HIGH COURT OF JUSTICE (CHANCERY DIVISION)—
6, 7 AND 10 MARCH AND 2 APRIL 1980

COURT OF APPEAL—8, 9, 10 AND 11 JUNE AND 9 JULY 1981

HOUSE OF LORDS—1, 2, 3 AND 4 FEBRUARY AND 11 MARCH 1982

Cole Bros. Ltd. *v.* Phillips (H.M. Inspector of Taxes)[1]

Corporation tax—Capital allowances—Lighting and other apparatus installed in shop premises—Whether "plant" or "setting" within which merchandise was sold—Finance Act 1971, *s* 41.

The Company claimed group relief (under Income and Corporation Taxes Act 1970, s 258(1)) in respect of a loss, claimed to have been suffered by JLP Ltd., in spending £945,600 on the installation of electrical apparatus (including specially-designed lighting and wiring) in a department store on the ground that it was "capital expenditure on the provision of machinery or plant for the purposes of the trade" within the meaning of ss 40 and 41 of the Finance Act 1971, (1) because the whole installation qualified as "plant"; alternatively (2) because its individual components so qualified.

The Revenue conceded that individual components (costing £369,244) qualified as "plant" but disputed the rest on the ground that they formed "part of the setting within which", as distinct from "part of the plant with which" merchandise was sold. The Special Commissioners allowed the appeal only in respect of (*a*) window panels, lighting and sockets, (*b*) wiring exclusively related to external signs, (*c*) sockets, wiring and electrical apparatus in the kitchen, (*d*) transformers and ancillary equipment (reducing the mains supply voltage from 11,000 volts to 415 volts 3-phase). The Company appealed.

The Chancery Division, dismissing the Company's appeal, held that as to (1) above, (*a*) the electrical installation as a whole did not qualify as a single item of plant; in the context of s 40 "plant" properly described what was actually employed in carrying out the processes characteristic of the trade or business, being contrasted on the one hand with (i) what was consumed by or subjected to those processes and (ii) the place or setting where the processes were carried on; (*b*) in the present case, the correct test for deciding whether the installation as a whole was "plant" was to ask whether this department store would have been a complete building and usable for any purpose without the electrical installation; or whether the installation could be regarded (i) as something added to a building otherwise complete, and (ii) as something employed in carrying on the activity of the taxpayer's retail trade: *Imperial Chemical Industries of Australia & New Zealand Ltd.* v. *Federal Commissioner of Taxation* (1970) 1 ATR 450 approved: *J. Lyons & Co. Ltd.* v. *Attorney-General* [1944] Ch 281 explained; (*c*) applying that test, since the store was patently incomplete as a setting for any trading activity without a reticulation system for electric current, this system was, as a whole, not plant; as to

[1] Reported (Ch D) [1980] STC 518; (CA) [1981] STC 671; (HL) [1982] AC 617; [1982] 1 WLR 1450; [1982] 2 All ER 247; [1982] STC 307; 126 SJ 709.

(2) above, (*a*) in the case of a taxpayer carrying on a retail trade, it is wrong to regard as "plant" whatever is provided as an amenity to customers: *Cooke* v. *Beach Station Caravans Ltd.* 49 TC 514; [1974] 1 WLR 1398 distinguished; (*b*) there was material on which the Special Commissioners could properly decide that the items which they disallowed were not plant. The Company appealed.

The Court of Appeal, allowing the Company's appeal to the extent only of the main switchboard, held that in deciding whether expenditure on a particular item is allowable as expenditure on plant the authorities demonstrate that the question (however expressed) which the Court must ask itself is whether the particular subject-matter under consideration either itself performs, or is a necessary or integral part of that which performs, simply and solely the function of "housing" the business, or whether, as its sole function or as its additional function, it performs some other distinct business purpose. The Company obtained leave to appeal from the House of Lords.

Held, in the House of Lords, dismissing the Company's appeal and re-affirming the distinction between "plant" and "setting" that:

(1) the criteria by which the courts define the frontier between those concepts is to look at the disputed object in order to see what it is and then to consider what in the context of the business actually being carried on is its function; but,

(2) the two concepts are not mutually exclusive and in certain cases notably that of a hotelier and restaurant proprietor the very thing the trader is selling includes an "ambience" or "setting";

(3) the character of a disputed object is however essentially a question of fact and degree for the determination of the Commissioners;

(4) there was evidence to support the decision of the Commissioners as to the character of the disputed objects in the instant case.

Criticism by Lord Hailsham L.C. (with whose speech Lord Bridge expressed agreement) and Lord Edmund-Davies of the Commissioners' use in the Case Stated of the common formula: The question of law for the opinion of the Court is whether on the facts found our decision was erroneous in point of law instead of specifying the point(s) of law for the opinion of the Court.

Dixon v. *Fitch's Garage Ltd.* 50 TC 509; [1976] 1 WLR 215 doubted (by Lord Hailsham L.C.).

CASE

Stated under the Taxes Management Act 1970, s 56, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 27 and 28 November 1978, Cole Bros. Ltd. (hereinafter called "the Appellant") appealed against the Inspector's decision on a claim for relief against corporation tax in respect of a loss incurred during the accounting period ended on 31 January 1976.

2. Shortly stated, the question for our decision, was the amount of the capital allowance or allowances due to John Lewis Properties Ltd. in respect of the electrical installation, comprising various items of electrical equipment, in the building in the Brent Cross Shopping Centre in north-west London in which John Lewis and Co. Ltd. carries on the business of a department store, and in particular how much of the expenditure in dispute was incurred upon the provision of "plant" within the meaning of s 40, Finance Act 1971 and related sections.

3. Mr. R. C. Stevens, a chartered engineer and chief electrical engineer of the John Lewis Partnership gave evidence before us. We also visited the building and inspected the installation.

4. The following documents or exhibits were proved or admitted before us:

Exhibited by the Appellant:—

(1) Note entitled "Uses of Electricity at Brent Cross Store".

(2) Photocopy of news release by the Consultative Committee of Accountancy Bodies dated 9 August 1977 headed "St. John's School Case".

(3) Analysis of the electrical installation at John Lewis, Brent Cross.

(4) A bundle of 17 coloured photographs of components of the electrical installation with an index.

(5) A specially designed lighting fitting.

(6) A sample of a suspension device.

Exhibited by the Inspector:—

(7) Photocopy of an "open letter" dated 22 November 1978 from Mr. E. O. Jackson of Inland Revenue Solicitors' Office to Clifford-Turner, the Appellant's solicitors.

(8) Extract, with comments added by Mr. Jackson, from an earlier decision of the Special Commissioners.

(9) Photocopy of The Law Times report of the decision in *J. Lyons & Co. Ltd.* v. *Attorney-General* vol 170, pp 349–351.

(10) Photocopies of three Australian reports (mentioned in para 16(3) of our decision and in para 8 of this Case).

None of these is annexed hereto as exhibits; they are, or can be made available for inspection by the Court if required.

5. The facts, which we found to be proved or admitted as a result of the evidence both oral and documentary adduced before us are set out in paras 2 to 14 inclusive of our written decision, a copy of which is annexed hereto and forms part of this Case.

6. The submissions made by Mr. F. Heyworth Talbot Q.C. on behalf of the Appellant are set out in para 15 of our decision.

7. The submissions made by Mr. E. O. Jackson on behalf of the Inspector are set out in para 16 of our decision.

8. The following cases were cited to us in addition to those which are mentioned in our decision:—*Hinton* v. *Maden & Ireland, Ltd.* 38 TC 931; [1959] 1 WLR 875; *ICI (Australia) Ltd.* v. *Federal Commissioner of Taxation,*

heard in October and December 1971, 2 ATR 672; *Federal Commissioner of Taxation* v. *ICI (Australia) Ltd.*, heard in March and December 1972, 3 ATR 321.

9. We, the Commissioners who heard the appeal, took time to consider our decision and gave it in writing on 5 March 1979. Our conclusions are set out in paras 17 to 20 inclusive thereof.

10. Figures were not agreed between the parties until 11 May 1979, and on 21 June 1979 we made our final determination as follows:

	£
Profits	2,689,734
Group relief	1,223,894
Net chargeable profits	1,465,840.

11. The Appellant, immediately after the determination of the appeal, declared to us its dissatisfaction therewith as being erroneous in point of law, and on 27 June 1979 required us to state a Case for the opinion of the High Court pursuant to the Taxes Management Act 1970, s 56, which Case we have stated and do sign accordingly.

12. The question of law for the opinion of the Court is whether, on the facts found, our decision was erroneous in point of law.

E. Wix
R. H. Widdows } Commissioners for the Special Purposes of the Income Tax Acts

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Turnstile House
94–99 High Holborn
London WC1V 6LQ

21 November 1979

Decision

Introduction

1. The question for determination is the amount of the capital allowance or allowances due to John Lewis Properties Ltd. ("JL Properties") in respect of the electrical installation, comprising various items of electrical equipment, in the building in the Brent Cross Shopping Centre in north-west London, in which John Lewis and Co. Ltd. ("John Lewis") carries on the business of a department store under the name of "John Lewis". The building in question ("the building") belongs to JL Properties, and is leased by that company to John Lewis. John Lewis, Cole Bros. Ltd. ("the Appellant") and JL Properties are all members of the John Lewis Group ("the Group"). For the material period, that is the year ended 31 January 1976, the accounts of JL Properties show a loss, which is augmented by a figure for capital allowance. To enable the Group to obtain the benefit of relief in respect of the augmented loss for the year under appeal, JL Properties surrendered the loss to the Appellant as

provided for in s 258(1), Income and Corporation Taxes Act 1970. The Appellant appeals against the decision of Her Majesty's Inspector of Taxes for Cavendish 2 District, on the amount of the group relief which the Appellant is entitled to under ss 258 and 259, Income and Corporation Taxes Act 1970. The construction and effect of the relevant statutes is not in dispute. We are concerned solely with how much of the expenditure in dispute was incurred upon the provision of "plant" within the meaning of s 40, Finance Act 1971, and related sections. Initially, therefore, we have to decide which of the items on which expenditure was made, constitute "plant".

The Installation

2. We had before us an agreed analysis of the expenditure on the electrical installation in the building. We reproduce this in the form in which it came before us (with the addition of numbers, and letters in brackets, for ease of reference). The document was modified, in certain respects, during the course of the hearing, and we indicate these revisions later in this paragraph.

Analysis Of The Electrical Installation At John Lewis, Brent Cross
("the analysis")

		£	£
I	*Expenditure in contention*		
	(*a*) Window panels, lighting and sockets	11,164	
	(*b*) Wiring to external signs	4,734	
	(*c*) Conduit and cables to specially designed lighting fittings	58,239	
	(*d*) Conduit and cables to other lighting fittings	25,405	
	(*e*) Specially designed lighting fittings	96,222	
	(*f*) Other lighting fittings	41,973	
	(*g*) Trunking relating to specially designed lighting fittings	108,585	
	(*h*) Conduit and cables to socket outlets	57,960	
	(*i*) Restaurant lighting and sockets	9,465	
	(*j*) Sub-main cables and riser cubicles relating to specially designed lighting fittings	41,519	
	(*k*) Sub-main cables and riser cubicles relating to other equipment	18,109	
	(*l*) Kitchen [including sockets and wiring]	7,165	480,540
II	*Special Treatment*		
	Transformers, switchgear etc.	104,808	104,808
III	*Expenditure not in dispute*		
	(*a*) Wiring, etc. to heating and ventilation equipment	92,721	
	(*b*) Wiring, etc. to fire alarm	1,976	
	(*c*) Wiring, etc. to clocks	3,833	
	(*d*) Public address system and staff location	60,591	
	(*e*) Wiring, etc. to TV workshop and cash registers	16,190	
	(*f*) Trunking for telephone system	60,662	

	£	£
(*g*) Wiring, etc. to lifts	10,367	
(*h*) Wiring, etc. to escalators	6,133	
(*i*) Wiring, etc. to burglar alarm	11,832	
(*j*) Wiring, etc. to smoke detectors	28,396	
(*k*) Wiring, etc. to E.A.M. [this signifies the Electrical Appliance Department], compactor room etc.	8,777	
(*l*) Emergency lighting system	15,835	
(*m*) Standby supply system	42,939	360,252
Total cost of electrical installation		945,600.

The following revisions were agreed between the parties during the hearing:— (1) The cost of the fitment for the display of fittings for sale in the lighting department should be deducted from the figure in I(*f*), and added to the items of expenditure under III. (2) The cost of the additional sockets installed in the television sales area should be deducted from the figure in I(*h*), and added to the items of expenditure under III. The actual figures under (I) and (II) remain to be agreed.

3. It will be apparent from the analysis, that upwards of £360,000 of the total cost of £945,600 is not in dispute, and is agreed by the Revenue to be allowable. It will also be apparent that the arrangement of the items in the analysis reflects a particular approach to consideration of the point at issue. Before considering whether that is the right approach, or the only approach, to consideration of the items listed in the analysis, we shall describe the principal components of the installation more fully.

4. *The sub-station:* The building was purpose-built in 1975. The contract for the erection of the building did not provide for any electrical installation, the latter being the subject of a separate contract. Each Electricity Board has the right to decide the voltage at which it will supply consumers. For small premises, a Board will establish its own sub-stations so that current may be delivered to individual consumers at the appropriate voltage (240 and 415) for immediate use. For larger premises, consequently requiring a larger load, a local Board may allow a consumer to provide a space for a sub-station on its own premises, the Board converting the current from the national grid voltage to 240 or 415. With very large premises, a Board may require a consumer to provide a sub-station at its own cost, the Board metering the current at the high national grid voltage, and leaving it to the consumer to convert that voltage to its requirements. In the case of the building, the Eastern Electricity Board ("the Electricity Board") refused to supply other than the national grid supply of 11,000 volts. The only cable in the store which, in the Appellant's contention, is correctly to be described as a mains cable, is the cable owned by the Electricity Board, which delivers electric current at 11,000 volts. That current comes into the building via switchgear belonging to the Electricity Board located in a sub-station, which is part of the total structure. The sub-station is situated in a corner of the building, and is surrounded internally by a wire cage. Access to the sub-station is by a door in the outside wall of the building, and the Electricity Board alone has access to the sub-station.

5. *Main switchgear and transformers:* The Electricity Board's equipment stands on shingle (to absorb oil) and from it passes by cable underneath the shingle and out of the cage to switchgear which is owned by John Lewis electric current at 11,000 volts. Three cables run from the switchgear, again under

shingle, one to each of three low-voltage transformers which convert the current from 11,000 volts to 240 or 415 volts, so that it is fit for use in the building. The converted current passes underground by cable from the transformers to the main switchboard for the electrical installation. The switchboard stands in an adjacent section to the transformers. Three of the switches control the incoming current; the remainder control outgoing circuits which feed all the equipment in the shop itself; for example, lighting and lifts. The cables which carry the current vary in size; the largest ones cannot be wound tightly because they have limited flexibility, and all the cables rest in a trench behind the swtchboard from which they pass, through ducts, into the store itself.

