

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
(REVENUE)

EMI GROUP ELECTRONICS LIMITED

Appellant

- v -

MARTIN COLDICOTT (HMIT)

Respondent

Mr Michael Flesch QC and Mr Conrad McDonnell (instructed by Messrs Rowe & Maw) appeared on behalf of the Appellant.

Mr Launcelot Henderson QC and Mr Timothy Brennan (instructed by The Solicitor for the Inland Revenue) appeared on behalf of the Respondent.

MR JUSTICE NEUBERGER:

Introduction

This is an appeal brought by EMI Group Electronics Ltd ("The Company") against the decision of the Special Commissioners (reported at [1996] STC 455). The Commissioners dismissed the Company's appeals against two determinations by the Inspector of Taxes that Income Tax should have been deducted by the Company in respect of certain emoluments made by the Company to two of its former senior employees.

Senior employees of the Company were employed under contracts of employment containing the following provision:

"The [employee] is required to give the Company three months' notice in writing of the intention to terminate employment. The Company will give [the employee] six months' notice of its intention to terminate employment. ... The Company reserves the right to make payment of the equivalent of salary in lieu of notice and to terminate employment without notice or payment in lieu for gross misconduct"

Mr A G D Soames and Mr J D Hussev were senior employees of the Company: their

respective employments were terminated by the Company which exercised its right in each case to make a payment in lieu of giving six months notice. The question raised by this appeal is whether such a payment (known as a "PILON") is taxable under Schedule E.

The Revenue's contention is that the PILONs were liable to tax in light of the provisions of Section 19(1) of the Income and Corporation Taxes Act ("the 1988 Act") which, so far as relevant, provides as follows:

"Tax under [Schedule E] shall be charged in respect of any office or employment on emoluments therefrom ..."

Section 131(1) of the 1988 Act provides that:

"... the expression "emoluments" shall include all salaries, fees, wages, perquisites and profits whatsoever."

(If the Revenue's contention is wrong, it is agreed that the PILONs would fall within Section 148 of the 1988 Act, the "golden handshake" provisions, subject to the £30,000 exemption in Section 188(4) of the 1988 Act).

In view of the width of the statutory definition of the word, it is clear that the PILONs were "emoluments". The crucial issue which divides the parties is whether the PILONs were "emoluments *therefrom*" within Section 19(1) of the 1988 Act - i.e. whether the PILONs were emoluments "from" the relevant employee's employment. The Revenue contends that the PILONs are taxable because they were emoluments *from* the employment of the relevant employees. It adopts the succinct reasoning of the Special Commissioners at [1996] STC 465d, where they said:

"[The Company] provided itself with two methods of lawfully terminating the contract of employment and the contract provided what the employee was to be paid in either case. That contract was the source of the payment which was in fact made. It was not an additional redundancy payment."

The Company contends that a distinction has to be made between payments made by employer as an inducement to becoming an employee, for being an employee, or for having been an employee (all of which are taxable) on the one hand, and, on the other hand, payments such as a PILON, for ceasing, or having ceased, to be an employee (which are not taxable). In a case such as this, the Company argues, the payment does not arise *from* employment: rather it arises from the disappearance of the employment.

This issue can thus be shortly expressed and easily understood, but, as is so often the case, the resolution of the dispute is not so simple. As Lord Radcliffe said in

Hochstrasser (HM Inspector of Taxes) v. Mayes [1960] AC 376, at 391:

"[I]t 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 that office or employment to say precisely when one considers that the money paid in one instance is, and in another instance is not a "perquisite or profit ... therefrom.""

There are similar observations in many - indeed, it would seem, most - of the cases concerned with this issue. In *Mairs (Inspector of Taxes) v. Haughey* [1994] 1 AC 303, Lord Woolf (with whom the other members of the House of Lords agreed) said at 320E-F:

"[T]his 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 on one side of the border or the other. In each case ultimately it is a matter of applying the statutory language to the facts."

