A COURT OF APPEAL (NORTHERN IRELAND)—2, 3, 4, 5 AND 6 MARCH AND 8 MAY 1992

B HOUSE OF LORDS—8, 9 AND 10 JUNE AND 22 JULY 1993

Mairs (H.M. Inspector of Taxes) *v.* Haughey[1]

C

Income tax—Schedule E—Employment—Emoluments—Benefits—Employer company privatised—Payment to employees when top-up redundancy scheme ended—Whether emolument or benefit chargeable to tax—Income and Corporation Taxes Act 1988, *ss* 19(1), 154, 156(1) *and* 168(3).

D

The taxpayer was an employee of Harland & Wolff ("H & W"), the Belfast shipbuilders, which was from 1975 in public ownership, the sole shareholder being, in 1989, the Department of Economic Development, Northern Ireland ("DED").

E

In 1989 arrangements for privatisation of H & W took shape: a new corporate structure was proposed by which a buyer would provide substantial capital and more would be raised by an offer of shares to H & W's management and employees.

F

Up to that time the employees were entitled to ordinary statutory redundancy rights and, by way of top-up, to rights under a non-statutory Enhanced Redundancy Scheme ("the ERS"). The various parties accepted that, after privatisation, the financial resources required to continue the ERS would not be available.

G

In June 1989 most of the employees, including the taxpayer, were sent a conditional offer of a job with the new company. The offer included details of a payment, described as *ex gratia*, which would be made to all new company employees who accepted the new terms and conditions and the ending of the ERS. The payment was to be calculated by an A+B formula, A being 30 per cent. of the amount which the employee would have received under the ERS if then declared redundant, and B being £100 for each complete year of service at H & W (with a minimum of £700).

H

All the offerees accepted. The buyout was completed in September 1989 and the "*ex gratia*" payment was made. The A element was paid direct by the DED. The B element was paid by the new company with funds provided by the DED. The taxpayer received £5,806, representing £4,506 in respect of the A element and £1,300 in respect of the B element.

I

On appeal against an assessment to income tax under Sch E, the taxpayer accepted that the B element was taxable but contended that the A

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(1) Reported (CA)(NI) [1992] STC 495; (HL) [1994] 1 AC 303; [1993] 3 All ER 801; [1993] STC 569.

element was not. The Special Commissioners decided that it was appropriate to apportion the total sum on the basis that the A element was compensation for the loss of contingent rights under the ERS and the B element was consideration for the acceptance of the new terms and conditions of work, and held that the A element was not taxable. The Crown appealed.

The Court of Appeal in Northern Ireland held, dismissing the Crown's appeal, that the A element was not taxable under Sch E because:—

(1)(a) The total payment of £5,806 consisted, in part, of compensation for the loss of contingent rights in the ERS and, in part, of consideration for accepting new terms and conditions of employment: there was evidence before the Special Commissioners to justify the apportionment which they made and to justify their finding of fact that the method of calculation of the A element did not overvalue the employees' contingent rights in the ERS;

(b) the Crown had not argued before the Special Commissioners that, if the entirety of the A element was held not to be an inducement to remain in employment or to enter into new employment, an apportionment of the A element should be carried out so that part of it be attributed to compensation for the extinction of contingent rights and part of it to inducement to remain in, or enter into, employment, and it would, therefore, not be right to remit the case to the Special Commissioners on that point;

Observations in *Yuill* v. *Wilson* [1980] 3 All ER 7: 52 TC 674 applied.

(2)(a) a payment under the ERS would not have been taxable under Sch E because it would not have been made to the recipient in return for his acting as or being an employee but because he was ceasing to be an employee and to cushion him against the hardship of losing his employment; if the receipt of a payment does not constitute an emolument from employment, the receipt of a sum paid to compensate for the loss of the contingent right to receive that payment cannot itself constitute an emolument from employment;

Hochstrasser v. *Mayes* [1960] AC 376: 38 TC 673, *Laidler* v. *Perry* [1966] AC 16: 42 TC 351 and *Shilton* v. *Wilmshurst* [1991] 1 AC 684: 64 TC 78 considered: *Hamblett* v. *Godfrey* [1987] 1 WLR 357: 59 TC 694 distinguished.

(b) moreover, even if a redundancy payment was taxable in law, a sum of money paid to obtain a release from a contingent liability, as distinguished from being remuneration under a contract of employment, was not taxable as an emolument;

Hunter v. *Dewhurst* 16 TC 605 (as explained in *Tilley* v. *Wales* [1943] AC 386: 25 TC 136) followed;

(3) the payment was not a taxable benefit within s 154 Income and Corporation Taxes Act 1988 because:—

(a) the taxpayer did not receive a benefit within the meaning of s 154 where the money received was paid to him, by way of fair valuation, in consideration of his surrender of a right to receive a larger sum in the event of the contingency of redundancy occurring; and

A (b) the cost of a benefit may be made good within s 156(1) of the 1988 Act by an employee giving his employer a non-pecuniary consideration (other than the provision of services), including the giving up of something of value such as a contingent right.

Per Hutton L.C.J. (McDermott L.J. in general agreement):

B (i) The payment was not made to the taxpayer "by reason of" his employment within s 154(1)(a) of the 1988 Act because what enabled him to enjoy the benefits was the surrender of his contingent right to receive a payment under the ERS, not his employment,

(ii) a receipt of cash can constitute a benefit within s 154;

C *Wicks* v. *Firth* [1981] 1 WLR 475: 56 TC 318 followed.

The Crown appealed, but did not pursue the contention that the payment was a taxable benefit within s 154 Income and Corporation Taxes Act 1988.

D *Held*, in the House of Lords, dismissing the Crown's appeal that;

(1) whether the issue were resolved by construing the documents or by looking at the substance and reality of the situation, the aggregate sum of £5,806 was paid for the two separate identifiable considerations of (i) the new terms and conditions of employment and (ii) the termination of the ERS: the Special E Commissioners were entitled to apportion the payment between those considerations and it could not be said that the apportionment adopted was wrong;

(2) as the characteristic of a redundancy payment is that it is to compensate or relieve an employee for what can be the unfortunate consequences of becoming unemployed, a non-statutory redundancy payment is not an F emolument from employment chargeable to income tax under Sch E, and, as a payment made to satisfy a contingent right to a payment derives its character from the nature of the payment which it replaces, a lump sum paid in lieu of the right to receive a redundancy payment is also not chargeable as an emolument under Sch E.

G

CASE

Stated under the Taxes Management Act 1970, s 56 by the Commissioners H for the Special Purposes of the Income Tax Acts for the opinion of the Court of Appeal in Northern Ireland.

1. On 9 and 10 April 1991 I, one of the Special Commissioners, heard the appeal of Robert Haughey against an assessment to income tax under Sch E for the year 1989–90, in the sum of £23,242.

I

2. Shortly stated, the question for my decision was whether either or both of two sums (£4,506 and £1,300) received by Mr. Haughey in that year of assessment and included in the assessed sum of £23,242 were taxable under Sch E, either as "emoluments from his employment" (under s 19 Income and Corporation Taxes Act 1988) or as a "benefit" or benefits provided for him (under s 154 of that Act).

3. The following witnesses gave evidence before me: A

Mr. Haughey.

Mr. Peter A. Williamson (now a full-time trade union official, but at the relevant time an employee of Harland & Wolff plc and chairman of the T. U. Works committee). B

Mr. Peter T. Swan (now group finance director of Harland & Wolff Holdings plc, but at the relevant time commercial director of Harland & Wolff plc).

Mr. Thomas W. Horner (an employee of Harland & Wolff for many C years, a trustee of its pension scheme and, until recently, a shop steward and trade union convenor).

Mr. Perry McDonnell (deputy chief executive of the Training & Employment Agency, an arm of the Department of Economic Development in which, at the relevant time, he had been the assistant secretary concerned D with privatisation).

4. The following agreed documentary evidence was before me:

A statement of agreed facts, with which documents referred to therein were bound up. E

A copy of the Inland Revenue's Statement of Practice (SP 1/81) in relation to non-statutory redundancy payments.

Copies of three letters (27 July, 15 September and 29 November 1989) passing between the Inspector of Taxes and Harland & Wolff. F

The statement of agreed facts and the documents referred to therein are annexed hereto. The other documents are available for inspection by the Court if required.

5. The facts of the case and the contentions advanced on behalf of the G parties are set out in my written decision, a copy of which is annexed to and forms part of this Case.

6. My decision was issued on 13 May 1991. For the reasons set out therein, I held that the sum of £4,506 included in the assessed sum was not taxable, under either s 19 or under s 154; but that the sum of £1,300 had H rightly been included in the assessed sum, as taxable under s 19. I, accordingly, reduced the assessment by £4,506, to £18,736.

7. Immediately after the determination of the appeal, both H.M. Inspector of Taxes and Mr. Haughey declared to us their dissatisfaction therewith as being erroneous in point of law. On 30 May 1991 H.M. I Inspector of Taxes, and on 10 June 1991 Mr. Haughey required us to state a Case for the opinion of the Court of Appeal in Northern Ireland pursuant to the Taxes Management Act 1970, s 56, which Case we have stated and I, the Commissioner who heard the appeal, do sign accordingly.

8. The questions of law for the opinion of the Court are

A. On the appeal by H.M. Inspector of Taxes—

(i) whether I erred in holding that the sum of £4,506 paid to Mr. Haughey was not an emolument "from employment" within the meaning of s 19 of the Income and Corporation Taxes Act 1988; and if not

(ii) whether I erred in holding that the receipt of that sum by Mr. Haughey was not a "benefit" in the sense in which that word is used in s 154 of that Act.

B. On the cross-appeal by Mr. Haughey—whether I erred in holding that the sum of £1,300 paid to Mr. Haughey was an emolument "from employment" within s 19 aforesaid.

B. O'Brien } Commissioner for the Special Purposes of the Income Tax Acts

15–19 Bedford Square
London
WC1B 3AS

19 August 1991

DECISION

This appeal by Mr. Robert Haughey is against an assessment to income tax under Sch E for the year 1989–90 in the sum of £23,242. The issue for my decision relates to the inclusion in that figure of lump sum payments totalling £5,806 which he received during the year. I understand, however, that the result of this appeal will govern the treatment of over 2,300 lump sums paid at the same time, and in the same circumstances, to Mr. Haughey's fellow employees: and that tax on some £5.5m (at least) is altogether at stake. That perhaps helps to explain Mr. Haughey's representation (at a hearing in Belfast) by Mr. Andrew Park Q.C.

Mr. Haughey has, for the last fifteen years or so, worked for Harland & Wolff, the Belfast shipbuilders. He is a construction manager. At one time the company was a very significant employer indeed in Northern Ireland, with some 30,000 employees; but with the disappearance of the tanker trade in the early 1970's, its business (and its workforce) greatly declined. In 1975 the Department of Commerce (relevantly represented in 1989 by the Department of Economic Development) became the sole shareholder. There followed fourteen years of public ownership, during which the business did not prove commercially successful. Indeed, over that period it was propped up by grants and loans from public funds, amounting to some £540m. By 1989 the workforce had shrunk to around 2,800—and even that number was not fully justified in commercial terms. Nevertheless, the employment situation in Northern Ireland was such that Harland & Wolff was still regarded as an important employer.

In May 1988 the Government decided that Harland & Wolff—and other shipyards in public ownership—should if possible be privatised. It was, it

seems, no longer content to accept the ever-increasing losses; and improvement was seen to be dependent on the application of private sector disciplines. The DED hoped that the company would be able to find a buyer, because the probable alternative was the closure of the shipyard: with inevitable adverse effects on employment, not only at Harland & Wolff itself but also for other businesses in the UK dependent on trading relationships with Harland & Wolff. But the possibility of closure was considered.

The company appreciated at a fairly early stage that privatisation would involve certain changes, so far as its employees were concerned. There would, for example, have to be acceptance of more flexible working arrangements (that is to say, less rigidity in the demarcation of functions assigned to particular jobs). Far more important for present purposes, there was also the question of the existing enhanced redundancy scheme.

The employees of Harland & Wolff had, between 1978 and 1986, been entitled to benefit under a statutory shipbuilding redundancy payments scheme. That was terminated in 1986 and it was replaced first by the ordinary statutory redundancy rights enjoyed by employees generally (which were not as extensive as those under the shipbuilding scheme) and, by way of top-up, a non-statutory enhanced redundancy scheme. I shall refer to that as "the scheme". Similar top-up schemes were, I understand, adopted by other shipyards in England and Scotland. Unlike the company's pension scheme, the scheme was not independently funded—the DED simply met the company's obligations as and when they arose. Resort to the scheme was frequent and it was plain that it could not survive privatisation.

After a false start during the second half of 1988, new arrangements for Harland & Wolff started taking shape early in 1989. The company had found a substantial buyer in the Olsen group of companies, and agreement in principle was reached between Harland & Wolff, Olsen and the DED in March. *Inter alia*, a new corporate structure was proposed. A holding company, Harland & Wolff Holdings plc ("Holdings") would be formed, with an issued share capital of some £15m. It would have a subsidiary as the operating company, Harland & Wolff 1989 Ltd. ("H & W '89"—it is now called Harland & Wolff Shipbuilding & Heavy Industries Ltd.). Of Holdings' share capital, £12m (80 per cent.) would be provided by Olsen. It was proposed to raise most of the remainder by way of an offer of shares to Harland & Wolff's management and employees ("the MEBO").

Leaving aside purely administrative steps, the new arrangements were to be brought in in two stages, each of which critically involved the employees.

First, a sufficient number of the employees whom management wished to retain had to agree to transfer from H & W to H & W '89, on new terms. Secondly, there had to be an adequate response to the MEBO proposal. The privatisation arrangements were dependent on the satisfaction of both conditions.

The discussions between the management, Olsen and the DED established the proposition that the employees' contracts following their transfer to H & W '89 would not include redundancy provisions comparable to those under the scheme. Those rights would have to be removed. It was initially calculated that a sum of £10m would just suffice to meet the company's immediate obligations towards those employees who would not be invited to

A transfer; to pay each transferred employee a sum equal to 30 per cent. of the amount which he would have received under the scheme had he been made redundant on 1 September 1989; and to make that 30 per cent. up to 100 per cent. of that amount later, in the case of any transferred employee who was made redundant within two years. The DED agreed to provide £10m for application in those ways.

B

As soon as agreement in principle had been arrived at by the Harland & Wolff board, Olsen and the DED, the trade union representatives at the shipyard were informed. Discussions between the board and the unions went on up to July 1989. They then came to an end, not because agreement had been reached on all points of difference but simply because the board could not C delay any longer in putting its proposals formally to its employees, for their individual decision. During the same period the board issued, at intervals, a news-sheet called "Privatisation News". Every employee got a copy, and that dated 8 May 1989 was concerned with the scheme, why it had to go, and what was proposed in that regard.

D The discussions between the management and the unions were, in part, devoted to the details of the changes in working practices which would come into operation when H & W '89 was fully operative. Differences between the parties in that area were resolved without great difficulty. Much the largest bone of contention was the proposed loss (after a transitional two-year period) of the benefits of the scheme.

E

The scheme was universally regarded by the employees as a matter of the first importance. So much so that Mr. Williamson (who was a fitter employed by H & W in 1989 and, as chairman of the trade union works committee, the leading representative on the staff side) told me that the scheme was seen as an "indirect part of their money". It constituted an F essential form of insurance, the notional premiums for which were being paid by the company. It appeared that retirement from full-time employment in the fullness of time was the exception rather than the rule. When work fell off, the company did not retain employees unnecessarily; although, as a former shop steward, Mr. Horner, told me, employees who had been made redundant might well be re-engaged later on a temporary basis (either as employG ees or as independent contractors) if work allowed. In general, therefore, employees envisaged their retirement as likely to be on a redundancy basis. The fact that there was only one ship under construction during the late, spring of 1989, coupled with the knowledge that it was nearing completion, would only have reinforced that expectation.

H During May and June 1989 the employees' representatives accordingly pressed hard for retention of the scheme or, at the very least, for great improvement in the terms on which it would be brought to an end. It is not disputed that the 30 per cent. offer did not have as its basis a genuine valuation of the employees' contingent rights. On the evidence I find that it certainly did not overvalue those rights: and I suspect that, if the matter were I investigated scientifically, the opposite would be demonstrated. But there were precedents for 30 per cent. payments in similar circumstances at shipyards in England and Scotland; and Harland & Wolff were under the constraint of having to fit the whole of the terminal costs of the scheme into the £10m which the DED has agreed to provide. No more was available from that source. The H & W board could not be shifted off that figure. However, the terminal costs of the scheme were carefully re-examined and it was found

that there was some room for a small improvement, in a different way. Although all employees would be affected, the improvement meant more to two classes of employees—those with very short service (for whom the 30 per cent. provision would have been *de minimis*) and those with long service, for whom the restriction to 30 per cent. was more onerous.

The differences between the board and the employees' representatives on the question of the scheme were never resolved during negotiations. On 6 July 1989 the board brought the negotiations to an end by issuing to 2,361 selected employees offers of jobs with H & W '89. (The balance of H & W employees—some 450 were to be made redundant.) Those employees who wished to accept the offer had to do so before the end of July. Acceptances were received from every single offeree.

In signifying his acceptance, each employee expressly accepted the new terms and conditions of working, and the termination of the scheme, subject to the making of the payments, and the two-year transitional arrangements, set out in s 4 of the offer documentation.

The material part of that s 4 (headed "Ex gratia formula") read as follows:

> "Subject to successful completion of the buyout targeted for September, all new company employees who accept the new terms and conditions and the ending of the enhanced redundancy scheme and who report for work following completion of the buyout will be entitled to an ex gratia payment calculated in accordance with the following formula (A & B):
>
> (A) 30 per cent. of enhanced redundancy scheme 'entitlement' (calculated at 1-9-89) *plus*
>
> (B) £100 (One hundred Pounds sterling) per complete year of service at H & W with the minimum payment under this element 'B' being £700."

The document went on to say that the tax position of such payment was under discussion with the Revenue; and it also set out the 2-year transitional arrangements under which the 70 per cent. balance of scheme benefits might become payable.

Following their acceptances of the July offer, the 2,361 employees (among whom was, of course, Mr. Haughey) became employees of H & W '89 on 8 August 1989. That completed the first stage of the privatisation. The old terms and conditions, and the scheme, remained in place, pending completion of the second stage (the MEBO).

The prospectus in relation to the offer of shares in Holdings was issued to the employees of H & W '89 on 21 August 1989. I do not know what level of subscription was required for the offer to be declared successful—I rather think the employees did not know either—but it was evidently attained (at least). That substantially concluded the matter.

The so-called "ex gratia" payments were made shortly afterwards. The two "elements" were not, in fact, paid together as a single payment (as envisaged in the earlier documentation): the "A" element was paid directly by the

DED, while the "B" element was paid by H & W '89 (which was put in funds by the DED for the purpose). Mr. Haughey's entitlement to £5,806 was, accordingly, received in two parts—£4,506 (element "A") and £1,300 (element "B"). Both payments were actually made under provisional deduction of PAYE tax and NIC.

The Crown's claim to tax the payments is put on alternative grounds. First, it is said that they were "emoluments from [Mr. Haughey's] employment", and so taxable under s 19 Income and Corporation Taxes Act 1988 (Sch E, Case I). In the alternative, it is said that they are taxable under s 154 of that Act (a section certainly applicable to Mr. Haughey's employment and also, I imagine, to that of most if not all of his fellow employees) as the cost of a benefit provided to him.

Before addressing the main arguments, I shall deal with the taxability of so much of the total payment as is represented by element "B". Up to the hearing, Mr. Park—relying on previous correspondence between the parties when letters on the Crown's side were written by the Inspector—understood that it was accepted that the "A" element represented compensation for the loss of rights under the scheme, while the "B" element was consideration for the acceptance of the new terms and conditions of working under employment with H & W '89. On that understanding, he was prepared to concede that the "B" element was an inducement to enter that employment, and was taxable under s 19, on well-established principles.

However, as the argument developed before me, it was clear that Mr. Butterfield, for the Crown, took a view of the "A" element different from that previously indicated. Furthermore, the genesis of the "B" element was laid bare by oral testimony. That element was the addition to the original 30 per cent. offer achieved by the employees' representatives in the negotiations during the summer. Mr. Park, accordingly, withdrew his concession, and contended that the "B" element was indistinguishable from the "A" element, for present purposes.

It is clear from the words in s 4 of the offer documentation, which I have cited, that what was set out as a single payment was the consideration for both of the changes; but that documentation does not clearly purport to distinguish between them. All that can be said is that that document is consistent with the existence of some appropriation viz. of the "A" element to one and of the "B" element to the other. However, the prospectus relating to the offer of the Holdings shares is more explicit. I refer, in particular, to para (d) of the summary of a "DED support letter", set out on page 87 of the prospectus, which states that the DED had agreed:

> "... to fund the costs of buyout of the shipbuilders Enhanced Redundancy Scheme (constituting part of the Ex-gratia Payment) and payment in respect of acceptance by Employees of the new terms and conditions of employment (constituting the balance of the Ex-gratia Payment) ..."

I appreciate that the prospectus and, indeed, the letter summarised therein were not in existence on 31 July 1989 when the 2,361 employees accepted the job offer (and its consequences). But it is, to my mind, inconceivable that the prospectus should have set the matter out in such terms if the division of the so-called, *ex gratia* payment into two parts with distinct

considerations had not represented the understanding of the two sides to the summer negotiations. Furthermore, I can well understand that the staff side would not wish it to appear that the changes in the terms and conditions of work had been conceded gratuitously. The passage in the prospectus does not expressly tie the two distinct considerations to the "A" and "B" elements respectively; but the logic of the manner in which the payments were made is apparent. The DED (as the owner of H & W) was responsible for H & W's obligations in relation to the scheme: and it paid element "A". The new working terms concerned H & W '89: and it made the element "B" payments.

The oral evidence leaves me in no doubt that the emergence of element "B" was motivated by a desire to do something about perceived unfairness in the existing formula by which the scheme was to be terminated. Nonetheless, the employees bound themselves to a different contractual consideration for the "B" element. In my opinion, that element is taxable under s 19, for the reasons initially accepted by Mr. Park.

I now turn to element "A". On this aspect, the parties adopted very different approaches. Mr. Park saw the payment as one made for giving up entirely an existing right relating to the contingency of redundancy. Mr. Butterfield, on the other hand, saw it as a payment for good staff relations in a continuing employment or as an inducement to remain in that employment—recalling *Laidler* v. *Perry*[1] 42 TC 351, which he did not, however, actually cite—or, possibly (but not preferably) as an inducement to enter into employment with H & W '89.