6. *Riser cupboards and cubicles:* The largest cables go to riser cupboards, three on each floor, situated adjacent to staircases in the building, and outside the selling area in order to conserve selling space. The riser cupboards, which contain cubicles (four or five feet high), in which are switches, fuses and contactors, serving different purposes, constitute the controls for each floor, a duct leading from the cubicle which supplies the shop to each of the sections into which the floor is divided. Other cables carry current from the main switchboard to the lift motor rooms, and to the heating and ventilating rooms. The cables, as well as other forms of conduit, are held in position by cleats, the bottom half of each cleat being attached to the wall by screws. From the cubicle serving the shop area, local wires travel to the equipment on the floor. Light fittings and power sockets are served mainly from here.

7. *Trunking:* The local wiring is carried inside rectangular metal casing, known as trunking, away from the cubicle, through the roof of the riser cupboard, and thence throughout the area of the store within the cavity between the underside of the floor above and the top of the false ceiling of the level which the cubicle serves. The trunking is suspended from the underside of the floor above by means of fitments set at intervals into the concrete of the structure. A run of trunking may carry as many as 100 individual wires. As well as carrying electrical wiring the trunking carries, in a separate compartment, telephone cables. Electrical wiring is carried from the trunking into the selling area behind metal plates attached to pillars which form an essential part of the structure, but are also decorated so as to enhance the selling area. From the riser cupboard, the amount of light in the shopping area can be controlled; the main lighting fittings may be switched on only partly, in order to save fuel, for example, when the shop is being cleaned.

8. *Emergency lighting system:* Cables for the emergency lighting system, which is battery charged, also pass through the riser cupboards; these are controlled by separate equipment which is situated in the cupboard. The emergency system can supply enough light for one hour throughout the selling area, sufficient time to clear the shop of people. The wiring for this system is encased in copper which is able to withstand damage and heat, in contrast to the normal polyvinylchloride (pvc) cables which are flammable; this is the system which would be used in the event of fire. If the electricity supply fails in a particular area, the emergency lighting will come on automatically. This item is not in dispute.

9. *Standby generator:* Should such a failure persist, the standby generator will be started. This is started by battery, but powered by diesel, and will supply about a quarter of the lighting normally available in the selling areas, which is sufficient to trade by. This item is not in dispute.

10. *Ceiling void:* This has already been mentioned. Besides the trunking for the electrical wiring and the telephone cables, it contains trunking for the air conditioning system, all suspended in the manner described.

11. *Ceiling lights:* The special fittings (I(*e*) of the analysis) were designed by Mr. R. C. Stevens ("Mr. Stevens"), chief electrical engineer of the John Lewis Partnership, for the building. They are four feet square, and take eight fluorescent lighting tubes. They were designed so that once the floor above had been constructed (and the suspension devices embedded in the concrete) the metal shell in which the lighting tubes are fitted could be suspended from the ceiling, so enabling the electrician to align the trunking, instead of having to wait for the shell of the building to be completed, and thereby saving costs. Before use an acrylic panel, serving as a diffuser, was fitted at ceiling level. The positioning of the fitments produces undulating lighting with peaks and troughs which the John Lewis Partnership has found better as a background for selling in a department store than the harsh, even lighting favoured by some other multiple stores. The design of the fitting, with its eight tubes, coupled with the control equipment make it simple to economise on lighting, by reducing the number of tubes in use from eight to six or four or two as required.

12. *Window lighting:* The basic lighting for the window areas consists of alternate 200 watt tungsten and 80 watt mercury vapour lamps. The lighting here is controlled by a purpose built control panel to suit the goods currently being displayed; different lighting will be used, for example, for a display of kitchen equipment from that suitable for showing off dresses. Individual items can be high-lighted. There are sockets at intervals on the floors and ceilings of the window area. Time switches are used to control the hours of lighting. We accepted Mr. Stevens' evidence that the window lighting serves display purposes as well as general lighting.

13. *Kitchen:* The kitchen serves both the restaurant and the staff canteen. Its equipment includes machines of a kind which are used in the home, but are of more robust design, intended to serve the much larger numbers for which the kitchen caters.

14. The total expenditure of £945,600 represents the cost of the items included in the installation (approximately £700,000) plus the profit costs of the builder in relation to them. A specification and drawings were prepared for the formal tender, itemised to suit Mr. Stevens' purposes, so that it has been possible to calculate a cost for each item (which includes a proportionate part of the builder's profit costs). Where it has not been possible to allocate cost in this way to individual parts of the installation, agreement has been reached between the Crown and the Appellant on a ratio to be applied; for example, where the load carried by cables serves the heating and ventilation system as well as lighting, it was agreed that 60 per cent. of the total cost of the relevant cables should be allocated to the former (which the Crown has agreed to allow) and 40 per cent. to the latter (with which this decision is concerned). The Crown contends that a similar sort of allocation should be made in respect of the transformers and switchgear (II in the analysis) if these are not wholly disallowed.

Submissions

15. Mr. F. Heyworth Talbot Q.C., who appeared for the Appellant, made the following submissions:

(1) The installation should be looked at as a whole, not analysed into its component parts. In support of this, he cited *Commissioners of Inland*

Revenue v. *Barclay, Curle & Co. Ltd.*(1) 45 TC 221 and *St. John's School* v. *Ward* 49 TC 524. A

(2) The whole installation is "plant" within the meaning of s 40, Finance Act 1971.

(3) If it was not correct to regard the whole installation as a single entity, some of the items listed as "Expenditure in contention" under I of the analysis, qualified as "plant" within the definition given by Lindley L.J. in *Yarmouth* v. *France* (1887) 19 QBD 647. B

(4) The Crown's practice, based on the views expressed by the courts over the years, whereby, for example, expenditure on cold water piping is regarded as part of the cost of the building and therefore as not qualifying for capital allowances, while relief was given on the cost of apparatus to provide hot water and central heating and of all hot water pipes, supported the view that the cost of the transformers was allowable, since current at 11,000 volts was no more use for the purposes of a store than cold water would be for central heating. C

In reply to submissions made on behalf of the Crown, Mr. Heyworth Talbot made the following further submissions:

(5) The practice of the Crown was, by its own account, based not on extra statutory concession but was in accordance with the decisions of the courts. D

(6) The narrow functional test contended for by the Crown (as in its submission (7)) would exclude items that in the instant case the Crown had agreed should be allowed (e.g. wiring to the fire alarm system).

(7) Where, as in the present case, the business was that of selling goods, expenditure which was incurred in order to sell the goods more successfully satisfies the requisite test. E

(8) The canopy in *Dixon* v. *Fitch's Garage Ltd.*(2) 50 TC 509 did not satisfy the test for plant because it was not part of the structure.

(9) It was not appropriate to apportion the cost of the transformers; they were either plant or not plant.

(10) In so far as the decision in *J. Lyons & Co. Ltd.* v. *Attorney-General* [1944] Ch 281 was relevant, much of the electric lighting equipment in the present case was, by contrast with the *Lyons* case, endowed with special features. F

16. Mr. E. O. Jackson, who appeared on behalf of the Crown, made the following submissions:

(1) A line must fairly be drawn between the "setting" in which a trade is carried on, and the "plant" by means of which it is carried on. G

(2) The true distinction lies between "what helps to sell merchandise" and "part of the setting where merchandise is sold".

(3) It was appropriate to ask: "Has the item in question any particular relevance to the activities of the appellant beyond the relevance they would have to any occupier's activities?", and in the alternative, adopting and adapting the words of Kitto J. in *Imperial Chemical Industries of Australia and New Zealand Ltd.* v. *Federal Commissioner of Taxation* [[1970] ATR 450] a case heard in Australia in 1970: "Would the construction of the building as a building of the general type to which it belongs be incomplete without [the items]? Does their function not go beyond making the building a suitable general setting for a wide range of possible activities?" H

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(1) [1969] 1 WLR 675. (2) [1976] 1 WLR 215.

(4) It does not follow that if an item qualifies as "plant", all the wiring to it must also be plant.

(5) As to the transformers, (with particular relevance to submission (3) above), in a structure the size of the building, taking such a maximum demand load that the Electricity Board will only supply current at 11,000 volts, the building would be incomplete for any purpose without such transformers.

(6) The right course in relation to the transformers is to apportion justly and equitably between ordinary electric wiring and "plant purposes wiring".

(7) The proper test to apply (as in *Dixon* v. *Fitch's Garage Ltd.* 50 TC 509 at page 514) is whether the item being considered "had a functional purpose to enable the company to perform the activity of supplying" its wares.

(8) Any apparent inconsistency between the principles enunciated in the cases and the practice of the Crown, was due to the need to devise rules of practice which erred, if at all, in favour of the taxpayer, and should not tell against his argument.

Decision

17. In reaching our decision, we have had regard to the principles which past judicial decisions require us to bear in mind, and in particular that to be plant and item must be part of the apparatus used for carrying on a business, and not merely part of the setting (the *Lyons* case[1], on which Mr. Jackson relied in material degree); that something which forms part of the setting of a trade may nevertheless be plant if it is more a part of the apparatus than part of the setting (*Jarrold* v. *John Good & Sons Ltd.*[2] 40 TC 681).

18. We do not accept Mr. Heyworth Talbot's contention that the entire electrical installation should be regarded as a single whole and we reject his submissions (1) and (2). Notwithstanding the *Barclay, Curle* case[3], where Lord Reid and Lord Donovan set their faces against the "piecemeal" approach, and the *St. John's School* case[4], where Templeman J., said: "In my judgment, one looks at the whole . . .", we consider, after careful reflection, that the multiplicity of elements in the Brent Cross installation, and the differing purposes which they serve, make the present case distinguishable from the dry dock in *Barclay, Curle* and the laboratory and the gymnasium in *St. John's School,* each of which, despite its component parts, was directed towards a single purpose. To adopt the approach advocated by Mr. Heyworth Talbot seems to us to be too sweeping, not only in the particular circumstances we have before us, but as a general approach.

19. We come, therefore, to consideration of the individual items in I and II of the analysis, taking them in a different order from that in the analysis. (The references in brackets are to the items set out in the analysis.)

A. *Transformers, switchgear, etc.* (II):—These items have been placed under a separate heading at the request of the Crown because, it is contended the cost, if not wholly disallowed, as the Crown contends it should be, should be apportioned between allowable and non-allowable items. We were not told whether the Crown accepts that the transformers and switchgear are to be regarded as a single entity, nor what is included in "etc". It is our view that the transformers ought to be considered separately from the switchgear.

Transformers—We have considered the tests proposed by Mr. Jackson in his submission (3). He proposed these as alternative formulations, although

(1) [1944] Ch 281. (2) [1963] 1 WLR 214.
(3) 45 TC 221. (4) 49 TC 524, at p 531.

they do not cover precisely the same ground. As to the first question, no evidence was offered, or suggestion made, about other possible activities; in a shopping centre the permitted range will be narrow. The questions posed by Kitto J. in the Australian case offer only limited guidance on the present point; that case was not concerned with transformers, and does not assist us in relation to the exigencies of the particular site, or the particular services, available. The following factors seem to us relevant: (1) Had the building been smaller, the reduction in the voltage might have been undertaken by the Electricity Board, but a building of smaller size would have been unsuitable for a department store. (2) The transformers are separate from the fabric of the building. (3) They perform a function in that they convert high voltage current to a low voltage; in doing so they have a more active role than the partitions in the *Jarrold* case(1). On the basis of (1), (2), and (3) we would answer in the negative Mr. Jackson's second test, namely: "Would the construction of the building as a building of the general type to which it belongs be incomplete without the items?" (4) Those items which, by inference from III of the analysis, the Crown agree to be allowable would be useless without the intervention of the transformers. (5) The Board of Inland Revenue has stated publicly that it regards "as eligible for capital allowances expenditure on apparatus to provide electric light or power" among other things. It has not been easy to reach a decision on these items, but, after careful reflection, we hold the transformers to be plant, but not the switchgear.

B. *Conduits and cables, sub-main cables and riser cubicles, trunking* (I (*c*) (*d*) (*g*) (*h*) (*j*) and (*k*)):—The purpose of the switchboard is to control the current coming in from the transformers and the current going out to the equipment in the shop. The conduits and cables, the sub-main cables and riser cubicles, and the trunking seem to us, to adopt wording in the Australian case referred to above to be "parts of the general equipment of the building" forming "the reticulation system" for conveying electric current throughout the building. We hold that these items are not plant.

C. *Other lighting fittings* (I(*f*)):—The building contains a number of lighting fittings other than the specially designed fittings; spot lights used for special displays; lighting in offices, kitchens, dining rooms, restrooms, on staircases, in the restaurants, and in other working areas. Mr. Stevens said that these were not specially designed by or for the group, but were bought from manufacturers' catalogues, chosen in the case of the restaurant fittings by the interior designer, and Mr. Stevens conceded that they had no special features. It seems to us that these items perform no more particular function than providing general lighting in areas where this is needed, and so forming part of the setting in which the business is carried on. There is very little natural light in the building, by reason of its location. We were shown, during the course of a visit to the building, arranged for us by the Appellant, some specially designed fittings of a different kind from those dealt with under the following heading, but it was not suggested to us that these performed a special function beyond general lighting, and we think it right to include these under the present head. We hold that none of these items is plant.

D. *Specially designed lighting fittings* (I(*e*)):—Three distinctive features were claimed for these. (1) They were so designed that they could be placed in position at an early stage in the construction of the building, enabling electrical work to start without the normal delay. (2) The lighting in them can be controlled to economise on fuel. (3) They provide a particular ambiance. To the extent that (1) invested the fittings with a functional role, it is one which was related to the construction of the building, and has no bearing on the trade

(1) 40 TC 681.

carried on in the building. As to (2), the means of control does not lie in the fittings themselves but in the control equipment, the operation of which we take to be comparable to that of a dimmer switch. The fittings themselves do not perform a function beyond providing light. Point (3) suggests that their role is that of "setting". We hold that the specially designed lighting fittings are not plant.

E. *Window panels, lighting and sockets and wiring to external signs* (I(*a*) (*b*)):—A shopper may enter a particular store for one or more of several reasons: because a particular article is required which can only be obtained there, because it carries the kind of goods sought and is conveniently situated, or with no specific purpose in mind except to explore the goods available and perhaps to buy. Lighting is one of the means by which customers in the second and third categories, of the kind sought by the operators of a particular department store, may be attracted to enter that store rather than another one nearby. The group has taken trouble to devise what they regard as a commercially satisfactory lighting system for the window areas. We hold that the control panels, the lighting and the sockets, which are more numerous than would be required in an area of similar size serving a less specialised purpose, to be plant; with these should be included any wiring exclusively related to these items. By the same token, we hold wiring exclusively related to the external signs to be plant.

