INCOME TAX - Schedule E - holder of offices - in 1993 the Appellant was elected as Chairman of one Lloyd's Names Association and in 1994 the Deputy Chairman of another - in 1997, when the litigation was settled, the Associations made payments to the Appellant (and others) - whether the payments were emoluments from an office - yes - or gifts of a personal nature - no - whether payments were termination payments - whether payments were benefits in kind - appeal dismissed - ICTA 1988 Ss 19, 148 and 154

THE SPECIAL COMMISSIONERS

JOHN C MCBRIDE - Appellant
- and -
STEPHEN JOHN BLACKBURN (HM INSPECTOR OF TAXES) - Respondent

SPECIAL COMMISSIONERS: DR NUALA BRICE

JOHN WALTERS QC

Sitting in London on 23 - 25 September 2002

Felicity Cullen of Counsel, instructed by Messrs Arnold Fooks Chadwick, Solicitors for the Appellant

Hugh McKay of Counsel, instructed by the Solicitor of Inland Revenue, for the Respondent

DECISION

The appeal

1. Mr John C McBride (the Appellant) appeals against an amendment to his self assessment tax return for the year 1997/98. The amendment was made by letter dated 4 January 2000 and showed tax due of £69,454.30.

2. The grounds of the Appellant's appeal were that two payments, amounting in total to £280,000, received by him from the Secretan and Wellington Names Associations, were not liable to income tax as they were gifts or testimonials of an exceptional nature paid to him personally and not for his work or services and that they were not received in connection with the termination of the holding of an office or employment.

3. The Inland Revenue argued that the payments were in the nature of remuneration and so were taxable either as emoluments from an office under the provisions of section 19 of the Income and Corporation Taxes Act 1988 (the 1988 Act) or as termination payments under section 148. Later they also argued, in the alternative, that the payments were taxable as benefits in kind under section 154.

The issues

4. Thus the issues for determination in the appeal were:

> (1) whether the payments received by the Appellant were "emoluments from an office" within the meaning of section 19 of the 1988 Act; or
>
> (2) whether the payments were received in connection with the termination of the holding of an office or employment within the meaning of section 148; or
>
> (3) whether the payments were benefits in kind within the meaning of section 154.

The evidence

5. There was a statement of agreed facts. A general bundle of documents was produced. In addition, a bundle was produced which contained the Lloyd's Reconstruction and Resettlement Offer of July 1996. Oral evidence was given by the Appellant on his own behalf. The Appellant had put his evidence into a written statement dated 5 September 2002. Oral evidence was also given on behalf of the Appellant by Mr Alan Smallbone, a former working Name at Lloyd's and a member of the Secretan Names Association. Mr Smallbone had put his evidence into a written statement dated 27 August 2002.

The facts

6. From the evidence before us we find the following facts.

The Lloyd's losses

7. In the late 1980s and early 1990s individual Names at Lloyd's incurred substantial losses. Many of the Names felt that they had not been served well by their agents, insurers, actuaries and Lloyd's itself. (The agents, insurers, actuaries and Lloyd's itself are collectively referred to as the Lloyd's defendants.)

8. The Appellant was born in 1930 and retired in 1991. He was one of the Names who had suffered losses at Lloyd's. As a Name, the Appellant was a member of the following syndicates for the Lloyd's years of account 1988, 1989 and 1990:

> (1) Lloyd's Syndicates 367, 411, 1097 and 1152 (the Secretan syndicates); and
>
> (2) Lloyd's Syndicate 448, (the Wellington syndicate); this was formerly managed by Wellington Underwriting Agencies Limited.

9. The Appellant's initial concern with regard to the Secretan syndicates concerned the run-off of the syndicates following the liquidation of the managing agents. The Appellant caused a letter to be circulated, through the Lloyd's Names Association, to the other Secretan Names to convene a meeting to discuss the formation of a group to supervise the run-off. It was only as the date appointed for this meeting approached that the Appellant became aware that there were far greater concerns than those connected with the run-off. The possibility of an action against the Lloyd's agents for negligence and breach of fiduciary duty was

drawn to the attention of the Appellant by a letter known as the Neville Russell letter.

10. The Neville Russell letter was a letter dated 26 February 1992 from Messrs Neville Russell, Chartered Accountants, to the Manager of the Audit Department at Lloyd's, written on behalf of Neville Russell and five other firms of panel auditors. It stated that a number of syndicates were unable to quantify their final liability for claims arising from asbestosis and related diseases and, as this was a factor which could affect the adequacy of reserves, it was being reported to the Committee (of Lloyd's) with a request for instructions before the syndicate solvency reports were issued.

11. The proposed action against the Lloyd's agents was eventually extended to the other Lloyd's defendants, namely the insurers, actuaries and Lloyd's itself. The original issue of the run-off of the Secretan syndicates remained unresolved for a number of years but was effectively disposed of prior to the settlement of the Lloyd's litigation.

12. As it was impracticable for each Name to claim individually against the Lloyd's defendants, and because the Rules of the Supreme Court did not, at that time, provide for representative or group actions, the Names began to form action groups, or Names Associations, through which to pursue their claims against the Lloyd's defendants.

The Secretan Names Associations

13. On 20 January 1993 an Association was formed by Names who were members of the Secretan syndicates (the Secretan Names Association). The Appellant was a founder member of this Association. Prior to the initial meeting an agenda was circulated which contained the following:

> "4. Committee remuneration
>
> None. Expenses only. If the Group is successful and the membership wishes to make some tangible expression of satisfaction, that will be up to them at the time."

14. The Appellant was elected Chairman at the formation of the Association and remained as Chairman until 8 July 1997. The Association adopted written Rules.

15. Rule 6 dealt with recoveries and the relevant part provided:

> "6.1 If, as a result of negotiations or litigation conducted by the Association on behalf of Litigating Members, those Members receive Recoveries, such Recoveries shall, subject to such professional advice as the Committee shall receive, be received by the Treasurer and held in a trust account …and such Recoveries shall be applied as follows:
>
> > 6.1.1 in paying or providing for the payment of any unpaid expenses and liabilities of the Association and in paying such sum (if any) as may be determined by a General Meeting of the Association to past and present

Officers or Members of the Committee in recognition of time devoted by them to the furtherance of the Objects, any such sum to be divided among such persons in such manner as the Committee may determine … ."

16. Rule 7 provided that there should be a Committee of members to deal with the day to day activities of the Association. Rule 8 provided that the Officers of the Association should be a Chairman, up to two Deputy Chairmen, a Treasurer and a Secretary. Rules 9.6, 9.7 and 9.8 provided:

> "9.6 The Committee may employ and remunerate or pay fees to such executive, administrative or clerical staff or self-employed consultants (whether or not such persons are Members) as it may in its discretion consider necessary or desirable for the purposes of achieving the Objects.
>
> 9.7 The Committee Members shall not be paid ex officio.
>
> 9.8 A Committee Member or Officer may be employed or engaged by the Committee in accordance with rule 9.6 but no such employment or engagement shall take place unless approved by unanimous decision of the Committee. Fees and other remuneration paid to Committee Members and officers shall be disclosed in the accounts of the Association laid before the Annual General Meeting."