Mr. Park's argument, in short, was that on its facts this case falls to be determined in line with the decisions in *Henley* v. *Murray*[2] 31 TC 351 (CA), *Hunter* v. *Dewhurst*[3] 16 TC 605 (HL) and (as to the relevant part) *Wales* v. *Tilley*[4] 25 TC 136 (HL). In all those cases, the taxpayer gave up something in return for a sum of money, and succeeded in his contention that the payment was not *from* his *employment*. Mr. Butterfield relied on two other cases in the same general area, namely *Bird* v. *Martland*[5] 56 TC 89 (Walton J.) and *Hamblett* v. *Godfrey*[6] 59 TC 694 (CA).

This is a notoriously difficult field. There is no doubt that the underlying principle was stated in *Hochstrasser* v. *Mayes*[7] 38 TC 673 (HL); and it has recently been set out in Lord Templeman's speech in *Shilton* v. *Wilmshurst* [1991] 2 WLR 530. Two passages from that speech are especially noteworthy[8]:

> "Section 181 [now s 19] is not limited to emoluments provided in the course of employment; the section must therefore apply first to an emolument which is paid as a reward for past services and as an inducement to continue to perform services and, secondly, to an emolument which is paid as an inducement to enter into a contract of employment and to perform services in the future. The result is that an emolument 'from employment' means an emolument 'from being or becoming an employee'. The authorities are consistent with this analysis and are concerned to distinguish in each case between an emolument which is derived 'from being or becoming an employee' on the one hand, and an emolument which is attributable to something else on the other hand,

(1) [1965] 2 WLR 1172. (2) [1950] 1 All ER 908. (3) 146 LT 510. (4) [1943] AC 386.
(5) [1982] STC 603. (6) [1987] 1 WLR 357. (7) [1960] AC 376. (8) 64 TC 78, at page 105F/I.

A for example to a desire on the part of the provider of the emolument to relieve distress or to provide assistance to a home buyer. If an emolument is not paid as a reward for past services or as an inducement to enter into employment and provide future services but is paid for some other reason, then the emolument is not received 'from the employment'. (Page 533).

B

I prefer the simpler view that an emolument arises from employment if it is provided as a reward or inducement for the employee to remain or become an employee and not for something else." (Page 537).

The difficulty lies in the application of the principle to the facts of par-
C ticular cases. The side of the line on which any case falls may well depend on one or two of its facts which strike the Court as the most significant for that particular case. It is hardly surprising, therefore, to find differences of judicial opinion in the course of deciding a particular case. To such an extent is this true of *Dewhurst* that it has commonly been distinguished on the ground that it was "special". I also note that in *Henley* v. *Murray* the Judge decided
D the matter one way without calling on the Crown—"a perfectly plain simple case"—and was reversed by the Court of Appeal, without the taxpayer being called on. It appears, moreover, that even if a given factor is considered of determining significance in one case, it does not follow that the same significance will be attached to the existence of the same factor in another.

E In *Henley* v. *Murray*, the taxpayer had received a sum in connection with (to use a neutral term) his resignation as managing director of a company. It seems that the critical fact identified by the Court of Appeal (but not by the Judge below) was that Mr. Henley had been placed under very considerable pressure to resign, and at once. In those circumstances, the Court regarded the case not as one in which a director had taken leave of
F absence, commuting into a lump sum the pay which he would have received under his contract of employment, but more as one of constructive dismissal, with a sum analogous to damages. The payment was not made "for being an employee": it was for ceasing to be one.

Mr. Park accepts that the facts in the instant case are not on all fours
G with those in *Henley* v. *Murray*: if only because the right to the payment did not arise on the cesser of employment, whether the employer is identified as H & W or, loosely, as Harland & Wolff. (The employees had left H & W and joined H & W '89 a month before their rights under the scheme, subject to the transitional period, were terminated). Nevertheless, it is abundantly clear that the "ex gratia payments" arose out of the termination of the scheme
H which had effectively been imposed on the employees. They had accepted what Mr. Horner described as "fool's gold" under extreme pressure of circumstances.

As already indicated, *Hunter* v. *Dewhurst* has long been regarded as a
I difficult decision. Perhaps the difficulty arises as much as anything else from the fact that the Court of Appeal had already decided that the payments received by two other directors of the same company, Arthur and Joseph Foster, were emoluments from their directorships (notwithstanding that they were payments which they could not have received during their employment), and that the Foster's cases were not before the House. The House, in deciding *Dewhurst*, did not comment on the Foster decisions; and I do not find it easy to discover the reason for the Court of Appeal's reversal of Rowlatt J.,

who had regarded the post-employment right to payment not as a right to deferred remuneration during employment but rather as something in the nature of a commuted pension. Undoubtedly, the fact which appears to have struck the Court of Appeal most forcibly was that the right to the payments was (by reason of its inclusion in the company's articles) actually contained within the directors' contracts of employment. But it can hardly be correct that such a right must always be regarded as an inducement to enter into employment and so an emolument therefrom. So to hold would affect all pensions arising from pensionable employment: and it was clearly pointed out in *Wales* v. *Tilley* that pensions (albeit taxable) are not taxable as "emoluments arising from employment", within the meaning of the taxing statute. That was demonstrated by the structure of the statute itself.

The *ratio* of the House of Lord's decision in *Dewhurst*, as identified in *Wales* v. *Tilley* and *Prendergast* v. *Cameron*[1] 23 TC 122 (CA), appears to have been that the true source of the payment made to Commander Dewhurst was not (as it had been for the Fosters) his contract of employment, which contained the contingent right to the payment under the articles, but the separate contract under which the company obtained its release from its contingent liability to make that payment in due course. The element of contingency in that case was not very strong—the circumstances in which a director might cease to be such without a right to payment were not very likely to occur—and the Court of Appeal had evidently discounted it. But insofar as it was a significant factor, it is a factor which exists in the instant case before me. Payments under the scheme were, of course, contingent on redundancy.

The majority in the House of Lords also noted that the sum which Commander Dewhurst received was less than that which he could have immediately claimed under the articles, by resigning altogether at once. The payment could, therefore, hardly be regarded as a mere substitute for a payment which (the Court of Appeal had held) would have been deferred remuneration for past services. That consideration may have reinforced their view that it was the new contract rather than the contract of employment which was the true source of the payment.

The reference which I have just made to "a mere substitute" leads naturally to cases like *Holland* v. *Geoghegan*[2] 48 TC 482 (the refuse collectors' compensation for their rights of salvage) and *Bird* v. *Martland* (compensation for the loss of the use of company cars), to which Mr. Butterfield referred. The relevance of that line of cases presupposes an inability to assign any reason to the payment other than the employment of the recipient. It also effectively presupposes that the emolument for which the payment is a substitute is itself an emolument from employment (usually, but not necessarily, a taxable perquisite). Now I am quite unable to see how *statutory* redundancy payments could be thought to be emoluments "from employment", s 579(1) Income and Corporation Taxes Act 1988 nowithstanding; and there is, in my view, no difference in principle between statutory redundancy payments and payments of the same character made in genuine redundancy circumstances under consensual arrangements. Mr. Butterfield did not seek to draw a contrary inference from s 579(1). I, therefore, accept Mr. Park's argument that the "substitution" line of cases is not

(1) [1940] AC 549. (2) [1972] 1 WLR 1473.

A in point in the present case. (Of course, Mr. Park also argues that even if payments under the scheme itself had been taxable as emoluments from employment—contrary to the Inspector's practice—it did not follow that the payments made in connection with the termination of the scheme would be taxable: *Dewhurst* et al.)

B As I understood him, Mr. Butterfield relied substantially on *Hamblett* v. *Godfrey*. The scheme, he argued, was on the evidence clearly connected with employment at Harland & Wolff, and was as much part of the contract of service as were the rights in issue in *Hamblett* v. *Godfrey*; and, as in that case, the sums were received for the loss of rights associated with an election to continue in employment.

C

There is, I believe, nothing in the judgments of the Court of Appeal in that case—or in either of the subsequent cases in the House of Lords (*Bray* v. *Best* [1989] STC 159 and *Shilton* v. *Wilmshurst*) where it has been noticed—to suggest that the decision in *Hamblett* v. *Godfrey* should be regarded as having significantly developed the law in this field. Whether a D payment is (to cite Lord Templeman) "... a reward for past services or an inducement to enter into employment and provide future services" or a "... reward or inducement for the employee to remain or become an employee", rather than a payment for something else, is a question of fact, and it will be determined on the facts of each case. Now in *Hamblett* v. *Godfrey* the employment (at GCHQ) was of a special character and the rights in question E were enjoyed, and by their very nature could only be enjoyed, within the employer/employee relationship, during the employment. The payments were made in recognition of changes in the conditions under which the employees performed their services. The changes were made because the employer regarded the continued existence of the rights as inappropriate in the context of the employment in question. On *those* facts, the "from employment" test F was found to be satisfied. But, as Mr. Park rightly pointed out, the enjoyment of rights under the scheme in the instant case was exclusively reserved to the period when the employment would, by definition, have ceased. That, Mr. Park contended, constituted a significant point of distinction between the facts of the two cases.

G Mr. Park drew my attention to the curious situation which could have arisen (and indeed still can arise for a few months longer) if an employee who had transferred to H & W '89 and received his element "A" payment had later been made redundant. He would then have received the balance of his scheme entitlement, under the two-year transitional arrangements. It would not seem possible for the Crown to accord to the second payment a H tax treatment consistent both with its arguments in relation to the first payment and with its previous practice in relation to scheme payments. If that previous practice was correct (as I think it was), the effect of the Crown's present claim is to tax, as an emolument from employment, a payment on account of a larger amount which was not such an emolument.

I In my judgment, the element "A" payments were not emoluments "from employment".

In the first place, it is unrealistic to regard them as "inducements" of any kind. In the employment circumstances prevailing, it was the offer of employment (or, if you will, of continued employment), and nothing else, which was the operative inducement. The board of Harland & Wolff well

knew that termination of the scheme—on almost any terms, let alone the ones offered—was not truly acceptable to the employees. Notwithstanding that, the 100 per cent. acceptance rate tells its own story.

Mr. Butterfield urged me to consider the employer's motives for paying the money. On that point, the position as it appears to me was this. Harland & Wolff, and the DED, wanted the business of the company to continue. That could only be if the business were privatised, with the introduction of one or more major outside investors. The current arrangements with the employees contained an impossible factor. That factor had to be got rid of: if it were not, the privatisation plan would collapse. The element "A" was offered in order to facilitate the elimination of the obstacle.

It is perhaps possible to regard the payments in *Hamblett* v. *Godfrey* as having also been made to remove what the employer saw as an obstacle. But the objective in that case consisted (as was pointed out by Knox J. and repeated by Purchas L.J.) of "... rights intimately linked with employment". The rights in the present case were genuinely linked with ex-employment, just like pensions. The source of the element "A" payments was not the employment but the removal of the liability to make payments if employment ceased in unfortunate circumstances.

I now turn to the second basis on which the "A" element is claimed to be assessable—s 154.

It is common ground that Mr. Haughey's employment is one to which this charging provision applies. Further, on the footing that my decision in relation to the taxability of the element "A" payment is correct, there is no chargeability apart from s 154. The question revolves round the satisfaction or otherwise of the pre-condition set out in s 154(1)(a), namely:

> "... by reason of his employment there is provided for him, or for others being members of his family or household, any benefit to which this section applies."

The section applies to certain described benefits and facilities and (subject to certain specified exceptions) to "... other benefits and facilities of whatsoever nature (whether or not similar to any of those mentioned above in this subsection". In the present case the "benefit" relied on is the receipt by Mr. Haughey of the element "A" payment (and, if I am wrong about the element "B" payment, that also). The general thrust of the provision as a whole is clearly directed against benefits in kind: and it is perhaps open to question whether Parliament had in mind payments of cash—at any rate cash payments made to the employee himself. But Mr. Park accepts that that is not a question which I (or probably any court below the House of Lords) can usefully raise anew because the Court of Appeal, in *Wicks* v. *Firth*[1] 56 TC 318, decided that cash sums were capable of being "benefits" within the section. "Other benefits or facilities of whatsoever nature" are strong words. All the same, it seems that this section (or its predecessors from 1948 in similar terms) was not invoked in "cash" cases—*Jennings* v. *Kinder*, for example, heard with *Hochstrasser* v. *Mayes*—prior to *Wicks* v. *Firth*; and it may have been that fact which led Lord Denning M.R., in *Wicks* v. *Firth*, to set forth a

[1] (CA) [1982] Ch 355; (HL) [1983] 2 AC 214.

A rather mistaken account of the origin of the "benefits in kind" legislation.

Two aspects of the pre-condition set out above fall to be considered. The first is "by reason of his employment". The meaning of those words—
B that is to say, the extent (if any) to which it differs from the meaning of "from employment" in the context of mainstream Sch E—has not been considered by the House of Lords. The reason is that, in the great majority of instances, the benefit in question has (as one would expect) been provided by, and at the expense of, the employer. *Wicks* v. *Firth* was such a case. Where the benefit is so provided, the general rule is that the benefit is deemed to
C have been improved "by reason of his employment" (s 168(3)), and the actual meaning of the phrase is a merely hypothetical question. In *Wicks* v. *Firth* the House of Lords declined to discuss it.

In the present case the question is not academic because the element "A" payment was made, not by Mr. Haughey's employer, but by the DED. Mr.
D Park contended that, if a payment is not an emolument "from" employment, it is also not made "by reason of" the employee's employment. Further, on the facts of the present case, it was made "by reason of" Mr. Haughey and a sufficient number of other employees electing to surrender his (and their) rights, in order to enable the privatisation plan to proceed.

E I find myself unable to adopt that approach. Although the House of Lords have been able to side-step the issue, in *Wicks* v. *Firth* the Court of Appeal did not (and, indeed, could not, because the Crown succeeded there). On this point Lord Denning M.R., who dissented in the result, was at one with Oliver and Walkins L.JJ. and he said (at page 338)(1):

F "The words cover cases where the fact of employment is the causa sine qua non of the fringe benefits, that is, where the employee would not have received fringe benefits unless he had been an employee. The fact of employment must have been one of the causes of the benefit being provided. but it need not be the sole cause, or even the dominant
G cause. It is sufficient if the employment was an operative cause—in the sense that it was a condition of the benefit being granted."

Lord Denning saw in the change of wording a deliberate departure from the mainstream Sch E test. Oliver L.J., at page 344(2), said:

H "One is directed to see whether the benefit is provided by reason of the employment and in the context of these provisions that, in my judgment, involves no more than asking the question 'what is it that enables the person concerned to enjoy the benefit?' without the necessity for too sophisticated an analysis of the operative reasons why that person may have been prompted to apply for the benefit or to avail himself of it."

I In the light of those observations it seems to me that there is no room, on the facts of the present case, for a finding that the payment was not made "by reason of" Mr. Haughey's employment, within the meaning of those words in s 154.

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(1) [1982] Ch 355, at page 363G/H. (2) *Ibid*, at page 371A.

That leaves the second aspect of the pre-condition, which concerns the word "benefit". With that, I will take an associated argument which Mr. Park put forward, related to s 156(1). A

The latter section is concerned with the quantum of an "emolument" brought into charge by s 154, and it provides that it shall be a sum equal to the cost of the benefit "... less so much (if any) of it as is made good by the employee to those providing the benefit". Unquestionably, the latter words are called into operation in any case in which an employee has made some payment for a benefit in kind provided to him (or his family). Mr. Park suggested that a similar deduction falls to be made in any case in which non-pecuniary consideration is given by an employee for a benefit provided in money form. As I indicated during the hearing, I do not accept that. What has to be "made good" is an amount of "cost": and it seems to me that only money can do that. But Mr. Park went on to contend that an employee does not have to rely on a deduction under s 156(1) in any case in which he has paid to the provider of the benefit a sum equal to the *full* cost of that which has been provided: because there is then no "benefit" at all, within s 154. That principle can be applied to the case where what has been provided is money. If the employee gives full consideration for the provision, there is no "benefit". (I need hardly add that for this purpose consideration in the form of services can be excluded, because the employer's payment would clearly be taxable under s 19, and s 154 would be wholly inapplicable.) Mr. Park completes his argument by saying that, on the facts, Mr. Haughey's surrender of his rights under the scheme constituted full consideration for the element "A" payment. B C D E

If that argument is not accepted, it would appear that, if a company employer were to purchase any asset from one of its employees at market value, (his house, for example) the sale price would be taxable under s 154. A slightly less extreme example is provided by *Hochstrasser* v. *Mayes* itself (or, to be precise, *Jennings* v. *Kinder*): and Mr. Butterfield did not flinch from the proposition that Mr. Jennings ought perhaps to have been charged under s 154's predecessor, and would be charged today. He submitted that the money in Mr. Haughey's hand must be accounted a "benefit" within the meaning of the section: it was better than nothing—and Mr. Haughey had it in hand although, in the event, he may never be made redundant. F G

The consequences of adopting the Crown's approach are, to my mind, so appalling that something must be wrong. The situation has been created by the "cash benefit" decision in *Wicks* v. *Firth*: if that was wrong, *cadit quaestio*. But on the assumption that it is right, it seems to me that Parliament must have intended Mr. Park's approach to "benefits" to be right also. Section 154 brings benefits into charge. All kinds of benefits are covered: but whatever they are, they must still be capable of being described as "benefits". The legislation is aimed at profits (in a broad sense) which escape taxation under the mainstream Sch E provisions for one reason or another. It is not aimed at receipts resulting from fair bargains. H

The bargain in the present case had, as its constituents, more than must the surrender of rights against a money payment. It would not be realistic to ignore another factor: the offer of continued employment. But at the end of the day I do not think that matters. I would adopt the words of Viscount Simonds in *Hochstrasser* v. *Mayes*[1]: I

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[1] 38 TC 673, at page 706.

A "Nor, if it became relevant, should I in the present case feel equal to the task of weighing the benefit or detriment enjoyed by the one side or the other. It was a bargain, and as good bargains should be, thought by each side to be worth while. I have the highest authority for my course if I leave it there and 'reject the lore of nicely calculated less or more'."

B

In my judgment, the payments made to Mr. Haughey were not chargeable under s 154.

In the result, I hold that the element "B" payment should be included in
C Mr. Haughey's taxable emoluments as an emolument within s 19; but the element "A" payment should not be included, under any head of charge. The notice of appeal reveals no other point of contention between the parties on this assessment, and none was suggested during the hearing. I, accordingly, determine the appeal by reducing the assessment by £4,506 to the sum of £18,736.

D

B. O'Brien } Commissioner for the Special Purposes of the Income Tax Acts

E 15–19 Bedford Square
London
WC1B 3AS

13 May 1991

F

The Crown's appeal was heard in the Court of Appeal (Northern Ireland) (Hutton L.C.J., MacDermott L.J. and Nicholson J.) on 2, 3, 4, 5 and 6 March when judgment was reserved. On 8 May 1992 judgment was
G given unanimously against the Crown, with costs.

Brian Kerr Q.C. and *Ronald Weatherup* for the Crown.

Andrew Park Q.C. and *John Thompson* for the taxpayer.

H

The cases cited in argument were those referred to in the judgment.

I **Hutton L.C.J.**:—Two questions arise on this appeal. The first question is whether the Respondent, who worked as a construction manager for Harland & Wolff, the Belfast shipbuilding company, was rightly assessed under Sch E of the Income and Corporation Taxes Act 1988 for the year 1989–1990 in the sum of £23,242, which included a sum of £4,506 paid to him in the circumstances which are set out below. If the answer to that question is in the negative, the second question is whether the sum of £4,506 is taxable under s 154 of the 1988 Act.

In stating the background to the questions which arise, I gratefully adopt the description of the recent history of Harland & Wolff given by the Special Commissioner, Mr. Brian O'Brien, in pages 1, 2 and 3 of his decision(1):

"At one time the company was a very significant employer indeed in Northern Ireland, with some 30,000 employees; but with the disappearance of the tanker trade in the early 1970's, its business (and its workforce) greatly declined. In 1975 the Department of Commerce (relevantly represented in 1989 by the Department of Economic Development) became the sole shareholder. There followed fourteen years of public ownership, during which the business did not prove commercially successful. Indeed, over that period it was propped up by the grants and loans from public funds, amounting to some £540m. By 1989 the workforce had shrunk to around 2,800—and even that number was not fully justified in commercial terms. Nevertheless, the employment situation in Northern Ireland was such that Harland & Wolff was still regarded as an important employer.

In May 1988 the Government decided that Harland & Wolff—and other shipyards in public ownership—should if possible be privatised. It was, it seems, no longer content to accept the ever-increasing losses; and improvement was seen to be dependent on the application of private sector disciplines. The DED hoped that the company would be able to find a buyer, because the probable alternative was the closure of the shipyard: with the inevitable adverse effects on employment, not only at Harland & Wolff itself but also for other businesses in the UK dependent on trading relationships with Harland & Wolff. But the possibility of closure was considered.

The company appreciated at a fairly early stage that privatisation would involve certain changes, so far as its employees were concerned. There would, for example, have to be acceptance of more flexible working arrangements (that is to say, less rigidity in the demarcation of functions assigned to particular jobs). Far more important for present purposes, there was also the question of the existing enhanced redundancy scheme.

The employees of Harland & Wolff had, between 1978 and 1986, been entitled to benefit under a statutory shipbuilding redundancy payments scheme. That was terminated in 1986 and it was replaced first by the ordinary statutory redundancy rights enjoyed by employees generally (which were not as extensive as those under the shipbuilding scheme) and, by way of top-up, a non-statutory enhanced redundancy scheme. I shall refer to that as 'the scheme'. Similar top-up schemes were, I understand, adopted by other shipyards in England and Scotland. Unlike the company's pension scheme, the scheme was not independently funded—the DED simply met the company's obligations as and when they arose. Resort to the scheme was frequent and it was plain that it could not survive privatisation.

After a false start during the second half of 1988, new arrangements for Harland & Wolff started taking shape early in 1989. The company had found a substantial buyer in the Olsen group of companies, and agreement in principle was reached between Harland & Wolff, Olsen

(1) Pages 277G/278H *ante*.