F. *Kitchen* (I(*l*)):—The equipment, in our view, satisfies the functional test, and we have no hesitation in holding the sockets and wiring and, so far as it is necessary for us to do so, the other equipment in the kitchen to be plant.

20. Finally, we consider the Crown's suggestion that if the transformers are found to be plant, only a proportionate part of the cost (in the ratio that the cost of all the other items in the analysis which are allowed, bears to the total costs under consideration), in the manner agreed between the Crown and the Appellant in respect of, for example, certain cables. In our view, there is no basis for apportionment of the cost of the transformers. We have found these three items to be plant, and the Appellant is accordingly entitled to an allowance of an amount determined in accordance with s 42, Finance Act 1971. Section 42 provides that the "allowance shall be of an amount equal to the whole of the expenditure in respect of which it is made". We did not find one or two of the transformers to be plant and the others or other not. It must follow that the whole of the cost of the transformers is to be allowed, and we so hold.

21. It will be necessary for the parties to reconsider the figures in the analysis, not only in respect of those items which the Crown conceded during the course of the hearing, but in order to take account of the terms of our decision. Accordingly, having given our decision in principle, we adjourn the proceedings for one month to enable the parties to reach agreement on the figures (which we understand they expect to be able to do without difficulty). When the figures have been notified to us we shall issue our final determination.

E. Wix
R. H. Widdows } Commissioners for the Special Purposes of the Income Tax Acts

Turnstile House
94–99 High Holborn
London WC1V 6LQ

5 March 1979

The case was heard in the Chancery Division before Vinelott J. on 6, 7 and 10 March 1980 when judgment was reserved. On 2 April 1980, judgment was given in favour of the Crown, with costs. A

F. Heyworth Talbot Q.C. and *John Gardiner* for the Company.

Brian Davenport and *R. W. Ham* for the Crown.

Jarrold v. *John Good & Sons Ltd.* 40 TC 681; [1963] 1 WLR 214 was cited in argument in addition to the cases referred to in the judgment. B

Vinelott J.—John Lewis Properties Ltd. (which I shall call "JL Properties") is the owner of a large department store in the Brent Cross Shopping Centre in north-west London. It was erected by a contractor for JL Properties in 1975. On completion it was leased to another company in the John Lewis Group, namely, John Lewis Ltd., which carries on the department store business. For C the year ended 31 January 1976 the accounts of JL Properties show a loss which is augmented by a sum of capital allowances claimed by JL Properties. Cole Bros. Ltd., the Appellant Company, is another company in the John Lewis Group. It made a profit during the relevant accounting period, and with a view to reducing its taxable profit and thus obtaining for the group the benefit of the loss incurred by JL Properties at the earliest possible date, JL Properties D surrendered its loss to Cole Bros. Ltd. in accordance with s 258(1) of the Income and Corporation Taxes Act 1970. No question arises as to the availability of group relief. The only question relates to the amount of the loss surrendered. That question in turn depends upon whether certain expenditure by JL Properties in connection with this building was expenditure on plant within the meaning of s 40 of the Finance Act 1971, attracting a 100 per cent. first year E allowance under s 41. No point is taken on the fact that the expenditure incurred in the provision of what is claimed to be plant was incurred by JL Properties whereas the business of the department store is carried on by John Lewis. For the purposes of this appeal they are to be treated as a single concern. The expenditure in question was expenditure on the provision of an electrical installation in the department store. It was installed not by the main contractor F who erected the building but by separate specialist contractors at a total cost of some £945,600. Of this sum, the Revenue agreed before the matter came before the Commissioners that expenditure on certain items (comprising amongst other things, wiring to heating and ventilation systems and an emergency lighting system and a standby supply system) was expenditure on the provision of plant. As to the balance, a sum of £104,808 was spent on the G provision of transformers and switchgear in circumstances which I shall outline in a moment. The remaining £480,540 was spent on items which are listed in the Case Stated as "expenditure in contention". I do not need to refer to this in detail at this stage. I should observe in passing that during the course of the hearing before the Commissioners some small items were taken out of this list of "expenditure in contention" and included in the list of expenditure allowed. H

Buildings, including those used for industrial or commercial purposes, are normally supplied by the electricity board for the area, in this case the Eastern Electricity Board, at the standard voltages of 240 and 415. For larger premises requiring a larger load the electricity supply is brought to the premises at the national grid voltage of 11,000. The electricity board may allow the consumer to provide a space for a substation erected by the electricity board, I the supply being taken by the consumer from the substation at the standard

voltages of 240 or 415. With premises requiring a very large supply the electricity board may require the consumer to provide a substation at its own cost. The electricity board then meters the current entering the substation at the national grid voltage. That is what happened in this case. The mains supply leads to switchgear belonging to the electricity board which is situate in a substation which is part of, and located in a corner of, the building. The substation is surrounded internally by a wire cage, the only access being through a door in the outside wall of the building to which the electricity board, and the electricity board alone, have the key. The electricity board's equipment in the substation stands on shingle and from it runs a cable underneath the shingle to switchgear outside the cage (owned by J L Properties) which carries current at 11,000V. That is then fed by three cables from J L Properties' switchgear to three transformers where it is converted down to 240V or 415V. The current then passes to the main switchboard. From there it passes by cable to riser cupboards and cubicles situated on each of the several floors of the building. Each cupboard has its own subsidiary switchgear for that floor. Other cables carry the supply to the lift motor rooms and the heating and ventilating rooms. Within each floor trunking carries wiring from the cubicle through the roof of the riser cupboard and from there over the whole area of the floor served. The wires are carried within the cavity between the underside of the floor above and the top of the false ceiling of the floor served. The wires are suspended from the underside of the floor above by fitments set into the concrete structure of the building when it was erected. The trunking carries not only electrical wiring but also, in a separate compartment, telephone wires. The wiring is carried by the trunking into the selling area behind metal plates attached to pillars which are an integral and essential part of the structure. There is an emergency lighting system, the cost of which has been allowed. It is battery-charged. The emergency supply also passes through these riser cupboards but is encased in copper, being fire-resistant, unlike the main wiring, which is encased in PVC. There is a standby generator, the cost of which again has been allowed, which is intended to be used when the batteries powering the emergency system (which is designed to last for one hour) have been exhausted. The Case Stated contains a more elaborate description of the installation, but the foregoing will, I think, be sufficient for the purpose of explaining the issues which arise in this appeal.

It was submitted by the Crown before the Commissioners that the transformers and the switchgear which stands between the electricity board's switchgear and the transformers (all of which were included together with certain ancillary equipment in the figure of £104,808 that I have mentioned) were not plant but that, as they served both the wiring system which is in dispute and the wiring to other parts of the installation which are agreed to be plant, the total cost of the transformers, the switchgear and the ancillary equipment should be apportioned *pro rata* in the proportions which the part of the installation which was agreed or held to be plant bears to the cost of the installation as a whole (other than the transformers, switchgear and ancillary equipment). The Commissioners decided, rightly it seems to me, that there was no legal basis for such an apportionment. They decided that the transformers were, and the switchgear was not, plant. That, as the Commissioners observed, leaves the ancillary equipment (included under the label "etc.") in the air. The Commissioners' division between the transformers and the switchgear was one which had not been contended for by either party. The taxpayer, of course, contends that the whole installation, or, if not the whole installation, the whole of the transformers, the switchgear and the "etc." are plant. But there is no appeal on this point by the Crown. The Commissioners also decided, against the Crown, that the cost of certain parts of the installation which had not been

allowed, namely, first, the special method of lighting the window areas and the control panels and sockets ancillary thereto (the aggregate cost of which was approximately £16,000) and, secondly, the wiring and sockets needed for bringing the supply of electricity to and making it available for use by equipment used in the kitchen serving the restaurant and staff canteens (the cost of which was £7,165) should be allowed. Again, the Crown do not appeal from this part of the Commissioners' decision.

Mr. Heyworth Talbot, on behalf of the taxpayer, submitted first that the installation as a whole is plant and that the Crown's piecemeal approach to it is fundamentally unsound. He submitted, in the alternative, that approaching the several items piecemeal, all or substantially all of them are plant.

The first submission. Mr. Heyworth Talbot started by reminding me that the word "plant" is an ordinary English word (see *Hinton* v. *Maden & Ireland, Ltd.*([1]) 38 TC 391, *per* Lord Evershed, at page 403, and *per* Lord Reid, at page 417) and that it is a word which, in ordinary English usage, bears a very extensive meaning. In the context of s 40, said Mr. Heyworth Talbot, "plant" connotes "an assembly of items so disposed in relation to each other that they perform one or more functions". He stressed that in deciding whether a given subject-matter is plant "one must look at the whole" (see *per* Templeman J. in *St. John's School* v. *Ward* 49 TC 524, at page 531) and submitted that in the present case the electrical installation as a whole was, in his words, "a functioning entity consisting of co-ordinated components, each group of which is dependent on the others for the fulfilment of purposes connected exclusively with the trade of the taxpayer". He compared it with a central heating plant. There the boilers and the pumps are clearly plant and the pipes which supply hot water to the parts of the building that the plant is designed to serve are equally plant, although to the eye of a guest in an hotel bedroom the hot water and the cold water pipes—which are not plant, being designed merely to distribute the mainswater supply—would appear to be indistinguishable. Here, it is said, electricity is supplied to this building in a form in which it is not capable of being used. Like the water in the central heating system, it is transformed into a different state and the machinery and equipment used for its transformation and its distribution in this new state must all be plant.

I hope I have summarised adequately Mr. Heyworth Talbot's subtle and sophisticated argument. It was presented with all his usual clarity, elegance and persuasiveness. But after the most careful consideration I do not feel able to accept it. The word "plant" is a chameleon-like word which takes its colour from its context. In ordinary speech its meaning is so extensive that it is difficult to draw any clear limit to it. Mr. Heyworth Talbot pointed out that in everyday speech we may describe a whole steel-making complex, including for instance buildings in which pig iron is converted into steel in open-hearth furnaces, as a steel plant. But in s 40 (which refers to "the provision of machinery or plant") and, I think, in most commercial contexts the word "plant" is commonly used to describe what is actually employed in carrying out the processes which are characteristic of the trade or business and is contrasted on the one hand with what is consumed by or subjected to those processes or which emerges as the product of the trade (whether goods or services) and on the other hand with the place or setting where the process is carried on. The distinction is made clear in a passage frequently cited in the judgment of Lindley L.J. in *Yarmouth* v. *France* (1887) 19 QBD 647, which was expressly approved by Lord Reid in the

([1]) [1959] 1 WLR 875.

A *Hinton* v. *Maden* case(1) at page 417. Lindley L.J. said at page 658(2), that plant

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

There the question was whether something animate—a horse—could be plant.
B The question that more frequently arises—at least in relation to capital allowances—is whether a building or fixture or a moveable structure or vessel is something by means of which a trade or business is carried on at the place or setting where it is carried on. In *Benson* v. *Yard Arm Club Ltd.* [1979] STC 266 the question was whether a vessel used as a floating restaurant was plant. Buckley L.J. said, at pages 272–3(3):

C

> "The building in which a business is carried on may accurately be described as 'provided for the purpose of the business' but, again, admittedly is not for that reason alone to be held to be plant. A structure attached to the soil may be plant. The dry dock in *Commissioners of Inland Revenue* v. *Barclay, Curle & Co. Ltd.*(4) was such, as also were the pools in *Cooke* v. *Beach Station Caravans Ltd.*(5). On the other hand, a structure of
D the nature of a building which was not attached to the soil was held not to be plant in *St. John's School* v. *Ward*(6). 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
E 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 be properly described as plant."

In applying this test to the present case the question which, I think, has to be answered is whether this department store—unquestionably the setting—would have been a complete building and usable for any purpose without the
F electrical installation or whether the installation can be regarded as something added to a building otherwise complete and as something employed in the carrying on of the activity of the taxpayer's retail trade. That was, as I see it, the approach of Uthwatt J. in *J. Lyons & Co. Ltd.* v. *Attorney-General* [1944] Ch 281, where the question was whether compensation recoverable for war damage to plant extended to cover the cost of replacing electric lamps and
G fitments used for lighting a tea-shop. Uthwatt J. said, at page 287:

> "In the present case, the question at issue may, I think, be put thus: Are the lamps and fitments properly to be regarded as part of the setting in which the business is carried on or as part of the apparatus used for carrying on the business? The lamps and their fitments are owned by a caterer and used in premises exclusively devoted to catering purposes, but
H the presence of lamps in this building is not dictated by the nature of the particular trade there carried on or by the fact that it is for trade purposes that the building is used. Lamps are required to enable the building to be used where natural light is insufficient. The actual lamps themselves, so far as the evidence goes, present no special feature either in construction, purpose or position, and, being supplied with electricity from public

(1) 38 TC 391. (2) 19 QBD 647. (3) 53 TC 67, at p 84; [1979] 1 WLR 347.
(4) 45 TC 221; [1969] 1 WLR 675; 1969 SC(HL) 30. (5) 49 TC 514; [1974] 1 WLR 1398.
(6) 49 TC 524.

suppliers, they form no part of an electric lighting plant in or on the hereditament. In my opinion, these lamps are not, in these circumstances, properly described as 'plant', but are part of the general setting in which the business is carried on." A

Mr. Heyworth Talbot fastened on the words, "The actual lamps themselves, so far as the evidence goes, present no special feature either in construction, purpose or position, and, being supplied with electricity from public suppliers, they form no part of an electric lighting plant in or on the hereditament." In the present case, he said, the equipment did present special features and were part of an integrated plant. But the distinction drawn by Uthwatt J. is, as I see it, between an electric lighting plant added to a building otherwise complete and equipment needed "to enable the building to be used when natural light is insufficient". This approach is also supported by the decision of Fox J. in *Hampton* v. *Fortes Autogrill Ltd.*(1) where it was claimed that false ceilings which covered, in an aesthetically acceptable way, services necessary for the company's trade as restaurateur—for instance, pipes for beer and Coca Cola and electrical conduits which also supported apparatus such as loudspeakers and ventilation grilles—were plant. Fox J. said: B C

"The right test in relation to any item is whether it performs a function in the actual carrying out of the business. To say that ceilings are part and parcel of some apparatus does not really answer that question because one is left with the further question: What is meant by 'part and parcel'? It cannot, I think, be said that the false ceiling is 'part and parcel' of, for example, the pipes. It may provide covering for them and for other things, and may provide some support for further things. It is not part and parcel of a pipe or an electric light or a power circuit; it is just a false ceiling." D E

Lastly, I was referred by Mr. Davenport to the decision of Kitto J. in *Imperial Chemical Industries of Australia and New Zealand Ltd.* v. *Federal Commissioner of Taxation* (1970) 1 ATR 450, where one question raised was whether so much of an electrical installation as consisted of wiring and conduits therefor and trunking which served an office building was "plant or articles" attracting capital allowances under Australian legislation. Kitto J. said, at page 451: F

"The electrical wiring with its enclosing conduits, and the trunking, are also parts of the general equipment of the building, fixtures beyond question, and having no relevance to the activities of the appellant beyond the relevance they would have to any occupier's activities. Together with switchboards, sub-switchboards and junction boxes, they form the reticulation system for conveying throughout the building electric current which is drawn ordinarily from the Melbourne City Council's power supply mains and, in emergencies, from a diesel electric generating plant in the basement of the building. I see no difference for present purposes between these electricity reticulating agents and the water reticulating pipes that run throughout such a building. It seems to me impossible to regard these elements in the equipment of the building as 'plant' any more than as 'articles'. The construction of the building as a building of the general type to which it belongs would be incomplete without them, and their function does not go beyond making the building a suitable general setting for a wide range of possible activities." G H I

That decision is not, of course, binding on me but in my judgment the test explicitly formulated by Kitto J.—is what is claimed to be plant something

(1) 53 TC 691, at p 697.

necessary to complete the building and make it suitable as a setting for any trade or business which might be carried on in a building of that general type—is implicit in the *J. Lyons & Co. Ltd.* case(1). In the present case, in my judgment, the department store was patently incomplete as a setting for any trading activity without a reticulation system for electric current. The claim that the electrical installation as a whole is plant, therefore, fails.