The Wellington Names Association

17. In 1991 an action group was formed by Names who were members of the Wellington syndicate. This was called the Wellington Names Association. The Association had written Rules. Rule 9 provided that the officers of the Association should be a Chairman, a Deputy Chairman, a Treasurer and a Secretary. Rule 10 provided that there should be a Committee of members. Rule 11.6 provided:

> "11.6 Members of the Committee shall not be entitled to receive any remuneration for their services to the Association but they shall be entitled to claim reimbursement of reasonable out of pocket expenses upon production of receipts in respect thereof."

18. The Appellant joined the Wellington Names Association in 1992 as a member. In about May 1994 he was appointed to the Committee and was elected Deputy Chairman on 28 October 1994. He remained as Deputy Chairman until 10 October 1997.

The role of the committees in the litigation

19. The prime purpose of the elected committees of the Names' Associations was to give instructions to solicitors. However, the legal proceedings were issued not by the Associations but by the individual Names, as the Associations, as such, had no claims against the Lloyd's defendants. Although the committee members had a right of indemnity from other Names in respect of the liability for the costs of the solicitors they instructed, there was no security for this indemnity and, if the legal proceedings had been unsuccessful, it would have been difficult to

recover a contribution to costs from the other Names who might then have been near to bankruptcy. Committee members therefore felt exposed and some Names recognised this. Ultimately, the legal costs of the Wellington Names Association amounted to £3.5M and those of the Secretan Names Association amounted to £3M.

The Lloyd's settlement offer

20. In July 1996 settlement of the actions between the Names and the Lloyd's defendants was close. Each individual Name, as plaintiff, had to agree the terms of settlement. The Associations did not have power to settle the claims and did not do so. Lloyd's issued an offer, called the Lloyd's Reconstruction and Renewal settlement offer, under which Names were to be reinsured into a new reinsurance company called Equitas. As part of the offer, Lloyd's offered to pay general damages, legal costs and "expenses refunds".

21. The expenses refunds were described in Appendix 3 of the settlement offer and were intended to reimburse individual Names and action groups (Names Associations) in respect of their properly incurred expenses connected with the litigation. Appendix 3 stated that Lloyd's would request details of expenses in August 1996. Paragraph 4.19 stated that an aggregate amount of £75M was offered in respect of expenses and if this sum was insufficient there would be some scaling down. In that case Lloyd's would take account of a number of factors, including the nature of the expenses claimed; the highest priority would be given to expenses directly related to litigation against underwriting agents and auditors but a lower priority would be given to the contingent remuneration of action group committee members. Thus members of Names Associations had to vote for payments before they knew how much Lloyd's would contribute.

22. Sir John Wood was Professor of Law at Sheffield University and an expert on industrial awards. He advised a number of Names Associations about the distribution and the amount of payments to be made to their committee members. The rules of some of these other Associations specifically provided for the payment of remuneration to committee members. In advising each Names Association Sir John would establish his own committee which he called a remuneration committee.

The Secretan payments

23. On 14 June 1996 the committee of the Secretan Names Association discussed payments to the committee and the Appellant said that he was unwilling to take on the task of allocating sums to different members. Reference was made to the work done by Sir John Wood for the other Associations. No decision was reached except that the proposal for payments should remain in the papers for the extraordinary general meeting. The matter was further considered at the committee meeting on 21 June 1996 when it was agreed that Sir John should be approached about chairing a committee. Sir John did form a committee with two founder members of the Association who were not committee members. One of these was Mr Smallbone.

24. A Special General Meeting was held on 18 July 1996. An agenda, prepared by the Appellant, was circulated in advance. We refer to its terms in more detail below, where we give our reasons for our Decision. One of the items on the agenda was "ex gratia payments to the Committee". The agenda paper drew attention to rule 6.1 and emphasised that any reward was entirely at the discretion of the membership. Some statistics of workload over the past four

years were given; There had been six general meetings; 38 committee meetings; 200 enquiries each month; and the Appellant as Chairmen had written 1,000 letters and papers, had received 1,000 faxes, and had sent 1,800 faxes. At the Special General Meeting, one member said that the real benefit from the activities of the committee was not the work they did but "what the committee really took on" which was the very considerable risk of "being in the firing line" for what might have been the enormous costs which were incurred. The meeting voted a maximum payment of £490,000 to the committee, subject to assessment of the distribution and the amount by Sir John Wood's committee. We also refer in more detail below to the minutes of the Special General Meeting.

25. One of the members at the meeting was working with Sir John Wood for another Association and said that Sir John would want to find out what work had been done and then see what a fair figure would be. He would also consider the "various tiers of responsibility". Sir John sought information from the members of the committee, including the Appellant, to find who had made a "good contribution". On 11 September 1996 Sir John's committee reported and remarked that it was clear that, as well as attendance at meetings, a great deal of work had been undertaken and a very considerable amount of preparation for the litigation had taken place. He recommended total payments of £380,000, of which £160,000 was for the Appellant. Payments to six other committee members were recommended of sums between £80,000 and £16,000 each. One payment was made to a leading Queen's Counsel who was not a member of the committee although he was a member of the Association. He had not done any legal work for the Association but he was able to recognise those who could help and he also "stiffened the resolve" of the Association. On 16 September 1996 the Association submitted a claim to Lloyd's, on forms supplied by Lloyd's, for legal costs and "committee remuneration". Ultimately the Lloyd's contribution in total was £240,351.

26. The awards suggested by Sir John were approved by a Special General Meeting held on 16 April 1997 and were not in fact scaled down; the members of the Association made up the difference between the payment suggested by Sir John Wood and the sum received from Lloyd's. The resolution put to the meeting was drafted by the Association's lawyers and referred to "the payment to the members of the Committee under Rule 6.1.1 out of the Recoveries of an additional sum in the aggregate of £177,500 over and above the sum of £202,500 already paid by Lloyd's towards remuneration, thus enabling the members of the Committee to be paid the full aggregate sum of £380,000 awarded by the Wood Committee". The resolution was carried in that form.

27. At a committee meeting immediately following the Special General Meeting on 16 April 1997 discussion took place about the ex gratia payments which had been voted and it was resolved that the payments should only be made upon the resignation of the relevant recipient. The Appellant resigned on 8 July 1997.

The Wellington payments

28. In the early years of the Wellington Names Association there was an Annual General Meeting on 18 December 1992 which the Appellant attended as a member. The remuneration of the committee was discussed and the feeling of the meeting was against "success fees". If there were to be payments they should be considered afterwards in the light of all the events. We refer to the minutes of this meeting in more detail below, where we give our reasons for our Decision.

29. After the Lloyd's settlement offer became known there was a committee meeting on 14 June 1996 when discussion took place about "committee remuneration" and it was suggested that submissions for £550,000 be made to Lloyd's for the "success fee". Again, we refer below in more detail to the minutes of this meeting. The matter was again considered at a committee meeting on 21 June 1996 when the suggestion was made that the payments should be termed "ex gratia" rather than "remuneration".