As the closing words of those observations indicate, the ultimate question for the court is whether, on the particular facts of the case before it, the payment concerned is caught by the words of the statute. While the court will obviously derive assistance from previous judicial observations, they will normally not, save where the facts are substantially indistinguishable from the instant facts, be determinative of the case under consideration. In particular, one must, I think, be very careful before applying judicial reformulations of the statutory language to the instant facts and treating the result as determinative. As Lord Reid said in *Laidler v. Perry (Inspector of Taxes)* [1966] AC 16 at 30B/C:

"There is a wealth of authority on this matter and various glosses on or paraphrases of the words in the Act appear in judicial opinions, including speeches in this House. No doubt they were helpful in the circumstances of the cases in which they were used, but in the end we must always return to the words in the statute and answer the question - did this profit arise from the employment? The answer will be "no" if it arose from something else."

To the same effect, in *Hochstrasser*, Lord Radcliffe considered various judicial reformulations of the statutory provisions and said at 391-2:

"These are all glosses and they are all of value at 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 as if it had been paid to him in return for acting as or being an employee."

The Authorities

In *Hochstrasser* [1960] AC 376 the employer made a payment to an employee under a scheme incorporated by reference into his employment contract, to compensate him for the loss he suffered on having to sell his house because he had to move as a result of changing his job. The payment was held not to be taxable because, as Lord Radcliffe explained at 392:

"The essential point is that what was paid to [the employee] 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."

The House of Lords reached the opposite conclusion in *Laidler*, where the employer had given gift vouchers to its employees every Christmas: the vouchers were held liable to tax. At 31G to 32A, Lord Reid said this:

The [employee's] argument is that these gifts were made not as rewards but to promote loyalty and good relations. That may be so. But each voucher must have been given to promote the loyalty and good relations with the recipient. The case is quite different where, out of benevolence, a gift is made to an employee who is in difficulties ... [T]he gift is not made merely because the donee is an employee. His employment is not the *causa causans*. Here it is. Vouchers are given to all members of the staff alike."

To the same effect, at 33E-F, Lord Morris of Both-y-Gest said:

"While it is clear that the [employee] would not have received the vouchers had he not been a staff employee, the facts as found show that he only received the vouchers because he was a staff

employee. He received them only in his capacity as a staff employee."

Later, he said this:

"The vouchers were not distributed to the staff workers on any individual or personal ground nor were there any special or particular reasons which were peculiar to any of them."

Those observations suggest that the essential difference between *Hochstrasser* and *Laidler* is that, in the former case, the payment to the employee was not attributable directly and solely to the fact that he was an employee: although his employment was a necessary condition of the payment, it was not a sufficient condition. It was also not the immediate cause of the payment: the immediate cause was the employee's having to sell the house at a loss. In *Laidler*, the sole cause of the receipt of the gift voucher was that the employee; although, in a sense, it could be said that the generosity of the employer coupled with the imminence of Christmas was a cause, I would adopt the submission of Mr Launcelot Henderson QC (on behalf of the Crown) and describe it as the occasion, of the presentation of the voucher.

Lord Hodson said this in *Laidler* at 35B:

"The *Hochstrasser* case depended on its own peculiar facts, there being a co-lateral contract between employer and employed quite outside their contract of service to compensate the employees for any losses they might incur on selling their houses on transfer from one post to another."

This observation appears to be consistent with the approach of Lord Cohen in *Hochstrasser* itself. At 395 he said this:

"[O]n the facts of the present case I am satisfied that Jenkins LJ was right when he said: "I think it might well be said that while the employee's employment by [the employer] was a *causa sine qua non* of his entering into the housing agreement and, consequently, in the events which have happened, receiving [the] payment ... The *causa causans* was the distinct contractual relationship subsisting between [the employer] and the employee under the housing agreement..."."

Both *Hochstrasser* and *Laidler* were cases where the benefit moved from employer to employee during the currency of the employment contract, and the central point at issue was therefore somewhat different in nature from that raised in the instant case. The judicial "glosses" put on the statutory words in the speeches in those two cases.

although obviously helpful and worthy of the highest respect, must not, I think, be applied to the facts of the present case without bearing in mind both their context and the fact that they are not the words of the centrally relevant statutory provision. They were paraphrases which were put forward in the context of the particular facts of those cases, which involved different problems and circumstances from the present case, not least in that the employment in those two cases was continuing when the payment in question was made.