Before turning to Mr. Heyworth Talbot's second main submission there is one other submission I should mention. Mr. Heyworth Talbot submitted that in the case of a taxpayer carrying on a retail trade whatever is provided as an amenity to customers is plant. He relied on the decision of Megarry J. in *Cooke* v. *Beach Station Caravans Ltd.*(2) [1974] STC 402, where the Judge held that expenditure on the provision of a swimming pool with filtration and chlorination plant by a taxpayer who carried on the business of running a caravan site and which was incurred with a view to attracting custom was expenditure on the provision of plant. I do not think that this decision supports the wide proposition for which Mr. Heyworth Talbot contends. The facts in *Cooke* v. *Beach Station Caravans Ltd.* were very unusual. The taxpayer's business consisted in the provision of amenities. It does not follow from that decision that expenditure by a shopkeeper or retail trader in the provision of any amenity is expenditure on the provision of plant. The canopy considered by Brightman J. in *Dixon* v. *Fitch's Garage Ltd.*(3) 50 TC 509, was an amenity. Indeed, it appears from the Case Stated that it was erected to stem the flow of customers to other filling stations which provided this amenity. But it was not plant. The courts may yet have to consider whether expenditure on the provision of enticing amenities—for instance, piped music or television to entertain customers whilst their cars are filled with petrol or washed, or a crèche, or a children's playground in a department store—can be said to be expenditure on the provision of plant. The question does not arise in this case. It is, to my mind, unreal to regard the supply to and distribution of electricity in a department store as a mere amenity.

The second submission. Mr. Heyworth Talbot next submitted that it was illogical to classify the transformers as plant but not the switchgear lying between the electricity board's switchgear and the transformers. That argument is, of course, double-edged. There may be something to be said for the view that if the local electricity board are unwilling to supply electricity to a large building of this size and design except at 11,000V then equipment needed to convert the electricity into a form in which it can be supplied for use throughout the building is part of the building and is not plant. As I see it, it would not be enough merely to say that a transformer in the ordinary usage of the word is plant which operates, albeit passively, to alter the character of the mains supply. However, Mr. Davenport pointed out that the use of this building as a supermarket may have imposed an exceptional demand for electricity and that the Commissioners may have taken the view that the building could have been used for other purposes making a lesser demand for electricity which in turn could have been met through the ordinary mains supply. He submitted that on that footing the Commissioners could properly have found that the transformers were plant which had a function in enabling John Lewis to carry on its particular trading activity. However, there is no appeal by the Crown as regards the transformers and I do not need to consider this aspect of the case further. As regards the switchboard, there was, I think, material on which the Commissioners could properly have decided that it was part of the system of directing the mains supply and so part of the reticulation

(1) [1944] Ch 281. (2) 49 TC 514. (3) [1976] 1 WLR 215.

system for electric current that was necessary for the completion of this building for any use and accordingly part of the setting and not plant.

The other main finding attacked by Mr. Heyworth Talbot related to certain specially designed lighting fittings, the cost of which was £92,222. I should set out in full the Commissioners' description of these fittings and their decision. Their description is as follows:

> "The special fittings . . . were designed by Mr. R. C. Stevens . . . chief electrical engineer of the John Lewis Partnership, for the building. They are four feet square, and take eight fluorescent lighting tubes. They were designed so that once the floor above had been constructed (and the suspension devices embedded in the concrete) the metal shell in which the lighting tubes are fitted could be suspended from the ceiling, so enabling the electrician to align the trunking, instead of having to wait for the shell of the building to be completed, and thereby saving costs. Before use an acrylic panel, serving as a diffuser, was fitted at ceiling level. The positioning of the fitments produces undulating lighting with peaks and troughs which the John Lewis Partnership has found better as a background for selling in a department store than the harsh, even lighting favoured by some other multiple stores. The design of the fitting, with its eight tubes, coupled with the control equipment make it simple to economise on lighting, by reducing the number of tubes in use from eight to six or four or two as required."

In their decision the Commissioners say:

> "Three distinctive features were claimed for these. (1) They were so designed that they could be placed in position at an early stage in the construction of the building, enabling electrical work to start without the normal delay. (2) The lighting in them can be controlled to economise on fuel. (3) They provide a particular ambiance. To the extent that (1) invested the fittings with a functional role, it is one which was related to the construction of the building, and has no bearing on the trade carried on in the building. As to (2), the means of control does not lie in the fittings themselves but in the control equipment, the operation of which we take to be comparable to that of a dimmer switch. The fittings themselves do not perform a function beyond providing light. Point (3) suggests that their role is that of 'setting'. We hold that the specially designed lighting fittings are not plant."

Mr. Heyworth Talbot launched a powerful attack on this finding. He contrasted it with the finding that the window panels were plant and submitted that the reasons given for the finding that the window panels were plant, namely, that they functioned to attract floating customers or window shoppers and were "more numerous than would be required in an area serving a less specialised purpose", applied equally to the specially designed light fittings. As Mr. Heyworth Talbot put it, one was designed to entice customers in and the other to keep them there when they went in. The light fittings were, he said, equally specialised fittings designed to provide a pleasing ambiance for customers. These are forceful arguments. The distinction is a fine one. But whilst the meaning of the word "plant" and the principles and criteria to be applied in deciding whether expenditure is expenditure on the provision of plant are questions of law, the application of that meaning and of those principles and criteria to any given set of circumstances is not a question of law; it is as Lord Evershed M.R. expressed it in *Hinton* v. *Maden & Ireland, Ltd.*(1)

(1) 38 TC 391.

A "largely, if not entirely, a matter of degree and therefore of fact" (see, at page 403). I can discern no error of principle in the Commissioners' approach to this item of expenditure or in relation to the other items of expenditure in dispute. That being so, this appeal must be dismissed with costs unless Mr. Heyworth Talbot wishes to adduce any further argument on costs.

Appeal dismissed, with costs.

B

The Company's appeal was heard in the Court of Appeal (Oliver L.J., Sir David Cairns and Stephenson L.J.) on 8, 9, 10 and 11 June 1981 when judgment was reserved. On 9 July 1981 judgment was given unanimously in favour of the Crown, with costs.

Barry Pinson Q.C. and *John Gardiner* for the Company.

C *Robert Carnwath* for the Crown.

The following cases were cited in argument in addition to those referred to in the judgment:—*Hinton* v. *Maden & Ireland, Ltd.* 38 TC 391; [1959] 1 WLR 875; *Munby* v. *Furlong* 50 TC 491; [1977] Ch 359; *Saxone Lilley & Skinner (Holdings) Ltd.* v. *Commissioners of Inland Revenue* 44 TC 122; [1967] 1 WLR 501; *ACT Construction Ltd.* v. *Customs and Excise Commissioners* [1980] D STC 716.

Stephenson L.J.—I have asked Oliver L.J. to deliver the first judgment.

Oliver L.J.—This is an appeal from the dismissal by Vinelott J. on 2 April 1980 of the appellant taxpayer's appeal from a decision of the Special Commissioners dismissing the appellant's claim for capital allowances in the tax year E 1975–76 in respect of certain expenditure claimed to have been incurred on the provision of plant. The appellant, Cole Bros. Ltd., is a company within the John Lewis Group, which includes John Lewis Ltd. and John Lewis Properties Ltd., and the expenditure in respect of which the allowances were claimed was incurred in respect of the John Lewis department store in the Brent Cross shopping complex. The store consists of a large purpose-built building which F was erected by John Lewis Properties Ltd. and completed in 1975, when it was let to John Lewis Ltd. The actual expenditure on the building was incurred by John Lewis Properties Ltd., who paid the cost of its erection and equipping and, so far as it is allowable, that expenditure increased the loss incurred by that company in the year in question. The appellant, however, made a profit in that year and that part of the loss of John Lewis Properties Ltd. which includes the G expenditure in question on this appeal was duly surrendered to the appellant under s 258(1) of the Income and Corporation Taxes Act 1970 in reduction of its profit. No question arises as to the availability to the appellant of the group relief assuming the expenditure to be an allowable deduction. The answer to that question depends upon whether the relevant expenditure is expenditure on "plant" or on the cost of providing "plant" within the meaning of s 40 of the H Finance Act 1971. If it is, s 41 of that Act permits a 100 per cent. first year allowance.

The total sum claimed by the appellant was £945,600 representing the total cost of the electrical installation in the building, but of this sum £360,252

representing, in broad terms, the cost of wiring to a number of specific items such as fire alarms, clocks, heating and ventilation systems, lifts, escalators, burglar alarms, emergency lighting systems, standby supply system and so on, was conceded by the Revenue before the matter came before the Special Commissioners. The items in dispute before the Special Commissioners consisted of expenditure on the complete lighting installation and the kitchen equipment, amounting in all to £480,540, and on a number of transformers, their associated switchgear and the main electrical switchboard, amounting to £104,808.

The relevant facts found or admitted as regards this expenditure are as follows: because of the high demand for electricity in respect of this building the Electricity Board declined to supply current at the standard voltage of 240 or 415 and required the building owner to provide a substation to which current is supplied at the national grid voltage of 11,000 volts. In order, therefore, to serve the various electrical systems in the building it was necessary to provide transformers (three in number) and their associated switchgear, to reduce the voltage to standard voltage. These are situate in a corner of the building and from them current is led by underground cables to a main switchboard, the constituent switches of which control the various equipment circuits, current being led from the switchboard into the main store through cables contained in ducts. That is, for present purposes, a sufficient description of what I may call the "inlet" side of the system. As regards the "outlet" side, the cables are led to what are known as "riser cupboards" on each floor, each containing cubicles about 4 or 5 feet high in which are contained the switches, fuses and contactors controlling the various sections into which each floor is divided. From the cubicle serving the shop area on each floor wires are carried to the equipment, including the light fittings and power sockets.

Turning to the lighting installation which, apart from the switchboard, constitutes the area of contention, this divides into four principal sub-heads the constituent items of which are set out in an analysis of the installation forming part of the decision. Items (*a*) and (*b*) consist of window panels, lighting and sockets and the wiring to external signs. These were allowed by the Special Commissioners and there is no appeal by the Crown against that allowance. Item (*l*) consists of kitchen equipment, sockets and wiring. These were likewise allowed and there is no appeal from that allowance. Items (*c*), (*e*), (*g*) and (*j*) consist of specially designed lighting fittings, the conduit and cables leading to them, the trunking and the sub-main cables and riser cubilces relating to them. I shall refer to these items collectively as "the special lighting", their total cost was £304,565, representing a little over 63 per cent. of the total lighting expenditure in contention before the Special Commissioners. Finally, items (*d*), (*f*) and (*k*) (amounting to £85,487 in all) consist of other light fittings, their ancillary conduits and cables and the sub-mains and riser cubicles relating to them. I shall refer to these items as "the normal lighting". Subject to two minor revisions agreed during the hearing before the Special Commissioners, all the items in these two sub-heads were disallowed and it is around them that the argument has principally centred although, as indicated below, there is a further issue regarding the main switchboard, which was also disallowed.

So far as concerns the special lighting, the facts found as regards the actual fittings were that they were designed by the John Lewis Partnership chief electrical engineer and consist of metal shells four feet square which can be suspended from the ceiling so that the trunking can be aligned by the electrical contractors without waiting for the shell of the building to be completed. Each metal shell carries eight fluorescent tubes, two of which are connected also to

the standby generator. The tubes are subject to control in pairs so that the number in use at any time may be two, four, six or eight, thus providing a simple method of economising if required. There is no finding that the fittings themselves had any special significance in relation to the particular trade carried on, although the spacing of them within the selling area was said to be designed to provide uneven lighting with peaks and troughs as opposed to a constant intensity throughout the area: and it was said that this had been found by the John Lewis Partnership to provide a better background for selling.

As regards the normal lighting, there is no finding about this in the Commissioners' detailed description of the system and the facts are rather cursorily (and I am bound to say I do not think very conveniently) found in their actual decision. It appears that this sub-head includes normal lighting in offices, kitchens, dining rooms, staircases, restaurant and other working areas, as well as spot-lights used for special displays. The fittings themselves were not specially designed but were chosen from manufacturers' catalogues—in the case of the restaurant they were chosen by the interior designer—but it was conceded that they presented no special features and the Commissioners found that their function was simply that of providing general lighting in the building in which there was very little natural light.

Finally, I come to the main switchboard. This again was rather cursorily dealt with by the Commissioners. They concluded that the transformers were "plant" within the meaning of that term in s 40 of the Act and they arrived at that conclusion by taking into account first that although the Electricity Board might have been prepared, in the case of a smaller building, to supply current of the requisite voltage directly, a smaller building would not have been suitable for a department store; secondly, that the transformers were separate from the fabric of the building: and thirdly, that they performed an active role in converting high voltage current to low voltage. Their conclusion was expressed thus: "It has not been easy to reach a decision on these items but, after careful reflection, we hold the transformers to be plant but not the switchgear." This last word is somewhat ambiguous because it might refer to (*a*) the switchboard alone, (*b*) the transformer switchgear alone, or (*c*) both together. We were, however, told that the Crown, in agreeing the amount to be allowed for the transformers, had included in it the cost of the ancillary switchgear—and, indeed, that seems only logical because it is difficult to see why what is accepted as plant should not embrace the mechanism for switching it on and off—so that I approach the case on the footing that it is common ground that, in this part of the Commissioners' decision, the word "switchgear" was intended to refer only to the switchboard.

