclusion that the item in question was plant.

69. We would also note that, insofar the formulation advanced suggests that the analysis stops as soon as it is established the item is used for the purposes of the business, then it is contrary to authority, which, as made clear by the Court of Appeal in *Wimpy*, requires consideration of whether the item has the function of premises. In so far as it is suggested that the analysis can stop as soon as any “plant-like” function is identified then the term “plant-like” discloses the preliminary nature of any such finding. A preliminary finding is just that; it could not mark the end of the analysis. In fact, that sort of preliminary finding made as a working proposition is precisely the nature of what the FTT found when the judge said (at [127]) she was “...prepared to

accept that the cavities did have a plant like function similar to that of a pump/compressor”.

70. Having found the appellants’ suggested approach was wrong, we still need to consider whether Mr Peacock is correct in his submission that the FTT’s approach was novel and contrary to the authorities. The FTT concluded “it is a matter of degree where premises have both plant and premises like functions: the question must be which of the functions predominates.” Ms Nathan, for HMRC, submits the test the FTT identified was in line with the correct legal principles.

71. We agree with Ms Nathan. Although we consider the terminology of predominance the FTT stated for its approach was not reflected in the authorities, (Ms Nathan did not suggest that it was) in our judgment the FTT’s approach, and in particular that the issue is a matter of fact and degree, was consistent with the applicable principles in the case-law we have set out at [54] above. The FTT was not in substance stating any novel approach.

72. In explaining how the FTT’s approach was consistent with the authorities we consider Ms Nathan was right to emphasise the extract from Peter Gibson LJ’s judgment in *Anduff* which we set out at [52] above. That suggested that to answer the question of whether the item functioned as premises or plant might involve deciding “whether it is more appropriate to describe the item as apparatus for carrying on the business or as the premises in or upon which the business is conducted”. The conclusion of that decision results in a binary outcome. The language of “more appropriate” reflects that, in reaching an eventual decision on the issue, there might be elements of the item’s purpose which point towards both the premises and plant function. Ultimately, however, it must be decided which description the item falls into. In directing itself to examine which function predominated the FTT was describing just that sort of task.

73. We reject Mr Peacock’s submission that Ms Nathan’s reliance on the extract in *Anduff* misreads what Peter Gibson LJ suggests. He based this on the judge’s actual analysis in relation to the facts of that case. There is perhaps some merit in the criticism that the FTT misread the analysis that was in fact applied in *Anduff*, in particular the way that it assumed the wash hall’s feature of recycling was considered a plant-like function. Peter Gibson LJ did not make such a finding in terms. Nevertheless, he did accept (at page 1117d) that it was arguable the concrete base of the building functioned as plant. In any case the lack of findings (which by definition could not amount to conclusions the building’s functions were plant, given the ultimate result) would not make the principle that Peter Gibson LJ had derived from the authorities, any less valid for the FTT to follow, even if the stated basis on which the FTT did so was not entirely correct. On the basis of the principles expressed in *Anduff* alone, it cannot be said the FTT’s approach, in substance, was a novel one.

74. We add that it seems to us Peter Gibson LJ’s reference to “more appropriate” echoed the terms in which Hoffman J, in *Wimpy* had summarised the majority view in *Barclay Curle* (see [50] above). The need to weigh up which function was more

appropriate and the nature of the task being one of fact and degree is also consonant with a number of other authorities. It is also arguably reflected in Nourse LJ's formulation in *Grays*, which Peter Gibson LJ referred to earlier, speaking in terms of the item "reasonably" being called one of the two competing outcomes.

75. The case-law consistently indicates the task of determining whether an item is plant or premises may not be straightforward and that it is a matter of evaluative judgment. Thus, as we have summarised at [54] above:

(1) It is apparent in *Jarrold* that Pearson LJ considered both views were open on the facts.

(2) In *Jarrold*, Donovan LJ put the question in terms of whether the item was "more a part of the setting than part of the apparatus carrying on the trade".

(3) In *Beach Site Caravans* Megarry J noted the difficulty of the subject area and that to some extent the matter must be one of impression.

(4) The nature of the question being one of fact and degree was noted for example in *Schofield* and in *Wimpy*.