A and the DED in March. *Inter alia*, a new corporate structure was proposed. A holding company, Harland & Wolff Holdings plc ('Holdings') would be formed, with an issued share capital of some £15m. It would have a subsidiary as the operating company, Harland & Wolff 1989 Ltd. ('H & W '89'—it is now called Harland & Wolff Shipbuilding & Heavy Industries Ltd.). Of Holdings' share capital, £12m (80 per cent.) would B be provided by Olsen. It was proposed to raise more of the remainder by way of an offer of shares to Harland & Wolff's management and employees ('the MEBO').

Leaving aside purely administrative steps, the new arrangements were to be brought in in two stages, each of which critically involved the C employees. First, a sufficient number of the employees whom management wished to retain had to agree to transfer from H & W to H & W '89, on new terms. Secondly, there had to be an adequate response to the MEBO proposal. The privatisation arrangements were dependent on the satisfaction of both conditions."

D The Crown, in its submission to this Court, placed considerable reliance upon the various documents issued by Harland & Wolff as showing that a payment of £4,506 was offered to the Respondent as an inducement to enter into new employment with Harland & Wolff 1989. Therefore, it is necessary to refer to the terms of some of these documents.

E It was not in dispute that the various parties accepted that, after privatisation, the financial resources required to continue the enhanced redundancy scheme would not be available, and it was, therefore, decided to terminate the enhanced redundancy scheme prior to the management and employee buy-out on certain terms which were mentioned and subsequently specified in the documents, to which I now refer.

F On 24 April 1989 Harland & Wolff sent to its employees the first issue of Privatisation News. It contained (*inter alia*) the following paragraphs.

"A new beginning . . .

On March 22 the Government agreed in principle to the formation G of a new Harland & Wolff.

The decision was the response to a campaign by management and trade unions, supported by people throughout Northern Ireland, to secure the future of the Belfast shipyard.

A new company . . .

H

The aim is to form the new company on 1st September 1989 with £15 million of share capital. We hope to raise £2.5 million of this from employees at all levels.

Olsen companies will contribute £12 million leaving £500,000 from other sources. Approximately £6 million of the £15 million will be used I to buy the shipyard and all the equipment.

Government is providing up to £39 million in grants and £60 million loans with a limited fund for performance guarantees in the early years of the new company.

This launch support is necessary but thereafter the company will have to stand on its own.

A new partner . . .

Mr. Fred Olsen and his companies are old customers of H&W.

His experience and expertise in shipping and shipbuilding will be very valuable to the company. His financial support and the initial order for three Suezmax tankers, valued at $150 million, have been and will be vital. He will be an equal partner with the workforce in terms of voting rights although he is investing more money.

A new commitment . . .

The buy-out has been chosen as the way to secure the shipyard's future. Closure was a real alternative. **Although the company can now be back in business with an assured order book, the future depends on the commitment of all employees.**

Employees at all levels will have an opportunity to share in the company's future by becoming shareholders.

Management will run the company, but they will be answerable to all the shareholders. As shareholders therefore employees will have a greater say in the company.

H&W must aim to become the most efficient in Europe and compete successfully in the world markets. Your commitment is essential.

There will be productivity incentives. It will need improvements in every aspect of the business. There will be a new shipyard layout.

It must be done to ensure success. It can be done if employees at all levels play their part.

A new structure . . .

A new beginning means change. The new company will need a committed workforce. To ensure success in competition for new orders which will depend upon efficiency, changes in employment conditions will be required, including, for example, more flexible working practices.

Statutory redundancy will not be affected. Pension rights will be protected.

A change of the enhanced redundancy scheme will be required. All redundancies and any termination of employment will be carried out in a fair and lawful manner. Any redundancies prior to September will be covered by the enhanced scheme.

One option is that employees who remain after September 1989 could receive a partial cash sum this year plus two years enhanced redundancy cover in return for cancelling the enhanced scheme. Discussions about these and other issues will be held with employee representatives."

On 1 May 1989 Harland & Wolff sent to its employees the second issue of Privatisation News which contained encouraging information about better market conditions for shipbuilding, of which Harland & Wolff could take advantage.

On 8 May 1989 Harland & Wolff sent to its employees the third issue of Privatisation News which contained (*inter alia*) the following paragraphs:

"In this bulletin we wish to provide information about one of the key issues which arose in our negotiations with Government—an issue which to a greater or lesser extent affects all of us and may remain important even if the future is brighter—redundancy payments.

Since 1977 the enhanced redundancy payment scheme has been available to all H&W employees who are declared redundant.

As part of privatisation we have to review this and we wish you to understand the position.

Facts about the scheme . . .

The enhanced Shipbuilders Redundancy Payment Scheme was introduced in 1977 for a fixed period as part of a wider programme of rationalisation within the British shipbuilding industry. It was subsequently renewed on several occasions. The current H&W scheme, whilst having no fixed termination date, is not a permanent guaranteed right of employment.

Even while it remains, to receive the benefit of the scheme an employee has to be made redundant. It is not within an employee's power to chose whether they receive it or not. The company has to decide who will be declared redundant and when.

There is no pot of cash. It is not the same as the pension fund for which payments are set aside on a yearly basis.

No private shipbuilding company could afford to maintain such an enhanced redundancy scheme. This includes the companies privatised out of British Shipbuilders which have a similar scheme that terminates this summer. **The new Harland & Wolff cannot afford to maintain such an enhanced scheme, but statutory redundancy entitlement will remain.**

A New Deal . . .

In negotiating the buy-out with Government we requested, and ministers have agreed, that a 'Fixed Sum' should be paid to cover the costs of

* making redundancy payments at the same level as under the enhanced scheme in the first two years of operation as a private company—there will be no loss of enhanced redundancy payment to anyone who has to be declared redundant within two years.

* financial recognition to all existing employees transferred to the new company for changes in working practices and conditions (including the ending of the enhanced redundancy scheme) that will be necessary to ensure competitiveness.

The 'Fixed Sum' can only be used for these purposes.

We believe this is a generous agreement and as good, if not better, than any other British shipbuilder has had on privatisation.

Enhanced redundancy guarantees have generally been restricted to a fixed number of redundancies after privatisation while we have offered cover for a two year period.

The new company will not benefit from any of the 'Fixed Sum' which is not used for the purposes outlined above, but is liable to meet agreed payments if these exceed this amount.

Company Proposal . . .

We have based our proposal on the experience of companies privatised from British Shipbuilders.

Subject to your support and as consideration for your acceptance of new employment terms we propose;

* to pay every employee a gross cash sum calculated at three tenths of the amount of the enhanced payment (the amount in excess of the statutory payment) which he or she would have received if declared redundant now. Everyone still employed at H&W will receive this, even if they are never declared redundant. The payment could be subject to income tax, but we are still investigating this.

* to pay any employee made redundant within the next two years, to August 31, 1991, a redundancy payment equal to his or her full entitlement which should have been due under the enhanced and statutory redundancy schemes less the initial payment.

* any employee made redundant before this is introduced will obtain the full entitlement under the enhanced and statutory schemes. Any employee made redundant after September 1, 1991 will receive only the statutory redundancy payment, but, of course, this person will have received the initial payment.

We believe that this is the fairest way of using the funds provided by the Government, balancing a cash payment to everyone for the changes in working practices and conditions and full protection for anyone who is made redundant during the first two years of privatisation.

We believe that this is as good a deal as any other British shipbuilder has achieved on privatisation.

However, we are prepared to consider alternative approaches within the stipulated guidelines which may be proposed by your representatives.

Remember that if you are employed in the new H&W after privatisation:

* statutory redundancy will not be affected

* pension entitlements remain protected

* you will receive the cash sum referred to above

* you will have two years protection for the balance of the enhanced redundancy cover

The choice is between employment and this package in a new company—which has an assured order book and the prospect of further orders in an improving market, or closure."

On 1 June 1989 Harland & Wolff sent to its employees the fourth issue of Privatisation News which contained (*inter alia*) the following paragraphs:

"Facts about the changes . . .

A Most of the basic conditions of employment prevailing in the old company will be carried forward into the new Harland & Wolff.

Hours of work . . . 39—NO CHANGE for manual and many staff employees, but for some members of staff we will need to discuss the implications of our desire to harmonise hours of working.

B

Pension arrangements ..... NO CHANGE

Holiday entitlement ..... NO CHANGE, 33 days

Sick Pay benefits ..... NO CHANGE

C

Paid Leave entitlement ..... NO CHANGE

However changes are required to ensure:

* Complete flexibility of all employees in their jobs and duties to eliminate ineffective manning patterns and unproductive methods
D (and where this requires further training it will be provided).

* Full use of the working day.

* Working arrangements free from restrictions and demarcations.

E

* Working hour arrangements and shift patterns compatible with order book demands and customer requirements.

* The resolution of problems and disputes without affecting production."

F

In July 1989 the employees of Harland & Wolff numbered 2,800 and on 6 July 2,361 employees were sent an offer of a job with the new company Harland & Wolff 1989. The job offer consisted of a number of documents which contained (*inter alia*) the following statements. The introduction contained the following statement:

G "Only if enough people accept the new employment terms and conditions can we proceed to the final stages of the buyout."

The letter from the chairman and chief executive, Mr. John Parker, contained the following statements:

H "The buyout has now entered a crucially important stage. Two major hurdles have yet to be crossed. First, a sufficient number of employees with the right balance of skills must accept new terms and conditions of employment and the termination of the enhanced redundancy scheme. Secondly, the buyout must be successfully concluded.

I In addition to the enclosed new terms and conditions, this pack contains:

— details of the **ex gratia payment** which will be paid to employees who accept the new terms and conditions and the ending of the enhanced redundancy scheme and who report for work following completion of the buyout. I refer to these payments again later in this letter. These details also contain information about the

new redundancy policy that will apply from completion of the buy-out.

Should you accept this offer and the termination of the enhanced redundancy scheme and (as mentioned earlier) start work following completion of the buyout, you will receive an ex gratia payment, details of which (including future redundancy policy) you will find in Section 4 of this information pack.

Please complete the Employee Reply Slip towards the front of this package which will signify your acceptance of these proposals. Remove and return it as soon as possible but **NOT LATER THAN 9.00 AM MONDAY, 31ST JULY 1989.**"

Section 4 of the documents contained the following details in respect of the *ex gratia* payment:

" EX GRATIA FORMULA

Subject to successful completion of the buyout targeted for September, all new company employees who accept the new terms and conditions and the ending of the enhanced redundancy scheme and who report for work following the completion of the buyout will be entitled to an ex gratia payment calculated in accordance with the following formula (A+B):

A) 30 %. of enhanced redundancy scheme 'entitlement' (calculated at 1/9/89) **plus**

B) £100 (one hundred Pounds sterling) per complete year of service at H&W with the minimum payment under this element 'B' being £700.

It is not yet known if the ex gratia payment can be paid free of tax—on which we are in discussion with the Inland Revenue. In the meantime, it would be prudent to assume it will be subject to tax and National Insurance.

In addition, in the event of an employee of the new company being declared redundant during the two year period following completion of the buyout, the redundant employee would receive, in addition to the ex gratia payment (A+B), the balance of his/her enhanced redundancy scheme 'entitlement' as calculated at 1/9/89. The redundant employee would also receive full statutory redundancy entitlement (which is not affected by the new terms and conditions).

Subject to any unforeseen administrative difficulties, it would be intended to make the ex gratia payment to employees during the two weeks following completion of the buyout."

The employee reply slip, to be signed by an employee, contained the following statements:

"I have read the letter of the offer dated 6th July,1989 and the new terms and conditions of employment which are attached to it.

I hereby confirm that I accept the new terms and conditions on the basis set out in that letter and the termination of the existing H&W enhanced redundancy scheme."

A The offer was accepted by every person to whom it was sent. Most of the employees to whom a job offer was not sent were given notice of redundancy on 6 July 1989.

A prospectus offering shares in Harland & Wolff 1989 was issued on 21 August 1989. The prospectus contained the following definition of "Ex gratia B payment":

> "... the payment due to an Employee in consideration of his accepting new terms and conditions of employment with H&W '89 and the termination of the enhanced Shipbuilders Redundancy Payments Scheme, subject to the completion of the Buyout."

C

The prospectus also contained the following statements in Part 4 under the heading "Employment and productivity":

> "In consideration of acceptance of the new employment terms and the ending of the SBRPS (the enhanced Shipbuilders Redundancy D Payments Scheme), Employees will receive an Ex-gratia Payment shortly after completion of the Buyout. This will not be received by Employees if the Buyout does not proceed. If an Employee is made redundant prior to 7th September, 1991 he will have certain limited enhanced redundancy rights.
>
> E DED will meet the cost of the compensation to the workforce of ending the enhanced Shipbuilders Redundancy Payments Scheme, compensation for changes in employment terms and any redundancies within two years of completion of the Buyout up to a maximum of £10 million.
>
> By a letter dated 8th August, 1989 in favour of the Company and H&W '89, DED agreed *inter alia*:
>
> F
>
> > (d) to fund the costs of buyout of the Shipbuilders Enhanced Redundancy Scheme (constituting part of the Ex-gratia Payment) and payment in respect of acceptance by Employees of the new terms and conditions of employment (constituting the balance of G the Ex-gratia Payment) together with redundancy costs in respect of employees made redundant after completion of the Buyout and prior to the expiration of two years following the Buyout subject to an overall maximum of £10 million."

On 8 September 1989 the management and employee buyout was com- H pleted when Harland & Wolff Holdings acquired the entire issued share capital of Harland & Wolff 1989.

On 22 September 1989 an "ex gratia" payment was made to each employee who had accepted the job offer. Each employee's "ex gratia" payment was calculated in accordance with the following "A+B" formula:

I

> (A) 30 per cent. of his enhanced redundancy scheme "entitlement" (calculated as at 1 September 1989) ("the A Element"); and
>
> (B) £100 for each complete year of his service at H & W, subject to a minimum of £700 ("the B Element").

The statement of agreed facts states, at para 8:

"The A Element was paid direct by the DED. Prior agreement as to the taxation of the A Element not having been reached, it was paid after deduction of amounts equivalent to those which would have been deducted under the Pay As You Earn System and as Employees' National Insurance Contributions if the A Element had represented emoluments chargeable to income tax under Schedule E and earnings for the purposes of National Insurance Contributions. The amounts deducted were deposited in a separate bank account in the name of the DED.

The B Element was paid by H&W '89 through the payroll system under deduction of PAYE and NIC. The DED provided H&W '89 with the funds needed to pay the B Element.

The aggregate 'ex gratia' payments made to employees were £9,178,172 comprising £5,561,264 in respect of the A Element and £3,616,908 in respect of the B Element."

The Respondent was paid a total sum of £5,806, representing £4,506 in respect of the A Element and £1,300 in respect of the B element.

It is agreed that tax was not charged on redundancy payments made between 1987 and 1989 to redundant employees under the enhanced redundancy scheme, although para 11 of the statement of agreed facts states that this agreed fact does not imply any agreement as to whether tax was not in law chargeable on such payments.

In a decision stated with admirable clarity the Special Commissioner held that the sum of £4,506 was not taxable under Sch E or under s 154. The Special Commissioner first decided that it was appropriate to apportion the sum of £5,806 received by the Respondent between element A (£4,506) and element B (£1,300) and to treat element A as being compensation for the loss of contingent rights under the enhanced redundancy scheme and element B as consideration for the acceptance of the new terms and conditions of working applicable to an employee of Harland & Wolff 1989. At page 7B of his decision, the Special Commissioner stated(1):

"It is clear from the words in s 4 of the offer documentation, which I have cited, that what was set out as a single payment was the consideration for both of the changes; but that documentation does not clearly purport to distinguish between them. All that can be said is that that document is consistent with the existence of some appropriation viz., of the 'A' element to one and of the 'B' element to the other. However, the prospectus relating to the offer of the Holdings shares is more explicit. I refer, in particular, to para (d) of the summary of a 'DED support letter', set out on page 87 of the prospectus, which states that the DED had agreed:

'... to fund the costs of buyout of the shipbuilders Enhanced Redundancy Scheme (constituting part of the Ex-gratia Payment) and payment in respect of acceptance by Employees of the new terms and conditions of employment (constituting the balance of the Ex-gratia Payment) ...'

(1) Pages 281F/282C *ante*.

A I appreciate that the prospectus and, indeed the letter summarised therein were not in existence on 31 July 1989 when the 2,361 employees accepted the job offer (and its consequences). But it is, to my mind, inconceivable that the prospectus should have set the matter out in such terms if the division of the so-called, *ex-gratia* payment into two parts with distinct considerations had not represented the understanding of B the two sides to the summer negotiations. Furthermore, I can well understand that the staff side would not wish it to appear that the changes in the terms and conditions of work had been conceded gratuitously. The passage in the prospectus does not expressly tie the two distinct considerations to the 'A' and 'B' elements respectively; but the logic of the manner in which the payments were made is apparent. The C DED (as the owner of H & W) was responsible for H & W's obligations in relation to the scheme: and it paid element 'A'. The new working terms concerned H & W '89: and it made the element 'B' payments.

The oral evidence leaves me in no doubt that the emergence of element 'B' was motivated by a desire to do something about perceived D unfairness in the existing formula by which the scheme was to be terminated. Nonetheless, the employees bound themselves to a different contractual consideration for the 'B' element."

The Special Commissioner held that the sum of £4,506 was not taxable under Sch E because the element A payments were not emoluments "from E employment". He stated, at page 13B(1):

"In the first place, it is unrealistic to regard them as 'inducements' of any kind. In the employment circumstances prevailing, it was the offer of employment (or, if you will, of continued employment), and nothing else, which was the operative inducement. The board of F Harland & Wolff well knew that termination of the scheme—on almost any terms, let alone the ones offered—was not truly acceptable to the employees. Notwithstanding that, the 100 per cent. acceptance rate tells its own story."

He further held, at page 13F(2):

G "The rights in the present case were genuinely linked with ex-employment, just like pensions. The source of the element 'A' payments was not the employment but the removal or the liability to make payments if employment ceased in unfortunate circumstances."

H The Special Commissioner also ruled that the sum of £4,506 was not taxable under s 154, and he held that the arrangement under which the Respondent received £4,506 in return for surrendering his contingent rights in the enhanced redundancy scheme was a fair bargain and stated, at page 17C of his decision(3):

I "The legislation is aimed at profits (in a broad sense) which escaped taxation under the main stream Sch E provisions for one reason or another. It is not aimed at receipts resulting from fair bargains."

The Special Commissioner held that the element B (£1,300) was taxable under Sch E on the ground that it was an inducement to enter employment

(1) Pages 285I/286A *ante*. (2) Page 286D *ante*. (3) Page 288H *ante*.

with Harland & Wolff 1989, and was, therefore, an emolument from employment. A

The Crown appealed against the decision that the sum of £4,506 was not taxable under Sch E of s 154. The Respondent cross-appealed against the decision that the sum of £1,300 was taxable under Sch E but abandoned this cross-appeal before the commencement of the hearing before this Court. B

Counsel for the Crown, Mr. Kerr Q.C. and Mr. Weatherup, advanced four main arguments which elucidated the issues which arose on this appeal and I would wish to pay tribute to the clarity of their submissions, and also to the clarity of the submissions of Mr. Park Q.C. who appeared with Mr. Thompson on behalf of the Respondent. C

1. It was submitted on behalf of the Crown that the Special Commissioner was not entitled to apportion the payment of £5,806 into two parts, one attributable to compensation for the loss of contingent rights under the enhanced redundancy scheme and one constituting consideration for the acceptance of the new terms and conditions of working applicable to employment with Harland & Wolff 1989. Mr. Kerr submitted that the issues of Privatisation News and the Job Offer made it clear that, at the outset, there was only one payment which was offered in consideration of three matters, viz. acceptance of new terms and working conditions, termination of the enhanced redundancy scheme and accepting employment with the new company, and this payment constituted element A before element B was negotiated. He submitted that the total payment of £5,806 comprising elements of £4,506 and £1,300 was all payable for one overall purpose which was to induce those employees who were not made redundant to join Harland & Wolf 1989 on new terms and conditions which would not include the enhanced redundancy scheme. He further submitted that the extent to which the payment of £5,806 was intended to compensate for the loss of contingent rights under the enhanced redundancy scheme was minimal and did not prevent the entire payment from being an inducement to enter into new employment on new terms and conditions. Mr. Kerr also criticised the Special Commissioner for taking into account the DED letter dated 8 August 1989 which was written after the nature of the payment was formulated and the offer of it had been made to the employees. D E F G

2. In reliance on the judgment of Lord Templeman in *Shilton* v. *Wilmshurst*(1) [1991] 1 AC 684, at 689, Mr. Kerr submitted that the offer of the payment of £5,806, being an inducement to enter into the new employment with Harland & Wolff 1989, was an "emolument from employment" and was, therefore, taxable under Sch E. H

3. It was submitted, in the alternative, that if it was correct to apportion the sum of £5,806 and regard the payment of £4,506 as compensation for the extinction of the Respondent's contingent rights in the enhanced redundancy scheme, receipt of a payment under the enhanced redundancy scheme was, in law, taxable under Sch E as an emolument from employment (even if, in practice, the Revenue did not claim the tax) and that, accordingly, the compensation received in respect of the extinction of the right to receive such a payment was itself subject to tax. I

(1) 64 TC 78.

4. In the alternative, it was submitted that the payment of £4,506 was taxable under s 154.

I propose to consider the first two issues together, and in doing so I apply the principle stated by Lord Hanworth M.R. in *Henry* v. *Foster* 16 TC 605, at 628:

"... in all tax cases we have to look at the substance of the matter."

Apportionment Of The Sum Of £5,806 And Whether Payment Of The Sum Of £4,506 Was An Inducement To Enter Into New Employment On New Terms And Conditions.

Whilst it is possible to regard some part of the aggregate sum of £5,806 as being paid as consideration for accepting the new terms and working conditions and, therefore, as an inducement, I consider it to be clear that a substantial part of that sum was paid to the Respondent to compensate him for the loss of his contingent rights in the enhanced redundancy scheme. I regard this as clear from the wording of the documentation to which I have earlier referred. In my opinion, this view is further supported by the considerations that element A of the total payment was calculated with reference to 30 per cent. of the amount of the enhanced redundancy payment which the Respondent would have received if he had been declared redundant in the summer of 1989, and that the Special Commissioner found as a fact, at page 4D of his decision, that the 30 per cent. certainly did not overvalue the employees' contingent rights in the enhanced redundancy scheme.