30. On 17 July 1996 there was an annual general meeting for which the Appellant prepared an agenda paper. We also refer to this paper in more detail below. One of the items for consideration was "ex gratia payments" to the committee. The paper recorded that there was no specific provision in the rules about such payments which were entirely a matter for the members. The paper also stated that there had been five general meetings; that the committee had met sixty-five times; and that the Deputy Chairman (the Appellant) had written 600 letters, received 1,000 faxes and sent 1,800 faxes. [In oral evidence the Appellant accepted that the same figures had been used for the Secretan Names Association and agreed that there might be some mistake; it was possible that the figures were for both Associations.] A figure of £550,000 was proposed and it was agreed that a total of £550,000 should be paid to the members of the committee. Sir John Wood was asked to make recommendations about the division of this sum.

31. Sir John asked the Appellant to complete a questionnaire which included a list of meetings attended but which did not refer to hours of work done or the production of records. A provisional apportionment by Sir John was reported to the committee meeting on 11 September 1996. The report stated that the procedure had been to obtain as much information as to the offices held, work undertaken and period on the committee of each committee member. Those concerned had also been asked to write telling of the extent of their involvement and indicating the skills they brought to the committee and the work they undertook. The report recommended a payment to the Appellant of £120,000 and payments were also recommended to fifteen other committee members ranging in amount from £87,000 to £2,000 each. (The Chairman of the Wellington Names Association waived any payment).

32. Sir John's proposals were discussed again at a committee meeting on 13 November 1996. That meeting also considered the tax treatment of the payments. Some members of the committee were unhappy with the proposals of Sir John because one Name who had done a lot of work in the early stages for the Association, but who had later resigned, received nothing. Another Name received only a minor payment although he had set up the Association and had contributed a great amount before he resigned. Also, Sir John had recommended a payment to a Name who was neither a member of the Association nor a member of the committee. After that meeting the Chairman of the Association consulted widely and then made the final decision as to "who should get what". These amounts were approved at a committee meeting on 12 February 1997 and confirmed at a meeting on 16 April 1997. The Appellant was awarded £120,000. At the meeting on 16 April 1997 it was resolved that "the ex gratia payments should be made only on the acceptance by the Chairman of the resignation of the relevant Committee member or Officer". Ultimately Lloyd's contributed £230,000 towards the payments. The Appellant resigned on 9 October 1997.

33. When the litigation had been settled the Appellant received a number of letters of appreciation from members of both Associations,

The payments to the Appellant and the appeal

34. On 10 July 1997 the Appellant was paid £160,000 by the Secretan Names Association. Tax at 23% was deducted "without prejudice and under protest" making a net payment of £123,200. On 14 October 1997 the Appellant was paid £120,000 by the Wellington Names Association. Tax at 23% was deducted "without prejudice and under protest" making a net payment of £90,737.94.

35. The Appellant's self-assessment tax return for the year of assessment 1997/98 was amended by the Inland Revenue on 12 November 1999 and on 26 January 2000 the Appellant appealed on the ground that the payments of £160,000 and £120,000, making a total of £280,000 were exempt from income tax.

36. The Appellant agreed that the payments to him came from the members of the Associations. Lloyd's made their payments to the Associations and the Associations made the payments to him and the other committee members.

The authorities

37. The following authorities were cited at the hearing:

In re Strong (1878) 1 TC 207

Turner v Cuxson (1888) 2 TC 422

Herbert v McQuade (1902) 4 TC 489

Cooper v Blakiston (1908) 5 TC 343

Cowan v Seymour (1919) 7 TC 372

Reed v Seymour (1927) 11 TC 625

*Slaney v Starkey (*1931) 16 TC 45

Calvert v Wainwright (1947) 27 TC 475

Moorhouse v Dooland (1955) 36 TC 1

*Bridges v Bearsley (*1957) 37 TC 289

Hochstrasser v Mayes (1960) 38 TC 673

Commissioners of Inland Revenue v Morris (1967) 44 TC 688

Moore v Griffiths (1972) 48 TC 338

Wicks v Firth (1982) 56 TC 308

Bray v Best (1989) 61 TC 705

Mairs v Haughey [1992] STC 495

Reasons for decision

38. We consider separately each of the issues in the appeal.

Were the payments emoluments from an office?

39. The first issue is whether the payments received by the Appellant were "emoluments from an office" within the meaning of section 19 of the 1988 Act

40. Section 19 of the 1988 Act contains the charge to tax on in respect of any office or employment and the relevant part provides:

> **"19 Schedule E**
>
> **(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 or emoluments therefrom which fall under one or more than one of the following Cases-**
>
> **Case I: any emoluments for any year of assessment in which the person holding the office or employment is resident and ordinarily resident in the United Kingdom … ."**

41. The term "emoluments" is defined in section 131(1) as including "all salaries, fees, wages, perquisites and profits whatsoever."

42. For the Appellant Mrs. Cullen accepted that if the payments were emoluments then they were chargeable under Schedule E. However, she relied upon *Hochstrasser v Mayes* at 705-707 for the principle that not every payment made to an office holder was taxable; to be taxable it had to be by reference to services rendered and also had to be something in the nature of a reward for services and paid in return for acting as an office holder. She accepted that voluntary payments could be taxable but not if they were personal gifts or presents made on personal grounds and not by way of payment for services, relying upon *Seymour v Reed* and *Calvert v Wainwright* at 477. There was no presumption that a payment was taxable. She relied upon *Turner v Cuxson* and argued that the payments to the Appellant were an honorarium paid to a deserving man in recognition of faithful service during the number of years in which he had conducted the litigation to a successful conclusion. She also relied upon *Cowan v Seymour* at 384 and argued that the payments had been made to the Appellant because of his personality and not because of his office. She relied upon *Reed v Seymour* at 646 and argued that the purpose of the payments to the Appellant was not to encourage him to further exertions but to express the gratitude of the members of the Associations for what he had already done and their appreciation of his personal qualities. It was relevant that the Appellant had no entitlement to any payment. She relied upon *Bridges v Bearsley* at 320 and argued that non-taxable personal gifts could be in recognition of services rendered while not being a reward for services rendered. She argued that there was no connection between the holding of the offices and the payments as one payment had been

made to a non-committee member. She relied upon *Morris* at 689 and argued that the payments were unexpected by the Appellant. She relied upon *Moore v Griffiths* at 350E and argued that the payments were an applause for a victory, a mark of esteem, and to mark pride in a great achievement.