Now these are the facts, and coming to the matter entirely fresh and unassisted by authority, one is prompted immediately to wonder what it is that distinguishes those parts of the equipment of the building, such as lifts, heating and window lighting, which are agreed to be plant, from the equipment described above which—or so it is contended—is not. Even a cursory glance at the authorities, however, is sufficient to demonstrate the impossibility of so naive an approach. Whatever one might think about the ordinary meaning of the word "plant" in the English language, it is now beyond doubt that it is used in the relevant section in an artificial and largely judge-made sense. The difficulty lies in discerning what is the principle which distinguishes one item of equipment from another—a task which almost of necessity involves reviewing yet again an extensive line of authorities which have already been reviewed in previous cases but without, so far as I at any rate can see, any very clear distillation of principle.

The starting point is inevitably the classical exposition of Lindley L.J. in *Yarmouth* v. *France* reported in 19 QBD 647, at page 658:

> "There is no definition of plant in the Act: but, in its ordinary sense, it includes whatever apparatus is used by a business man for carrying on his business,—not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or moveable, live or dead, which he keeps for permanent employment in his business."

This is the bedrock, and all the subsequent cases may be regarded as glosses imposed on Lindley L.J.'s central proposition. That proposition imports three essential qualifications for any given subject-matter before it can be considered "plant", viz: (i) it must be "apparatus", (ii) it must be used for the carrying on of a business, and (iii) it must be kept for permanent use in the business. The difficulty in applying the proposition to particular facts and circumstances lies in determining in any given case what is, if I may use the loose expression, "business apparatus". The first limitation, which was intended rather as exposition than qualification, was imposed by Uthwatt J. in the case of *J. Lyons & Co. Ltd.* v. *Attorney-General*(1) in 1944, reported in 170 LT 348, a case which was concerned with the question whether electric lamps, sockets and wires contained in a restaurant and used for the general lighting of the premises, were "land" for the purposes of the War Damage Act 1943. As a result of the artificial statutory definition of "land" in the Act they were such only if they were "plant". Uthwatt J. postulated the question "Are the lamps and fitments properly to be regarded as part of the setting *in* which the business is carried on, or as part of the apparatus used *for* carrying on the business?" (the emphasis is mine). He answered that question in accordance with the first alternative on the following ground:

> "But the presence of lamps in this building is not dictated by the particular trade there carried on, or by the fact that it is for trade purposes that the building is used. Lamps are required to enable the building to be used where natural light is insufficient. The actual lamps themselves, so far as the evidence goes, present no special features either in construction, purpose or position and, being supplied with electricity from public suppliers, they form no part of an electric lighting plant in or on the hereditament."

The implication from this seems to be that if there had been present any such special feature or if the building had been served by its own generating equipment, the learned judge might have reached a different conclusion; but the real importance of the case is the distinction drawn between "apparatus" on the one hand and "setting" on the other—a distinction which permeates all the authorities up to the present day. That distinction is, however, not an easy one to apply.

In *Jarrold* v. *John Good & Sons, Ltd.*(2) reported in 40 TC 681, this court upheld the decision of Pennycuick J. and although casting no doubt on the decision of Uthwatt J., nevertheless pointed out that "setting" and "apparatus" are not necessarily mutually exclusive, since some articles may constitute both. For instance, as Donovan L.J. remarked, curtains and partitions in a theatre may be, from one point of view, setting and from another, plant used in the carrying on of the theatrical business. Nor can the question be determined by asking whether the item in question plays an "active" or a "passive" role in the

(1) [1944] Ch 281. (2) [1963] 1 WLR 214.

A business. A short practical test (referred to with approval in subsequent cases) was propounded by Pearson L.J. at page 696; he said:

> "There can be no doubt, therefore, as to the main principles to be applied, and the short question in this case is whether the partitioning is part of the premises in which the business is carried on, or part of the plant with which the business is carried on."

B On the face of it this might seem to suggest that anything which forms part of the structure of (in the sense of being a fixture in) premises used for the carrying on of business cannot be plant, but quite clearly Pearson L.J. cannot have intended to go to this extent. Donovan L.J. had already mentioned that few would deny that the heating installation of a building was plant, and subsequent cases show clearly that the mere fact that a given item is itself a structure or part C of a structure affixed to land is not conclusive. For myself I doubt whether there is any universal and easily defined distinction and what I think Pearson L.J. had in mind was whether the item concerned did no more than provide the necessary location or venue for the carrying on of the business or whether it made some further contribution to the business itself. It cannot, however, be pretended that the authorities are all easy to reconcile.

D That "plant" may include not only equipment fixed to and forming part of a structure built into or permanently affixed to land, but also the structure itself, appears from three cases: *Commissioners of Inland Revenue* v. *Barclay, Curle & Co. Ltd.*(1) 45 TC 221; *Cooke* v. *Beach Station Caravans Ltd.*(2) 49 TC 514; and *Schofield* v. *R. & H. Hall Ltd.* 49 TC 538—which were concerned respectively with a dry-dock, a swimming-pool and paddling pools and a grain E silo, and in each of which the structure itself was held to be plant. The importance of these is, first, that they emphasise that what is important is not, or not primarily, the nature of the item in question—that is to say whether it is a "chattel" or a "structure" or a "building"—but the function that it performs in the taxpayer's business activity; and, secondly, that in the *Barclay Curle* case the House of Lords adopted and affirmed the distinction propounded by F Pearson L.J. in *Jarrold* v. *John Good & Sons, Ltd.*(3). It is, however, important to bear in mind what Pearson L.J. was referring to when he referred to "the premises in which the business is carried on". As indicated above, the notion which, as I read his judgment, he was seeking to convey was that of the building which did no more than "house" the business. I emphasise this because it does seem to me that in some of the later cases this has become identified (as I think, G erroneously) with the specific function of providing shelter from the elements, so that it is said that nothing whose sole function is shelter can be plant.

In *Broken Hill Proprietary Co.* v. *Commissioner of Taxation* 41 ALJR 337, for instance, Kitto J. observed:

> "I do not exclude buildings simply because they are places where operations are carried on. I do exclude those which merely provide shelter H for persons as they work and for their equipment";

and the same approach is to be found in *Dixon* v. *Fitch's Garage Ltd.*(4) 50 TC 509, where Brightman J. held that the canopy carrying lighting and an advertising fascia and providing covering for a self-service petrol station was not plant on the ground that it contributed not at all to the actual supply of petrol but was merely an amenity providing shelter for motorists and staff.

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(1) 1969 SC (HL) 30. (2) [1974] 1 WLR 1398.
(3) 40 TC 681. (4) [1976] 1 WLR 215.

Whilst it may well be that in many cases that which merely provides shelter may not be "plant", I do not for my part find that function, in itself, a very satisfactory test. The costermonger's barrow is, I should have thought "plant" and I would not exclude from it the collapsible canopy which he carried with it to provide against inclement weather. Equally, I would have thought that the blinds fitted to shop windows to protect the goods displayed there from excessive sunlight were as much "plant" as the heating system which prevents them from freezing.

The truth is, in my judgment, that much of the apparent difficulty of deciding whether expenditure on a particular item is allowable as expenditure on "plant" arises from attempting to treat as precise criteria tests which have been propounded as alternative formulations or expositions of the short question asked by Pearson L.J. in *Jarrold* v. *John Good & Sons, Ltd.*(1). Whether the test be expressed as the provision of "shelter", as a "building" or "premises", as "the functional test", or, to adopt the homely vernacular suggested by Megarry J. in the *Beach Station Caravan* case(2), "where it's at", the underlying concept is, I think, the same and comes back ultimately to that short question, upon which it is difficult to improve. At risk of propounding yet a further refinement, it seems to me that the authorities, with one possible exception, demonstrate that the question (however expressed) which the Court must ask itself is whether the particular subject-matter under consideration either itself performs, or is a necessary or integral part of that which performs, simply and solely the function of "housing" the business or whether, as its sole function or as an additional function, it performs some other distinct business purpose. Clearly the mere fact that the subject-matter is a structure or building is not decisive. This is demonstrated by the three "structure" cases to which I have referred. Equally clearly the fact that it is a chattel is not decisive. The chattel nature of the item in question was assumed in *St. John's School* v. *Ward* 49 TC 525, and was conceded in *Benson* v. *Yard Arm Club Ltd.*(3) [1979] 1 WLR 347, both of them decisions binding upon this court.

Buckley L.J. in the latter case put the question thus(4):

> "Is the subject-matter the apparatus, or part of the apparatus, employed in carrying on the activities of the business? If it is, it is no matter that it consists of some structure attached to the soil. If it is not part of the apparatus so employed, it is not plant, whatever its characteristics may be."

In that case, a restaurant business was housed in the hull of a paddle-steamer moored in the Thames, and the court rejected the claim to treat the hull as "plant" on the ground that it did no more than provide a good venue at which to carry on business. In effect it was no more than a prefabricated building which, instead of standing on dry land, was allowed to float. It might equally well, for example, have been hauled up on to land like Amundsen's "Fram" outside Oslo. By the same token, no doubt if the ship had been engined and used as a vehicle for gastronomic cruises on the river, it would have qualified as plant because it would have served an additional function in a composite business of restaurateurs and carriers.

Cases such as these, where the court is concerned simply with the essential housing of a business do not, in my judgment, present any particular difficulty. Less easy to answer, however, are the questions which arise in relation to equipment, such as that in the instant case, which does not itself house the

(1) 40 TC 681. (2) 49 TC 514. (3) 53 TC 67. (4) *Ibid*, at p 85.

A business but which can fairly be said to be a necessary or integral part of that which does. That question arose in *Hampton* v. *Fortes Autogrill Ltd.*(1) [1980] STC 80, which was concerned with a claim for an allowance in respect of the false ceilings fitted to the interiors in the public parts of a number of restaurant or café premises acquired by the respondent taxpayer. Their primary function was simply to cover and conceal the various service pipes or conduits which ran
B in the space between them and the true ceilings, although they were also used as the support for such equipment as loudspeakers and light-fittings. Fox J. held that they were not plant. It was, he said, just covering and even assuming that the pipes and wires in the ceiling cavity were plant, the covering was not part of that plant.

> "A permanent ceiling, true or false, is part of the premises in which
C the trade is carried on. The fact that plant is attached to it does not, in my view, make the ceiling plant. It is just a ceiling and, as such, does not perform a function in carrying out the trade any more than the remainder of the premises do"

—that is a quotation from pages 84 and 85(2). In the light of the way in which I have endeavoured to express the relevant question above I should, perhaps,
D pause to note that in that case the Commissioners had found that in as much as the ceilings provided covering for equipment which was plant they were part and parcel of the apparatus. Fox J. dealt with that finding thus:

> "The right test," he said, "in relation to any item is whether it performs a function in the actual carrying out of the business. To say that ceilings are part and parcel of some apparatus does not really answer that
E question because one is left with the further question: What is meant by 'part and parcel'? It cannot, I think, be said that the false ceiling is 'part and parcel' of, for example, the pipes. It may provide covering for them and for other things, and may provide some support for further things. It is not part and parcel of a pipe or an electric light or a power circuit; it is just a false ceiling."

F I do not dissent in the least from this in the context of that case, but I do not think it compels a conclusion (nor do I think that the learned Judge intended to suggest that it did) that it may not be helpful to enquire whether a particular item forms part of some other structure or equipment, for the function which it performs in relation to the business may well take its colour from the function performed by the larger entity of which it forms part. Indeed, such an enquiry
G is implicit in the universally accepted test propounded by Pearson L.J. and it has constituted a step in the process of decision in other cases (see, for example, Templeman J. in *St. John's School* v. *Ward* 49 TC 534, lines F and G; and Lord Denning M.R., in *Bridge House (Reigate Hill) Ltd.* v. *Hinder* 47 TC 182 at page 191, where he propounds the test of whether the equipment is ancillary to the building). Again, I think that the test propounded by Fox J. has to be
H approached with the caveat that it is not, and was not, I think, intended to be, precise, but was merely an alternative way of expressing the concept embodied in Pearson L.J.'s short question. To seek to use it as a precise criterion can lead to confusion because one is left with the question, what is meant by a function—and in one sense the provision of housing or location is a "function"—and what is meant by the "actual" carrying on of the business? This might seem to be
I reviving the distinction between "active" and "passive" function which was rejected by this court in the *Jarrold* case(3) and by Lord Donovan in the *Barclay, Curle* case(4), and it seems probable that what Fox J. had in mind was

(1) 53 TC 691. (2) *Ibid*, at p 696. (3) 40 TC 681. (4) 45 TC 221.

the decision of Brightman J. in *Dixon* v. *Fitch's Garage Ltd.*(1) to which I have already referred. In that case, the learned Judge reviewed the authorities and applied the functional test in concluding that the canopy there in question was not plant but merely part of the setting. He put it thus(2):

> "The proper test is whether the canopy had a functional purpose to enable the company to perform the activity of supplying petrol to motor vehicles . . . The petrol pumps would deliver petrol to vehicles whether or not there was a canopy overhead. The canopy merely makes the business of supplying petrol more comfortable for motorists and the staff of the petrol station."

And a little later in his judgment he observed:

> "There is a clear thread running through the recent cases, including two Australian cases referred to in the silo case, showing that a structure is not plant if its only purpose is to provide shelter and if it plays no part in what may be termed 'the commercial process' . . . the taxpayer's Counsel sought to introduce a new test: whether the item in question is commercially desirable or necessary to enable the taxpayer to sell his petrol to the best advantage. That, to my mind, is an amenity test as distinct from a functional test, and is not a permissible test."

The *Dixon* case might appear, at first sight, to be out of line with the concept which I have suggested above, but I do not think that, on analysis, it is. If I have a criticism of the decision—and it is one which I would put forward with the greatest deference having regard to its source—it is that perhaps it takes an unduly restricted view of what the business was (it was, after all, selling petrol and allied products through a self-service operation, not merely supplying petrol through pumps) and that it underestimates the part that the provision of an amenity may play in carrying on a business. For instance, the swimming pools in the *Beach Station Caravans* case(3) provided, as Buckley L.J. recognised in *Benson* v. *Yard Arm Club Ltd.*(4) "an attractive service or amenity for patrons . . . and as such formed part of the commercial activity of the business". It may be that another tribunal might have come to a different decision on the same facts (see, for instance, the judgment of Lord Cameron in the case next referred to, at page 62) but as I read his decision Brightman J.'s view was that the canopy performed no function beyond that of housing or providing the location for the business. If that is right, the case rests squarely in the mainstream of the authorities.