I am further of opinion that this payment in respect of the loss of the contingent rights in the enhanced redundancy scheme cannot be regarded as an inducement to enter into new employment with Harland & Wolff 1989; it was paid as compensation for the loss, not as an inducement to remain in employment or enter into new employment. Accordingly, as the total payment of £5,806 consisted, in part, of compensation for the loss of the contingent rights in the scheme and, in part, of consideration for accepting new terms and conditions of employment, I consider that the Special Commissioner was fully entitled to apportion the total payment into two parts, and that ample authority for such an apportionment is found in the decision of the House of Lords in *Tilley* v. *Wales*(1) [1943] AC 386.

Mr. Kerr criticised the Special Commissioner for attributing the entirety of element A (which represented 30 per cent. of enhanced redundancy scheme "entitlement") to compensation for the loss of the Respondent's contingency rights under the scheme, because he submitted that the issues of the Privatisation News, sent to the employees before there was agreement that the additional element B sum would be paid, made it clear that the payment of 30 per cent. of enhanced redundancy scheme "entitlement" was intended as consideration for the acceptance of new employment terms as well as for the termination of rights in the enhanced redundancy scheme.

I consider that the decision as to what part of the payment of £5,806 should be apportioned to compensation for the loss of rights in the enhanced redundancy scheme and what part should be apportioned to consideration for acceptance of new terms and conditions of employment was a decision to

(1) 25 TC 136.

be made by the Special Commissioner on the facts before him. Accordingly, his decision on apportionment can only be challenged on the well-known grounds stated by Lord Radcliffe in *Edwards* v. *Bairstow & Another*(1) [1956] AC 14, at 36. In my opinion, no such challenge can validly be mounted by the Appellant. I consider that there was evidence before the Special Commissioner to justify the apportionment which he made, and that, as I have already stated, that apportionment is supported by the considerations that element A of the total payment was calculated with reference to 30 per cent. of the amount of the enhanced redundancy payment which the Respondent would have received if he had been declared redundant in the summer of 1989, and by the Special Commissioner's finding of fact at page 4D of his decision that the 30 per cent. certainly did not overvalue the employees' contingent rights in the enhanced redundancy scheme. In my opinion, the reasoning of the Special Commissioner at page 7A-H and 8A-B of his decision is persuasive, and his determination as to apportionment is not one which has no evidence to support it or which is contradicted by the true and only reasonable conclusion.

There is a further reason why I would not set aside the apportionment made by the Special Commissioner even if, contrary to what I have held, I considered that he had erred in law in making it. The reason is that stated by Viscount Dilhorne in *Yuill* v. *Wilson* [1980] 3 All ER 7, at 14g(2):

> "My Lords, it would not in my opinion be right to remit the case to the commissioners for them to make a finding of fact on this issue when the Crown could at the hearing before them, if they had thought fit to do so, have put forward the contention as an alternative to their main contention, that if the two companies had not realised a gain on the completion of the sales of the full purchase price, they had realised the moneys which they were able to enjoy and of which they were free to dispose and the value of the contingent rights to the balance of the purchase price, and have called evidence with regard thereto.
>
> I cannot think it right that the Crown should now be given the opportunity of supplementing the case they presented against the taxpayer and of calling fresh evidence with regard thereto.
>
> In my opinion the case should not be remitted to the commissioners on this or any other point. The power to remit given by the Taxes Management Act 1970, s 56(6) and (7) is wide but I have not known it exercised so as to enable the Crown to obtain re-hearing and to call fresh evidence in order to obtain a finding on a question which could not have been raised at the first hearing; nor have I known prior to this case of any instance of a court remitting a case to allow commissioners to make such further findings of fact and to hear further evidence as they might deem appropriate in the light of the judgment of the court. I do not think that the Court of Appeal was right to remit the case to the commissioners for that purpose."

I consider that it is clear from the decision of the Special Commissioner that the Crown argued that the entirety of element A was an inducement to remain in employment or to enter into new employment, and so taxable, but that the Crown did not argue that, if the Special Commissioner rejected this argument, he should carry out an apportionment of element A and attribute

(1) 36 TC 207, at page 229. (2) 52 TC 674, at page 714B/E.

part of it to compensation for the extinction of contingent rights and part of it to inducement to remain in, or enter into, employment. At page 8B of his decision, the Special Commissioner stated(1):

> "I now turn to element 'A'. On this aspect, the parties adopted very different approaches. Mr. Park saw the payment as one made for giving up entirely an existing right relating to the contingency of redundancy. Mr. Butterfield, on the other hand, saw it as a payment for good staff relations in a continuing employment or as an inducement to remain in that employment—recalling *Laidler* v. *Perry* 42 TC 351, which he did not, however, actually cite—or, possibly (but not preferably) as an inducement to enter into employment with H & W '89."

Accordingly, for the two reasons I have stated, I would not set aside the apportionment made by the Special Commissioner. I also consider that, as element A constituting the sum of £4,506 was paid to the Respondent to compensate him for his loss of contingent rights in the enhanced redundancy scheme, it was not taxable as an inducement to remain in, or enter into, employment.

Was a payment under the Enhanced Redundancy Scheme taxable in law under Sch E as an emolument from employment so that compensation in respect of the extinction of the scheme was also taxable?

Section 19 Sch E of the Income and Corporation Taxes Act 1988 provides:

> "(1) The Schedule referred to as Schedule E is as follows:—
>
> SCHEDULE E
>
> 1. Tax under this Schedule shall be charged in respect of any office or employment on emoluments therefrom which fall under one or more than one of the following Cases."

The House of Lords has given guidance in a number of cases on the meaning of the words "emoluments therefrom" and I, therefore, turn to those authorities. In *Hochstrasser* v. *Mayes* [1960] AC 376, at 391, Lord Radcliffe stated(2):

> "... it is not easy in any of these cases in which the holder of an office or employment receives a benefit which he would not have received but for his holding of that office or employment to say precisely why one considers that the money paid in one instance is, in another instance is not, a 'perquisite of profit ... therefrom.'
>
> The test to be applied is the same for all. It is contained in the statutory requirement that the payment, if it is to be the subject of assessment, must arise 'from' the office or employment. In the past several explanations have been offered by judges of eminence as to the significance of the word 'from' in this context. It has been said that the payment must have been made to the employee 'as such'. It has been said that it must have been made to him 'in his capacity of employee'. It has been said that it is assessable if paid 'by way of remuneration for his services', and said further that this is what is meant by payment to him

(1) Page 282C/E *ante*. (2) 38 TC 673, at page 707.

'as such'. These are all glosses, and they are all of value as illustrating the idea which is expressed by the words of the statute. But it is perhaps worth observing that they do not displace those words. For my part, I think their meaning is adequately conveyed by saying that, while it is not sufficient to render a payment assessable that an employee would not have received it unless he had been an employee, it is assessable if it has been paid to him in return for acting as or being an employee. It is just because I do not think that the £350 which are in question here were paid to the respondent for acting as or being an employee that I regard them as not being profits from his employment."

Viscount Simonds stated, at 389([1]):

"My Lords, if in such cases as these the issue turns, as I think it does, upon whether the fact of employment is the causa causans, or only the sine qua non, of benefit, which perhaps is only to give the natural meaning to the word 'therefrom' in the statute, it must often be difficult to draw the line and say on which side of it a particular case falls."

In *Laidler* v. *Perry* [1966] AC 16, at 34F and 35B, Lord Hodson stated([2]):

"The appellant relied on a decision of your Lordships in *Hochstasser* v. *Mayes* as establishing that not every payment or benefit given to an employee by his employer is necessarily given to him as an emolument of his employment, for the relationship may be the causa sine qua non of the payment or benefit; but that of itself is not enough. It is only when the employment is the causa causans of the payment or benefit that tax liability exists.

...

The *Hochstrasser* case depended on its own peculiar facts, there being a collateral arrangement between employer and employed quite outside their contracts of service to compensate the employees for any losses they might incur on selling their houses on transfer from one post to another. It was held that these payments were not made in reward for services and that they were not taxable."

In *Shilton* v. *Wilmshurst* [1991] 1 AC 684, at 689B, Lord Templeman stated([3]):

"Section 181 is not limited to emoluments provided in the course of employment; the section must therefore apply first to an emolument which is paid as a reward for past services and as an inducement to continue to perform services and, secondly, to an emolument which is paid as an inducement to enter into a contract of employment and to perform services in the future. The result is that an emolument 'from employment' means an emolument 'from being or becoming an employee'. The authorities are consistent with this analysis and are concerned to distinguish in each case between an emolument which is derived 'from being or becoming an employee' on the one hand, and an emolument which is attributable to something else on the other hand, for example, to a desire on the part of the provider of the emolument to relieve distress or to provide assistance to a home buyer. If an emolument is not paid as a reward for past services or as an inducement to enter into employment

([1]) 38 TC 673, at pages 705/706. ([2]) 42 TC 351, at page 366. ([3]) 64 TC 78, at page 105.

A and provide future services but is paid for some other reason, then the emolument is not received 'from the employment'."

Following the guidance contained in those judgments, I am of the opinion that a payment made under the enhanced redundancy scheme was not, in law, taxable under Sch E as an emolument "from" employment. A person B would not have received the payment unless he had been an employee of Harland & Wolff but, as Lord Radcliffe stated, that is not sufficient to render the payment assessable. I consider, if I may adopt the words of Lord Radcliffe, that the payment would not have been made to him "... in return for acting as or being an employee"; on the contrary, I think that the payment would have been made to him because he was ceasing to be an C employee and to cushion him against the hardship of losing his employment. As para 2 of the statement of agreed facts states:

> "The purpose of the Enhanced Redundancy Scheme and its predecessor statutory scheme was to help deal with the human problems arising from the contraction of the shipbuilding industry by the provision of D enhanced benefits to redundant employees."

Applying the test stated by Viscount Simonds, and approved by Lord Hodson, I consider that employment by Harland & Wolff would only have been the *causa sine qua non* of the redundancy payment, and not the *causa causans*. In my opinion, the *causa causans* would have been the redundancy.

E

Applying the words of Lord Templeman, I consider that the redundancy payment would not have been paid "... as reward for past services or as an inducement to enter into employment and provide future services" but would have been paid "for some other reason" viz. to cushion the individual against the hardship of redundancy.

F

The Crown relied on the second sentence in the following passage in the judgment of Lord Hanworth M.R. in *Henry* v. *Foster* 16 TC 605, at 630, where he stated:

> "It therefore comes back to the consideration of what, in substance, this payment was made for and, inasmuch as the company, to my mind, G would have no power to dispose of its funds in the same way as was done in *Cowan* v. *Seymour*, this payment must be related to the services rendered, and if related to the services rendered, it comes back to being a sum which is a profit which can be asked for and demanded as a profit arising from the office or employment of profit which had up to that time been enjoyed by the director. The fact that it falls to be paid after H the office has come to an end does not divorce it completely from the office, but I have said enough to show that, in my judgment, there must be the direct relation between the holding of the office and the right to have this payment made."

I The principle stated in that sentence does not assist the Crown, as it only applies if the payment received after the termination of employment is an emolument "from" the employment, and for the reasons I have stated, I consider that a redundancy payment is not such an emolument.

Accordingly, as I consider that a redundancy payment would not have been an emolument "from" employment, I further consider that compensation for the loss of the contingent right to receive such a payment is not tax-

able as an emolument "from" employment. In my opinion, if the receipt of a payment does not constitute an emolument "from" employment, the receipt of a sum paid to compensate for the loss of the contingent right to receive that payment cannot itself constitute an emolument "from" employment.

Mr. Kerr submitted that the reasoning adopted by Knox J. and the Court of Appeal in *Hamblett* v. *Godfrey*(1) [1986] 1 WLR 839 and [1987] 1 WLR 357, in holding that the payment to the civil servant was taxable, was applicable to the present case. He argued that just as the payment which Miss Hamblett received in respect of her loss of rights enjoyed within the employer/employee relationship was taxable as an emolument from her employment, so the payment which the Respondent received in respect of his loss of rights under the enhanced redundancy scheme was taxable. Part of the headnote of the decision of the Court of Appeal is as follows:

> ". . . in determining whether the payment was an emolument as defined in section 183(1) of the Act of 1970 both its status and the context in which it was made had to be considered; that the taxpayer received the £1,000 in recognition of the loss of rights that were not personal rights but were directly connected with her employment; and that accordingly, the source of the payment was the employment and it was made to the taxpayer because of changes in the conditions of her employment and for no other reason and as such it fell within the charge of Schedule E income tax by virtue of the provision of section 181 of the Act."

At 370E, Neill L.J. stated(2):

> "It is plain that the taxpayer received her payment as a recognition of the fact that she had lost certain rights as an employee, and by reason of the further fact that she had elected to remain in her employment at GCHQ. Accordingly, if I may adopt the language of Lord Radcliffe in the passage I have referred to, the payment to the taxpayer was made in return for her being and continuing to be an employee at GCHQ, or to use the words of Viscount Simonds, 'the payment accrued to the taxpayer by virtue of her employment.' But in the end I think it is right to base my decision on the wording of the statute. It is clearly not enough that the payment was received from the employer. The question is, was the payment an emolument from the employment? In other words, was the employment the source of the emolument? It was argued by Mr. Mathew in the course of his cogent submissions that the rights lost by the taxpayer were mere personal rights, and that indeed, this was a stronger case from the taxpayer's point of view than *Hochstrasser* v. *Mayes*, since the rights given to the employee in that case were part of a composite contract. With respect, I find it impossible to accept this argument. As the commissioners held, the rights had been enjoyed within the employer/employee relationship. The removal of the rights involved changes in the conditions of service. The payment was a recognition of the changes in the conditions of service.
>
> I have been driven to the conclusion that the source of the payment was the employment. It was paid because of the employment and because of the changes in the conditions of employment and for no

(1) 59 TC 694. (2) *Ibid*, at pages 726H/727D.

other reason. It was referrable to the employment and to nothing else. Accordingly, in my judgment, the £1,000 was a taxable emolument."

I consider that the judgments in *Hamblett* v. *Godfrey* do not lay down any new principle. In their judgments both Knox J., at first instance, and the Court of Appeal followed the guidance as to the meaning of the words "from employment" given in judgments in the House of Lords, and concluded in relation to the facts of that particular case that the payment came from Miss Hamblett's employment. In his judgment, at first instance at 850D, Knox J. stated(1):

> "Weighing the factors of either side, I conclude that this payment can properly and should be described as being from the employment."

I can discern no proposition of law in the judgments in *Hamblett* v. *Godfrey* to cause me to alter the opinion which I have formed in the light of the judgments of the House of Lords that the payment of £4,506 to the Respondent did not come from his employment. The facts in *Hamblett* v. *Godfrey* which led Knox J. and the Court of Appeal to the conclusion that the payment of £1,000 was taxable differed in important respects from the facts in the present case. One important difference was this. I am satisfied, for reasons which I have stated, that the payment of £4,506 was not made to the Respondent to induce him to stay on in employment. But in *Hamblett* v. *Godfrey* the payment was held to be made in return for Miss Hamblett continuing to be an employee at GCHQ. In the passage which I have already cited Neill L.J. stated(2):

> "... the payment to the taxpayer was made in return for her being and continuing to be an employee at GCHQ."

In the present case the payment was not made in return for the Respondent continuing to be an employee of Harland & Wolff, rather it was made to compensate him for the loss of a contingent right to receive a redundancy payment which he would have received, not for continuing to be an employee, but for becoming redundant.

Mr. Park addressed a further argument to the Court which he formulated as follows: where an employee has a right to receive something on a future contingency and enters into an agreement to surrender the contingent right in return for a compensation payment, the compensation payment is not an emolument from the employment; and that remains so even if, had the contingency happened, the amount then receivable would have been taxable as an emolument from the employment.

Mr. Park submitted that the decision of the majority of the House of Lords in *Hunter* v. *Dewhurst* 16 TC 605 was authority for this proposition, and he relied on the following statement of the decision in *Hunter* v. *Dewhurst* contained in the judgment of Viscount Simon L.C. in *Tilley* v. *Wales* [1943] AC 386, at 392(3):

> "There an article of association of the company which had employed Commander Dewhurst provided that when a director died or resigned or ceased to hold his office for a cause not reflecting upon his conduct or competence, the company should pay to him or his represen-

(1) 59 TC 694, at page 714B. (2) *Ibid*, at page 727A. (3) 25 TC 136, at page 149.

tatives 'by way of compensation for the loss of office' a sum equal to the total amount of his remuneration in the preceding five years. Commander Dewhurst subsequently agreed with the company, at a time when he was ceasing to be chairman but was remaining a director, that in lieu of his rights under this article he should be paid 10,000*l.*, while his remuneration as director was at the same time reduced by 250*l.* per annum. Lord Warrington, Lord Atkin and Lord Thankerton held that the 10,000*l.* was not a profit from his employment as director and did not represent salary, but was a sum of money paid down by the company to obtain a release from a contingent liability as distinguished from being remuneration under the contract of employment."

Mr. Park submitted that the payment of the sum of £4,506 to the Respondent "... was a sum of money paid down by the company to obtain a release from a contingent liability as distinguished from being remuneration under the contract of employment".

In reply to this argument Mr. Kerr advanced a number of submissions. He submitted, first, that it was now accepted that a payment could be taxable as an emolument from employment even if it was not paid as a reward for services. Thus in *Hamblett* v. *Godfrey* after referring to passages in judgments in the House of Lords, Neill L.J. stated, at 370D[1]:

> "Thus these passages, as well as those to which Purchas L.J. has already referred in greater detail, demonstrate to my mind that emoluments from employment are not restricted to payments made in return for the performance of services."

Mr. Kerr submitted, secondly, that the decision of the House of Lords in *Hunter* v. *Dewhurst* was based on the premise that a payment could not be an emolument from employment unless it was a reward for services, and that, if the point in *Hunter* v. *Dewhurst* arose in the House of Lords for the first time today, the decision would be different. He submitted, thirdly, that the statement by Viscount Simon in *Tilley* v. *Wales*, relied on by Mr. Park, was, accordingly, no longer good law.

Mr. Kerr supported these arguments by submitting that, if a sum payable on a contingency was taxable when the contingency occurred and the payment was made, there was no reason in principle why a lesser payment to release the contingent liability should not be taxable.

Whilst I respectfully recognise that Mr. Kerr's attractive argument might succeed if the point fell to be considered in the House of Lords, I consider that this Court should follow the statement of Viscount Simon in *Tilley* v. *Wales* as to the effect of the decision of the House of Lords in *Hunter* v. *Dewhurst*. Therefore, if (contrary to what I have held) I had decided that a redundancy payment was taxable in law, I would have held that the payment of £4,506 received by the Respondent was not taxable in accordance with the statement of Viscount Simon.

Was the payment of £4,506 taxable under s 154?

Section 154 provides:

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(1) 59 TC 694, at pages 726G/H.

A "154–(1) Subject to section 163, where in any year a person is employed in director's or higher-paid employment and—

(*a*) by reason of his employment there is provided for him, or for others being members of his family or household, any benefit to which this section applies; and

B

(*b*) the cost of providing the benefit is not (apart from this section) chargeable to tax as his income,

there is to be treated as emoluments of the employment, and accordingly chargeable to tax under Schedule E, an amount equal to whatever is the C cash equivalent of the benefit.

(2) The benefits to which this section applies are accommodation (other than living accommodation), entertainment, domestic or other services, and other benefits and facilities of whatsoever nature (whether or not similar to any of those mentioned above in this subsection), excluding however— D

(*a*) any benefit consisting of the right to receive, or the prospect of receiving, any sums which would be chargeable to tax under section 149; and

E (*b*) any benefit chargeable under section 157, 158, 160 or 162;

and subject to the exceptions provided for by section 155."

Section 156(1) provides:

"(1) The cash equivalent of any benefit chargeable to tax under section 154 is an amount equal to the cost of the benefit, less so much (if F any) of it as is made good by the employee to those providing the benefit."

Section 168(3) provides:

G "For the purposes of this Chapter—

(*a*) all sums paid to an employee by his employer in respect of expenses, and

(*b*) all such provision as is mentioned in this Chapter which is H made for an employee, or for members of his family or household, by his employer,

are deemed to be paid to or made for him or them by reason of his employment, except any such payment or provision made by the employer, being an individual, as can be shown to have been made in the normal course of his domestic, family or personal relationships." I

The deeming provision in s 168(3) has no application in the present case as the sum of £4,506 was not paid to the Respondent by his employer but by the Department of Economic Development.

In the context of the present case, s 154 gives rise to the following questions:

(1) Was the payment received by the Respondent "by reason of his employment"? A

(2) Can the receipt of a cash payment constitute a "benefit" within the meaning of s 154?

B

(3) If the answer to question (2) is "Yes", did the receipt of the cash payment by the Respondent constitute a "benefit" within the meaning of s 154, having regard to the fact that he received the benefit in return for surrendering his contingent right to receive a payment under the Enhanced Redundancy Scheme?

C

(4) If the receipt of the payment was a "benefit" within the meaning of s 154, was it "made good" by the Respondent within the meaning of s 156(1)?

The Special Commissioner decided the first question in favour of the Crown. After citing the relevant passages from the judgments of Lord Denning M.R. and Oliver L.J. (as he then was) in *Wicks* v. *Firth*[1] [1982] Ch 355, the Special Commissioner stated, at page 16A of his decision[2]: D

> "In the light of those observations it seems to me that there is no room, on the facts of the present case, for a finding that the payment was not made 'by reason of' Mr. Haughey's employment, within the meaning of those words in s 154." E

I approach this question by considering the passages in the judgments in *Wicks* v. *Firth* cited by the Special Commissioner. At 363F, Lord Denning stated[3]:

F

> *"By reason of his employment*
>
> It seems to me that the words 'by reason of' are far wider than the word 'therefrom' in section 181(l) of the Income and Corporation Taxes Act 1970. They are deliberately designed to close the gap in taxability which was left by the House of Lords in *Hochstrasser* v. *Mayes* [1960] G AC 376. The words cover cases where the fact of employment is the causa sine qua non of the fringe benefits, that is, where the employee would not have received fringe benefits unless he had been an employee. The fact of employment must be one of the causes of the benefit being provided, but it need not be the sole cause, or even the dominant cause. It is sufficient if the employment was an operative cause—in the sense H that it was a condition of the benefit being granted. In this case the fact of the father being employed by ICI was a condition of the student being eligible for an award. There were other conditions also, such as that the student had sufficient educational attainments and had a place at a university. But still, if the father's employment was one of the conditions, that is sufficient. If two students at a university were talking to one I another—both of equal attainments in equal need—and the one asked, the other 'Why do you get this scholarship and not me?' He would say 'Because my father is employed by ICI.' That is enough. The scholarship was provided for the son 'by reason of' the father's employment."