43. Mrs. Cullen accepted that the Appellant's service in his offices as Chairman and Deputy Chairman respectively were the background to the payments but argued that the payments were not for services rendered. She distinguished *Strong* and argued that the payments to the Appellant were not in discharge of the duties of the office holder as there were no prescribed duties as such. She also distinguished *Cooper v Blakiston* although she relied upon the words of the Lord Chancellor at 355 and argued that the payments to the Appellant were gifts of an exceptional kind peculiarly due to his personal qualities and were made for his being the lead litigator rather than for being an office-holder. She distinguished *Herbert v McQuade* although adopting the words of the Master of the Rolls at 499 where he said that a gift was not taxable if given to a curate who had, by his personal qualities and the length of time during which he had exhibited them, established a claim upon the bounty of the individuals who gave him a present at the end of fifteen years' service. She distinguished *Calvert v Wainwright* and argued that the payments were gifts given on personal grounds because of the Appellant's qualities and his faithfulness. She distinguished *Moorhouse v Dooland a*nd argued that the payments did not arise in the ordinary course of the Appellant's service as Chairman or Deputy Chairman but were for the excellent performance of his role as lead litigator; they were exceptional as they were unique and would not be repeated; and there was no right or entitlement to the payments. In all these authorities the taxpayer received other remuneration whereas the Appellant received no other remuneration for the offices he held in the Associations.

44. For the Respondent Mr McKay argued that the question was: what did the Appellant get the money for? He argued that the payments were in return for service**s** provided and for nothing else. The payments started with the decision of Lloyd's to set aside the sum of £75M as "expenses". The payments were not exceptional as similar payments had been made to the committee members of many other Names Associations. In July 1996 details had been provided of the work done by the Appellant to both Associations before they voted on the payments. The evidence was that Sir John Wood considered the amount of work done. The resolution of the Secretan Names Association was by reference to rule 6.1.1 which contemplated payment "in recognition of the time devoted to the furtherance of the Objects" of the Association. All the functions identified by the Appellant, including being lead litigator and "holding the thing together" were activities which resulted from his offices as Chairman and Deputy Chairman respectively and were not personal characteristics. Leading the litigation was a function of each committee member and it was relevant that the size of the payment made to each member varied by reference to the amount of work undertaken.

45. In considering the arguments of the parties we first refer to the authorities cited to us to see what principles we should apply. We then consider the oral evidence and decide what weight we should give to it having regard to the existence and content of the contemporaneous documents. We then apply the legal principles to the facts of this appeal.

46. It has been long been established that a voluntary payment can be taxable (*Strong,* 1878) if the payment is received in respect of the discharge of the duties of an office. It has also long been established that a payment is not taxable if it is

not in recognition of services rendered but for faithful previous service outside the office (*Turner v Cuxson* , 1888). *Strong* was followed in *Herbert v McQuade* (1902) where, at 500, the Master of the Rolls said::

> " … the test is whether from the standpoint of the person who received it, it accrues to him in virtue of his office; if it does, it does not matter whether it was voluntary or whether it was compulsory on the part of the persons who paid it."

47. *Cooper v Blakiston* (1908) adopted the same test but in his judgment the Lord Chancellor said, at 355:

> "Had it been a gift of an exceptional kind, such as a testimonial, or a contribution for a specific purpose, as to provide for a holiday, or a subscription peculiarly due to the personal qualities of the particular clergyman, it might not have been a voluntary payment for services, but a mere present."

48. The distinction between a voluntary payment for the discharge of duties (which is taxable) on the one hand and a mere present or testimonial (which is not taxable) on the other hand was applied In *Cowan v Seymour* (1919). There the secretary of a company acted without remuneration from the date of its incorporation to the date of its liquidation. When the liquidation was complete there was a sum in hand which was divisible between the shareholders. They voted the sum in question equally between the chairman and the secretary. The Court of Appeal held that the payment did not accrue to the secretary in respect of an office or employment of profit and that therefore he was not chargeable to tax. The Master of the Rolls at 379 stated that the fact that the office was at an end was a fact of very, very great weight and similarly, the fact that the payment was not made by an employer but by the shareholders individually pointed to it not being a payment for services. At 380 he said:

> "In this Case I should certainly say that the undisputed facts show that this was not a payment for services rendered in the true sense, nor was it a profit which accrued to this gentleman by reason of his office, but it was very much more in the nature of a testimonial to him for what he had done in the past while his office, which had then terminated, was in existence."

49. The distinction between payments accruing in respect of the office or employment and personal gifts was also drawn in *Reed v Seymour* (1927). There the committee of a cricket club granted a benefit match to a professional cricketer in their services. The House of Lords held that the proceeds of the benefit match were not a profit accruing to the cricketer in respect of his office or employment but were in the nature of a personal gift and not assessable to income tax. At 646 Viscount Cave said:

> . it must now (I think) be taken as settled that they [emoluments] include all payments made to the holder of an office or employment as such - that is to say , by way of remuneration for his services, even though such payments may be voluntary - but that they do not include a mere gift or present (such as a testimonial) which is made to him on personal grounds and not by way of payment for his services. The question to be answered is, . "Is it in the end a personal gift or is it remuneration?" If the latter it is subject to the tax; if the former, it is not."

50. The same distinction was drawn by Rowlatt J in *Slaney v Starkey* (1931) at 49 and by Atkinson J in *Calvert v Wainwright* (1947) at 477 where he said that voluntary payments received as a reward for services rendered were taxable but personal gifts given on personal grounds other than for services rendered, irrespective of and without regard to the services rendered, are not taxable. In *Moorhouse v Dooland* (1954) the principles fell to be applied **to** a cricketing professional for whom a collection had been made for meritorious performance. In deciding that the payments were part of the earnings of the taxpayer, and not mere presents, Sir Raymond Evershed MR at 15 gave weight to three factors, namely, that the taxpayer was a professional cricketer; that the payments were not exceptional; and that the taxpayer had a right to them.

51. The distinction between remuneration for service in an office on the one hand, and testimonials on the other, was followed in *Bridges v Bearsley* (1957) where two directors, who wished to acquire shares in the company, agreed with the future shareholders to continue with the company for four years in return for which they would receive the shares at a later date. The Court of Appeal held that the shares were not remuneration but testimonials for what they had done. At 320 Morris LJ described the distinction between remuneration for services and personal gifts and remarked that some payments might have a blend of both elements. However, a personal gift would not lose its attributes merely because the gift was in recognition of services. Later, at 321, he said that the fact that a large payment was to be made by someone other than the employer was a considerable indication that the payment was not by way of remuneration. Remuneration had the element of reward or payment for some specific services rendered and it usually came from the pocket of an employer.

52. *Hochstrasser v Mayes* (1960) established the principle that not every payment by an employer to an employee was a reward for services. There the employer entered into agreements with employees who were transferred to another part of the country that the employer would reimburse any loss made on the subsequent sale of a house purchased because of the transfer. At 706 Viscount Simonds said that there was nothing to suggest that the payment was a reward for services and at 707 Lord Radcliffe said that the sums were not paid "in return for acting as or being an employee". In *Morris* (1967) an employee who was seconded to another employer for a particular task was fully remunerated by that other employer but, at the end of his secondment, his original employers made a gift to him to mark their appreciation of his work during the secondment. This was held to be a gift. The same principles were applied in *Moore v Griffiths* (1972) where a professional footballer, who was a member of the team which was successful in the World Cup competition in July 1966, received a bonus from the Football Association. Brightman J held that this was not a reward or remuneration for services but to mark his participation in an exceptional event, namely, winning the World Cup championship. There was no element of recurrence; there was no expectation of reward; the payment had not previously been announced; and the function of the payer was to promote the sport of football and not to derive a benefit from the services of the players.