The Company and the Revenue can each find passages in the speeches which appear to assist their respective cases. Thus, sentences taken from the passages I have already quoted from the speeches of Lords Reid, Morris and Hodson in *Laidler* could be said to provide assistance to the Revenue's case; and the Company's case could be said to be supported by sentences in *Hochstrasser* from the speeches of Lord Radcliffe (from passages I have cited) and Viscount Simonds, who suggested at 391 that, in order to be taxable, a payment must be "a reward for [the employee's] services". That particular observation can be invoked to illustrate the problems which can arise if one concentrates too much on the judicial "glosses" as opposed to the actual statutory words and the principles which can be extracted from the cases. First, while it can be said that a PILON is not "a reward for [the employee's] services" in the sense that he receives it only if his employment terminates and the Company elects not to permit him to work for the six months notice period, it could also be said to be a "reward for his services" in the sense that it is a sum contingently payable to an employee under the terms of his employment contract in the event of it being determined. It is a somewhat unprofitable exercise to decide which of those contentions is correct as, ultimately, what I have to decide is whether, on the facts, a PILON falls within the words of s.19(1) of the 1988 Act, and not within the words of a judicial reformulation of the Section. Secondly, in a more recent decision, *Bray v. Best* [1989] 1 WLR 167, the House of Lords has effectively reformulated the "reward for services" test suggested by Viscount Simonds: see per Lord Oliver at 176F-177D (in a passage which I quote below).

For the same sort of reasons, I consider that observations of Lord Templeman (with whom the other members of the House of Lords agreed) in *Shilton v. Wilmhurst (HM Inspector of Taxes)* [1991] 1 AC 684 must be seen in the context of the problem thrown up by the facts of that particular case. The respondent was employed by Nottingham Forest FC, and the question was whether a payment to him made by that club to induce him to take up employment with Southampton FC, fell within Schedule E. Lord Templeman said at 689D-E, in a passage on which the Company relies:

"The authorities ... 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"."

Mr Michael Flesch QC accordingly argued on behalf of the Company that a PILON was compensation for the employee having to cease work permanently, and it cannot be said to have been "paid as a reward for past services or as inducement to enter into employment and provide future services", and it must therefore be treated as "paid for some other reason", from which it follows that a PILON is not taxable.

I see the force of that argument, but I cannot accept it for a number of reasons. First, it involves construing what Lord Templeman said rather than what the statutory provisions say. Secondly, it relies on what Lord Templeman said in the context of a case which was concerned with a payment made to induce a prospective employee to enter into the employment contract: the general guidance he was seeking to give must be seen in that context. Thirdly, as with Viscount Simonds's paraphrase in *Hochstrasser*, it seems to me that it is by no means clear that a PILON should not be treated as "a reward for past services or as an inducement to enter into employment", given that the contingent right to a PILON is obtained by the employee as an effectively integral part of his employment contract. Fourthly, it appears that Lord Templeman did not regard any reformulation of the statutory words as always providing a satisfactory answer, because he immediately went on to say at 689E-F:

"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."

Fifthly, it is hard to reconcile the Company's contention with what Lord Templeman said towards the end of his speech at 694H:

"In *Hamblett v. Godfrey* [1987] 1 WLR 357, a sum of £1,000 paid to a civil servant for giving up her rights to join a trade union was held to be taxable 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. The source of the payment was the employment."

Hamblett was a unanimous decision of the Court of Appeal upholding both the decision and reasoning of Knox J, and it appears clear that Lord Templeman approved it. (Indeed, it would have been difficult for him to do otherwise, in light of the fact that it had already been approved by the House of Lords in *Bray* at [1989] WLR 176H to 177A.) I find it hard to see how the decision in *Hamblett*, as summarised by Lord Templeman, fits in with the suggestion that his statement at 698D-E was intended to be an exhaustive reformulation of the statutory definition.

In *Hamblett*, itself Purchas LJ said this at [1987] 1 WLR 368A:

"The rights, the loss of which was being recognised, were ...

directly connected with the fact of the taxpayer's employment. If the employment did not exist, there would be no need for the rights in the particular context in which Miss Hamblett found herself. So I start from the position that those are the rights directly connected with employment."

He then went on to contrast the payment in that case with a payment made by an employer to discourage an employee from indulging in a recreational activity to which, for some reason, the employer objected.