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(1) 56 TC 318. (2) Page 287I *ante*. (3) 56 TC 318, at page 338B/E.

Oliver L.J. stated, at 370B(1):

> "The essence of Mr. Aaronson's submission is that the words 'by reason of' in section 61 are merely a synonymous alternative for the word 'from' as construed in that case and that they must be given the same meaning, so that the question to be asked (and one which the commissioners, as a finding of fact, answered in the negative) is simply 'was the child's scholarship a remuneration or reward for the father's services?' He points out that the original charge to Schedule E in the Income Tax Act 1842 was on salaries, etc. 'accruing by reason of' an office or employment and that the fasciculus of sections with which this appeal is concerned is headed 'Benefits derived by company directors and others from their employment.' Thus, the argument runs, unless it can be said—and the question is one of fact for the commissioners—that the benefit under consideration is provided, in effect, as part of the consideration for the rendering of the employees' services, it is not a benefit arising from or provided by 'reason of' the employment.
>
> Whilst I see the attraction of an argument which attributes to the legislature an admirable consistency in the expression of its intention, I find myself unable to accept Mr. Aaronson's submissions on this point. Accepting once more that the subject is not to be taxed except by clear words, the words must, nevertheless, be construed in the context of the provisions in which they appear and of the intention patently discernible on the face of those provisions, from the words used. As it seems to me, the obvious intention of this legislation—presumably in an attempt to produce fairness between taxpayers—is to impose tax on the value of those otherwise untaxed advantages which the employee enjoys because he is employed, advantages which may not even accrue to him directly but which, because of their receipt by a member of his household, benefit him by relieving him of an expense which he might otherwise expect to bear out of his own resources. These are, in many cases, by definition, benefits which could not in any ordinary sense be attributed to a reward for the employee's services—for instance the use of a car for the private purposes of a member of the employee's family or an interest-free loan to one of his relatives—and to restrict the operation of the section in the way suggested by Mr. Aaronson would, in my judgment, virtually deprive it of any operation at all in the case of benefits other than those provided to the employee himself. Speaking only for myself I do not, in the case of this legislation, find the philosophical distinction between a 'causa causans' and a 'causa sine qua non' helpful. I see no reason why a benefit 'derived' from the employment (to use the words of the chapter title) necessarily has to be invested with an intention on the part of the employer to remunerate the employee for the performance of his duties. One is directed to see whether the benefit is provided by reason of the employment and in the context of these provisions that, in my judgment, involves no more than asking the question 'what is it that enables the person concerned to enjoy the benefit?' without the necessity for too sophisticated an analysis of the operative reasons why that person may have been prompted to apply for the benefit or to avail himself of it."

I prefer, with respect, the test suggested by Oliver L.J. which involves asking the question "what is it that enables the person concerned to enjoy the

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(1) 56 TC 318, at pages 343F/344E.

benefit?" than the *causa sine qua non* test suggested by Lord Denning. I respectfully agree with Lord Denning and Oliver L.J. that the words "by reason of" in s 154 are wider than the word "therefrom" in s 19(1). It also follows that, if one does not apply to s 154 the *causa causans* test approved by the House of Lords in relation to s 19(1), a *causa sine qua non* may constitute a "reason" for the provision of a benefit. But I consider, with respect, that the *causa sine qua non* test suggested by Lord Denning is too wide and could let in a factor in the past which, in ordinary language, would not constitute a "reason" for the provision of the benefit. It is appropriate to recall the warning given by Lord Radcliffe in *Hochstrasser* v. *Mayes,* at 391, that, whilst explanations by eminent judges of the meaning of particular words are valuable, they do not displace the words themselves. Neill L.J. gave the same warning in *Hamblett* v. *Godfrey,* at 370D, when he said: "... one must never lose sight of the fact that these explanations cannot provide a substitute for the statutory words".

Whilst in this case the question which arises in respect of the words "by reason of" is not an easy one to answer, I consider that the payment was not received by the Respondent "by reason of" his employment with Harland & Wolff. Asking the question posed by Oliver L.J. "What is it that enables the person concerned to enjoy the benefit?" I would answer "The surrender by the Respondent of his contingent right to receive a payment from the enhanced redundancy scheme", and I would not answer "His employment with Harland & Wolff".

Adapting the question posed by Lord Denning at the end of the passage of his judgment I have cited, if the Respondent and a friend employed by another engineering company were talking to one another and the friend asked the Respondent "Why did you receive a payment of £4,506 and not me?" I consider that the Respondent would answer "Because I gave up my right to get a payment if I became redundant" and would not answer "Because I am employed by the new Harland & Wolff company". Therefore, I would differ from the Special Commissioner on the first question.

The second question is whether the receipt of cash can be the receipt of a benefit within the meaning of s 154. The Special Commissioner proceeded on the basis that it can. In *Wicks* v. *Firth* the Court of Appeal held that the receipt of cash was the receipt of a "benefit" within the meaning of s 61 of the Finance Act 1976, which contained the provisions now contained in s 154. Lord Denning, with whose judgment Watkins L.J. agreed, stated, at 364B([1]):

> *"The cash equivalent for the benefit*
>
> Section 61 is designed to overcome the evasion of tax by giving fringe benefits. These fringe benefits are often in kind and not in cash. They may be such as not to be able to be turned to pecuniary account. Nevertheless Parliament intends them to be taxed. It does so by saying that tax is to be charged on 'an amount equal to whatever is the cash equivalent of the benefit.'
>
> But, if the fringe benefit is in cash and not in kind, then it seems to me that the tax is to be charged on the cash. There is no need to seek for

([1]) 56 TC 318, at page 338E/G.

A a cash equivalent when the benefit is in cash. So the section should be interpreted as if it read: 'and accordingly charged to income tax under Schedule E on the cash (when the benefit is in cash) or on an amount equal to whatever is the cash equivalent of the benefit (when the benefit is in kind).' In short, when the benefit is paid in cash, the cash is itself to be treated as an emolument of the employment. So the 'emolument' here B was the actual sum paid in cash to the son. It was paid 'by reason of' the father's employment. So prima facie it is chargeable by section 61 and is taxable as if it was part of the emoluments of the father."

Oliver L.J. stated, at 366E(1):

C "In the first place this chapter of the Act of 1976 and section 61 in particular are directed to sums of money or other benefits which are provided 'by reason of his' (that is, the director's or employee's) 'employment'—a phrase which will have to be considered in the context of the second argument advanced by the taxpayers."

D The point whether the receipt of cash can constitute a benefit was not considered when that case was heard on appeal by the House of Lords. Mr. Park submitted that the Court of Appeal had erred in holding that the receipt of cash could be a "benefit" within s 154 and invited this Court not to follow that part of the decision in *Wicks* v. *Firth*. Mr. Park submitted that s 154 was only intended to tax benefits in kind of the nature referred to in s E 154 and the succeeding sections in Chapter II, such as accommodation and cars. I do not accept that submission, and I consider that it is decisively answered by the judgment of Goulding J. at first instance in *Wicks* v. *Firth* [1981] 1 WLR 475. Referring to the second point advanced on behalf of the taxpayers by Mr. Heyworth Talbot Q.C., the learned Judge said, at 480H(2):

F "The second point was that when one looks at the provisions of section 61 of the Act of 1976 and the neighbouring ancillary sections one sees that the emphasis is entirely on benefits in kind, and they are not apt to cover cash payments such as that made by the trustees to the children of the two taxpayers. It was pointed out that there is a long enumeration of benefits in kind in section 61(2), which I have read, and that G section 62, which I have not read, contains exceptions relating to different species of benefit in kind. It was also submitted that the very words of charge, if you read the definition of 'cash equivalent' back into section 61(1)—that is, tax is chargeable on 'an amount equal to whatever is an amount equal to the cost of the benefit, less so much (if any) of it as is made good by the employee'—are really only sensible in relation to H benefits in kind and not in cash. I may say at once that I have not been persuaded by that submission. The words 'of whatsoever nature (whether or not similar to any of those mentioned above in this subsection)' are to my mind too strong to admit of the inference which I have been invited to draw. It is also not immaterial, I think that one of the specific exceptions in section 62—namely, in subsection (6)—is a benefit I consisting in the provision of a pension, annuity or the like on the employee's death or retirement. At least that makes it clear that, but for the words of exception, provisions for future cash sums would be within the scope of section 61, thereby making it all the harder, I think, to limit the words 'benefits and facilities of whatsoever nature' by reference to

(1) 56 TC 318, at page 340E/F. (2) *Ibid*, at pages 332F/333A.

what has gone before. Accordingly, without further ado I can reject that second submission." A

The third question was answered by the Special Commissioner in the negative in favour of the Respondent. He stated, at page 17B of his decision(1).

"The consequences of adopting the Crown's approach are, to my mind, so appalling that something must be wrong. The situation has been created by the 'cash benefit' decision in *Wicks* v. *Firth:* if that was wrong, *cadit quaestio*. But on the assumption that it is right, it seems to me that Parliament must have intended Mr. Park's approach to 'benefits' to be right also. Section 154 brings benefits into charge. All kinds of benefits are covered: but whatever they are, they must still be capable of being described as 'benefits'. The legislation is aimed at profits (in a broad sense) which escape taxation under the mainstream Sch E provisions for one reason or another. It is not aimed at receipts resulting from fair bargains. B C

The bargain in the present case had, as its constituents, more than just the surrender of rights against a money payment. It would not be realistic to ignore another factor: the offer of continued employment. But at the end of the day I do not think that matters. I would adopt the words of Viscount Simonds in *Hochstrasser & Mayes*: D

'Nor, if it became relevant, should I in the present case feel equal to the task of weighing the benefit or detriment enjoyed by the one side or the other. It was a bargain, and as good bargains should be, thought by each side to be worth while. I have the highest authority for my course if I leave it there and "reject the lore of nicely calculated less or more".' E

In my judgment, the payments made to Mr. Haughey were not chargeable under s 154." F

In my opinion, the decision of the Special Commissioner on this point was correct. The Respondent received the payment of £4,506 in return for surrendering his contingent right to receive a payment under the enhanced redundancy scheme, and the Special Commissioner held, at page 4D of his decision, that the payment did not overvalue that right. Therefore, I consider that the Respondent did not receive a "benefit" within the meaning of s 154 where the money received was paid to him, by way of fair valuation, in consideration of his surrender of a right to receive a larger sum in the event of the contingency of redundancy occurring. G H

In advancing the Crown's argument on this point, I did not understand Mr. Weatherup to contend that s 154 operated to tax an employee in respect of a fair bargain between him and his employer. The main argument advanced by Mr. Weatherup was that the sum of £4,506 was not received by the Respondent in consideration of his surrender of the contingent right to receive a payment under the enhanced redundancy scheme, but was received by him as an inducement to continue employment with Harland & Wolff, so that it was, in reality, a "benefit" which he received. However, I reject that argument that the payment was an inducement for the reasons which I have already given in an earlier part of this judgment. I

(1) Pages 288G/289B.

A The considerations which arise in relation to the fourth question are very similar to those which arise on the third question. Despite answering the third question in favour of the Respondent, the Special Commissioner decided the fourth question against the Respondent because he considered that an employee could only "make good" within the meaning of s 156(1) by making a cash payment, and he stated, at page 16B of his decision(1):

B

> "That leaves the second aspect of the pre-condition, which concerns the word 'benefit'. With that, I will take an associated argument which Mr. Park put forward, related to s 156(1).
>
> The latter section is concerned with the quantum of an 'emolument' C brought into charge by s 154, and it provides that it shall be a sum equal to the cost of the benefit '... less so much (if any) of it as is made good by the employee to those providing the benefit'. Unquestionably, the latter words are called into operation in any case in which an employee has made some payment for a benefit in kind provided to him (or his family). Mr. Park suggested that a similar deduction falls to be made in any D case in which non-pecuniary consideration is given by an employee for a benefit provided in money form. As I indicated during the hearing, I do not accept that. What has to be 'made good' is an amount of 'cost': and it seems to me that only money can do that."

E On this point I respectfully differ from the Special Commissioner and I would decide the point in favour of the Respondent. If, as the Court of Appeal held in *Wicks* v. *Firth*, cash paid by an employer can constitute a benefit under s 154, I consider that s 156(1) permits an employee to "make good" to the full or to a lesser extent the cash he receives by giving his employer a non-pecuniary consideration, provided that the non-pecuniary consideration is not the provision of services: see *Stones* v. *Hall*(2) [1989] STC F 138, at 148h-j. If an employee can reduce his liability to tax by paying cash for a benefit in kind which he receives from his employer, I can see no reason why he should not also be able to reduce his liability to tax by giving up something of value, such as a contingent right, to his employer in return for cash which he receives from him.

G Accordingly, I would hold that the payment received by the Respondent is not taxable either under s 19 or under s 154.

I reach this conclusion with some satisfaction, because by a Statement of Practice dated 10 March 1981 the Revenue has stated that it will not charge H tax on genuine redundancy payments, and I would regard a situation where the Revenue does not charge tax on a redundancy payment but does charge tax on a payment made in consideration of the release of a contingent right to receive a payment as being inequitable.

I Two questions are set out in the Case Stated by the Special Commissioner(3):

> "(i) whether I erred in holding that the sum of £4,506 paid to Mr. Haughey was not an emolument 'from employment' within the meaning of s 19 of the Income and Corporation Taxes Act 1988; and if not

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(1) Page 288A/C *ante*. (2) 60 TC 738. (3) Page 277A/B *ante*.

(ii) whether I erred in holding that the receipt of that sum by Mr. Haughey was not a 'benefit' in the sense in which that word is used in s 154 of that Act."

I would answer both questions in the negative and would dismiss the appeal by the Crown.

MacDermott L.J.:—To adopt the words of Watkins L.J. in *Wicks* v. *Firth* [1982] Ch 355, at 373 "I listened with an interest approaching awe" to the arguments attendant upon the twin propositions advanced on behalf of the Revenue to support its claim that the sum of £4,506 received by Mr. Haughey (the taxpayer) from DED (the Department of Economic Development) in the course of the scheme to privatise Harland & Wolff, was taxable.

Those propositions were that the sum was either an "emolument from his employment" within s 19(1)1 of the Income and Corporation Taxes Act 1988 (the "1988" Act) or a benefit within s 154 of the 1988 Act.

My conclusion is that the sum is not taxable.

The general background

In argument we were carefully led through a series of cases mainly in the House of Lords. The salient feature in those cases is that they all turn on the individual judicial view of the facts of the particular case. There is little, if any, difference of opinion in this field as to what is an "emolument", or what the words "from his employment" mean, or what is or is not capable of being described as a "benefit". The problem is, as so often is the case, fitting the facts into the tolerably clear statutory framework.

Harland & Wolff used to be regarded as the largest shipyard in the world. At one time some 30,000 men were employed. It was the heart of industrial life in East Belfast, (where the yard lies surrounded by the homes of its workers) and its presence enriched the commercial life of Belfast and the rest of Northern Ireland. To a working man in Belfast being a shipyard worker was a badge of distinction and the men were proud of their part in the life of the shipyard. Their loyalty to the shipyard was intense and even when paid off (as was often the case) or in other employments, when the word went out that carpenters or painters, rivetters or upholsterers, or any other trade were wanted the men flocked back to the shipyard gates in the hope of being "taken on". Today, though the workforce has shrunk to a few thousand, this sense of pride and loyalty remains.

The importance of the shipyard in the life of Belfast is part of the social history of Belfast and I take notice of it though it is not mentioned in the agreed facts, or in the Case Stated or in the decision of Mr. O'Brien—a Commissioner for the Special Purposes of the Income Tax Acts. And I emphasise this part of the tapestry of life in Belfast because when the "battle" (for that is what it was) arose in 1988 to try to save the shipyard and to ensure that it had a future, the workers and the employers shared a common determination to secure the continuance of the shipyard. The documents which figured in the case must be read in this light—the employers and employees were not opposed or even working at arm's length. They shared a common purpose: the determination that the shipyard would be saved in

spite of Governmental decision that public ownership, which had occurred in 1977, should end and privatisation should occur, if that could be achieved. The means devised for the scheme of privatisation was a "Management Employee Buy out"—the very title emphasising the common purpose shared by employers and employees.

Privatisation

After the busy war-time and post-war years when great ships, both naval and mercantile, graced the slipways, shipbuilding in the western world fell into decline. The reasons were economic and accentuated by the emergence of highly competitive shipbuilding in the Far East which dominated the world markets. The Government, conscious of the importance of the shipyard to both the commercial and social life of Northern Ireland, poured vast sums into the shipyard and by 1977 owned Harland & Wolff. Eventually current political philosophy demanded an end to such ongoing expenditure but the Government, though politically motivated, was mindful of its social and humanitarian obligations. Thus it did not forsake the shipyard. It declared that it should be privatised. It put up money, it wrote off debts and it participated in the pursuit of an outside interest which would bring financial aid and "know-how" to a privatised shipyard. In the end the Norwegian shipping firm, Fred Olsen, agreed to become involved as a substantial buyer.

The way ahead was becoming clearer and the position is stated thus in the decision of the Commissioner[1].

> "After a false start during the second half of 1988, new arrangements for Harland & Wolff started taking shape early in 1989. The company had found a substantial buyer in the Olsen group of companies, and agreement in principle was reached between Harland & Wolff, Olsen and the DED in March. *Inter alia*, a new corporate structure was proposed, A holding company, Harland & Wolff Holdings plc ('Holdings') would be formed, with an issued share capital of some £15m. It would have a subsidiary as the operating company, Harland & Wolff 1989 Ltd. ('H & W '89'—it is now called Harland & Wolff Shipbuilding & Heavy Industries Ltd.). Of Holdings' share capital, £12m (80 per cent.) would be provided by Olsen. It was proposed to raise most of the remainder by way of any offer of shares to Harland & Wolff's management and employees ('the MEBO')."

But two problem areas had to be resolved and I adopt the description of the situation set out by the Commissioner[2].

> "The company appreciated at a fairly early stage that privatisation would involve certain changes, so far as its employees were concerned. There would for example have to be acceptance of more flexible working arrangements (that is to say, less rigidity in the demarcation of functions assigned to particular jobs). Far more important for present purposes, there was also the question of the existing enhanced redundancy scheme.
>
> The employees of Harland & Wolff had, between 1978 and 1986, been entitled to benefit under a statutory shipbuilding redundancy payments scheme. That was terminated in 1986 and it was replaced by the ordinary statutory redundancy rights enjoyed by employees generally (which were not as extensive as those under the shipbuilding scheme)

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[1] Page 278E/G *ante*. [2] Page 278B/E *ante*.

and, by way of top-up, a non-statutory enhanced redundancy scheme. I shall refer to that as 'the scheme'. Similar top-up schemes were, I understand, adopted by other shipyards in England and Scotland. Unlike the company's pension scheme, the scheme was not independently funded—the DED simply met the company's obligations as and when they arose. Resort to the scheme was frequent and it was plain that it could not survive privatisation."

He also, in my view rightly, emphasised the importance of the scheme to the employees in these words(1):

"The scheme was universally regarded by the employees as a matter of first importance. So much so that Mr. Williamson (who was a fitter employed by 'H & W' in 1989 and, as chairman of the trade union works committee, the leading representative on the staff side) told me that the scheme was seen as an 'indirect part of their money'. It constituted an essential form of insurance, the notional premiums for which were being paid by the company. It appeared that retirement from full-time employment in the fullness of time was the exception rather than the rule. When work fell off, the company did not retain employees unnecessarily: although as a former shop steward, Mr. Horner, told me, employees who had been made redundant might well be re-engaged later on a temporary basis (either as employees or as independent contractors) if work allowed. In general, therefore, employees envisaged their retirement as likely to be on a redundancy basis. The fact that there was only one ship under construction during the late Spring of 1989, coupled with the knowledge that it was nearing completion, would have only reinforced that expectation."

It seems to me to be clear beyond question that before privatisation could succeed, before any "buyer" would sign, the employees' interest in and the employer's obligation under the scheme would have to be removed because no "buyer" would countenance taking on such liabilities. Having heard evidence and considered the documents before him, this was the conclusion of the Commissioner. He said(2):

"The discussions between the management, Olsen and the DED established the proposition that the employees' contracts following their transfer to H & W '89 would not include redundancy provisions comparable to those under the scheme. Those rights would have to be removed. It was initially calculated that a sum of £10m would just suffice to meet the company's immediate obligations towards those employees who would not be invited to transfer; to pay each transferred employee a sum equal to 30 per cent. of the amount which he would have received under the scheme had he been made redundant on 1 September 1989; and to make that 30 per cent. up to 100 per cent. of that amount later, in the case of any transferred employee who was made redundant within two years. The DED agreed to provide £10m for application in those ways."

The relevant chronology as it affected Mr. Haughey

1. At the beginning of July 1989 he was, as he had been for many years, employed by Harland & Wolff plc ("the old company"). The enhanced

(1) Page 279E/G *ante*. (2) Pages 278I/279A *ante*.

redundancy scheme (the "ERS") was in force and was a collateral part of his terms of employment.

2. On 6 July 1989 the old company sent to 2,361 members of the workforce of 2,800 a lengthy bundle of documents entitled "Job Offer Documentation". Mr. Haughey and his fellow employees were asked to agree to what both sides realistically described as a "package". The men were offered employment in Harland & Wolff 1989 Ltd. ("the new company") on the new terms and conditions set out in the documentation, but the offer was subject to two conditions:

> "First a sufficient number of employees with the right balance of skills must accept new terms and conditions of employment and the termination of the enhanced redundancy scheme. Secondly, the buyout must be successfully concluded."

The package also contained details of the "ex gratia" payment, as it was described, which would be paid to employees who accepted the new terms and conditions and the ending of the ERS and who reported for work following the completion of the buyout.