53. From these authorities, therefore, we derive the following principles. A voluntary payment is taxable if it is received in respect of the discharge of the duties of an office; or if it accrues by virtue of the office; or if it is in return for acting in the office. However, a gift is not taxable if it retains its characteristic as a gift (which we would describe as an exercise of bounty intended to benefit the donee for reasons personal to him or her), even though it is given in recognition of services rendered, or if it is "peculiarly due" to personal qualities, or if it is to mark participation in an exceptional event. Relevant factors are: whether the

payment is made by the employer; whether the office is at an end; whether other remuneration is paid; whether the payment is exceptional; whether there is an element of recurrence; and whether the recipient is entitled to the payment.

54. We now turn to apply those principles to the facts of this appeal. We first consider the oral evidence and then assess its credibility against the documentary material.

55. We found the Appellant to be a truthful and honest witness of fact. However, some of his evidence was in the nature of inferences made from primary facts and we later test his evidence against the documents. In evidence the Appellant (who argued that the payments were gifts) said:

> "The only reason for my holding an office at all was the necessity, in litigation of this scale, with some thousands of plaintiffs, of having a set of rules and some formality. Strictly speaking, my duties as a committee member, as opposed to my personal interest as a litigant, were merely to organise the membership records, supervise the subscriptions, arrange for meetings to be properly minuted and communicate with the membership. The gifts were made in respect of fronting the litigation, standing up to be counted, taking the risk; not for being a member of the committee. If there had been half a dozen litigants instead of thousands, there would have been no association, no rules, no office, but gifts might well still have been made. The underlying nature of the undertaking is surely not determined by its scale."
>
> "It has always been my view that the payments to me (and others) were ex gratia payments."
>
> "The last thing that was on my mind when I took up these posts was the gaining of any reward from the holding of the post itself. I would be very surprised in those dark days whether any other Name, whether he be a committee member or not, really contemplated any payments from Lloyd's at all."
>
> "There were times when others wanted to give up. I was never in that frame of mind. I persuaded others to stay on board."
>
> "Although it cannot be denied that I and my colleagues carried out a substantial amount of work, it was done without expectation of payment; the reward would be winning. The work was not the reason for the payments."
>
> "There was never any question of my being paid for hours of work which I had done. I entered into my positions of "offices" without even a thought to payment for doing what I was doing."
>
> "Whilst the reasons for the members to vote in favour of the payments may be myriad, those expressed to me have all been of gratitude for holding the show together in a way which led to a good result."
>
> "I did not keep time sheets because it never crossed my mind that I might get paid for my time."

> "I am of the view that the overwhelming support that was received for the payments from the membership at large was not because we had done a lot of work; they did not ask how much work we had done. I do not think that was the measure by which they judged what the payments should be. They voted the payments, to my mind out of gratitude. They wanted those who had stood in the front line to get a larger share of the overall settlement."
>
> "As committee members we provided leadership, we fronted the litigation, we "stood up to be counted", we took the risk, we managed the litigation, we communicated with the members and we "held the show together" ".
>
> "The payments reflected the activities and prominence of the committee members and their contribution to the results. They were a 'proper reward'".
>
> "It was the personal qualities of the committee members that determined the size of their payments."

56. Mr Smallbone gave evidence that the nature of the payments made to the Appellant by the Secretan Names Association was that of an unsolicited gratuity - a gift of gratitude. Most of the Names in the Secretan syndicates were elderly people or widows who had no real knowledge of the workings of Lloyd's who felt that the Appellant should be given a present. The approach of Sir John's committee was that of awarding medals or decorations. Different medals were awarded for different ranks of service. As the Appellant was Chairman of the Association he was awarded the highest payment. The payments were made for personal qualities rather than for hours worked.

57. In assessing the weight to give to the oral evidence of the Appellant and Mr Smallbone we test it against the contemporaneous documents. The first relevant document is the Rules of the Secretan Names Association. Rule 6.1.1. anticipated payments to officers and members of the committee "in recognition of time devoted by them" to the objects of the Association which was to conduct the litigation. The Appellant told us, and we accept, that he had derived these Rules from another Association and so that provision was probably not uncommon (although it did not appear in the rules of the Wellington Names Association). Otherwise the Rules of both Associations made it clear that officers and committee members would not be remunerated "ex officio".

58. The next relevant document is the Lloyd's settlement offer. That included proposals for "expenses refunds" which contained a reference to the contingent remuneration of action group committee members.

59. At the Special General Meeting of the Secretan Names Association on 18 July 1996 payments to the officers and committee were discussed against the background of statistics relating to the amount of work they had done. Sir John Wood's committee referred to "the great deal of work" which had been undertaken and the "very considerable amount of litigation" that had taken place. Payments were recommended not only to the Appellant but to other members of the committee also. The Lloyd's claim form referred to "committee remuneration".

60. At the Annual General Meeting of the Wellington Names Association (and the Committee meeting of the Association on the same day) the payments were

discussed against the background of statistics relating to the amount of work done. The payments were referred to as "committee reward". Sir John Wood obtained information about the offices held by each person, the amount of work undertaken (but not the hours spent) and the period on the committee.

61. We have not regarded the use of the word "remuneration" either by Lloyd's or by Sir John Wood as being conclusive in this appeal. We have asked: what were the payments made for? We answer that question: "for the result achieved in the litigation". There is no doubt (and the contrary was not suggested by the Revenue) that but for the result achieved in the litigation, no payments would have been made.

62. This answer to the question "what were the payments made for?" is consistent both with the payments being emoluments of the respective offices of the Officers (including the Appellant) and the Committee members - and so taxable under section 19 - and with their being gifts in recognition of the several recipients' contributions to the achievement of the result, outside the ambit of section 19. We find, however, that the weight of the *indicia* in the contemporaneous documents overwhelmingly points towards each of the payments being emoluments within section 19, because, although ex-gratia, they were paid by the Associations (that is, by the members of each Association, following the passing of the Resolutions at the respective General Meetings) for or in respect of the services which had been rendered by the various Officers and Committee member-recipients, rather than as gifts to the recipients in recognition of those services.

63. In the case of the Secretan Names Association, the payments were made pursuant to rule 6.1.1 which provided for payments "in recognition of the time devoted by [past and present Officers or Members of the Committee] in recognition of time devoted by them to the furtherance of the Objects" which were to protect and/or advance the interests of members as underwriting members of Lloyd's and in particular their claims for compensation for losses suffered as being members of the relevant syndicates. Payments under Rule 6.1.1 could be understood as payments for the Officers' and Committee Members' time in prosecuting the members' claims for compensation. By itself, however, we do not regard the wording of rule 6.1.1 as conclusive (and there was no parallel provision in the rules of the Wellington Names Association). It would be possible to regard Rule 6.1.1 merely as convenient legal machinery to enable the payments to be made, without imprinting on them the particular characteristics of emoluments rather than gifts.