The most recent authority, upon which the appellants rely strongly, is the Scottish decision of *Commissioners of Inland Revenue* v. *Scottish & Newcastle Breweries Ltd.*(5) [1981] STC 50, in which the Inner House of the Court of Session, upholding the Special Commissioners, allowed as expenditure on the provision of plant, the cost of a range of light-fittings, lamps, spotlights, murals, tapestries and other decorative features in a number of hotels and licensed premises the carrying on of which constituted the taxpayer's business in that case. It should, perhaps, be noticed that an item of £2,635, representing the cost of general wiring built in to the fabric of the buildings up to the point of the wall socket or ceiling rose, had been disallowed by the Special Commissioners on the ground that it was simply part of the fabric of the buildings in which the business was carried on, and there was no appeal against their decision on this point. The basis for the court's and the Special Commissioners' decisions,

(1) 50 TC 509. (2) *Ibid*, at pp 514–5. (3) 49 TC 514.
(4) 53 TC 67, at p 85. (5) 55 TC 252.

A however, was the consideration that the particular trade with which the case was concerned was that of keeping hotels and licensed premises in which the provision of an atmosphere of comfort and luxury was itself part of the business. In the words of Lord Cameron (page 62)(1)

> "I see no reason in principle, why, in the case of a taxpayer engaged in this service industry, he should not be entitled to claim that what he has
> B provided to 'embellish' the surroundings provided by him in his premises should be held to be as much 'plant' of his business as the beds or chairs or carpets with which he has furnished his bedrooms or lounges."

For my part, however, I do not derive great assistance from this decision in the context of the instant case, since it turned entirely upon the peculiarities of the particular trade there carried on and upon some very strong findings of fact as
C regards the way in which the equipment in dispute had been selected or designed and the purposes which it served in the business.

More nearly in point is the Australian decision in *Imperial Chemical Industries of Australia and New Zealand* v. *Federal Commissioner of Taxation* (1970) 1 ATR 450 (approved by the Full Court of the High Court in *Federal Commissioner of Taxation* v. *I.C.I. (Australia) Ltd.* 3 ATR 321) upon which
D Vinelott J. placed great weight in the instant case. That case was concerned with two open-plan office buildings in which the work-rooms were formed by movable partitions, many of which did not reach the ceiling. The disadvantages which would have accrued from excessive noise were counteracted by special sound-absorbing ceilings consisting of acoustic tiles supported by metal frame-works attached by rods to the concrete floor above. Their use was standard
E practice in buildings of this particular type, although they were of a special size in the particular buildings under consideration. The other item in dispute consisted of the electric lighting wiring, trunking and conduits. As regards the acoustic ceilings, Kitto J. found that they played no part in the appellants' business activities. He said:

> "Their sound-absorbing qualities do, no doubt, make working in the
> F building more efficient, and to that extent they are better ceilings than sound-reflecting ceilings would be. But every part of a building makes some contribution to the comfort and efficiency of those who work in it. To take it notionally to bits and describe as 'plant' any bit that has a function which is useful in connexion with the business carried on there, seems to me indefensible. The truth is that the ceilings with which we are
> G concerned do nothing for the appellants' business that they would not do for the business of any other occupier."

In saying this the learned Judge was, as I read his judgment, simply applying the test propounded by Pearson L.J. and concluding that the ceilings were no more than a normal, though no doubt conveniently designed, part of the building in which the appellants had chosen to house their business. On the same ground
H he held equally that the electrical installation did not qualify as plant, because it was simply a part of the general equipment of the building "having no relevance to the activities of the appellant beyond the relevance they would have to any occupier's activities".

With these principles in mind I turn to the facts of the instant case. In the court below the primary argument advanced by the appellants appears to have
I been that the electric lighting system was simply a part of, and indistinguishable from, the electrical installation as a whole and that that whole electrical

(1) Page 266 *post.*

installation, albeit serving a number of different puposes, was to be treated as "plant". That contention Vinelott J. felt unable to accept and in this Court the matter was put slightly differently, although I think that the difference is rather one of scale than of principle, for what was contended was that the electric *lighting* installation as a whole was inseparable into its constituent elements and should be regarded as "plant". Every part of the system is, it was argued, dependent upon every other part and the system has therefore to be looked at as a whole. Vinelott J. rejected this—or rather the broader contention advanced before him as regards the whole installation—on a ground which Mr. Pinson has criticised as imposing yet a further gloss on the general test propounded by Pearson L.J. Having enunciated the general test he continued([1]):

> "In applying this test to the present case the question which, I think, has to be answered is whether this department store—unquestionably the setting—would have been a complete building and usable for any purpose without the electrical installation or whether the installation can be regarded as something added to a building otherwise complete and as something employed in the carrying on of the activity of the taxpayer's retail trade."

In saying this it is, I think, clear that the learned Judge had in mind the judgment of Kitto J. in the case to which I have already referred. Having held that the electrical installation in that case formed "the reticulation system for conveying throughout the building electrical current" drawn from the mains supply, Kitto J. concluded

> "the construction of the building as a building of the general type to which it belongs would be incomplete without them, and their function does not go beyond making the building a suitable general setting for a wide range of possible activities."

Vinelott J. applied this test and concluded that the department store was patently incomplete as a setting for any trading activity without a reticulation system for electrical current. It is submitted that the mere fact that what is claimed as plant consists of, or forms part of, a reticulation system—which I take to be no more than a convenient term for a distribution network—cannot of itself be conclusive. Equally, it is said, it does not necessarily follow that because, if you take some particular item away, a building may be said to be incomplete for use, it follows that that item is not plant. With both of those submissions I agree, and I do not think Kitto J. intended to propound the completeness or incompleteness of the building as a universal test. The important words in the part of his judgment which I have quoted above seem to me to be those commencing with the words "and their function does not go beyond . . ." for these make it clear that what he had in mind was simply that the installation in that case was no more than an integral part of the building which housed the business. He was, I think, simply applying the functional test.

It may well be that a building is incomplete without some form of electrical installation, but if the occupier in supplying that deficiency, instals a system specially adapted to the particular business purpose for which he proposes to use the building—a purpose, for instance, requiring particularly heavy cables because of the current likely to be consumed for a particular process—I do not see why the mere fact that its removal would render the building incomplete should deprive it of its character as plant: and I do not think that Kitto J.

([1]) Page 203 *ante*.

intended to suggest that, in such circumstances, this would be the result, for it would then be serving some specific business purpose in addition to that of merely providing the essential housing of the business.

Now it may be said that Vinelott J. in the instant case adopted what I may call "the completeness test" of Kitto J. without also applying the functional test to that equipment whose absence would have made the building incomplete. He may not have done so in terms, but as I read his judgment he was approaching the case on the footing that the electrical installation as a whole was simply a normal part of a building used to house any business. Having regard to the number of special features conceded or found by the Commissioners to be plant, that may not have been a right conclusion in relation to the total electrical installation, and speaking for myself I prefer the reasoning of the Special Commissioners, who rejected the appellant's submission on the ground that the multiplicity of elements and the different purposes which they serve effectively precluded treating the electrical system as a totality. In relation to the electrical *lighting* system, treated as a whole and separate from the general electrical installation however, I would for my part arrive at the same conclusion as Vinelott J., albeit perhaps by a different route. There is, as I see it, nothing in the Commissioners' findings which suggests that there is anything in the electric lighting system, as a system and as opposed to particular individual parts of it, which is special to the appellant's business or indeed to the business of a department store. The building has, as the Commissioners found, very little natural light by reason of its location, and the lighting system as a system appears to be no more than that which would be required in a building of this type whatever purpose it is used for. The system, which includes not only its wires and cables but the attendant ducts and trunking, appears to me, therefore, to be nothing more than a standard part of a commercial building, performing no function other than that of providing a housing for the business. It is not, therefore, "plant" having regard to the authorities to which I have referred above.

I turn, therefore, to the three individual items or combination of items which are in dispute, that is to say the special lighting, the normal lighting and the switchboard. Mr. Pinson argues that the special lighting consists of specially designed fitments which were purpose-built for the store in order to display goods to their best advantage and to provide the best light for the appellant's business. But this goes beyond the Commissioners' findings of fact. True it is that the fitments were designed by John Lewis's own chief electrical engineer but the special features claimed for them are, first, that they were so designed as to be capable of being fitted independently of the progress of the building work (which has nothing to do with the appellant's business as such); and secondly that the constituent tubes could be controlled in pairs (a useful economy measure no doubt, but one which again has no relation to the appellant's business as such). The only feature suggested as having any relation to the business is not in the fitments themselves but in their positioning within the building which, it was said, produced a better background for selling, and the suggestion is, in reliance on what may be implied from Uthwatt J.'s dictum in *J. Lyons & Co. Ltd.* v. *Attorney-General*[1] that this goes at least some way to qualifying them as plant. The Commissioners, however, thought that this feature merely reinforced their view that the internal lighting of the building was simply a part of the setting and Vinelott J. could discern no error of

(1) [1944] Ch 281.

principle in their approach. Nor can I. As Buckley L.J. put it in *Benson* v. *Yard Arm Club Ltd.*(1) the question of whether a particular article is plant is A

> "a question of law, being one of interpretation, but nevertheless it is a jury question in the sense that the word 'plant' is not a word of art; it must be interpreted according to its ordinary meaning as a word in the English language in the context in which it has to be construed; that is to say, the court of construction must interpret it as a man who speaks English and B understands English accurately but not pedantically would interpret it in that context, applying it to the particular subject-matter in question in the circumstances of the particular case."

I would qualify that only by adding that the English speaker must, I think, be assumed to have studied the authorities.

Now the Special Commissioners are the tribunal of fact and it was for them C to say, applying the proper tests, whether a particular item was or was not plant in the circumstances of this case. They had, in my judgment, clearly the right test in mind. They visited the premises and saw the equipment *in situ*. In my judgment, Vinelott J. was right in declining to interfere with their decision. The same, in my judgment, applies to the normal light fittings. It is objected that these included a number of spotlights for special displays and restaurant lights D which were chosen by an interior decorator. That may be so, but the mere fact that fittings of a particular type have been selected in preference to other available fittings cannot conclude the question. The Commissioners, after inspecting the building and the fittings in question, concluded that none of the fittings in dispute performed any function beyond that of providing light in areas of a building which had little natural light. That finding of fact seems to E me conclusive and it is not suggested that it was other than one to which the Commissioners could properly have come.

Finally, there is the switchboard, the facts about which are not easily deducible from the Stated Case. We have been shown a photograph of it and it is evidently a very large piece of apparatus, apparently incorporating some 25 control switches. All that the Commissioners say in their findings is that it F

> "stands in an adjacent section to the transformers. Three of the switches control the incoming current; the remainder control outgoing circuits which feed all the equipment in the shop itself; for example, lighting and lifts."

Their actual decision I have already quoted, and it conveys nothing of their reasons. Vinelott J. dealt with this part of the case in the following short G passage from his judgment(2):

> "As regards the switchboard, there was, I think, material on which the Commisioners could properly have decided that it was part of the system of directing the mains supply and so part of the reticulation system for electric current that was necessary for the completion of this building for any use and accordingly part of the setting and not plant." H

For my part, I am not sure that I see what material the learned Judge was referring to. Leaving aside for the moment the question of whether, in applying Kitto J.'s "completeness" test to this equipment, the learned Judge was applying the right criterion, I can readily see that it could be argued that a switchboard or panel for controlling the electrical circuit is an integral part of

(1) 53 TC 67, at pp 80–81. (2) Pages 205–6 *ante*.

the building and therefore itself nothing more than part of that which houses or provides the setting for the business. But the question was not "is a switchboard in a building 'plant'?" but "is *this* switchboard 'plant'?". The background here is that a very substantial part of the total electrical installation had, rightly or wrongly, been agreed or found to be "plant". That included not only the actual equipment but the wiring system ancillary to it, which must mean the wiring down as far as the switchboard, since I cannot read the expression "wiring etc.", which occurs in the Stated Case in relation to each undisputed item of equipment, as excluding the relevant conduits, cables, trunking and riser cubicles. Thus the switchboard controls, not only the electric lighting (which was disallowed) but also the heating and ventilation circuit, the fire-alarm and clock circuits, the public address system, the wiring to the television workshop and cash registers, the lift, escalator, burglar alarm circuits and smoke detectors, and the electrical appliance department. All these are agreed items, to which have to be added the items found by the Commissioners to be plant, that is to say the window panels, external signs and kitchen equipment and ancillary wiring. In the light of this it does seem to me to be very difficult to argue either that the wiring which is agreed or found to be plant can be segregated from its attendant control switches or that the size and nature of this switchboard was not dictated by the necessity to incorporate into it those control switches. One can perhaps test it in this way: If the building had contained no electrical equipment other than that conceded or found to be plant, could it be argued that the switchboard which was introduced as the necessary control for that installation was not either itself plant or something the cost of which was incurred in the provision of plant? I should have thought not.

The findings in the Case Stated and the Commissioners' decision are somewhat unsatisfactory but there is nothing that I can find in the case which appears to me to supply any firm support for the decision at which they arrived on this part of the case. All the indications appear to me to point to the opposite conclusion and on this point therefore, I would differ from Vinelott J. In the result, therefore, I am of the opinion that the learned Judge reached the right conclusion on the questions before him except as regards this one matter. I would allow the appeal as regards that item but dismiss it as regards the remainder of the items in issue.

Sir David Cairns—I agree that the appeal should be allowed to the extent indicated in the judgment of Oliver L.J., but otherwise should be dismissed. I agree with the reasons given by Oliver L.J. for arriving at that conclusion.

I have had the opportunity of reading in draft the judgment which is about to be delivered by Stephenson L.J.; I also agree with that judgment.

Stephenson L.J.—What is plant? That is the question that an Inspector of Taxes has had to answer, not for the first time and that a dissatisfied taxpayer has asked the Special Commissioners of Income Tax and more than one court, again not for the first time, to reconsider in order to answer the question whether this or that or the other is plant.