As the sum in dispute in these proceedings was part of that "ex gratia" payment I set out verbatim how s 4 of the documentation described the "*Ex Gratia Formula*":

> "Subject to successful completion of the buyout targeted for September, all new company employees who accept the new terms and conditions and the ending of the enhanced redundancy scheme and who report for work following completion of the buyout will be entitled to an ex gratia payment calculated in accordance with the following formula (A + B):
>
> A) 30% of enhanced redundancy scheme 'entitlement' (calculated at 1/9/89) **plus**
>
> B) £100 (One Hundred Pounds sterling) per complete year of service at H&W with the minimum payment under this element 'B' being £700.
>
> It is not yet known if the ex gratia payment can be paid free of tax—on which we are in discussion with the Inland Revenue. In the meantime, it would be prudent to assume it will be subject to tax and National Insurance.
>
> In addition, in the event of an employee of the new company being declared redundant during the two year period following completion of the buyout, the redundant employee would receive, in addition to the ex gratia payment (A + B), the balance of his/her enhanced redundancy scheme 'entitlement' as calculated at 1/9/89. The redundant employee would also receive full statutory redundancy entitlement (which is not affected by the new terms and conditions).
>
> Subject to any unforeseen administrative difficulties, it would be intended to make the ex gratia payment to employees during the two weeks following completion of the buyout."

At page 7 of his decision the Commissioner stated his finding as to the genesis of the "B" element of the formula in these terms(1):

> "That element was the addition to the original 30 per cent. achieved by the employees' representatives in the negotiations during the summer."

A further relevant finding in relation to the "B" element is to be found at the bottom of the same page of the decision. It is(2):

> "The oral evidence leaves me in no doubt that the emergence of element 'B' was motivated by a desire to do something about perceived unfairness in the existing formula by which the scheme was to be terminated. Nonetheless, the employees bound themselves to a different contractual consideration for the 'B' element. In my opinion, that element is taxable under s 19, for the reasons initially accepted by Mr. Park."

Mr. Park's concession being, as it was in this Court, that the "B" element was subject to tax being an inducement paid by the employer to the employee.

3. On or before 31 July 1989 Mr. Haughey and all the other offerees accepted the offer of 6 July in these terms:

> "I hereby confirm that I accept the new terms and conditions on the basis set out in that letter and the termination of the existing H & W enhanced redundancy scheme."

The fact that this was a 100 per cent. acceptance underlines the loyalty of the men to the shipyard and their anxiety to remain in employment even though as the Commissioner found at the bottom of page 4 "The differences between the board and the employees were never resolved during negotiations".

Though the package was accepted, acceptance did not take place immediately as the "buyout" had not been completed—that being a transaction involving the transfer of shares. Thus Mr. Haughey continued in the employment of the "old company" on the "old basis" which included entitlement to participate in the ERS scheme.

4. On 8 August 1989 the business was transferred by Harland & Wolff to a company newly incorporated in Northern Ireland and then called Harland & Wolff (1989) Ltd. ("H & W '89"). The entire issued share capital of H & W '89 was at that time beneficially owned by the DED. On the transfer of the business contracts of employment of the employees of H & W were, by operation of the Transfer of Undertakings (Protection of Employments) Regulations 1981, transferred from H & W to H & W '89.

Thus Mr. Haughey became an employee of the new company but still on the original terms and conditions including participation in ERS as the package was conditional on privatisation and, of course, at this time DED owned the "new" company though it was a distinct legal entity.

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(1) Page 281E/F *ante*. (2) Page 282B/C *ante*.

A 5. On 21 August 1989 the prospectus was issued for the purchase of shares in Harland & Wolff Holdings plc.

6. By on or before 8 September 1989 enough employees had subscribed so that agreed fact 7 states:

B "On 8 September 1989 the MEBO was completed when 'Holdings' acquired the entire issued share capital of H & W '89."

The package was now unconditional and so when the men reported to work on the next day the position was that:

C (1) All contingent rights in the ERS were terminated and Mr. Haughey was employed by the new company.

(2) Flexible working practices took effect on the new terms and conditions.

(3) The employees were entitled to receive the "ex gratia" payment D comprising both the "A" and "B" elements.

7. On 22 September 1989 Mr. Haughey received an aggregate "ex gratia" payment of £5,806, of which £4,506 was in respect of the "A" element and £1,300 in respect of the "B" element. The "A" element was paid to him by DED after deductions of amounts corresponding to PAYE and NIC. The E "B" element was paid to him by H & W '89 through the payroll after deduction of PAYE and NIC—DED having provided H & W '89 with the necessary funds.

What did the "A" element represent?

F I emphasise this question because Mr. Park Q.C. (who appeared with Mr. John Thompson for Mr. Haughey) stated that he did not propose to challenge the Commissioner's finding that element "B" was taxable (which is Question "B" on the Case Stated). Thus it is accepted that tax is payable under Sch E on £1,300.

G As appears from page 6 of the decision of the Commissioner, Mr. Park appeared before him believing that it was accepted that the "A" element represented the compensation for the loss of rights under the scheme while the "B" element was consideration for the acceptance of the new terms and conditions of working under employment with H & W '89. But at the hearing before the Commissioner the Revenue argued that the aggregate of elements H "A" and "B" represented both a payment for working flexibility and compensation for loss of "rights" in the ERS.

The Commissioner considered this submission with care. He sought assistance in his construction of the offer documentation by reference to the prospectus—a route which was understandably questioned by both Counsel. I But his conclusion, at page 7 of the decision, commends itself to me: he said(1):

"But it is, to my mind, inconceivable that the prospectus should have set the matter out in such terms if the division of the so-called, *ex gratia* payment into two parts with distinct considerations had not

(1) Pages 281I/282B *ante*.

represented the understanding of the two sides to the summer negotiations. Furthermore, I can well understand that the staff side would not wish it to appear that the changes in the terms and conditions of work had been conceded gratuitously. The passage in the prospectus does not expressly tie the two distinct considerations to the 'A' and 'B' elements respectively; but the logic of the manner in which the payments were made is apparent. The DED (as the owner of H & W) was responsible for H & W's obligations in relation to the scheme: and it paid element 'A'. The new working terms concerned H & W '89, and it made the element 'B' payments."

Mr. Brian Kerr Q.C. (who appeared with Mr. Weatherup for the Revenue) in the course of arguing that elements "A and B" should not be regarded as distinct but as part of an all embracing aggregate sum referred us to passages in the four issues of the news sheet "Privatisation News" which was distributed to employees. He pointed out that what was referred to was a "Fixed Sum" which was not broken down into two elements. That is so, but between the date of the last issue (1 June 1989) and the despatch of the offer letter on 6 July 1989, negotiations had been ongoing and s 4 shows that the "ex gratia" payment was to be calculated according to a formula involving elements A and B. That is the language of the offer document and the earlier formulation is, in my view, quite irrelevant.

Element "A" is described in the "ex gratia" formula as "30% of enhanced redundancy scheme 'entitlement' (calculated at 1/9/89)" and I cannot see any rational basis for attaching the formula, even in part, to an assessment of the value of an acceptance of flexible working conditions. Reading all the relevant documents I am satisfied that the Commissioner was entitled to proceed on the basis that the "A" element represented compensation for loss of rights, more correctly contingent rights, in the ERS. Alternatively, if the matter was uncertain on the documentary evidence he was entitled on *all* the evidence to apportion the total payment into taxable and non-taxable elements as he did. Somewhat tentatively, Mr. Kerr suggested that it might be appropriate to refer the matter back to the Commissioner for clarification. I would not support such a course for the reasons set out in *Yuill* v. *Wilson* [1980] 3 All ER 7. In my judgment, the factual matrix of this case has been fairly and sensibly found and established by the Commissioner in his decision.

The relevant statutory provisions:

"19–(1) The Schedule referred to as Schedule E is as follows:—

SCHEDULE E

1. The tax under this Schedule shall be charged in respect of any office or employment on emoluments therefrom which fall under one or more than one of the following Cases—"

And s 154:

"154—(1) Subject to section 163, where in any year a person is employed in director's or higher-paid employment and—

(*a*) by reason of his employment there is provided for him, or for others being members of his family or household, any benefit to which this section applies; and

A (*b*) the cost of providing the benefit is not (apart from this section) chargeable to tax as his income,

there is to be treated as emoluments of the employment, and accordingly chargeable to income tax under Schedule E, an amount equal to whatever is the cash equivalent of the benefit.

B (2) The benefits to which this section applies are accommodation (other than living accommodation) entertainment, domestic or other services, and other benefits and facilities of whatsoever nature (whether or not similar to any of those mentioned above in this subsection), excluding however—

C (*a*) any benefit consisting of the right to receive, or the prospect of receiving any sums which would be chargeable to tax under section 149; and

(*b*) any benefit chargeable under section 157, 158, 160 and 162;

D and subject to the exceptions provided for by section 155.

(3) For the purposes of this section and sections 155 and 156, the persons providing a benefit are those at whose cost the provision is made."

E *Emoluments from Employment*

Mr. Kerr's primary submission was that the entire "ex gratia" payment was an inducement aimed at ensuring that Mr. Haughey and the other men remained in employment at the shipyard after privatisation.

His secondary submission was that, if element "A" was compensation F for a surrender of his contingent rights in the ERS, the sum received was an emolument from Mr. Haughey's employment.

Despite that attractive manner in which Mr. Kerr presented his argument, I can see no valid foundation for saying that Mr. Haughey was induced to act as he did. He signed the offer document because he wanted to G remain in employment and in employment in the shipyard though no doubt like all the men he hoped to get as much money as possible once he knew that some money was available. That is my clear opinion from the material before me and I am re-enforced in this view by the fact that there is no suggestion in the decision that the Commissioner considered that there was any inducement.

H

The law reports are well stocked with cases which decide whether or not a receipt by an employee is an "emolument from employment": I do not propose to seek to rationalise the various authorities to which we were referred: the height of my ambition is to decide the present case on a proper legal basis. The authorities underline several matters which I have sought to bear I in mind.

1. When considering the relevant facts one is looking for the *substance* of the transaction. Thus, in *Henry* v. *Foster* 16 TC 605, Lord Hanworth M.R. said "It therefore comes back to the consideration of what, in substance, this payment was made for": see also the speech of Lord Thankerton in the associated case of *Hunter* v. *Dewhurst,* at 649.

2. Though one must always bear in mind the actual words of the statute, tests have been formulated which help one to focus on the essentials of a transaction. I would mention first, the test of Lord Radcliffe in *Hochstrasser* v. *Mayes* [1960] AC 376, at 391(1):

> "The test to be applied is the same for all. It is contained in the statutory requirement that the payment, if it is to be the subject of assessment, must arise 'from' the office or employment. In the past several explanations have been offered by judges of eminence as to the significance of the word 'from' in this context. It has been said that the payment must have been made to the employee 'as such.' It has been said that it must have been made to him 'in his capacity of employee.' It has been said that it is assessable if paid 'by way of remuneration for his services,' and said further that this is what is meant by payment to him 'as such.' These are all glosses, and they are all of value as illustrating the idea which is expressed by the words of the statute. But it is perhaps worth observing that they do not displace those words. For my part, I think that their meaning is adequately conveyed by saying that, while it is not sufficient to render a payment assessable that an employee would not have received it unless he had been an employee, it is assessable if it has been paid to him in return for acting as or being an employee. It is just because I do not think that the £350 which are in question here were paid to the respondent for acting as or being an employee that I regard them as not being profits from his employment."

and secondly, the recent test of Lord Templeman in *Shilton* v. *Wilmshurst* [1991] AC 684, at 689(2):

> "Section 181 is not confined to 'emoluments from the employer' but embraces all 'emoluments from employment;' the section must therefore comprehend an emolument provided by a third party, a person who is not the employer. Section 181 is not limited to emoluments provided in the course of employment; the section must therefore apply first to an emolument which is paid as a reward for past services and as an inducement to continue to perform services and secondly, to an emolument which is paid as an inducement to enter into a contract of employment and to perform services in the future. The result is that an emolument 'from employment' means an emolument 'from being or becoming an employee.' The authorities are consistent with this analysis and are concerned to distinguish in each case between an emolument which is derived 'from being or becoming an employee' on the one hand, and an emolument which is attributable to something else on the other hand, for example, to a desire on the part of the provider of the emolument to relieve distress or to provide assistance to a home buyer. If an emolument is not paid as a reward for past services or as an inducement to enter into employment and provide future services but is paid for some other reason, then the emolument is not received 'from the employment'. The task of determining whether an emolument was paid for being or becoming an employee or was paid for another reason, is frequently difficult and gives rise to fine distinctions."

He refined this test further, at page 693(3):

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(1) 38 TC 673, at page 707. (2) 64 TC 78, at page 105. (3) *Ibid*, at page 109.

A "I prefer the simpler view that an emolument arises from employment if it is provided as a reward or inducement for the employee to remain or become an employee and not for something else."

3. The onus of proving that the money received by Mr. Haughey is liable to tax rests on the Crown. As Viscount Simonds said in *Hochstrasser,*
B at 389([1]):

"It is for the Crown, seeking to tax the subject, to prove that the tax is exigible, not for the subject to prove that his case falls within exceptions which are not expressed in the statute but arbitrarily inferred from it."

C The fact that element "A" was paid by DED not by Mr. Haughey's employer, the new company does not, of itself, determine the question. Nor is the matter resolved against the taxpayer simply because he, the recipient, was an employee of the company owned by the payer, DED. The important question is why was the money paid? In answering that question it is important to remember the purpose for which ERS existed. That is set out in
D agreed fact 2.

"The purpose of the Enhanced Redundancy Scheme and its predecessor statutory scheme was to help deal with the human problems arising from the contraction of the shipbuilding industry by the provision of enhanced benefits to redundant employees."

E Thus an ERS payment was not a payment of deferred or retained pay. It was a payment because a man who had lost his job was unemployed and deserved some assistance while he sought another job. The nature of an ERS payment does not, therefore, suggest to me that it is either a reward for services or an inducement in respect of some future services.

F This view is confirmed when one recalls the purpose for which DED paid the money. Such payment was to terminate the rights and liabilities which existed under the ERS so that the shipyard could be sold free of the ERS incumbrance to an outside buyer which was the key to the whole privatisation scheme. Payment was made by DED as the promoter of the privatisation scheme: it was neither a reward nor an inducement to the men—it
G was an essential first step in freeing the shipyard for privatisation.

Thus to return to Lord Templeman's simpler formulation—the emolument was not provided as a reward or inducement for the employee to remain or become an employee. It was "for something else"—to terminate the ERS scheme so that the shipyard could be privatised.

H In the course of the argument, the liability of redundancy payments and lump sums in lieu to tax were debated at length. Someday considerations of such matters may be required but we are not concerned with generalities. We are concerned with the specific issue—was the element "A" receipt taxable in the circumstances of the present case? I have no doubt that it is *not* subject to
I tax under s 19(1) of the 1988 Act.

Is the receipt taxable as a benefit under s 154?

I can deal with this topic shortly as I am in agreement with the judgment of the Lord Chief Justice generally and in respect of the s 154 claim. I

([1]) 38 TC 673, at page 706.

am content to find against this claim on the basis that, assuming the receipt can properly be described as a "benefit", the benefit has been made good by the taxpayer. Section 156(1) of the 1988 Act states:

> "The cash equivalent of any benefit chargeable to tax under section 154 is an amount equal to the cost of the benefit, less so much (if any) of it as is made good by the employee to those providing the benefit."

On the evidence in this case I am satisfied that the value of Mr. Haughey's contingent right in the ERS was at least worth what he received by the element "A" payment and so, no benefit remains to be taxed under s 154. The relevant finding of the Commissioner is at page 4 of his decision(1):

> "It is not disputed that the 30 per cent. offer did not have as its basis a genuine valuation of the employees' contingent rights. On the evidence I find that it certainly did not overvalue those rights and I suspect that, if the matter were investigated scientifically, the opposite would be demonstrated."

I can only add that I am attracted by and readily adopt the Commissioner's conclusion on this aspect of the case (page 17)(2).

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

I answer the relevant stated question (A) as follows:

> "(i) whether I erred in holding that the sum of £4,506 paid to Mr. Haughey was not an emolument 'from employment' within the meaning of Section 19 of the Income and Corporation Taxes Act 1988;
>
> No.
>
> (ii) Whether I erred in holding that the receipt of that sum by Mr. Haughey was not a 'benefit' in the sense in which that word is used in Section 154 of that Act.
>
> No."

Nicholson J.:—I have had the opportunity of reading in draft the judgments of the Lord Chief Justice and of MacDermott L.J. and respectfully agree with them as to the outcome of this appeal.

The Special Commissioner was entitled to find that the sum of £5,806 could be divided into two sums, namely, the A element of £4,506 paid by the Department of Economic Development and the B element of £1,300 paid by the employers. He was entitled to find that the A element was paid and received for giving up Mr. Haughey's contingent right to an enhanced redun-

(1) Page 279H/I *ante*. (2) Page 288H *ante*.

dancy payment under the special scheme between Harland & Wolff plc and its employees and that the payment was not made as an inducement to enter into employment or to continue in employment with Harland & Wolff (1989) plc. As Mr. Park Q.C. pointed out on behalf of the taxpayer, Mr. Peter Swann, now a group finance director of Harland & Wolff Holdings plc and at the relevant time commercial director of Harland & Wolff plc, gave oral evidence as did Mr. Perry McDonald, deputy chief executive of the Training and Employment Agency, an arm of the Department of Economic Development, of which at the relevant time he was assistant secretary concerned with privatisation. Neither of them said in evidence or in cross-examination that the payment of £4,506 was made as an inducement to enter or continue in employment.

The Special Commissioner also held that the payment was not an emolument from employment. This seems to me to be a conclusion of law but is usually treated as so intimately bound up with the facts that it cannot be disentangled from them.

In *Glantre Engineering Ltd.* v. *Goodhand*(1) [1983] 1 All ER 542 the headnote reads, *inter alia*:

> "The quality of a payment made to an employee at the inception of his employment, ie whether or not it constituted an emolument from his employment was essentially a question of fact to be decided on by the commissioners on a consideration of all the evidence before them and their determination could not be set aside by the court unless it was inconsistent with the only reasonable conclusion to be drawn from the evidence."

Valiant attempts were made by Mr. Kerr Q.C., on behalf of the Inland Revenue, to suggest that the two payments of £4,506 from the Department of Economic Development and £1,300 from the employers should be treated as one payment and should not have been apportioned. Alternatively, he argued that the payment of £4,506 should be referred back to the Special Commissioner for further apportionment because *some part of it* must have been paid as an inducement to accept the offer of employment. In *Yuill* v. *Wilson* [1980] 3 All ER 7, at page 14, Viscount Dilhorne said(2):

> "... it would not in my opinion be right to remit the case to the commissioners for them to make finding of fact on this issue when the Crown could at the hearing before them if they had thought fit to do so put forward the contention as an alternative to their main contention. ... I cannot think it right that the Crown should now be given the opportunity of supplementing the case they presented against the taxpayer and of calling fresh evidence with regard thereto."

and Lord Edmund Davies, at pages 16 and 17, cited various authorities in support of this point of view.

It would be unjust to remit the Case to the Special Commissioner in order to enable the Inland Revenue to cross-examine or call evidence about "inducement" when they did not do so at the original hearing.

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(1) 56 TC 165. (2) 52 TC 674, at page 714B/D.

A separate argument advanced on behalf of the Inland Revenue was that the sum of £4,506 was taxable even though it was not an inducement to be or become an employee but was, in fact, received in consideration for the release of a contingent right. The proposition that release of a term or condition of employment for the payment of a sum of money *must* be an emolument within the meaning of s 19 of the 1988 Act was not supported by the cases which were cited.

Reliance was placed by Mr. Kerr Q.C. on *Hochstrasser* v. *Mayes*(1) [1960] AC 376. In that case ICI had a scheme to assist their married employees. The agreement was very elaborate in character defining with great nicety the conditions upon and the limits within which ICI would implement a guarantee against loss upon resale of a house purchased by an employee. The provisions of the agreement were summarised by Jenkins L.J. in the Court of Appeal and are found at pages 377–380 of the report of the case in the House of Lords.

Viscount Simonds approved, at page 388, the statement by Upjohn J. who heard the case at first instance on appeal from the Special Commissioners: see [1959] Ch 22, at page 33(2):

> "In my judgment the authorities show that it is a question to be answered in the light of the particular facts of every case whether a particular payment is or is not a profit arising from the employment. Disregarding entirely contracts for full consideration in money or moneys worth and personal presents, in my judgment not every payment made to an employee is necessarily made to him as a profit arising from his employment. Indeed in my judgment the authorities show that to be a profit arising from employment the payment must be made in reference to the services an employee renders by virtue of his office, and it must be something in the nature of a reward for services past, present or future."

Viscount Simonds said that the single word "past" might be open to question, but apart from that it appeared to him to be entirely accurate.

In the Court of Appeal the headnote reads, *inter alia*:

> "Held ... (2) by Jenkins and Pearce L.JJ. (Parker L.J. dissenting), that, although the agreement was entered into by an employee in his capacity as such, it was a genuine bargain advantageous to both parties, under which the employee gave good consideration for the benefits received, so that it should be regarded as collateral and made for the consideration other than the employee's services. Accordingly no tax was chargeable."

Pearce L.J. said, at page 58(3):

> "In these cases the difficulties come, not from any difference in opinion as to what are the principles applicable to them, but from a difference as to how these principles should be applied ... If looking fairly at the agreement, one can say that this is a fair agreement ... under which the company gets appreciable benefits (other than the mere benefit of giving a financial advantage to this particular employee and

(1) 38 TC 673. (2) *Ibid*, at page 685. (3) *Ibid*, at page 699.

A thereby making him a more contented worker) and that the employee gives a genuine and appreciable consideration, then there is enough to make it a collateral transaction."

In the House of Lords Viscount Simonds said, at page 390(1):

B "It was a bargain and as good bargains should be, thought by each side to be worth while . . ."

Lord Radcliffe said, at page 392(2):

"... it is assessable if it has been paid to him in return for acting as or being an employee."

C

But he did not add "... or for giving up a valuable right as an employee or for ceasing to be an employee". However, his view of the facts differed from Viscount Simonds in that he said(3):

"In my opinion, such a payment is no more taxable as a profit from
D his employment than would be a payment out of a provident or distress fund set up by an employer for the benefit of employees whose personal circumstances might justify assistance."

Lord Cohen said, at page 395, that he agreed that(4) "... the housing agreement constituted a genuine bargain advantageous, no doubt, to the
E Respondent, but also not without its advantages to ICI and I can see no reason for disregarding it as the source of the payment".

Lord Denning said, at page 397(5):

"If Mr. Mayes had been injured at work and received money com-
F pensation for his injuries, no one would suggest that it was a profit from his employment. Nor so here, where all he receives is compensation for his loss ... it was not a remuneration or reward or return for his services in any sense of the word... "

In my opinion, the *Hochstrasser* case supports the Respondent's arguments.