64. Another relevant factor is the Lloyd's settlement offer. This preceded and gave rise, in the case of the Secretan Names Association, to the first vote (at the Special General Meeting on 18th July 1996) by the members of what were described as "ex-gratia payments to the Committee", and made provision for "refunds of certified expenses" being "properly incurred or committed expenses". It is more natural to think of a properly incurred or committed expense (albeit ex gratia or non-contractual) as remuneration, than to think of it as a gift made in recognition of work done or a result achieved - though that is certainly not impossible. Again, this factor suggests to us that the resultant payments were emoluments, but we do not consider it conclusive on the point.

65. The agenda paper circularised to members of the Secretan Names Association before the Special General Meeting on 18th July 1996, made reference, in the context of a proposal for an "ex gratia payment to the Committee" of £490,000, to rule 6.1.1 making provision for a "reward" for the committee at the discretion

of the membership. The proposal was supported by statistics relating to the work done by the Officers and Committee Members and concluded: "[i]t is possible that Lloyd's will regard committee reward [*sic*] as part of the Association's costs to be reimbursed, subject to their reasonableness". This is, in our view, compelling evidence that the proposal to make an ex gratia payment was originally put to the members of the Secretan Names Association as a proposal to pay a reward for the work done by the Officers and Committee Members, rather than as a gift.

66. Perhaps because of the way the proposal was put in the agenda paper, the discussion recorded at the Special General Meeting of the Secretan Names Association had the flavour of a discussion of whether the Members of the Committee (including the Officers) deserved any (and, if so, what) payment for the work they had done, rather than a discussion of whether any (and, if so, how much) money should be awarded to the Committee Members as a gift or present in recognition of the settlement achieved. That is to say, the gist of the discussion turned on what the meeting considered was an appropriate reward for the work done, rather than how generous (or ungenerous) the members wished to be in making a payment to mark the achievement (in the context of a joint enterprise in which all, or most, had lost money). Again, we regard the discussion at the meeting as compelling evidence pointing towards the payments being emoluments. We give a few examples:

> The Chairman (the Appellant): "I now come on to the matter of ex gratia payments to the Committee. Some of the justification for this was provided in the agenda paper ..."
>
> A Member: "We then come on to the next point that £490,000 divided by seven is £70,000 apiece. I personally take the view that serving on the Committee is akin to being a charitable trustee. I think you are entitled to an honorarium but I do not think you are entitled to an honorarium of this size when one considers all the names who are in hardship ... The Committee on this basis, looking at the number of Committee meetings, are going to get over £1,500 each on an average basis for each committee meeting. ... I would like to see reasonable honorariums but not at this level."
>
> A Member: "Mr. Chairman, I am a trustee of various funds and I have spent midnight oil, but to be remunerated at this rate, I mean, I think in your case the number of faxes you have sent, the number of faxes you have received, you know a reasonable amount could be quite substantial, but an average of £70,000 apiece when Lloyd's is capping peoples losses at £50,000 I think is wholly unreasonable."
>
> Another member: "I am personally of the opinion that the excellent work that the Committee has done is adequately and not over-rewarded by the proposal in front of us ..."
>
> Another member: "I think that the sum put forward is extremely high. Having been involved in voluntary work - and I understood it was a voluntary committee; I did not think it was going to be a paid committee - at the same time I think there should be some remuneration ..."
>
> Another member: " .. I cannot believe that we should ask them [the Committee] at the end of a successful campaign to do them

> [*sic*] for nothing, and I do not hear anybody in this room making that argument .... I do have to say that at the Wellington Action Group the committee ... will earn about £10,000 per annum over the five years, whereas on the figures before us today that average per committee [*sic*] is £17,500 each over a period of four years ..."
>
> Another member: [speaking on the proposal that Sir John Wood should form a remuneration committee] "He does not want to choose a number and then justify it. He wants to find out what work has been done and then see what a fair figure would be. His thinking so far is that there have to be various tiers of responsibility ... There will be tiers and speaking without giving away any confidences, Sir John Wood's attitude will be to look at the different responsibilities of the officers and then the committee members; and once an assessment of it has been done the total figure will be arrived at."
>
> The Chairman (the Appellant): "In practice, I think I can agree on behalf of my colleagues that if the award is scaled down then obviously our remuneration is scaled down."

67. As for the Wellington Names Association (of which the Appellant was Deputy Chairman), the position there regarding payments to the Committee was (as we have noted above) that there was a discussion at the first Annual General Meeting (on 12th December 1992), long in advance of any settlement becoming available, as to whether the Committee would be entitled to what was termed a "success fee" of 1½% of any settlement, as apparently had been proposed and adopted in the case of at least one other action group (the Gooda Walker Action Group). The mood of the meeting was against provision for any such "success fee" - which, had it been agreed and paid, would in our view undoubtedly have been emoluments of any offices concerned.

68. There was an intervention at that meeting by a member, who put the matter in a way which we think accurately describes the context in which payments did ultimately come to be made by the Wellington Names Association. He said:

> ".. there are a lot of people who do a tremendous amount of work quite freely and do not expect any success fee, but those individuals who actually do the work, in particular the secretary, could be awarded an honorarium. I think the committee should keep that in mind."

69. In this context, we consider that the word "honorarium" was used as meaning a monetary reward for services, given without any legal obligation to do so.

70**.** Then there was an intervention by another member who said:

> " .. I didn't mean to raise a red herring about this honorarium. The thing is that it is vital we stand together. ... What I don't want to see happen, having raised the red herring at the beginning, sir, is that our honorary secretary or any member of the committee should be disadvantaged because it [the resolution of the claim] might last five years. The reason why they formed the committee, in my assumption, is because they were the hardest hit and the most aggressive, wanting to do something about it. I think, therefore, if they have been badly hit - and, God knows, I've lost a

> seven-figure sum, so I know what hard-hit means - they are the very people we should make sure are able to do the job and have the continuity from beginning to end. I saw, [referring to another member] that you shook your head when somebody mentioned an honorarium. It is so vital we stick together on this, and you should, as a committee, consider that. I would also like it to be minuted, with your agreement, Chairman, that, if the committee are so minded, there should be some form of gratuitous payment following the outcome of a successful conclusion to our legal action. (*Applause*)."

71. It was in this context that the minutes of the Committee meeting of the Wellington Names Association of 14th June 1996 (after the settlement offer from Lloyd's had been received) noted with regard to "Committee Remuneration":

> "JM (the Appellant) had provisionally indented for £500,000 to Lloyd's for our success fee [*sic*]. This amounted to 4% of our award, and he thought this was a reasonable amount to be shared amongst the WNA [Wellington Names Association] Committee."