Neill LJ said at the end of his judgment at 370H-371A:

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

The third member of the Court of Appeal, Balcombe LJ, said at 371B that Knox J "came to the right conclusion for the right reasons". It is, I think, instructive to see how Knox J expressed himself at first instance at (1987) 59 TC 694. Having asked himself, at 712B "whether the £1,000 received by Miss Hamblett [was] received from her employment", he went on to say this at 713G:

"[T]he rights in respect of which the payment was made ... were in my judgment part and parcel of the employer and employee relationship. There is a clear distinction here between the situation in *Hochstrasser* ... and the present case in that the employee's loss against which he was indemnified in *Hochstrasser* ... was a loss of a purely personal nature; that is to say, loss on the sale price or value of his house albeit triggered by his employer's decision that he should move."

He put the point slightly differently at 714D, having again referred to *Hochstrasser*:

"In this case there is no such independent source other than the [employer's] desire to recognise the loss of rights intimately linked with employment."

I should also refer to the decision of the House of Lords in *Bray*, not least because it involved the payment by an employer to an employee after the employment had been determined. In a passage which is of some assistance in the present case (and which also highlights the problems inherent in relying on judicial reformulations in other cases of the statutory words) Lord Oliver of Aylmerton (with whom the other members of the House of Lords agreed) said this at [1989] 1 WLR 176F to 177B:

" Of course, emoluments include, and indeed normally consist primarily of, sums paid by way of periodic remuneration for services, but it is, I think, clear that that concept is not an essential ingredient of the term ... An employee renders services so that, in some circumstances at least, "in return for being an employee" [the quotation being from Lord Radcliffe in *Hochstrasser*] may be expanded into "in return for being a person who renders services" and then contracted again into "in return for rendering services". In this House [in *Brumby v. Milner* [1976] 1 WLR 1096, 1100 the test adopted both by Lord Simon of Glaisdale and Lord Kilbrandon was whether the profit arose "from employment" or "from something else" quoting Lord Reid in *Laidler* [He then referred to *Hamblett* and continued] In the light of these authorities, I cannot read the phrase "reward for services" as anything more than the conventional expression of the notion that a particular payment arises from the existence of the employer-employee relationship and not, to use Lord Reid's words in *Laidler* ..., from "something else"."

In *Wilcock (HM Inspector of Taxes) v. Eve* (1995) 67 TC 223, at 232C Carnwath J said this:

"One thing that is clear from recent authorities is that the concept of an emolument from employment is not confined to something in the nature of a reward for continuing employment."

He turned to the judgment of the Court of Appeal in *Hamblett* and its approval in *Bray*; he then cited Lord Templeman's observations on *Hamblett* which I have quoted from *Shilton*, and said this at 233I:

"It is noteworthy that there is no reference there to the fact that Miss Hamblett continued as an employee."

I now turn to the most recent decision of the House of Lords in this area of law, and upon which Mr Flesch understandably placed particular reliance. In *Mairs* [1994] 1 AC 303 the Revenue sought to charge to tax a payment made by an employer to an employee as compensation for giving up his contingent rights under an enhanced redundancy scheme. Affirming the decision of the Court of Appeal in Northern Ireland, the House of Lords held that the payment did not fall within Schedule E.

Mr Flesch relied on two observations in Lord Woolf's speech. First, Lord Woolf said this at 320D/E:

"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."

The second sentence in that quotation, if read on its own, provides some support for the Company's primary contention in this case, to the effect that a PILON is a payment from unemployment and not a payment from employment (because it is only payable in the event of the employee being dismissed and in the event of his not being permitted to work out his six months notice). However, there are good reasons for not accepting that submission. I have already suggested that one should be wary of relying on a statement lifted out of a judgment, and that one should bear in mind that the statement was made in the context of the particular facts before the court. In connection with this, the sentence upon which Mr Flesch relies has to be put in its specific context. It followed a detailed analysis by Lord Woolf of the nature of a redundancy payment at 319E-320C. At the very beginning of that passage, Lord Woolf explained why it was necessary to consider the nature of a redundancy payment:

"In order to decide whether payments made under such a scheme are taxable under Schedule E, it is necessary to identify the qualities of a genuine non-statutory redundancy payment."