G

In the present case it has been found as a fact that the payment was not made in return for acting as or being an employee, but instead it was in return for the release of an obligation of the employer to pay enhanced redundancy payments under an enhanced redundancy scheme. Whilst in many cases the fact that a payment is made to every employee is indicative
H that it is an "emolument", I do not consider that this is decisive.

In the present case it was an agreed fact that in 1987 Harland & Wolff introduced the enhanced redundancy scheme as a successor to a statutory shipbuilding redundancy scheme which was introduced in 1978 and terminated in 1986. It was also an agreed fact that the purpose of the enhanced
I redundancy scheme and its predecessor statutory scheme was to help deal with the human problems arising from the contraction of the ship building industry by the provision of enhanced benefits to redundant employees. Men have been frequently made redundant at an age and in circumstances where they would have great difficulty in finding further employment.

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(1) 38 TC 673, at page 706. (2) *Ibid*, at page 707. (3) *Ibid*, at page 708.
(4) *Ibid*, at page 710. (5) *Ibid*, at page 711.

Redundancy payments, whether statutory or contractual, are used sometimes to start up a small business, or to pay for the acquisition of new skills, or for retraining, or are invested to enable former employees to have a somewhat better standard of living than they otherwise could afford. Such a payment is not a reward for past services, although the payment may have been calculated on the basis of years of past service. It is not a payment for services to be rendered. It is not a payment *as* an employee or "in the course of" employment.

In the present case Mr. Haughey and the other employees will receive wages or salaries for their services during the course of their employment with Harland & Wolff (1989). The payment of £4,506 has not been in lieu of "deferred remuneration". It has not been paid for continuing to work with Harland & Wolff (1989) on the same conditions as before or on different or less advantageous conditions than before. It was paid in order to release the employers from an obligation to pay Mr. Haughey and the other employees redundancy payments in the event that they were made redundant and to enable the shipyard to be privatised. It was received as compensation for the loss of those contingent rights.

Reliance was placed by Mr. Kerr Q.C. on the judgment of Knox J. in *Hamblett* v. *Godfrey*(1) [1986] 1 WLR 839 and on the judgment in the Court of Appeal [1987] 1 WLR 357. Relevant facts in that case included the fact that before December 1983 the taxpayer's rights included the right to join a trade union and to apply to an industrial tribunal in respect of rights conferred upon employees under Employment Protection legislation. Unilateral steps taken by the Prime Minister as Minister for the Civil Service and by the Secretary of State for Foreign and Commonwealth Affairs had as their effect that the staff, including the taxpayer, lost their right to belong to trade unions or to resort to industrial tribunals, and lost other forms of statutory protection of their rights as employees under this legislation. A general notice was issued to employees stating that staff of GCHQ would receive a financial payment in recognition of lost rights previously enjoyed. The Special Commissioners found that the payment was "an ex gratia payment solely in recognition of the withdrawal of statutory rights which the GCHQ staff, in common with other employed persons, had previously enjoyed" and "to recognise a disadvantage imposed on [the taxpayer] ... but it was not paid in return for her services and it lacked the element of remuneration ...".

At page 844 of his judgment, Knox J. stated(2):

> "The factual finding is that the £1,000 was not paid in return for the taxpayer's services. The conclusion of law is that the finding prevents the payment from being an emolument. ... The fundamental principle I take to be that each case has to be tested against the provisions of the Act and the authorities do no more than illuminate those provisions and are not a substitute for them, nor are they to be construed as though they were themselves statutory."

At page 845, he rejected the proposition that if a payment is not remunerative it is not an emolument, citing *Laidler* v. *Perry* [1966] AC 16 in which Lord Reid said that(3):

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(1) 59 TC 694. (2) *Ibid*, at page 708B/D. (3) *Ibid*, at page 709E/F.

A

> ". . . a sum given to an employee in the hope or expectation that the gift will produce good service by him in future is taxable;"

At page 848, Knox J. stated(1):

> ". . . the right to join a trade union is a right intimately bound up with and necessarily part and parcel of a particular employment."

B

At page 849, he set out the rights which a taxpayer lost under the Employment Protection Acts and stated(2):

> "The mere recital of those rights shows how bound up with the relationship of employer and employee were . . . the payment did reflect the fact that continued service by the taxpayer would be on terms different from and less advantageous than those under which he had previously served."

C

Thus the payment was made in the hope or expectation that the employee would remain an employee on less favourable terms of service and was received by the employee on the basis that she had a moral obligation to stay as an employee on these more disadvantageous terms. The relevant portion of the headnote in the Court of Appeal reads:

D

> ". . . in determining whether the payment was an emolument as defined in section 183(1) of the Act of 1970 both its status and the context in which it was made has to be considered; that the taxpayer received £1,000 in recognition of the loss of rights that were not personal rights but were directly connected with some employment; and that accordingly the source of the payment was employment and made to the taxpayer because of changes in the conditions of the employment and for no other reason."

E

F

At page 365 and following, Purchas L.J., stated that the only question was whether the payment of the £1,000 was an emolument arising from the employment(3).

> "There is no doubt in this case that the employment protection legislation goes directly to the employment of the taxpayer with the employer. The right to join a union in my judgment also falls directly to be considered with that employment."

G

Neill L.J., at page 370, said:

> "It is plain that the taxpayer received a payment as recognition of the fact that she lost certain rights as an employee and by reason of the further fact that she elected to remain in her employment at GCHQ. Accordingly, if I may adopt the language of Lord Radcliffe . . . the payment to the taxpayer was made in return for her being and continuing to be an employee at GCHQ. . . . The removal of the rights involved changes in the conditions of service. The payment was in recognition of the changes in conditions of service."

H

I

The payment in that case is not analogous with the payment in the present case; in order to receive a redundancy payment a person must be dismissed from employment, not continued to be employed. Once one severs, as the Special Commissioner did and was entitled to do, the right to the redun-

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(1) 59 TC 694, at page 712E. (2) *Ibid*, at page 713A/E. (3) [1978] 1 WLR 357, at page 368D.

dancy payment from other terms and conditions of existing and continuing employment, then the distinction between the facts of *Godfrey's* case and the present case is apparent. The term or condition of his contract which Mr. Haughey gave up was not one which was intended to operate whilst he was an employee.

The Inland Revenue have not been deterred from arguing that a redundancy payment is taxable by their Statement of Practice which reads at SP1/81:

"Non-statutory redundancy payments

1. Section 412 [now see section 579 subsection 1 of the ICTA 1988] Income and Corporation Taxes Act 1970 provides that any statutory redundancy payment shall be exempt from liability under Schedule E with the exception of any liability under section 187 of the Taxes Act [now see section 148 of the ICTA 1988].

2. A payment made under a non-statutory redundancy scheme may in law be taxable in full under Schedule E if the scheme is part of the conditions under which the employees agree to give their services, or if there is an expectation of payment on their part. However, in practice, the Inland Revenue accept that in the case of a genuine redundancy the only tax liability on lump sum payments made under redundancy schemes is under section 187, even though the payment may be calculated by reference to the length of service or the amount of remuneration or is conditional on continued service for a short period consistent with the reasonable needs of the employer's business.

3. As a general guide redundancy is regarded as genuine for this purpose if (a) payments are made only on account of redundancy as defined by section 81 of the Employment Protection (Consolidation) Act 1978; (b) the employee has been continuously in the service of the employer for at least 2 years; (c) the payments are not made to selected employees only; and (d) they are not excessively large in relation to earnings and length of service.

The Inland Revenue also accept that a scheme may be devised to meet a specific case of redundancy, for example, the imminent closure of a particular factory, or couched in general terms to embrace redundancies as and when they arise.

4. This practice is designed to distinguish between payments which are made in cases of genuine redundancy and those which are no more than terminal bonuses given as a reward for services and which are taxable in full. It follows that each case must be considered in the light of its particular facts. Where an employer wishes to be satisfied in advance of a proposed scheme which falls within the Revenue guideline, the inspectors will be prepared to give in advance clearance on being informed of the full facts."

The redundancy payments made to the 429 ex-employees of Harland & Wolff plc under the enhanced redundancy scheme were not taxed; payments made to those who have been made redundant within two years from the coming into operation of the agreement between Harland & Wolff (1989) will not be taxed.

Statutory redundancy payments became available under the Contracts of Employment and Redundancy Payments Acts (Northern Ireland) 1965. By

A s 38 of the Finance Act 1966 it was provided that any statutory redundancy payment and the corresponding amount of any employer's payment should be exempt from income tax under Sch E. This section was re-enacted in 1970 and further re-enacted in 1988. It would not have been enacted unless it was considered that statutory redundancy payments might be liable to taxation unless specifically exempted. But it does not follow that, because such pay-
B ments were specifically exempted, they would be taxable but for the section. This is recognised in the Statement of Practice wherein it is stated that a payment made under a non-statutory redundancy scheme *may* (my underlining) be taxable in law under Sch E if the scheme is part of the conditions under which the employees agree to give their services.

C But, as the Special Commissioner has held, a redundancy payment is one to which an employee is entitled because he is dismissed from employment and ceases to be employed, and not because he is or becomes an employee. It is true that the calculation of the payment is based on the number of years' service and the amount of remuneration which the person earned but that is not the reason for the payment.

D

Section 11(1) of the Act of 1965 reads:

"(1) When on or after the appointed day an employee who has been continuously employed for the requisite period—(*a*) is dismissed by his employer by reason of redundancy ... then subject to the following
E provision of this part the employer shall be liable to pay him a sum (in this Act referred to as a redundancy payment) calculated in accordance with schedule 3 ...

(2) For the purposes of this Act an employee who is dismissed shall be taken to have been dismissed by reason of redundancy if the dis-
F missal is attributable wholly or mainly to—

(*a*) the fact that his employer has ceased or intended to cease to carry on the business for the purposes of which the employee was employed by him or has ceased or intends to cease to carry on that business in the place where the employee was so employed; or

G (*b*) the fact that the requirements of that business for employees to carry out work of a particular kind, or for an employee to carry out work of a particular kind in the place where he was so employed have ceased, diminished or are expected to cease or diminish."

H Section 36 provides for a redundancy fund and for redundancy fund contributions to be paid by employers into the fund. Schedule 3 of the Act sets out the calculation of redundancy payments. It is, of course, true that unless one has been an employee one will not receive a redundancy payment. That is what some, though not Lord Simon of Glaisdale, would call the "*sine qua non*" of the payment.

I

I share the views of the Special Commissioner on this topic. He stated that he was "... quite unable to see how *statutory* redundancy payments could be thought to be emoluments 'from employment', s 579(1) Income and Corporation Taxes Act 1988 notwithstanding", and went on(1):

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(1) Page 284I *ante*.

A

> "... there is, in my view, no difference in principle between statutory redundancy payments and payments in the same character made in the genuine redundancy circumstances under consensual arrangements."

Later he stated(1):

B

> "But, as Mr. Park rightly pointed out, the enjoyment of rights under the scheme in the instant case was for those exclusively reserved to the period when employment would, by definition, have ceased."

At a later stage he stated(2):

C

> "Mr. Park drew my attention to the curious situation which could have arisen (and indeed still can arise for a few months longer) if an employee were transferred to H & W '89 and received his element 'A' payment had later been made redundant. He would then have received a balance of his scheme entitlement, under the two-year transitional arrangements. It would not seem possible for the Crown to accord to the second payment a tax treatment consistent both with its arguments in relation to the first payment and with its previous practice in relation to scheme payments. If that previous practice was correct (as I think it was) the effect of the Crown's present claim is to tax as an emolument from employment, a payment on account of a larger amount which was not such an emolument."

D

E

I do not consider it necessary to deal with the argument advanced on behalf of the Inland Revenue that a pension paid on foot of a contract of employment would be taxable as an emolument from employment, if it were not specifically provided for in the relevant taxing statute.

F

Apart from the difficulties facing the Inland Revenue in arguing that redundancy payments are taxable as "emoluments from employment", they face the fact that, in the present case, the payment has been made for commutation of a contingent right to a redundancy payment. They have argued, therefore, that, whether or not a redundancy payment is taxable, commutation of a contingency right to such a payment is taxable and, therefore, that the reasoning in *Hunter* v. *Dewhurst* 16 TC 605 and *Tilley* v. *Wales* [1943] AC 386 would not now be followed by the House of Lords.

G

Hunter v. *Dewhurst* was cited on behalf of the Respondent as authority for the proposition that, if redundancy payments are taxable, commutation of a contingency right to such a payment is not taxable. Regardless of the logic of the decision, in my view, it is not for this Court to challenge its standing. *Tilley's* case was cited on behalf of the Respondent as authority for the proposition that, if redundancy payments are not taxable, commutation of a contingency right to such a payment is not taxable. It is not for this Court to challenge the reasons given for the decision.

H

I

I agree with the Special Commissioner that s 154 is not aimed at receipts resulting from fair bargains. In view of the finding that Mr. Haughey surrendered a right which was worth at least £4,506, it cannot be said that he was paid a benefit within s 154.

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(1) Page 285F *ante*. (2) Page 285G/H *ante*.

But I respectfully disagree with the Special Commissioner's ruling that the cost of the benefit must be made good in cash by the employee. I agree with Mr. Park Q.C. that, even if there was a benefit provided to Mr. Haughey, the cash equivalent has been reduced to nil under s 156(1) because it was "all made good by Mr. Haughey". The expense referred to in s 156(2) to which the Department of Economic Development was put was made good by the surrender of the contingent right. Normally this would be made good in cash but a benefit may be made good in kind—for example, by the exchange or assignment or surrender of a contractual right capable of a monetary valuation. For these reasons, s 154 does not apply.

I do not consider it necessary to decide whether cash payments made directly by an employer to an employee himself are taxable as benefits under s 154. Nor do I consider it necessary to embark on an examination of the difference, if any, between the phrase "from employment" and "by reason of his employment".

Appeal dismissed, with costs.

The Crown's appeal was heard in the House of Lords (Lords Griffiths, Ackner, Browne-Wilkinson, Mustill and Woolf) on 8, 9 and 10 June 1993 when judgment was reserved. On 22 July 1993 judgment was given against the Crown, with costs.

Patrick Coughlin Q.C., *Ronald Weatherup* and *Launcelot Henderson* for the Crown.

Andrew Park Q.C. and *John Thompson* for the taxpayer.

The following cases were cited in argument in addition to the cases referred to in the judgment:—*Bray* v. *Best* 61 TC 705; [1989] 1 WLR 167; *Brumby* v. *Milner* 51 TC 583; [1976] 1 WLR 1096; *Hamblett* v. *Godfrey* 59 TC 694; (ChD) [1986] 1 WLR 839; (CA) [1987] 1 WLR 357; *Bolam* v. *Muller* 27 TC 471; *Henley* v. *Murray* 31 TC 351; [1950] 1 All ER 908; *Stedeford* v. *Beloe* 16 TC 505; [1932] AC 388; *Duncan's Executors* v. *Farmer* 5 TC 417; 1909 SC 1212; *Dale* v. *de Soissons* 32 TC 118; [1950] 2 All ER 460; *Fitzleet Estates Ltd. & Others* v. *Cherry* 51 TC 708; [1977] 1 WLR 1345; *The Governors of the Rotunda Hospital, Dublin* v. *Coman* 7 TC 517; [1921] 1 AC 1; *Commissioners of Inland Revenue* v. *Dowdall O'Mahoney & Co. Ltd.* 33 TC 259; [1952] AC 401.

Lord Griffiths:—My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Woolf, and for the reasons he gives, I, too, would dismiss the appeal.

Lord Ackner:—My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Woolf, and for the reasons he gives, I, too, would dismiss the appeal.

Lord Browne-Wilkinson:—My Lords, I have read in draft the speech prepared by my noble and learned friend Lord Woolf and for the reasons he gives, I, too, would dismiss the appeal.

Lord Mustill:—My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Woolf, and for the reasons he gives, I, too, would dismiss the appeal.

Lord Woolf:—My Lords, Mr. Robert Haughey contends that he agreed to forego his contingent entitlement to be paid a non-statutory enhanced redundancy payment in the event of his becoming redundant in return for the payment of a lesser sum of £4,506. The Inland Revenue treated that the lesser sum as being assessable to income tax under Sch E for the year 1989–90 so Mr. Haughey was assessed in the sum of £23,422, which included the tax alleged to be payable on the lesser sum. He appealed against that assessment and was successful both before the Special Commissioner and the Court of Appeal in Northern Ireland in establishing that he was wrongly assessed in that sum of £4,506.

On this appeal to your Lordships' House the Revenue argued that the lesser sum, £4,506, which is part of a payment of £5,806, was paid to Mr. Haughey and accepted by him as an inducement to enter into new employment on different terms and conditions of employment from those on which he had previously been employed. These terms did not include any entitlement under the enhanced redundancy scheme (except for a two-year transitional period). Neither the Special Commissioner nor the Court of Appeal considered that the payment was made for this purpose. However, the Revenue submit that, in accord with the principles laid down in *Edwards* v. *Bairstow and Another*[1] [1956] AC 14, this is the only conclusion which, as a matter of law, it is permissible for a tribunal to reach as to the purpose for which the lump sum was paid and received and so this is a submission on which they are entitled to rely on this appeal. If the Revenue is correct in this submission, then Mr. Park Q.C., for Mr. Haughey, accepts that the appeal succeeds. If the Revenue fails and the payment was made for the purpose for which Mr. Haughey contends, then the Revenue still argue that the assessment was correct. Because of the Revenue's first argument it is necessary to set out the facts in more detail than would otherwise be necessary

The Facts

Until 8 August 1989 Mr. Haughey was employed by Harland & Wolff plc ("H. & W. 1") as a construction manager. He had been employed by the company for some thirteen years. H. & W. 1 had been in public ownership since 1975 and by 1989 its sole shareholder was the Department of Economic Development, Northern Ireland ("the DED").

Since 1988 the Government had been attempting to privatise H. & W. 1. In March 1989 an agreement in principle was reached between H. & W. 1 and representatives of the Olsen group of companies ("Olsen") and the DED which might, at last, enable privatisation to be achieved. A new corporate structure, including the creation of a holding company, Harland & Wolff Holdings plc ("H. & W. 2"), with an operating subsidiary, Harland & Wolff 1989 Ltd. ("H. & W. 3") was proposed. It was intended that 80 per cent. of

(1) 36 TC 207.

A H. & W. 2's share capital (£12,000,000) would be funded by Olsen and that the majority of the remaining 20 per cent. would be subscribed by the management and employees in accordance with a management and employee "buy-out" arrangement.

It was intended that the new structure should be achieved in two stages; B each stage involved the co-operation of the employees. First, a sufficient number of the employees whom the management wished to retain had to agree a transfer from H. & W. 1 to H. & W. 3 on new terms and conditions of employment. Secondly, the management and employee "buy-out" had to be implemented.

C The employees of H. & W. 1, including Mr. Haughey, had attractive contingent rights in a non-statutory enhanced redundancy scheme under their existing conditions of employment. This scheme was not independently funded and the DED had, therefore, to meet H. & W. 1's obligations under the scheme as and when they arose. The scheme was intended to deal with the human problems arising from the contraction of the shipbuilding indus- D try, by the provision of enhanced benefits to redundant employees. In the past there had been frequent resort to the scheme since in general it was as a result of redundancy that an employee's employment came to an end. It was not, therefore, surprising that the Special Commissioner made a finding that the scheme "... was universally regarded by the employees as a matter of the first importance".

E

The proposed terms of employment would require the employees to adopt more flexible working arrangements. In addition, the employees who were retained by H. & W. 3 would have to give up their rights under the enhanced redundancy scheme. As a result of discussions between the management, Olsen and the DED, it was envisaged that each transferred F employee would be paid 30 per cent. of the amount which he would have received under the scheme had he been made redundant on 1 September 1989 and that the 30 per cent. would be made up to 100 per cent. in the case of any transferred employee who was made redundant within two years thereafter. The DED agreed to provide the £10,000,000 which it was calculated would just suffice to meet the costs involved and to meet the redundancy G payments which would be payable to those employees who would not be offered employment upon the new terms.

When agreement in principle had been reached, the unions were informed and discussions took place between the management and the unions. In part, those discussions related to changes in working practices. H Here the Special Commissioner found that the differences between the parties "... were resolved without great difficulty". The Special Commissioner also found that "... much the largest bone of contention was the proposed loss (after a transitional two-year period) of the benefits" of the enhanced redundancy scheme.

I The employees of H. & W. were kept informed of the progress of discussions by leaflets entitled "Privatisation News". On behalf of the Revenue particular reliance was placed on the issue of 8 May 1989. That issue expresses the management's confidence that, with the co-operation and commitment of the employees, H. & W. 3 had the potential to become a viable business with all that this implied for future employment opportunities; that H. & W. 3 could not afford to maintain an enhanced redundancy scheme,

but that statutory redundancy entitlement would remain. It then set out the position at the time in these terms:

"**A New Start**...

Since 1977 the enhanced redundancy payment scheme has been available to all H & W employees who are declared redundant.

As part of privatisation we have to review this and we wish you to understand the position.

Facts about the scheme...

The enhanced Shipbuilders Redundancy Payment Scheme was introduced in 1977 for a fixed period as part of a wider programme of rationalisation within the British shipbuilding industry. It was subsequently renewed on several occasions. The current H & W scheme, whilst having no fixed termination date, is not a permanent guaranteed right of employment.

Even while it remains, to receive the benefit of the scheme an employee has to be made redundant. It is not within an employee's power to choose whether they receive it or not. The company has to decide who will be declared redundant and when.

There is no pot of cash. It is not the same as the pension fund for which payments are set aside on a yearly basis.

No private shipbuilding company could afford to maintain such an enhanced redundancy scheme. This includes the companies privatised out of British Shipbuilders which have a similar scheme that terminates this summer. The new Harland and Wolff cannot afford to maintain such an enhanced scheme, but statutory redundancy entitlement will remain.

A New Deal...

In negotiating the buy-out with Government we requested, and ministers have agreed, that a 'Fixed Sum' should be paid to cover the costs of:

* making redundancy payments at the same level as under the enhanced scheme in the first two years of operation as a private company—there will be no loss of enhanced redundancy payment to anyone who has to be declared redundant within two years.

* financial recognition to all existing employees transferred to the new company for changes in working practices and conditions (including the ending of the enhanced redundancy scheme) that will be necessary to ensure competitiveness.

The 'Fixed Sum' can only be used for these purposes...

Company Proposal...

We have based our proposal on the experience of companies privatised from British Shipbuilders.