72. The minutes continued:

> "The whole question of remuneration was discussed further. JM said he did not want to have to defend what [one member] was asking for [£650,000]. [Another member] said WNA was one of the front-runners of the Long-tail Groups. We had put in a great deal of work; he tended to agree. [Another member] thought we did not want to be put in a defensive position, and should not ask for too much. We must be able to say what we had achieved first. JM asked the Committee for their opinion. [Two members] thought we should ask for 5%. [One member] made the following points: (a) a small contract attracts a larger percentage fee; (b) WNA Committee members were not paid salaries, as was the case with a number of other Action Groups ... (c) WNA had been pioneers for the Long-tail Action Groups. We had done a lot of ground work which was beneficial to other L.T. groups, even if our own claim was fairly modest. (d) We had submitted £550,000 [*sic*] to Lloyd's for our success fee. This was 4% of the award but did not include the Equitas release. [Another member] suggested we should obtain information on what other Action Groups were doing about success fees so that if the question arose at the AGM we would be fully informed as to the general position."

73. On 25th June 1996, after a meeting of action group chairmen, which the Appellant attended, he circulated a note to the Committee of the Wellington Names Association, which mainly dealt with the size of the Association's claim for committee payments in comparison with other claims that were being made. The note concluded:

> "We are comfortably within the Berriman guidelines for large groups, and all in all, I think what we are putting in for is a reasonable compromise between a proper reward, and appearing too greedy. Groups in the latter category will almost certainly be scaled down by Lloyd's, and I am sure you agree we should not be among them. It is essential that we get good tax advice."

74. The agenda paper for the Annual General meeting of the Wellington Names Association, which recommended acceptance of Lloyd's settlement offer and considered the matter of committee payments included the following:

> "Ex-gratia payment to Committee
>
> It is apparent that most action groups are proposing some form of ex-gratia payment for the work done by their committees in furtherance of the Objects of the Association, even those such as Janson Green and Cuthbert Heath who already pay certain members of their committees. The position in Wellington is, as you know, that the only member of the Committee who is paid is the Secretary [he was paid emoluments of £12,500 per annum which had been specifically approved in General Meeting]. ...
>
> The Association was founded in 1991 and the recoveries presently on the table therefore represent the fruit of 5 years' work.
>
> There is no specific provision in the rules for any payment to the Committee but the matter was raised at the AGM on 12 December 1992 by [a named member – this is a reference to the intervention noted at paragraph 70 above] and was left open for further consideration. Any payment is therefore entirely a matter for the membership. Having said that the volume of work over the past five years has certainly been in excess of anything foreseen ...
>
> [The point was made that the bulk of the work done, particularly by the Appellant as Deputy Chairman, was the greater because the work had been "handled from home without benefit of secretariat".] The committee has always been mindful that at the end of the day the membership might not be able to recover the costs involved and made dispositions accordingly.
>
> The Committee propose a figure of £550,000, amounting to £110,000 per annum, to be divided among ten current and four past members. This represents 4% of the recovery, or 1.3% if the [Equitas] releases are included. If this amount is approved, the Committee would intend to consult outside advisers to define the distribution.
>
> Lloyd's have indicated that they may regard committee reward as a proper part of the Association's costs to be reimbursed, subject to their being justifiable in terms of time spent. The proposals are certainly justifiable in those terms, and also in the context of what we know of the proposals of other action groups. They take no account of the special personal risk to which members of the Committee were exposed in such bitterly contested litigation."

75. The *indicia* in the documentary evidence which we have rehearsed above, which we find persuasive are: first, the reference to the payments being rewards; secondly, the reference to them having been earned; thirdly, the reference to them being (in part) in recognition of extra work done to save the Association incurring (secretarial) costs which might have proved irrecoverable; fourthly, the reference to them being (in part) compensation to the committee members having worked for no salaries; and**,** fifthly, the reference to the possibility of ex-

gratia payments having been an inducement to keep Committee members in post to ensure continuity from beginning to end.

76. We were at one stage impressed by the fact that the rules of the Associations provided for no remuneration to be paid to the Committee members ex officio, and in particular that, in the case of the Secretan Names Association, an ex gratia award, in all relevant respects comparable to the award made to the Appellant, was made to a leading Queen's Counsel who was not at any time either an Officer of the Association or a Committee member. Although these factors could point towards the conclusion that the Appellant's office was not the source of the payments, they are, in our judgment, overwhelmingly outweighed by the contra-indications mentioned above.

77. We now turn to apply the legal principles, which we have identified, to the facts which we have found. We find that the payments were taxable because they were received in respect of the discharge of the duties of an office; that they accrued by virtue of the office; that they were in return for acting in the office; and that they were in recognition of services rendered. They were not gifts in recognition of services or "peculiarly due" to personal qualities, nor were they gifts to mark participation in an exceptional event. The payments were made by "the employer", namely the Associations, and were decided upon before the offices were at an end. We accept that other remuneration was not paid; that there was no element of recurrence; and that the recipients were not entitled to the payments at the commencement of their offices, but those factors are not conclusive. We also regard it as relevant that payments were made to nearly all officers and committee members. The fact that the payments were not of the same amounts indicates that they reflected the differing amount of work and responsibility undertaken by each recipient.

78. We can imagine that if there had been half a dozen litigants, instead of thousands, and no association, no rules and no office, and gifts had been made, they might not have been taxable. But that is to consider an imaginary factual situation. In fact there was an office, and the payments had their source in it. Likewise, although the payments to some extent recognised the Appellant's work as "lead litigator" (in particular in relation to bearing heavier risks in the litigation than those who were not on the Committees), in fact, because of the organization of the litigation through the Associations, his functions as "lead litigator" were assimilated to the functions of his offices, rendering payments made in respect of his work as lead litigator emoluments of his offices.

79. Our conclusion**,** therefore, on the first issue in the appeal is that the payments received by the Appellant were "emoluments from an office" within the meaning of section 19 of the 1988 Act. That means that the appeal must be dismissed and that we do not have to decide the other two issues in the appeal. However, as arguments were addressed to us we very briefly express our views.

(2) Were the payments termination payments?

80. The second issue is whether the payments were received in connection with the termination of the holding of an office or employment within the meaning of section 148

81. Section 148 of the 1988 Act contains the provisions relating to termination payments and at the relevant time the relevant parts provided:

"148 Payments on retirement or removal from office or employment

(1) Subject to the provisions of this section and section 188, tax shall be charged under Schedule E in respect of any payment to which this section applies which is made to the holder or past holder of any office or employment … whether made by the person under whom he holds or held the office or employment or by any other person.

(2) This section applies to any payment (not otherwise chargeable to tax) which is made, whether in pursuance of any legal obligation or not, either directly or indirectly in consideration or in consequence of, or otherwise in connection with, the termination of the holding of the office or employment or any change in its functions or emoluments, …

(4) Any payment which is chargeable to tax by virtue of this section … shall be treated as emoluments of the holder or past holder of the office or employment assessable to tax under Schedule E.

82. For the Appellant Mrs.Cullen argued that the decisions to make the payments were made in 1996 when each of the Associations voted to make a submission to Lloyd's about the payments. She argued that the payments were gifts made in connection with the settlement of the Lloyd's litigation and were not in consideration, or in consequence, of or otherwise in connection with the termination of the holding of the offices within the meaning of section 148(2). Although the payments were made to the Appellant after he had resigned from his offices there was no real nexus between the payments and the termination of the offices. The termination of the offices was not the reason for, nor cause of, the payments.