76. In all the cases, a judgment had to be made as to whether the item was more appropriately described as apparatus with which the business was carried out or premises in which the business was carried out. So, for example, the House of Lords decision in *Barclay Curle* was an example of an item which could be said to have a premises function but where ultimately, when the item's function was considered taking account of the trade, the item had a plant function which was clearly articulated in the majority's judgments. In fact, Hoffman J's description of the majority holding in that case (see [50] above) in *Wimpy* in a judgment that was cited with approval by Fox LJ in the Court of Appeal in that case and cited by Peter Gibson LJ in *Anduff* serves to explain how Peter Gibson LJ's reference to "more appropriate" was grounded in the previous cases.

77. We are fortified in our view that the FTT directed itself correctly in substance on the legal approach by the way it went to on to apply the test to the facts (see [56] onwards above). It evaluated the respective plant-like and premises-like (storage) functions and made a judgment on which function the cavities had. That was consistent with it considering which function was "more appropriate". In our view, that evaluation is not open to challenge. The FTT was fully entitled to reach the conclusion it did on the basis of the evidence that was before it and the primary findings of fact that it made.

78. In summary, we therefore reject the appellants' principal challenge that the FTT approached the decision on whether the cavities were plant under the common law inconsistently with authority. The ground seeks to set up a dichotomy between a long-standing principle said to emerge from *Barclay Curle* and an entirely novel principle advanced by the FTT. That dichotomy is flawed in two respects. First, *Barclay Curle* (or for that matter the subsequent cases) do not establish such a principle. Second, the

FTT's approach, while novel only in terminology, was in substance consistent with the relevant legal principles.

79. It follows, that although we might have expressed the question in terms of which function was "more appropriate" as Peter Gibson LJ set out in *Anduff*, there was no error of law in relation to the way the FTT directed itself, as alleged.

80. The appellants raise two other alleged errors in the FTT's decision that the cavities were not plant which we can deal with relatively briefly.

81. First, they say the FTT also mischaracterised or mis-remembered the appellants' argument. This was not that the divide between plant and premises depended on the "main" or "primary or significant" function but exactly the opposite (as set out in the appellants' primary challenge we have discussed above). The parties were not, therefore "really saying the same thing" as the FTT had recorded at [115].

82. It is true to say the appellants were not arguing a "main function" test, but any error in that respect did not amount to an error of law in the FTT's decision when considered in context, still less any material error that would warrant setting aside the decision. The FTT plainly appreciated the appellants' key submission, as put to us in this appeal. It considered it and rejected it at [104] to [107]. The FTT's adoption of the test mentioning the issue being a matter of degree, and the question of which function predominated, was derived from the FTT's discussion of its rejection of the appellants' argument. It was not predicated on any mistaken assumption that the appellants were arguing for a main function test.

83. Second, the appellants submit the FTT misinterpreted the ratio of *Schofield*. This did not turn, as the FTT suggested at [118] and [129], on the nature of the trade in that case being grain importing rather than mere grain storage but that the silos had a plant-like function (allowing delivery of grain by means of gravity) as well as a premises or setting function. The plant-like function was sufficient irrespective of the premises or setting function and without regard to the relative significance of either function.

84. On that last point we have already explained why we consider that was not a principle evident from *Barclay Curle* or one which took root in later cases. We consider the FTT was correct to see *Schofield* as a case where the nature of business and the role that silos played in it was key (see above at [31]). This is borne out in the way subsequent cases have described it. In *Anduff*, when describing it as a case in which the "premises test" was passed (i.e. the item was plant), Peter Gibson LJ referred to Lowry CJ saying that the silos played a part themselves in the "distributive process of reception, distribution and discharge" of the grain". In *London Electricity* Blackburne J described how the silos had "their own separate function in the taxpayer's trade of grain importing, namely the holding of grain in a position from which it could be conveniently discharged in varying quantities. It was not mere shelter for men or grain."

85. For the reasons above we conclude the FTT made no error of law as alleged in the appellants' ground in relation to its consideration of whether the cavities were "plant" as that term is understood in the common law.

86. Given our conclusion, we do not consider the remaining issues on s21 / 23 CAA, which would only be relevant if it were concluded the cavities were "plant" under the common law definition.

**Disposition**

87. The appellants' appeals are dismissed.

Signed on Original

**JUDGE TIMOTHY HERRINGTON**

**JUDGE SWAMI RAGHAVAN**

**RELEASE DATE: 5 March 2021**