Subject to your support and as consideration for your acceptance of new employment terms we propose:

* to pay every employee a gross cash sum calculated at three tenths of the amount of the enhanced payment (the amount in excess of the

statutory payment) which he or she would have received if declared redundant now. Everyone still employed at H & W will receive this, even if they are never declared redundant. The payment could be subject to income tax, but we are still investigating this.

* to pay any employee made redundant within the next two years, to August 31, 1991, a redundancy payment equal to his or her full entitlement which should have been due under the enhanced and statutory redundancy schemes less the initial payment.

* any employee made redundant before this is introduced will obtain the full entitlement under the enhanced and statutory schemes. Any employee made redundant after September 1, 1991 will receive only the statutory redundancy payment, but, of course, this person will have received the initial payment.

We believe that this is the fairest way of using the funds provided by the Government, balancing a cash payment to everyone for the changes in working practices and conditions and full protection for anyone who is made redundant during the first two years after privatisation.

We believe that this is as good a deal as any other British shipbuilder has achieved on privatisation.

However, we are prepared to consider alternative approaches within the stipulated guidelines which may be proposed by your representatives.

Remember that if you are employed in the new H. & W. after privatisation:

* statutory redundancy will not be affected

* pension entitlements remain protected

* you will receive the cash sum referred to above

* you will have two years protection for the balance of the enhanced redundancy cover

The choice is between employment and this package in a new company—which has an assured orderbook and the prospect of further orders in an improving market, or closure."

At 8 May 1989 it was only intended that there should be the payment of the 30 per cent. which in Mr. Haughey's case would amount to £4,506 ("element A"). However, negotiations continued and, on a careful re-examination of the terminal costs of the proposal, it was found that there was room for a small improvement in the terms to be offered to the employees. This improvement was £700 or (if more) £100 per complete year of service of the employee with H. & W. ("element B", which in Mr. Haughey's case would be £1,300). This improvement affected all employees but was more beneficial to two groups: those with very short service (and those for whom the 30 per cent. provision would have been minimal) and those with long service (for whom the restriction to 30 per cent. was more onerous).

Negotiations continued until 6 July 1989 when H. & W. 1 brought the negotiations to an end by issuing to 2,361 selected employees, including Mr. Haughey, offers of jobs with H. & W. 3. The offer had to be accepted before the end of July and was in fact accepted by all the employees to whom it was made. The offer was contained in a letter of 6 July which stated that the offer

was being made on behalf of H. & W. 3 and on the new terms and condition of employment:

> "... on the basis that, if you accept them, they will replace your present terms and conditions as from completion of the buy-out. i.e. only if the buy-out is completed."

The letter stated that there was enclosed with it, in addition to the new terms and conditions:

> "... details of the ex gratia payment which will be paid to employees who accept the new terms and conditions and the ending of the enhanced redundancy scheme and who report for work following completion of the buy-out."

The letter also stated:

> "Should you accept this offer and the termination of the enhanced redundancy scheme and (as mentioned earlier) start work following completion of the buy-out, you will receive an ex gratia payment, details of which (including future redundancy policy) you will find in section 4 of this information pack."

Finally the letter stated that, if an employee reply slip had not been returned by 31 July 1989, it would be assumed that the employee did not wish to accept the offer.

Section 4, referred to in the letter, set out the details of the *ex gratia* payment with reference to the elements A and B. It also pointed out that an employee would also receive full statutory redundancy entitlement "... which is not affected by the new terms and conditions".

The reply slip which was provided, which was to be completed by the employee, recorded the fact that the employee had read the letter of offer dated 6 July 1989 and the new terms and conditions of employment which are attached to it and went on to say:

> "I hereby confirm that I accept the new terms and conditions on the basis set out in that letter and the termination of the existing H. & W. enhanced redundancy scheme."

Although all the employees who were offered the new terms accepted them, the new terms of employment only applied when the management and employee buy-out was completed and an employee reported for work following completion of the buy-out. The buy-out was in fact completed on 8 September 1989. Prior to that date, on 8 August 1989, the business of H. & W. 1 was transferred to H. & W. 3. Initially, H. & W. 3's entire issued share capital was beneficially owned by DED. On the transfer of the business, employees' contracts were transferred to H. & W. 3 by operation of the Transfer of Undertakings (Protection of Employment) Regulations 1981.

After the buy-out had been completed and the employees had reported for work, the employees became employed on the new terms and conditions and entitled to receive a sum representing the aggregate of the A and B elements. The payments were actually made on 22 September 1989, the A element being paid directly by the DED, while the B element was paid by H. & W. 3 with funds provided by the DED for this purpose. (Nothing turns on

A the method of payment.) Mr. Haughey received an A element of £4,506 and a B element of £1,300. Both payments were paid under deduction of amounts equivalent to tax and National Insurance contributions, the amounts deducted being deposited in a separate bank account in the name of the DED pending the outcome of the appeal.

B *The Statutory Provisions*

If tax is payable on these sums, then it is payable under s 19(1) of the Income and Corporation Taxes Act 1988 which provides:

"19.—(1). The Schedule referred to as Schedule E is as follows:—

C *Schedule E*

1. Tax under this Schedule shall be charged in respect of any office or employment on emoluments therefrom which fall under one or more than one of the following Cases..."

D "Emoluments" is defined by s 131(1) of the 1988 Act as including "all salaries, fees, wages, perquisites and profits whatsoever".

The decision of the Special Commissioner

The status in relation to tax of both the A and the B elements of the E payment were in issue on the initial appeal. The Special Commissioner decided that it was "unrealistic" to regard them as "inducements of any kind". He took the view that the employees were in the position indicated in the final passage cited from "Privatisation News" of 8 May 1989. They either accepted employment on the new terms and conditions and accepted the *ex gratia* payment or were faced with closure of the dockyard and no employ- F ment. He said that he regarded the other documentation as supporting there being a single payment for both considerations. Prior to the hearing before him, Mr. Andrew Park Q.C., who also appeared before your Lordships' House, understood that it was accepted by the Revenue that the A element represented compensation for the loss of rights under the enhanced redundancy scheme, while the B element was consideration for the acceptance of G the new terms and conditions. At the hearing, it soon became clear that the Revenue did not accept that this was the situation. The Special Commissioner decided that the single payment of the A and B elements was "the consideration for both of the changes". He regarded the documents as being consistent with the existence of some appropriation of the total lump sum and he appropriated the A element of the payment to the loss of the H enhanced redundancy scheme payments and the B element to the acceptance by the employees of the new terms and conditions of employment. He then decided that the A element was not taxable but that the B element was taxable. In coming to that conclusion, he rejected the alternative argument advanced by the Revenue, which has not been renewed, that in any event the A element should be taxable under s 154 of the Act as a benefit.

I *The decision of the Court of Appeal*

The Court of Appeal came generally to the same conclusion. Hutton L.C.J. explained his view as to what the payment was made for in these terms [1992] STC 495, at pages 516–517(1):

(1) Page 301B/G *ante*.

"*Apportionment of the sum of £5,806 and whether payment of the sum of £4,506 was an inducement to enter into new employment on new terms and conditions.*

Whilst it is possible to regard some part of the aggregate sum of £5,806 as being paid as consideration for accepting the new terms and working conditions and therefore as an inducement. I consider it to be clear that a substantial part of that sum was paid to the taxpayer to compensate him for the loss of his contingent rights under the scheme. I regard this as clear from the wording of the documentation to which I have earlier referred. In my opinion this view is further supported by the considerations that element A of the total payment was calculated with reference to 30% of the amount of the enhanced redundancy payment which the taxpayer would have received if he had been declared redundant in the summer of 1989, and that the Special Commissioner found as a fact that the 30% certainly did not overvalue the employees' contingent rights under the scheme.

I am further of opinion that this payment in respect of the loss of the contingent rights under the scheme cannot be regarded as inducement to enter into new employment with H & W 1989; it was paid in compensation for a loss, not as an inducement to remain in employment or enter into new employment. Accordingly, as the total payment of £5,806 consisted, in part, of compensation for the loss of the contingent rights in the scheme and, in part, of consideration for accepting new terms and conditions of employment, I consider that the Special Commissioner was fully entitled to apportion the total payment into two parts, and that ample authority for such an apportionment is found in the decision of the House of Lords in *Wales (Inspector of Taxes)* v. *Tilley* [1943] AC 386, 25 TC 136."

The other members of the Court, MacDermott L.J. and Nicholson J., were of the same view and considered that the Special Commissioner was entitled to come to the conclusion to which he did come.

The purpose for which the lump sum was paid

Notwithstanding the gallant arguments of Mr. Coghlin Q.C., on behalf of the Revenue, to the contrary, I am quite satisfied that the Special Commissioner and the Court of Appeal were right to conclude that this was not a situation where the aggregate sum, consisting of the two elements, should be regarded as being paid as an inducement to the employees to become or remain employed by H. & W. 3. As Mr. Park submitted on behalf of Mr. Haughey, there was no need for any such inducement. Whether you approach the issue as being one to be resolved by construing the documents which resulted in the change in the terms of employment or looks at the substance and reality of the situation which brought about the change in the conditions of employment, the total payment was made for the two separate identifiable considerations referred to in the letter of 6 July 1989 and, in particular, in the employee's reply slip of acceptance. The payment was in consideration of (i) the new terms and conditions of employment and (ii) the termination of the enhanced redundancy scheme. It is true that neither of the two elements are exclusively referable to either element of the consideration. However, as was accepted by Mr. Coghlin, if the payments were being paid for two considerations, the Special Commissioner was entitled to apportion the payments between the considerations (as to which see *Tilly* v. *Wales* [1943] AC 386), and, this being so, it cannot be said that the apportionment adopted

A was wrong. In these circumstances, on the documents and the evidence I have no difficulty in rejecting the Revenue's first and primary contention.

The liability to income tax for payment made in lieu of a right to receive a non-statutory redundancy payment

B The rejection of the Revenue's primary contention makes it possible to focus on what I regard as being the important issue raised by this appeal, that is, whether a cash payment made for giving up non-statutory contingent redundancy rights is received by an employee as an emolument from his employment and chargeable to income tax under s 19 of the Act.

C On this appeal, as the first step in their argument, it was submitted on behalf of the Revenue that in law a payment made to an employee under the enhanced redundancy scheme (unlike a statutory redundancy payment) would have been taxable as an emolument from his employment. This submission is inconsistent with the actual treatment by the Revenue of such payments in accord with a long-standing statement of practice issued by the Revenue dealing with such non-statutory redundancy payments. The practice D was issued at the same time as a press release in conjunction with the announcement by the Chancellor of his budget proposals on 10 March 1981. The press release recorded that the statement of practice clarified the "treatment of non-statutory redundancy payments". The statement of practice includes the following passage:

E "A payment made under a non-statutory redundancy scheme may in law be taxable in full under Schedule E if the scheme is part of the conditions under which the employees agree to give their services, or if there is an expectation of payment on their part. However, in practice the Inland Revenue accept that in the case of a genuine redundancy the only tax liability on lump sum payments made under redundancy F schemes is under section 187 (now section 148), even though the payments may be calculated by reference to the length of service or the amount of remuneration, or is conditional on continued service for a short period consistent with the reasonable needs of the employer's business." (Section 148 is of no relevance to the present issue).

G I recognise that the Revenue are only departing from the position set out in the statement of practice for the purpose of establishing a step in their argument as to what they regard as being the correct position in relation to a payment made to "buy out" an employee's contingency redundancy rights and not in relation to those redundancy rights themselves. Nonetheless, I am concerned about the Revenue adopting this approach since I do not under- H stand the policy reasons for treating a payment genuinely made in lieu of receiving a redundancy payment in a different way from an actual redundancy payment. It is inevitable that if a payment is made in substitution for a payment which might, subject to a contingency, have been payable that the nature of the payment which is made in lieu will be affected by the nature of the payment which might otherwise have been made. There will usually be no legitimate reason for treating the two payments in a different way. However, I I say no more on this subject since I am satisfied that the present practice of the Revenue as described in the statement of practice accords with the position in law of payments made to an employee on redundancy under a non-statutory redundancy scheme.

In order to decide whether payments made under such a scheme are taxable under Sch E, it is necessary to identify the qualities of a genuine non-

statutory redundancy payment. Assistance is provided by s 81(2) of the Employment (Protection) Consolidation Act 1978 which sets out for the purposes of statutory redundancy when an employee is taken to be dismissed by reason of redundancy. For an employee to be in this position, a dismissal has to be "attributable wholly or mainly to—

> "(*a*) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed, or
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> (*b*) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish."

Redundancy, whether statutory or non-statutory, involves an employee finding himself without a job through circumstances over which he has no control. It is also a quality of redundancy that it does not give rise to a right to compensation unless the employee has been employed for a minimum period and that the right when it accrues increases, initially, with the period of employment and then subsequently reduces until eventually the employee loses any right of payment upon his reaching normal retirement age. These qualities were fully reflected in the enhanced redundancy payment scheme operated by H. & W. 1. A redundancy payment has, therefore, a real element of compensating or relieving an employee for the consequences of his not being able to continue to earn a living in his former employment. The redundancy legislation reflects an appreciation that an employee, who has remained in employment for the minimum time, has a stake in his employment which justifies his receiving compensation if he loses that stake. It is distinct from the damages to which he would be entitled if his employment were terminated unlawfully. It is also unlike a deferred payment of wages in that the entitlement to a redundancy payment is never more than a contingent entitlement, which no doubt both the employer and employee normally hope will never accrue.

Having identified the nature of a redundancy payment, it is now necessary to determine whether it falls within the description contained in limited statutory provisions which I have already cited. Giving full effect to the wide statutory definition of emoluments in s 131(1) of the Act, in the absence of authority I would have regarded a payment having the qualities which I have identified as not falling within the statutory definition of an emolument from employment. Instead of being an emolument from employment, it is a payment to compensate the employee for not being able to receive emoluments from his employment. However, this is an area in which there is an abundance of authority. It is not always easy to reconcile these authorities since as is to be expected they are frequently concerned with situations close to the borderline between payments which fall within and payments that fall without the statutory provision. It is possible to have almost an infinite variety of situations which, although they have common characteristics, as a matter of fact and degree fall one side of the border or the other. In each case ultimately it is a matter of applying the statutory language to the facts. However, general assistance is provided by the speeches in *Hochstrasser* v. *Mayes* [1960] AC 376 and *Shilton* v. *Wilmshurst*[1] [1991] 1 AC 684. In the

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[1] 64 TC 78.

A former case I find the passage in the speech of Lord Radcliffe, at page 391, of help where he said of the statutory language(1):

> "For my part, I think that their meaning is adequately conveyed by saying that, while it is not sufficient to render a payment assessable that an employee would not have received it unless he had been an employee, it is assessable if it has been paid to him in return for acting as or being an employee."

In that case, accordingly, although it was regarded as being near the borderline, a payment which was made to an employee under the terms of his employment to compensate him for loss that he suffered on selling his home because of having to move due to the circumstances of his employment was held not to be taxable, the reason being, as Lord Radcliffe explained(2):

> "The essential point is that what was paid to him was paid to him in respect of his personal situation as a house-owner, who had taken advantage of the housing scheme and had obtained a claim to indemnity accordingly. In my opinion, such a payment is no more taxable as a profit from his employment than would be a payment out of a provident or distress fund set up by an employer for the benefit of employees whose personal circumstances might justify assistance."

In the other case, *Shilton* v. *Wilmshurst* [1991] 1 AC 684, at page 689, Lord Templeman described the charge in these terms(3):

> "Section 181 (now section 19) is not confined to 'emoluments from the employer' but embraces all 'emoluments from employment;' the section must therefore comprehend an emolument provided by a third party, a person who is not the employer. Section 181 is not limited to emoluments provided in the course of employment; the section must therefore apply first to an emolument which is paid as a reward for past services and as an inducement to continue to perform services and, secondly, to an emolument which is paid as an inducement to enter into a contract of employment and to perform services in the future. The result is that an emolument 'from employment' means an emolument 'from being or becoming an employee'. The authorities are consistent with this analysis and are concerned to distinguish in each case between an emolument which is derived 'from being or becoming an employee' on the one hand and an emolument which is attributable to something else on the other hand, for example, to a desire on the part of the provider of the emolument to relieve distress or to provide assistance to a home buyer. If an emolument is not paid as a reward for past services or as an inducement to enter into employment and provide future services but is paid for some other reason then the emolument is not received 'from the employment'."

In the *Shilton* case the suggested emolument was, as in this case, paid by a third party, but it was paid as an inducement to Mr. Shilton to enter into a contract of employment with another football club by the football club which up to that time had been entitled to his services. (It was no doubt because of the reference to "an inducement" by Lord Templeman that the Revenue wished to establish that the payment to Mr. Haughey was paid as an inducement.)

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(1) 38 TC 673, at page 707. (2) [1960] AC 376, at page 392. (3) 64 TC 78, at page 105.

When these two short citations of the highest authority are examined it is significant that they treat as being outside the charge payments which are either from a distress fund or to relieve distress. As I indicated earlier a characteristic of a redundancy payment is that it is to compensate or relieve an employee for what can be the unfortunate consequences of becoming unemployed.

The other significant characteristic of a redundancy payment is that it is payable after the employment has come to an end. *Prima facie* a payment made after the termination of employment is not an emolument from that employment. It can be, however, an emolument from the employment if, for example, it is a lump sum payment in the nature of deferred remuneration. As Lord Hanworth M.R. indicated in *Henry* v. *Foster* 16 TC 605, at pages 629–630, in order to determine whether this is the situation it is necessary to look at the substance of the matter. If a payment relates to the services rendered then the fact that the payment is made after employment comes to an end does not mean that it is divorced from the employment. The distinction between the deferred payment of wages or salary and a redundancy payment may be narrow but it is nonetheless real. In the case of a deferred payment once the employment comes to an end the right to payment will inevitably accrue. In the case of a redundancy payment, the sum is only payable in limited circumstances and there will be no entitlement if, for example, the employee leaves the employment on his own accord.

The only case to which your Lordships were referred which actually involved a redundancy payment was *Comptroller-General of Inland Revenue* v. *Knight* [1973] AC 428. That was a decision of the Privy Council. The opinion of their Lordships was delivered by Lord Wilberforce. The legislation which was being considered by their Lordships was not identical but only similar to the statutory provisions under consideration here. In particular, the payment to be taxable had to be "...paid or granted in respect of the employment". The redundancy payment which was made was not made under a contract. In concluding that the redundancy payment was not taxable, Lord Wilberforce said, at page 435:

> "Although there was no express bargain between the company and the respondent, their Lordships do not see any valid reason in principle for making a distinction between this case and cases (admittedly involving no charge to tax) where the payment is made expressly as consideration for abrogating a service agreement. Equally with such cases the payment falls outside the taxing words 'in respect of his employment'."

Reliance was placed by the Revenue on an earlier passage in Lord Wilberforce's speech, at page 433, where he said:

> "Two propositions are accepted as common ground in the present case. First, where a sum of money is paid under a contract of employment, it is taxable, even though it is received at or after the termination of the employment: see for example *Henry* v. *Foster* (1931) 16 T.C. 605. Secondly, where a sum of money is paid as consideration for the abrogation of a contract of employment, or as damages for breach of it, that sum is not taxable: see for example *Henley* v. *Murray* (1950) 31 T.C. 351."

The Revenue latched on to the first proposition. However, Lord Wilberforce was doing no more than citing an agreed general proposition. As with most propositions of this kind it is subject to exceptions. For example,

pension payments will usually be payable in consequence of a contract of employment but they are not emoluments "in respect of the employment" or "from the employment" taxable under Sch E. They are taxable under distinct statutory provisions. I, therefore, reject the Revenue's submission that, in law, a non-statutory redundancy payment is an emolument from employment chargeable to income tax under Sch E.

The Revenue's next submission is that, even though the redundancy payment to which the employees would have been entitled on becoming redundant, if their conditions of employment had not been changed, would not have been an emolument from their employment, the sum paid to "buy out" this contingent entitlement was such an emolument.

It is impossible to accept this submission. As already indicated, the payment made to satisfy a contingent right to a payment derives its character from the nature of the payment which it replaces. A redundancy payment would not be an emolument from the employment and a lump sum paid in lieu of the right to receive the redundancy payment is also not chargeable as an emolument under Sch E.

It is not strictly necessary to deal with the Revenue's remaining submission which is dependent on a non-statutory redundancy payment being taxable. The submission is that, if a payment made under the enhanced redundancy scheme is taxable as an emolument from employment, then a payment to terminate the right to receive the benefits from a redundancy scheme is also taxable as an emolument from employment. The Revenue advance this submission because, in the Court of Appeal, Mr. Haughey contended successfully that, even if a payment under the enhanced redundancy scheme was taxable, a payment made to secure the termination of his rights under the scheme would not be taxable as an emolument from the employment. This contention was based on the decision of the majority of your Lordships' House in *Hunter* v. *Dewhurst* 16 TC 605 and the statement, the *ratio,* of that decision by Viscount Simon L.C. (with whose opinion Lord Atkin and Lord Russell of Killowen agreed) in *Tilly* v. *Wales* [1943] AC 386, at page 392, where Viscount Simon L.C. said(1);

> "There an article of association of the company which had employed Commander Dewhurst provided that when a director died or resigned or ceased to hold his office for a cause not reflecting upon his conduct or competence, the company should pay to him or his representatives 'by way of compensation for the loss of office' a sum equal to the total amount of his remuneration in the preceding five years. Commander Dewhurst subsequently agreed with the company, at a time when he was ceasing to be chairman but was remaining a director, that in lieu of his rights under this article he should be paid £10,000, while his remuneration as director was at the same time reduced to £250 per annum. Lord Warrington, Lord Atkin and Lord Thankerton held that the £10,000, was not a profit from his employment as director and did not represent salary, but was a sum of money paid down by the company to obtain a release from a contingent liability as distinguished from being remuneration under the contract of employment."

(1) 25 TC 136, at page 149.

It being unnecessary to express a final view, I merely indicate that, at present, I am not persuaded that this aspect of the Court of Appeal of Northern Ireland's decision was incorrect or that *Hunter* v. *Dewhurst* was wrongly decided. This is because for the Revenue to succeed the Revenue would have to establish, contrary to my provisional view, that the lump sum payment was the nature of an income payment before it could begin to qualify as being chargeable to tax under Sch E.

In these circumstances, I would dismiss this appeal, with costs.

Appeal dismissed, with costs.

[Solicitors:—Crown Solicitor, Northern Ireland, for Solicitor of Inland Revenue; Messrs. Evershed, Wells & Hind.]