Parliament has not attempted to put an end, or a limit, to such litigation by defining plant. Many judges have made the attempt. The more definitions multiply, the less enviable grows the task of H.M. Inspectors of Taxes. If they "traverse the whole gamut of reported cases" crossing the border into Scotland and the seas to Australia in their search for guidance, they find plant in the most unlikely objects, from a horse to a swimming pool, from a dry dock to a mural

decoration. Faced with such applications of the word, all supported by cogent reasoning, they may be pardoned for finding anything, or almost anything, to be or not to be plant and may be justified in making any number, or almost any number, of inconsistent concessions and illogical distinctions. It all depends on the circumstances, especially the work of the particular taxpayer, and (I feel bound to add) on how it strikes the particular judges of the question, whether in tax administration or on the judicial bench. Left to myself I would find it impossible to differ from the combined opinion of the Special Commissioners and Vinelott J. as to what items in the appellant's department store were or were not plant.

The philosopher-statesman, Balfour, is reported to have said it was unnecessary to define a great power because, like an elephant, you recognised it when you met it. Unhappily plant in taxing and other statutes is no elephant (though I suppose an elephant might be plant). It has lost what resemblance to machinery it may once have had and any contrast with buildings or structures is now misleading, however strong the temptation to go back to those simple similarities and differences which the word might have suggested before repeated difficulties of application drove judges to gloss them over. Surprising though its extension by judicial decision may have been and surprising too the refusal of the Commissioners and the judge to extend it to some of the items disallowed in this case, I am unable to say that the respondents misunderstood or misapplied the law as developed, not always, I think, consistently, in the reported cases analysed by Oliver L.J., except in the one respect in which he holds that the judge may have misunderstood it and the Commissioners have misapplied it.

I would accordingly allow the appeal to the extent which he indicates, and for the reasons which he gives.

Appeal allowed, in part, with costs. Leave to appeal to the House of Lords refused.

The Company's appeal was heard in the House of Lords (Lord Chancellor, Lord Hailsham of St. Marylebone, Lords Wilberforce, Edmund-Davies and Russell of Killowen) on 1, 2, 3 and 4 February 1982 when judgment was reserved. On 11 March 1982 judgment was given unanimously in favour of the Crown, with costs.

Barry Pinson Q.C. and *John Gardiner* for the Company.

J. S. Hobson Q.C. and *Robert Carnwath* for the Crown.

The following cases were cited in argument in addition to those referred to in the speeches:—*Hinton* v. *Maden & Ireland, Ltd.* 38 TC 391; [1959] 1 WLR 875; *Bridge House (Reigate Hill) Ltd.* v. *Hinder* 47 TC 182; *Munby* v. *Furlong* 50 TC 491; [1977] Ch 359; *Brown* v. *Burnley Football and Athletic Co. Ltd.* [1980] STC 424; *Federal Commissioner of Taxation* v. *I.C.I. (Australia) Ltd.* (1972) 3 ATR 321; *Brutus* v. *Cozens* [1973] AC 854; *J. Lyons & Co. Ltd.* v. *Attorney-General* [1944] Ch 281; 170 LT 348.

Lord Chancellor—My Lords, the question in this case revolves round the entitlement of the Appellants to an initial capital allowance in respect of the installation of various items of electrical equipment in a multiple store at the

A Brent Cross Shopping Centre. The store was erected by John Lewis Properties Ltd. and the business there is carried on by John Lewis and Co. Ltd., a member of the same group as John Lewis Properties Ltd. The Appellants, Cole Bros. Ltd., are also a member of this group, and as the result of arrangements between its members, it is not disputed that if capital allowance is attracted by the items remaining in question the Appellants are entitled to the advantage
B of it.

The items still involved in this appeal amount in value to a total of £453,218 out of a total cost of £945,600. The individual items, presented in the form of an agreed document to your Lordships, included lighting fittings, standard and specially designed, with their conduits and cables, trunking, conduits and cables to socket fittings, restaurant lightings and fittings, and sub-main cables
C and riser cubicles. In the light of what I am about to say the precise details do not matter. The balance of the £945,600, i.e. £492,382 represents items in the installation which now admittedly attract allowance. Some of these were conceded by the Revenue, some accepted by the Special Commissioners, and an additional portion representing switchgear allowed by the Court of Appeal, as to which last, there being no cross-appeal on behalf of the Respondent, there is
D no longer any question before your Lordships' House.

Entitlement to the allowance is claimed under s 41(1) of the Finance Act 1971, which so far as material, provides as follows:

> "Subject to the provisions of this Chapter, where (*a*) a person carrying on a trade incurs capital expenditure on the provision of machinery or plant for the purposes of the trade, and (*b*) in consequence of his incurring
E the expenditure, the machinery or plant belongs to him . . . during the chargeable period related to the incurring of the expenditure, there shall be made to him for that period an allowance (in this Chapter referred to as 'a first-year allowance') which shall be of an amount determined in accordance with section 42 below."

Neither the proviso to subs (1) nor the remaining subsections of s 41 are
F material to the determination of the instant appeal, and the sole bone of contention arising out of s 41(1) which I have quoted above is whether or not the capital expenditure admittedly incurred in respect of the disputed items was incurred "on the provision of plant". None of the items disputed were incurred on the provision of machinery and all were incurred for the purposes of the trade carried on at the premises in Brent Cross Shopping Centre.

G In the course of the numerous authorities cited before us, including the Court of Appeal judgment in the instant case, it has been repeatedly stated that the expression "plant", where it is used in s 41 is an ordinary English word to be interpreted, in the words of Buckley L.J., in *Benson* v. *Yard Arm Club Ltd.*(1) [1979] 2 All ER 336 at page 339 and [1979] STC 266 at pages 268–9: "as a man who speaks English and understands English accurately but not
H pedantically would interpret it in [that] context, applying it to the particular subject-matter in question in the circumstances of the particular case." To this admirable precept Oliver L.J. in delivering the judgment of the Court of Appeal in the instant case at [1981] STC 671 page 682(2) warily, and perhaps wearily, added the cautionary rider that "the English speaker must, I think, be assumed to have studied the authorities". These however, as he cautiously
I admitted in an earlier passage (*ibid* page 676) cannot be pretended to be at all easy to reconcile, and, as he said in a still earlier passage (page 675) "it is now

(1) 53 TC 67. (2) Page 207 *ante*.

beyond doubt that [the word 'plant'] is used in the relevant section in an artificial and largely judge-made sense". In this Oliver L.J. was, perhaps unconsciously, only echoing the words of Mrs. Piozzi in 1789 who first came across the word "plant" in its present signification when applied to "a large portion of ground in Southwark, . . . destined to the purposes of extensive commerce", and added "but the appellation of a plant gave me much disturbance from my inability to fathom the meaning of it". [Observations and Reflections made in the Course of a Journey through France, Italy and Germany by Hester Lynch Piozzi, London 1789, vol. i. pages 132–133.] From all this, I think, it may be inferred that the word "plant" in the relevant sense, although admittedly not a term of art, and therefore part of the general English tongue, is not, in this sense, an ordinary word, but one of imprecise application, and, so far as I can see, has been applied to industrial and commercial equipment in a highly analogical and metaphorical sense, borrowed, unless I am mistaken, from the world of botany.

Since I find it myself helpful in analysing the various authorities beginning with the observations of Lindley L.J. in *Yarmouth* v. *France* (1887) 19 QBD 647 at page 658, I think it worthwhile spending a moment's time in reflecting briefly on what the botanical analogy is. In the field of botany "plant" is used in three quite separate contexts. It can mean a vegetable organism synthesizing its nourishment from inorganic materials by the use of chlorophyll. In this sense an oak tree is a plant, whilst the Matterhorn is not. It can mean a vegetable organism with a soft stem. In this sense a bluebell is a plant, but an oak tree is not. Neither of these senses affords the analogy. But the word can mean a vegetable organism deliberately placed in an artificially prepared setting. A gardener can say "I am going to dig my flower beds in readiness for my plants" or, "I am going to buy some plants at my garden centre". It is this sense which gives it its analogical meanings, e.g. in medicine ("an organ transplant"), in crime ("it was planted on me"), or in industry, which is the sense we are now discussing, as the means by which a trade is carried on in an appropriately prepared setting. In each case, the contrast is between the thing implanted, i.e. the plant, and the prepared setting into which it is placed (cf. Oliver L.J. in the instant case at pages 676–7([1]), Pearson L.J. in *Jarrold* v. *John Good & Sons Ltd.* 40 TC 681 at page 696, *Commissioners of Inland Revenue* v. *Barclay, Curle & Co. Ltd.* 45 TC 221, *per* Megarry J. in *Cooke* v. *Beach Station Caravans Ltd.*([2])[1974] STC 402), from which it has extended even to the horse in *Yarmouth* v. *France (supra)* in the field of employer's liability. It also explains Uthwatt J.'s interpretation of this last authority in *Lyons (J.) & Co. Ltd.* v. *Attorney-General* [1944] Ch 281 at page 287 where he cites *Yarmouth* v. *France* as contrasting plant not merely with stock-in-trade as stated by Lindley L.J. but with the place in which the business is carried on.

The last citation raises a question which has underlain much of the controversy in the present case and in the other authorities referred to. If "plant" is to be contrasted with the place in which the business is carried on, the line must be drawn somewhere. This is a practical necessity in the case of capital allowances, since plant attracts one type of allowance, rated currently at 100 per cent. whereas the building in which the plant is housed rates another, and lower rated, allowance, and the building in which the business of a retail shop such as that at Brent Cross is carried on is excluded from that type of allowance altogether. There must therefore be a criterion (or criteria) by which the Courts define the frontier between the two. Thus arises the analysis of function in the authorities (cf. the analysis of the function of the dry dock in

([1]) Pages 211–2 *ante*. ([2]) 49 TC 514.

Commissioners of Inland Revenue v. *Barclay, Curle & Co. Ltd.*(1) *(supra)* especially at pages 238 and 239 by Lord Reid, which largely guided his decision when your Lordships' committee was split 3–2). Counsel for the Appellants in the present case strove mightily to limit the relevance of function to "building or structure" cases like the dry dock in *Barclay, Curle* or the swimming pool in the *Beach Station Caravans* case (*Cooke* v. *Beach Station Caravans Ltd.*(2) 49 TC 514) or perhaps "place only" cases where, he claimed, the functional test could not be satisfied. The basis of the argument was that if the equipment under discussion was established to be "apparatus" no question as to function could arise. Unfortunately this contention appears to me to beg the question. If the plant is to be distinguished from the housing of the plant (" the place where the business is carried on" as distinct from the means by which it is to be carried on) it is necessary before it is possible to decide whether the disputed object is apparatus or not to look at it in order to see what it is and then consider what, in the context of the business actually being carried on, is its function. This proves to be a trap for the unwary, for in certain cases, notably that of a hotelier and restaurant proprietor, the very thing the trader is selling includes an "ambience" or "setting". This is well illustrated by the decision in *Commissioners of Inland Revenue* v. *Scottish & Newcastle Breweries Ltd.*(3) [1981] STC 50, since upheld in your Lordships' House, where the "plant" included some ornamental seagulls and mural decorations. Similarly in *Jarrold* v. *John Good & Sons Ltd.* 40 TC 681, [1963] 1 All ER 141, Donovan L.J., following Pennycuick J., is recorded as saying, page 694 of the former, page 147 of the latter report: "I agree with Pennycuick J. that 'setting' and 'plant' are not mutually exclusive conceptions. The same thing may be both . . .", and at page 238 of the *Barclay, Curle* case Lord Reid said "Undoubtedly this concrete dry dock is a structure but is it also plant?". This result is to be contrasted with the Hispaniola restaurant case (*Benson* v. *Yard Arm Club Ltd.*(4) [1979] STC 266) where the hull of a floating restaurant was held not to be plant though it was expressly stated that had the floating restaurant not been engine-less and moored, but fitted with engines and moving up and down the Thames, the result would have been different. The distinction can also be observed in the *St. John's School* case (*St. John's School* v. *Ward*(5) [1974] STC 69) where a free standing gymnasium and laboratory, including minor electrical apparatus valued at £240, was found not to be plant, when contrasted with *Jarrold* v. *John Good & Sons Ltd.* 40 TC 681, where moving partitions in an office building were decided to be plant, and with the Northern Irish case (*Schofield* v. *R. & H. Hall Ltd.*(6) [1975] STC 353) where grain silos were also so held. In the same line as the *St. John's School* case were the so-called "false" ceilings in *Hampton* v. *Fortes Autogrill Ltd.*(7) [1980] STC 80 which were held not to be plant, whereas the fittings or apparatus they concealed were plant. If *Dixon* v. *Fitch's Garage*(8) [1976] 1 WLR 215 can stand in the light of the decision in the *Newcastle Breweries* case, which may be doubted, this is another example of the same distinction where the housing is to be distinguished from the plant which it houses.

Reference was also made to a number of Australian cases including *I.C.I. (Australia & N.Z.) Ltd.* v. *Federal Commissioner of Taxation* (1970) 120 CLR 396, (1970) 1 ATR 450. Here Appellant's Counsel rightly stressed that caution is required since the statutory context in Australia differs from that in England, and Collins English Dictionary denotes a subsidiary meaning of "plant" in the Australian usage which differs from that in England. Speaking for myself, however, I find the use of this Australian decision of Kitto J.

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(1) 45 TC 221. (2) [1974] STC 402. (3) 55 TC 252. (4) 53 TC 67.
(5) 49 TC 524. (6) 49 TC 538. (7) 53 TC 691. (8) 50 TC 509.

(subsequently affirmed in the High Court ((1972) 3 ATR 321) and *Broken Hill Proprietary Co. Ltd.* v. *Federal Commissioner of Taxation* (1968) 120 CLR 240) by Oliver L.J. in the instant appeal(1) [1981] STC 671 at page 676, and inferentially at pages 677, 678, perfectly proper and convincing, based as it was partly on English authorities cited above. The Australian I.C.I. case was of interest because it was the only recent case when an electrical installation *per se* had come up for consideration in the present context, and Kitto J. had said that for himself:

> "I see no difference for present purposes between these electricity reticulating agents and the water reticulating pipes which run through such a building" (an office building). "It seems to me impossible to regard these elements in the equipment of the building as 'plant' any more than as articles."

To be just to the Appellants one must contrast this statement by Kitto J. with the remark of Donovan L.J. in *Jarrold* v. *John Good & Sons Ltd.* 40 TC 681 at page 694: "The heating installation of a building may be passive in the sense that it involves no moving machinery, but few would deny it the name of 'plant'. The same thing could no doubt be said of many air conditioning and water softening installations." Speaking for myself, I would find it very difficult to draw a significant distinction between the "reticulation" of a heating installation and the the reticulation of an electrical installation, but it is precisely at this point that I begin to wonder whether your Lordships are in truth being invited to decide a question of fact and degree (as to which there is no appeal from the Commissioners) or a true question of law (as to which an appeal will lie). As Pearson L.J. said in *Jarrold* v. *John Good & Sons Ltd. (supra)* at page 696:

> ". . . the short question in this case is whether the partitioning is part of the premises in which the business is carried on, or part of the plant with which the business is carried on. *Either view could have been taken.*" [Emphasis mine.] ". . . . I think the Commissioners have, in effect, preferred the second view, and it cannot be said that there was no evidence to support it, or that any error of principle was involved."