Lord Woolf then went on to examine those qualities at 319H-320C where he said this:

"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 a period of employment and then subsequently reduces until eventually the employee loses any right of payment upon his reaching normal retirement age. ... A redundancy payment is 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 him receiving compensation if he loses that stake."

Further, the sentence upon which Mr Flesch relies represented a provisional view reached before consideration of *Hochstrasser* and *Shilton* to which Lord Woolf then turned, quoting from Lord Radcliffe in the former case and Lord Templeman in the later case. Lord Woolf then said this at 321G:

"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."

As I have already indicated, it does not seem to me that a PILON can fairly be said to constitute what might be called a "distress payment"; in this connection it is to be contrasted with a redundancy payment, whose nature Lord Woolf explained in the passage at 319E-320C.

The second observation of Lord Woolf on which Mr Flesch particularly relied was to this effect at 321H:

"Prima facie a payment made after the termination of employment is not an emolument from that employment."

Although that observation is of some assistance to the Company's contention, I do not consider that it takes the argument in this case much further. It is clear that this was only a prima facie observation. It is self-evidently subject to exceptions, as Lord Woolf immediately went on to say, giving as an example "a lump sum payment in the nature of deferred remuneration"; another example is the payment in *Bray*.

More generally, Mr Flesch relied on the conclusion and the reasoning in *Mairs*. So far as the conclusion is concerned, he contended that, although a PILON and a redundancy payment are not identical in nature, there is a striking similarity between the two concepts, and it would be illogical if the one was taxable and the other was not. One sees the force of the point, but I have already referred to judicial observations of the highest authority which show that there can be fine distinctions between payments which are, and payments which are not, taxable. As Lord Woolf said in *Mairs* itself at [1994] 1 AC 322A:

"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."

Lord Woolf's observations relating to redundancy payments show, there are real differences between a PILON and a redundancy payment. Furthermore, in *Mairs* at 320C Lord Woolf said that a redundancy payment "is distinct from the damages to which [an employee] would be entitled if his employment were terminated unlawfully". It is also unlike a PILON, which, quite apart from the fact that it is not linked to a statutory scheme, is payable irrespective of the length of service of the employee, the reason for his dismissal, his closeness to retirement age, or his

prospects of re-employment. In my judgment, a PILON is neither a "deferred payment of wages or salary" nor "a redundancy payment". If there can be said to be a spectrum of types of payment, from the point of view of charge to Schedule E, I consider that a PILON falls somewhere in the narrow area between those types of payment on the spectrum.

Mr Henderson suggested that there were observations in *Mairs* which assisted the Crown's case. Thus, having decided that a redundancy payment was not itself liable to tax, Lord Woolf said at 319D:

"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 would 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." (and see also a similar observation at 323B)."

The argument was that if Mr Flesch is correct in contending that a PILON should be treated as a payment to an employee to earn remuneration by working out his notice, then the fact that such remuneration would be chargeable to tax under Schedule E suggests that a PILON should also be so liable. The point was not in the forefront of the Crown's case, essentially for two reasons. First, the relevant observation of Lord Woolf was not part of the ratio, and, in any event, does not appear to have been intended to be a decisive point on its own. Secondly, it is not accepted by the Crown that a PILON, despite its name, is really a payment to an employee in lieu of his being able to earn remuneration during the period of notice: on analysis, Mr Henderson says that the employment contract entitles the Company to determine the contract in one of two ways, namely either by giving six months notice or alternatively by paying a PILON.

The second aspect of Lord Woolf's speech in *Mairs* upon which Mr Henderson relied was based on a proposition which was common ground in *Comptroller-General of Inland Revenue v. Knight* [1973] AC 428, which Lord Woolf quoted at 322F:

"[W]here 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... ."

At 322G-H Lord Woolf said that in that passage:

"Lord Wilberforce was doing no more than citing an agreed proposition. As with most propositions of this kind it is subject to exceptions."

I consider that Lord Woolf was saying that he was prepared to proceed on the assumption that the proposition cited by Lord Wilberforce was right, but that it was subject to exceptions. That does not seem to me to take matters much further in the instant case: if there is such a general proposition, it has exceptions, and I have to decide whether a PILON is within the general proposition or represents one of the exceptions.