83. For the Respondent Mr McKay argued that the payments were made in connection with the termination of the office. He referred to the fact that in each Association there had been a resolution that the payments would only be made after a committee member or an office holder had resigned. The Appellant had resigned and the payments had been made to him after his resignation.

84. From our conclusions on the first issue it will be seen that we agree that the decisions to make the payments were made in 1996 when each of the Associations voted to make the claims to Lloyd's for the payments. We are of the view that the payments were made in return for acting in the offices from their commencement until 1996 and were not made in consideration of, or in consequence of, the termination of the offices. However, in the special nature of these payments, they only became payable and due because the Lloyd's litigation was finalised and that meant that there was no longer any reason for the existence of the Associations. Thus there was a time connection between the making of the payments and the termination of the offices. However, we must approach this issue on the assumption that we had decided that the payments did not fall within section 19, and so were "not otherwise chargeable to tax". Thus, we must assume that we had found that the payments were indeed gifts made in recognition of the services provided, rather than emoluments of the offices concerned. In our judgment, it follows from this assumption that notwithstanding the time connection between the payments and the termination of the offices, there was (as Mrs. Cullen submitted) no real, in the sense of causal, connection

between the payments and the termination. Therefore, if we had concluded that the payments were not emoluments taxable under section 19, we would also have concluded that they were not taxable under section 148 as being payments made in connection with the termination of the holding of the offices.

(3) Were the payments benefits in kind?

85. The third issue is whether the payments were benefits in kind within the meaning of section 154.

86. Part V of the 1988 Act (sections 131 to 207) contains the provisions relating to the Schedule E charge. Chapter II of Part V (sections 153 to 168G) contains provision relating to employees earning £8500 or more and directors. Section 154 contains the general charging provision for benefits in kind and the relevant part provides:

> **"(1) … where in any year a person is employed in employment to which this Chapter applies 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) 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."**

87. Section 167(1) provides:

"(1) This Chapter applies -

> **(a) to employment as a director of a company … and**
>
> **(b) to employment with emoluments at the rate of £8,500 per year or more."**

88. "Employment" is defined in section 168(2) to mean "an office or employment the emoluments of which fall to be assessed under Schedule E …" and section 168(3) provides that:

> **"(3) For the purposes of this Chapter [which includes s.154] … (b) all such provision as is mentioned in this Chapter which is made for an employee … [is] deemed to be .. made for him .. by reason of his employment, except any such payment or provision which is made by the employer, being an individual, in the normal course of his domestic, family or personal relationships"**

89. For the Appellant Mrs. Cullen raised four points on the language of the legislation. First she argued that section 154 only applied to benefits provided during the continuance of the employment. Where the legislation intended the benefits in kind provisions to apply where the employment had terminated or ceased it contained express provisions to that effect. Examples were in section 160(3)(b) and in 162(7). Here the payments had been made after the employment ceased. Secondly, she argued that section 154(1) only applied to "a person employed in employment to which this Chapter applies". Employment was defined in section 169(2) to mean an office the emoluments of which fell to be assessed under Schedule E. The Appellant had not been employed by the Associations in an office the emoluments of which fell to be assessed under Schedule E because during the continuance of the office the Appellant had never received any emoluments. She accepted that *Allen* was authority for the principle that benefits in kind could be taken into account to decide whether there was an employment but was not authority for the principle that emoluments received after the end of an employment were to be treated as received during the course of the employment. Thirdly she argued that the nature of the offices held by the Appellant were not such as to come within the meaning of section 168(2) because the Appellant had no contract regulating his working hours, his holiday entitlement, his notice period, his normal retirement age, etc. There was no expectation of reward and no reciprocal obligations. Fourthly she argued that, as there was no employment, the result of section 167(1) was that whole of Chapter II did not apply.

90. Turning to the authorities Mrs. Cullen accepted that *Wicks v Firth* and *Mairs v Haughey* established the principle that benefits in the form of cash could be taxed under these provisions. In *Wicks v Firth* she preferred the formulation of Oliver LJ which was "what is it that enables the person concerned to enjoy the benefits?" She argued that it was only the success in the litigation that enabled the Appellant to enjoy the benefit. She relied upon the fact that, in this appeal, payments had been made to persons who were not office holders or committee members, for example the leading Queen's Counsel to whom we have made reference above. If the Inland Revenue were right in their view of the very wide ambit of the section then both sections 19 and 148 would be redundant as far as directors and higher paid employees were concerned. Finally she argued that part of the cost of the payments had been borne by Lloyd's as part of the overall settlement of the claims and so could not also be benefits in kind.

91. For the Respondent Mr McKay argued that payments of cash could be benefits within the meaning of section 154 relying upon *Wicks v Firth* and *Mairs v Haughey.* It was agreed that the Appellant had held an office with each Association and he argued that it did not matter that the offices produced no emoluments other than the benefits in question relying upon *Allen* at 1548 d-h. It did not matter that he payments were received after the offices had ceased because they were received in the same year as a year in which the Appellant had held the offices. Indeed, the decision to make the payments was made while the Appellant held the offices. The provision of the benefits was "by reason of" the holding of the offices as the payments were made in recognition of services rendered. The test for section 154 was less demanding than for section 19 relying upon *Wicks v Firth* at 338B-E and 344 A-E and *Mairs v Haughey* at 525d.

92. Again, we must approach this issue on the assumption that we had decided that the payments were not emoluments of the Appellant's offices (*i.e.* that the cost of providing the benefit was not (apart from section 154) chargeable to tax as his income – see section 154(1)(b)). On that assumption there would be force, in our view, in Mrs. Cullen's submissions that the Appellant's offices were not

offices "the emoluments of which fall to be assessed under Schedule E". We very briefly record that if we had concluded that the payments were not taxable under section 19, we would also have concluded that they were not chargeable under section 154. To have concluded that they were so chargeable could well, as Mrs. Cullen submitted, have meant that the very wide ambit of section 154 made section 19 (the basic Schedule E charging section) and section 148 redundant as far as directors and higher paid employees were concerned. We would have been reluctant to reach a conclusion with these consequences

Decision

93. Our decisions on the issues for determination in the appeal are:

> (1) that the payments received by the Appellant were "emoluments from an office" within the meaning of section 19 of the 1988 Act; that means that we do not have to decide the other two issues but as arguments were put to us we very briefly express our views which are:
>
> (2) that the payments were not received in connection with the termination of the holding of an office or employment within the meaning of section 148; and
>
> (3) that the payments were not chargeable to income tax pursuant to section 154.

94. That means that the appeal must be dismissed.

95. We would like to express our gratitude to both Counsel for their assistance in this case. Although we have not been able to find in her Client's favour, we wish to express particular admiration for Mrs. Cullen's presentation of the Appellant's case, which could not have been put more persuasively.

DR NUALA BRICE

JOHN WALTERS QC

SPECIAL COMMISSIONERS

SC 3009/2002

18.12.02