The resolution of my doubt as to this is not rendered easier by the form in which the case has been stated by the Commissioners, who following recent, and to my mind not particularly admirable, practice, have stated their decision in the form of a mingled series of propositions of mixed fact and law, and then added somewhat inconsequently: "The question of law for the opinion of the Court is whether on the facts found our decision was erroneous in point of law." The scheme devised by Parliament was to limit appeals from the Commissioners to questions of law only by providing that appeals should be by way of Case Stated, and it seems to me as a comparatively rare visitor to this field of jurisprudence that the Commissioners do rather less than their duty to Parliament if, with the aid of Counsel on both sides, particularly of Counsel for the party demanding the Case to be stated, they do not identify a definable point of law for the decision of the Court, but leave the Court to guess what is the precise point of law it is being asked to decide, and Counsel for the Appellant to be reduced to argue, as he was in the instant appeal, that, if the question was one of fact, the decision of fact upheld by the Commissioners, Vinelott J. and three members of the Court of Appeal was not one at which any properly directed set of Commissioners could reasonably have arrived, and therefore, *per se,* a question of law. The whole form in which special cases have recently come to be stated, of which the present appeal only affords one example, seems to me to

(1) Pages 211–3 *ante*.

add force to the doubts expressed in his Hamlyn Lectures by Mr. Hubert Monroe Q.C. as to the value of the present four-tier system of appeal. ["Intolerable Inquisition?" Reflections on the Law of Tax, Stevens & Sons, 1981 at pages 82, 83.]

In my search for a definable question of law on which a decision of a court could be founded I was at first attracted by the argument for the Appellants, first presented to the Commissioners and persisted in to the last, that the whole electrical installation from the point where it was delivered by the Electricity Board at 11,000 volts, to the point at which having been transformed to 240 volts and delivered in the form of light and power to various points in the store "should be looked at as a whole and not analysed into its component parts". If this were a point of law, it was rejected by Vinelott J. and by the Court of Appeal and it would therefore be open to review by your Lordships. The more however this simplistic view was considered, the more clearly I came to realise that, whether or not I would have come to this conclusion had I been a Commissioner (as to which I still feel some doubt), the Commissioners, as a tribunal of fact, were entitled to decide, after analysing the evidence and visiting the premises, as they did decide in the circumstances of the particular case in para 18 of their case([1]):

> "We do not accept Mr. Heyworth Talbot's contention that the entire electrical installation should be regarded as a single whole; and we reject his submissions (1) and (2). Notwithstanding the *Barclay, Curle* case([2]), where Lord Reid and Lord Donovan set their faces against the 'piecemeal' approach, and the *St. John's School* case([3]), where Templeman J., said 'In my judgment, one looks at the whole . . .:' we consider, after careful reflection, that the multiplicity of elements in the Brent Cross installation, and the differing purposes which they serve, make the present case distinguishable from the dry dock in *Barclay, Curle* and the laboratory and the gymnasium in *St. John's School,* each of which, despite its component parts, was directed towards a single purpose. To adopt the approach advocated by Mr. Heyworth Talbot seems to us to be too sweeping, not only in the particular circumstances we have before us, but as a general approach."

I am not myself happy about the phraseology of the last sentence if it was intended to convey that the "single entity" submission could never be right in any case or that they were not free in law to reach a different conclusion. If it had been so intended I am inclined to think that it would have been a misdirection, but it seems to me that the decision in the particular circumstances which the Commissioners had before them was one of fact and degree to be decided on evidence and inspection; and their finding is therefore a proposition which I do not feel able to contradict. In my view, to quote again from the judgment of Pearson L.J., "either view could have been taken"; in other words the question was one of fact. If, as Donovan L.J. said in the short passage I have already cited, a heating apparatus can be regarded in the way for which the Appellants contend, I do not see why, as a matter of principle, the same cannot be said of an entire electrical installation. But the Commissioners have decided in the instant appeal that the multiplicity of components in the Brent Cross installation preclude this approach, and, if I am right, they were entitled to do so.

Once the "single entity" submission is rejected, as I have felt it necessary to do, the plausibility of the Appellants' case as a proposition of law seems to me

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([1]) Page 197 *ante*. ([2]) 45 TC 221. ([3]) 49 TC 524.

to melt into thin air. Once it is accepted that it was open to the Commissioners to decide as a tribunal of fact that "the multiplicity of elements in the Brent Cross installation and the differing purposes which they serve" entitled the Commissioners to reject the "entire entity" submission and come to an analysis of its individual components having regard to the nature and function of each, it seems to me that we are clearly in the realm of fact and degree, and, in the absence of a clear and identifiable misdirection in point of law, I do not think it possible to differ from it, at least as to the items still in dispute after the decision of the Court of Appeal had disposed of the main switchboard in the Appellants' favour. The one submission on behalf of the Appellants on this part of the case to the effect that a distinction can be drawn between "apparatus cases", "building or structure cases" and "place only" cases, except for the purposes of arguments directed towards fact and degree, appears to me, for the reasons I have said, to rest upon a logical fallacy. I can therefore see no reason to find fault with the judgment of Oliver L.J. or, in so far as it was affirmed, of Vinelott J. and, in particular, I would wish to affirm my agreement with Oliver L.J. in his evident reliance on the expository judgment of Buckley L.J. in *Benson* v. *Yard Arm Club Ltd.*(1) cited at page 682 of his judgment(2), and on the passages in the judgments of Pearson L.J. in *Jarrold* v. *John Good & Sons Ltd.*(3) *(supra)* and of Megarry J. in *Cooke* v. *Beach Station Caravans Ltd.*(4) *(supra)* on which Oliver L.J. also evidently placed reliance at several points.

In the event, I come to the conclusion, not without some wavering from time to time, that this appeal must be dismissed.

Lord Wilberforce—My Lords, in the appeal, recently heard by this House, in *Commissioners of Inland Revenue* v. *Scottish & Newcastle Breweries Ltd.*(5) my noble and learned friend Lord Lowry made a comprehensive review of the authorities relating to the meaning of "plant" in the Finance Act 1971, s 41, and other statutes. He also stated, by reference to his preceding judgment in *Schofield* v. *R. & H. Hall Ltd.* 49 TC 538 the principles by which courts should be guided in reviewing decisions, whether particular items of property should be regarded as "plant", of the General and Special Commissioners. That recent appeal was concerned with items of lighting and decor installed in the taxpayer's premises for the purpose of its trade. It was decided in the taxpayer's favour on the basis of clear and strong findings of fact by the Special Commissioners that (I summarise) the items in question were not merely the setting in which the trader carried on his business, but represented or created something which he offered to his customers to resort to and enjoy.

We are here concerned with a different trade—that of a department store—and with different items. As the case was presented to the Commissioners, these consisted of a large number of pieces of equipment, the total cost of which was £945,600. I group these for convenience under four heads: (i) trunking for the telephone system, emergency lighting and standby lighting systems, wiring to heating and ventilation equipment, to fire alarm and public address systems, to lifts and escalators and other apparatus, (ii) transformers and their associated switchgear, (iii) the main electrical switchboard, (iv) the complete lighting installation, including fittings, some specially designed, their conduits and cables, trunking, riser cubicles etc. The entirety of this equipment was ordered by the owner of the department store—John Lewis Properties Ltd.—for installation in a large purpose built building at Brent Cross. It was provided under a separate contract from that relating to the building itself and

(1) 53 TC 67. (2) Page 218 *ante*. (3) 40 TC 681.
(4) 49 TC 514. (5) 55 TC 252.

A on the basis of a specification and drawings prepared within the John Lewis Group. For reasons which I need not develop, it is not disputed that such capital allowances as are available in respect of this installation may be claimed by the present Appellants, Cole Bros. Ltd..

The Appellants claimed that they were entitled to capital allowances in respect of expenditure on the provision of the totality of the equipment as being
B "machinery or plant" provided "for the purposes of trade". In dealing with this claim the Commissioners had to decide in the first place whether they should regard the expenditure as having been made in respect of one single entity, or whether they should look separately at individual items or groups of items. They were strongly urged to adopt the single entity approach, but they did not agree to do so. Instead they decided that, in view of what they described as the
C "mulitiplicity of elements in the Brent Cross installation and the differing purposes which they serve", they should place these elements in suitable categories, and this they did. This decision was strongly attacked in the appeal and learned Counsel were able to suggest a number of quite plausible arguments in favour of a single entity approach. These arguments fail however, in my opinion, for the fundamental reason that, whatever merits that approach
D may have, to reject it involves no error of law. The Commissioners' decision to reject it, and instead to consider categories, or single items, was not, as I read it, based on any general proposition that a "single entity" approach is, as a matter of principle, wrong—if it had been I should regard it critically. It was one based on their examination of the facts and upon their personal inspection, and so was in the realm of pure fact. Indeed, if one asks what is the principle of law which
E they can be said to have violated, it is impossible to state it, unless by an assertion that no reasonable body of Commissioners could have come to the conclusion which they reached. Such an assertion I should be most reluctant to accept if I were reviewing the Commissioners' findings for the first time. After it has been reviewed, but without success, in two Courts, reluctance becomes impossibility. The first and main line of the Appellants' argument, in my
F opinion, fails. That being so, the Appellants are obliged to attack the Commissioners' individual findings as regards individual items or categories. They are not wholly without ammunition. As regards the main electrical system, including conduits and cables and riser cubicles they can point to the anomaly of regarding heating systems as plant—as it appears that the Revenue is willing to accept—but not electrical systems. They can appeal to the fact that although
G the Commissioners refused to agree that the switchboard constitutes plant, the Court of Appeal reversed their decision—so it is said that this House should not hesitate to disagree with the Commissioners on other items. There is some attraction in both of these arguments. As regards the switchboard there has been no appeal to this House. On the whole argument, however, the Appellants fail to satisfy me that the Commissioners erred in law. As regards
H the main electrical system, there is no finding that it was in any way special to the Appellants' business, or anything more than the standard equipment of a commercial business. The Commissioners were entitled on this point to derive support from the judgment of Kitto J. in the High Court of Australia in *I.C.I. of Australia and New Zealand Ltd.* v. *Federal Commissioner of Taxation* (1970) 1 ATR 450. Although that case was concerned with a different statute and, of
I course, with its own facts the learned Judge considered and relied on English authorities on the meaning of "plant". His judgment shows, at least, that the similar approach of the Commissioners to the present case can be supported.

> "The electrical wiring" he said, "with its enclosing conduits, and the trunking, are also parts of the general equipment of the building, fixtures beyond question, and having no relevance to the activities of the appellant

> beyond the relevance they would have to any occupier's activities. Together with switchboards, sub-switchboard and junction boxes, they form the reticulation system for conveying throughout the building electric current which is drawn ordinarily from the Melbourne City Council's power supply mains . . . The construction of the building as a building of the general type to which it belongs would be incomplete without them, and their function does not go beyond making the building a suitable general setting for a wide range of possible activities",

l.c. pages 451–2. This is of course not a statement of law: it leaves the Commissioners free to find the facts of the case before them otherwise. But there is no error in law if, as they did, they make similar findings: there was certainly evidence on which they could do so. Some other individual findings were attacked—these relating to "special lighting". It is not appropriate for me to say whether I agree with them. They were near or on the borderline. But that is a common feature of cases about "plant"—see *Jarrold* v. *John Good & Sons Ltd.* 40 TC 681 at page 696 *per* Pearson L.J.: the decision must be left to the Commissioners.

For these reasons I hold that the appeal fails and must be dismissed.

Lord Edmund-Davies—My Lords, I have had the great advantage of reading in draft the speech prepared by the Lord Chancellor and I too doubt that I should have decided this case in the same way in all respects as that which commended itself to the Commissioners.

The regrettable absence from their Stated Case of specification of the point or points of law upon which the views of an Appellate Court were sought has substantially increased my difficulty. For some time during the hearing of the appeal I was in doubt whether the Commissioners had regarded themselves as *obliged* to adopt what for convenience was called the "piecemeal" approach to the individual items constituting the electrical installation in the Appellants' Brent Cross premises. This doubt was in part generated by the statement in para 18 of their case that adoption of the general or "entire entity" approach . . . "seems to us to be too sweeping, *not only in the particular circumstances we have before us, but as a general approach*". (Emphasis added.) If this meant that the Commissioners felt compelled as a matter of law to reject the "entire entity" approach, this would have run counter to some of the decided cases and would itself have constituted a question of law calling for careful consideration. But I was at length won over to the view that this was not so, and that the Commissioners, while recognising that in some circumstances a general approach would be the proper one, had concluded that the type and nature of the Appellants' Brent Cross electrical installation called for the "piecemeal" approach. And that conclusion, as I see it, was one of fact for the Commissioners alone. Having formed that view, for the reasons propounded in the speech of the Lord Chancellor with which I am in respectful and complete agreement, it appeared to me that there existed no question of law calling for the decision of their Lordships, and that the appeal must accordingly be dismissed. It is a conclusion which could well have been arrived at by others at an earlier stage of this protracted and doubtless expensive litigation had an attempt been made to identify the points of law considered to be involved. In fairness to the Commissioners, it should be added that the formula they adopted in their case (viz. "The question of law for the opinion of the Court is

A whether, on the facts found, our decision was erroneous in point of law") has for some time crept into common usage in many branches of the law. But it is a bad formula, and it should be dropped.

I concur in the dismissal of the appeal.

Lord Russel of Killowen—My Lords, I incline to the view that had I been the Special Commissioners I might well have come to the conclusion that
B electrical equipment remaining in this case in dispute was relevantly "plant". It was ordered and installed under a contract separate from the contract under which the building designed for use as a department store was erected. The equipment had as its purpose the lighting of the department store in the manner considered most appropriate for the use of the building in carrying on the trade therein of selling such goods as are commonly found on sale in a department
C store. The equipment was not integral structurally with the building.

However, the question in any case such as this is basically one of fact and degree for the Special Commissioners to decide. It is not for your Lordships' House to substitute its view unless an error of law is to be discerned as having been made by the Special Commissioners, applying well known principles. In common with your Lordships, whose opinions I have been able to peruse in
D draft, I am unable to discern any error in law, and accordingly I also would dismiss this appeal.

Lord Bridge of Harwich—My Lords, I have had the advantage of reading in advance the speech of my noble and learned friend on the Woolsack. I entirely agree with it and for the reasons he gives I too would dismiss the appeal.

E *Appeal dismissed, with costs.*

[Solicitors:—Messrs. Clifford-Turner; Solicitor of Inland Revenue.]