The Revenue also relied on two decisions of the Court of Appeal, *Henry (HM Inspector of Taxes) v. Foster* (1932) 16 TC 605 and *Dale (HM Inspector of Taxes) v. de Soissons* (1950) 32 TC 118. In each of those cases, the question was whether an employee, who was entitled to a payment under his employment contract, as a result of the termination of that contract, was chargeable to tax under Schedule E in relation to that payment. In each case, he was held to be so chargeable.

In *Henry*, the employment contract entitled the employee, on his employment ceasing (other than due to misconduct, bankruptcy, lunacy or incompetence) to payment of a sum equal to his total remuneration over the last five years of his contract. Lawrence LJ said at 632:

"In my judgment, the determining factor in the present case is that the payment ... whatever the parties may have chosen to call it was a payment which the Company had contracted to make to [the employee] as part of his remuneration for his services as a director. It is true that payment of this part of his remuneration was deferred until his death or retirement or cesser of office... ."

That case is not determinative in favour of the Revenue in the present case, because of the circumstances in which the payment became due (simply on ceasing to be employed, there being no question of the payment being in lieu of notice) and the very size of the payment. A case heard together with *Henry* in the Court of Appeal, *Hunter (HM Inspector of Taxes) v. Dewhurst*, went to the House of Lords (also reported at (1932) 16 TC 605). The contractual provisions in *Hunter* were similar to those in *Henry* but the employer negotiated new terms with the employee on the cesser of his employment, including a lump sum payment, different in amount from that which would have been payable under the contract. In the House of Lords, Viscount Dunedin said at 640 essentially dealing with the facts in *Henry* that:

"[T]he payment was part of a contract under which [the employee] served and in respect of the services rendered while [he] served. ... [T]he true nature of the payment, in my opinion, was just deferred remuneration."

"Deferred remuneration" is not perhaps a natural description of a PILON, but, as it is part (albeit a contingent part) of the overall remuneration package for the employee under the contract in the present case, it cannot be said to be inaccurate; however, at least to my mind, it would not be right to describe a PILON as "*iust* deferred

remuneration".

It is also interesting to see how Lord Thankerton and Lord MacMillan dealt with the matter. Lord Thankerton said at 649:

"It is clear, in my opinion, that a payment [under the relevant contractual provision in that case] to a director who has in fact resigned, is contractually part of the consideration for his services as a director and would be correctly described as arising from the office of director, but there would remain the question as to whether it was in the nature of income or not."

Lord MacMillan at 652 said that:

"The payment would have been made to [the director] in pursuance of the terms on which he held his office as director and, as such, would have been a profit directly arising from his office."

Those two observations, at least if taken in isolation, can fairly be said to assist the Crown's case in the present instant, but, once again, they must be read in the context of the facts of the case before the House of Lords. They were *obiter* remarks made in the context of a case where the House of Lords ultimately decided that tax was not payable.

In *Dale* the respondent was employed on the basis of a fixed salary plus a commission, for a term of 3 years, but the employer was entitled to terminate the agreement at the end of the first or second years on payment of, respectively, £10,000 or £6,000 as "compensation for loss of office". The employment having been determined at the end of the first year, the issue was whether the payment of £10,000 was assessable under Schedule E. Sir Raymond Evershed MR observed at 127 that:

"[The] £10,000 was part of the remuneration which [the respondent] was entitled to get under and receive from, his contract of service. The contract provided that he should serve either for 3 years at an annual sum or, if the company so elected, for a shorter period of 2 years or 1 year at the annual sum in respect of the 2 years or the 1 year, as the case may be, plus a further sum, that is to say it was something to which he became entitled as part of the terms upon which he promised to serve, something which he was entitled to receive in the particular event specified, namely, the term not running the 3 years but being earlier determined."

At the end of his judgment at 128, he quoted with express approval the concluding observations of the judge at first instance, to this effect:

"In the present case the [respondent] surrendered no rights. He got exactly what he was entitled to get under his contract of employment. Accordingly the payment in my judgment falls within the taxable class."

The facts of that case, as analysed by the Court of Appeal, were close to those of the present case. In that case, the respondent had the right to work for 3 years; however, the employer had the contractual right to determine his employment early (sc. After 1 or 2 years) and, if the employer chose that course, it had to pay the respondent a specified sum (sc. £10,000 or £6,000 respectively). That sum was unanimously held by the Court of Appeal to be liable to tax under Schedule E. In the present case, once notice determining the employment contract was given by the Company, the employee had the right to work for a further 6 months; however, the Company had the contractual right to require the employee to cease working as soon as notice was given, and, if the Company chose that course, it had to pay the employee a PILON. The right in the Company to elect between the employee working for 6 months or receiving a PILON derived from the contract of employment, and in those circumstances, as the £10,000 was liable to tax in *Dale*, the Revenue argues that the PILON is liable to tax in the present case.

There are differences between the two cases. First in *Dale*, the £10,000 or £6,000 became payable on a single contingency at the instigation of the employer, namely determination of the contract at the end of the first or second year; in the present case, a double contingency is required before the PILON is payable, namely the determination of the employment contract and the subsequent election to pay the PILON, in each case at the suit of the Company. Secondly, the money in *Dale* was payable for premature determination of the contract: here it is instead of the employee being able to work out his notice. In conceptual and in practical terms these distinctions are fairly slight, and it could be said to be somewhat surprising if they produced a different result. However, bearing in mind the judicial observations I have cited as to the fine distinctions in this area, it is by no means inconceivable that such distinctions could produce a different result in this case than that in *Dale*. Furthermore, one should perhaps be a little cautious of adopting the reasons of the Court of Appeal in a case decided nearly fifty years ago, since when the statutory provisions have been considered and explained in a number of cases, of which at least five have been heard in the House of Lords.

Conclusions

Having reviewed the authorities referred to by both parties, I revert to the question raised on these appeals, namely whether a PILON is an emolument "from" the employment of the relevant employee of the Company. In my judgment, it is.

First, it is a payment which is, albeit contingently, due from the Company to the employee under the terms of the employment contract. That is clearly neither a sufficient (see *Hochstrasser* and *Mairs*) nor a necessary (see *Hamblett*) condition. However, as it appears to me to be a relevant consideration, not only as a matter of common sense, but also in the light of observations of Lord Cohen in *Hochstrasser* at

395, Lord Hodson in *Laidler* at 35B-C and Lords Thankerton and MacMillan in *Hunter*. Accordingly, this is a factor which suggests that a PILON is a payment which "derives from" the employment, and that it was part of the package of benefits which the Company, as prospective employer, offered to the employee to induce him to take the employment.

Secondly, the receipt of an PILON appears to me "to arise from the existence of the employer-employee relationship and not ... from something else" to quote from Lord Oliver in *Bray*, after considering the judicial reformulations in *Hochstrasser*, *Laidler* and *Brumby*. To put the point in a slightly different way, the right to a PILON was "directly connected with employment" and "the rights in respect of which the [PILON] was made ... were ... part and parcel of the employer and employee relationship" (to quote from Purchase LJ and Knox J respectively in *Hamblett*). The terms on which an employment contract can be brought to an end seem to me to be self-evidently an inherent part of the contractual relationship. Although the determination of the contract coupled with the election of the Company to pay the PILON had to occur before the PILON was payable, that represented the "occasion" of the payment, rather than its cause, in the same way as the employee's cesser of employment in *Henry* and *Dale*, and the advent of Christmas in *Laidler*, were not the cause, but the occasion, of the payment in those cases.

Thirdly, the payment of a PILON is not personal to any particular employee or dependent on the personal circumstances of the employee. Indeed, as I have mentioned, the contractual provisions as to notice and PILONs in the instant cases were included in all the contracts of the more senior employees of the Company. To quote again from the first instance judgment in *Hamblett*, at 714D, "there is no independent source other than the [employer's] desire to recognise the loss of rights intimately linked with employment". In particular, I do not consider that a PILON (unlike a redundancy payment) can fairly be said to be a payment to relieve the employee against distress or something akin thereto, as in *Hochstrasser* as explained by Lord Woolf in *Mairs* at 321G.

Fourthly, in so far as the payment of a PILON is in lieu of the Company letting the employee earn from the Company during the notice period, it would seem surprising if the PILON were not taxable, given that the earnings would be (see the observations of Lord Woolf in *Mairs* at 319D and 323B to which I have referred).

Fifthly, it appears to me that the reason for, and circumstance in which, a PILON is payable are similar to those in respect of the payments in *Dale* and - to a lesser extent - *Hunter*. Although this is an area where fine distinctions exist and each case turns on its own facts, I must confess to finding it difficult to justify a logical basis for reaching a different decision in this case from that of the Court of Appeal in *Dale*.

It would be wrong to suggest that the arguments the other way have no force. The decision and reasoning in *Mairs* clearly give the Company a powerful case. However, as I have sought to explain, it appears to me that the crucial point is that the fiscal quality of the payment in that case was determined by the fact that it was a contractual substitution for a redundancy payment, which, while it clearly has some qualities in common with a PILON, also has some different characteristics which are, in my judgment, crucial for the purpose of the present issue. While appreciating that it

involves an oversimplification, I would suggest that the method of assessment, and the purpose of a redundancy payment, as explained by Lord Woolf, show that it is to be regarded as compensation for loss of status or loss of the employee's "stake in his employment", that it may be properly perceived as a payment to relieve distress. I do not consider that the same points can be made in respect of a PILON, which is simply part of the agreed machinery for determining the employee's contract of employment, which is in the employer's standard form.

It is, nonetheless, a fair point that the distinction between the two types of payment is a fine one. However, the cases show that this is an area of the law where narrow distinctions can often make all the difference. In particular, in the present case, it can be said with at least equal force that the difference between a PILON and a deferred payment, as in *Dale*, is a fine one. If it is helpful way of analysing the matter, it seems to me that, in light of the statutory words and the way in which they have been interpreted by the Courts, a PILON has more in common with the payment in *Dale* than with that in *Mairs*, for the purpose of deciding whether it is an emolument "from" employment.

It was suggested on behalf of the Company that the proper distinction is between a payment for ceasing to be employed (which is not taxable) and a payment for having been employed (which is taxable): a redundancy payment and a PILON are said to fall into the former category, and a deferred payment into the latter. Although the initially attracted by that analysis and although it can be said to find some support in observations of Lord Woolf, I reject it. It is not what the words of the statute say; it is not the basis upon which any of the cases have been decided (if I have understood the speech in *Mairs* correctly); it is a distinction which, while attractive in theory, appears to me to be hard or unhelpful to apply in practice: most cases falling in one category will, I suspect, also fall into the other; it is an analysis which is difficult to reconcile with the reasoning and decisions in *Henry* and *Dale*. Finally, it is not a formulation which appears to me to be determinative of the issue in the present case: it can be said that a PILON is a payment for having been employed and one is back to arguing about whether a payment satisfies a particular reformulation of the statutory test.

Mr Flesch also contended that the Revenue's argument resulted in an anomaly: he said that the contractual provision for a PILON was for the benefit of the employer, and it would be extraordinary if the employee were taxed on receipt of it, particularly as, in the absence of such a provision, a dismissal without notice would result in the employee receiving damages which would not be taxable. That point is not as telling as it first seems. First, the employee does benefit from the contractual provision: as Mr Henderson pointed out, the employees in the present cases were entitled to their PILONs in full without proof of damage and were under no "duty to mitigate", whereas that would not be the case if there were no provision for a PILON and the employment was determined without notice. Secondly, there is a real difference as a matter of law between a contractual PILON and damages for unlawful premature determination of an employment contract: it is therefore not surprising if they are treated differently under tax law. Thirdly, the Company's argument also can be said to result in anomaly: it may be thought by some to be surprising if a PILON were not taxable, while salary paid during the currency of the notice (in lieu of which PILON is payable) is liable to tax. Fourthly, arguments based on anomaly should, at least in an area such as this, where it is clear that narrow distinctions can be decisive, should

only be relied on as a last resort.

In these circumstances, I reach the same conclusion as the Commissioners (and for substantially similar reasons, albeit I have expressed them far less economically) and dismiss the appeals. I should like to thank both Counsel for each party for their clear and succinct written and oral arguments.