

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, CHANCERY DIVISION
(THE HON MR JUSTICE PETER SMITH)
ON APPEAL FROM THE SPECIAL COMMISSIONERS OF INCOME TAX

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/2008

Before :

LORD JUSTICE SEDLEY
LORD NEUBERGER OF ABBOTSBURY
and
LORD JUSTICE WILSON

Between :

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS**

Appellants

- and -

**ALAN BLACKBURN SPORTS LIMITED
AND
ALAN BLACKBURN**

Respondents

Mr Guy Newey QC and Miss Catherine Addy (instructed by the Solicitor for HM Revenue Customs) for the Appellants

Mr Patrick Way and Mr Michael Jones (instructed by Messrs Fishburns) for the Respondents

Hearing date: Tuesday 18 November 2008

Judgment

Lord Neuberger of Abbotsbury :

Introductory

1. This is an appeal brought by the Commissioners for HM Revenue and Customs against a decision of Peter Smith J, allowing the appeal of Alan Blackburn (“Mr Blackburn”) and Alan Blackburn Sports Limited (“the Company”) against a decision of the Special Commissioner, Dr John Avery Jones CBE. It concerns the availability of relief under the Enterprise Investment Scheme (“EIS relief”), whose effect is to defer charges arising on capital gains, in respect of shares allotted by the Company to Mr Blackburn between September 1998 and January 2001.

The statutory provisions

2. EIS relief is available under the Taxation of Chargeable Gains Act 1992, in cases where an investor makes a “qualifying investment”. The relevant statutory provisions are to be found in Schedule 5B to the 1992 Act, which contains a number of requirements which have to be satisfied in order for an investment to be “qualifying”. Three passages in Schedule 5B, which I set out in the terms in which they were expressed at the relevant time, are of central relevance for present purposes.
3. By para 1(2) of Schedule 5B:

“The investor makes a qualifying investment for the purposes of this Schedule if –

- (a) eligible shares in a company for which he has subscribed wholly in cash are issued to him at a qualifying time ...
- ...
- (c) at the time when they are issued the shares are fully paid up (disregarding for this purpose any undertaking to pay cash to the company at a future date),
- ...
- (f) all the shares comprised in the issue are issued to raise money for the purpose of a qualifying business activity,
-”

4. Para 13(1) of Schedule 5B is in these terms:

“Where an individual who subscribes for eligible shares (“the shares”) in a company receives any value from the company at any time in the seven year period [for 2000-01 the defined expression “designated period” is substituted], the shares shall be treated as follows for the purposes of this Schedule –

- (a) if the individual receives the value on or before the date of the issue of shares, as never having been eligible shares; and

(b) if the individual receives the value after that date, as ceasing to be eligible shares on the date when the value is received.”

5. Para 13(2) of schedule 5B provides:

“For the purposes of this paragraph an individual receives value from the company if the company –

...

(b) repays, in pursuance of any arrangements for or in connection with the acquisition of the shares, any debt owed to the individual other than a debt which was incurred by the company –

(i) on or after the date on which he subscribed for the shares; and

(ii) otherwise than in consideration of the extinguishment of a debt incurred before that date.”

The basic facts and procedural history

6. The Company was incorporated by Mr Blackburn in August 1998, with him and his wife as the directors and (it seems) the owners of the two issued £1 shares. On various occasions over the next thirty months, Mr Blackburn injected nearly £1.2m into the Company. On all such occasions, a £1 share in the Company was issued to Mr Blackburn for each pound he paid to the Company. Sometimes, the Company’s resolution to allot the shares occurred after he had paid the money (or some of it) to the Company, and sometimes it occurred before. In all cases the allotment of shares was duly recorded in the Company’s share register.

7. In summary, the payments and share allotments were as follows:

- (a) 149,998 shares: application informally made and allotment resolved on or after 4 September 1998; Mr Blackburn says he paid for these shares by paying £111,000 for a property bought in the Company’s name (“the Property”) on 1 September 1998; most of the balance of about £40,000 was paid later that month;
- (b) 140,000 shares: informally applied for and allotment resolved on 6 January 1999; in February 1999, £140,000 was paid to the Company by Mr Blackburn;
- (c) 210,000 shares: allotment resolved on 26 June 1999, the date on which they were informally applied for; on 30 June 1999, £210,000 was paid;
- (d) 100,000 shares: applied for on 21 September 1999, and allotment resolved on 5 October 1999; on 9 October 1999, Mr Blackburn paid £100,000;
- (e) 350,000 shares: application on 26 April 2000; allotment resolved on 8 May 2000; £96,000 paid in March and April 2000, the balance paid during May;
- (f) 240,000 shares: application on 13 December 2000; allotment resolved on 5 January 2001; payments of about £240,000 between July and October 2000.

8. In October 2002, Mr Blackburn applied for EIS relief in relation to all the payments he had made, on the basis that, in each case, they were in respect of shares in the Company, and the requirements of Schedule 5B were satisfied. The Revenue refused to accept any of the claims, and Mr Blackburn appealed to the Special Commissioners. In his full and careful decision (SPC00606), Dr Avery Jones allowed the appeal in cases (b), (c) and (d) above, where, by the time of the payment of the money (or, where the money was paid in more than one instalment, by the time of the payment of the first instalment), Mr Blackburn's application for the shares and the Company's resolution to allot them had been made. However, he dismissed the appeal in cases (a), (e) and (f), where the payment of money was made (in whole or in part) before the application for the shares or the resolution to allot them.
9. The decision on the latter point was appealed by Mr Blackburn (and the Company) to Peter Smith J, who allowed the appeal - [2008] EWHC 266 (Ch). In his clearly expressed judgment, he did not disagree with much of the Special Commissioner's reasoning, but he accepted an argument which had not been advanced previously on behalf of Mr Blackburn. With permission granted by Rimer LJ, the Revenue now appeals against Peter Smith J's decision.

The arguments

10. The simplest way of putting Mr Blackburn's case, at any rate at first sight, is that he paid the Company £1 in cash for every £1 share allotted to him on each occasion in respect of which he now seeks EIS relief. Following the decision of the Special Commissioner, the Revenue now accept that he is entitled to such relief where he had applied for the shares and the Company had resolved to allot them to him, by the time that he made any payment in respect of those shares. Where Mr Blackburn applied for the shares and the Company resolved to allot them to him purportedly in respect of money that he had already paid, the Revenue's argument is as follows:
 - (a) At the time of payment, the money cannot be said to have been for the shares, as there was no application to, resolution by, or agreement with, the Company that shares would be allotted in return for the money or indeed at all;
 - (b) The money, at the time it was paid, must therefore have represented a loan from Mr Blackburn to the Company;
 - (c) It follows from this that, when the shares were allotted to Mr Blackburn, they effectively redeemed that loan;
 - (d) Accordingly, (i) Mr Blackburn did not "subscribe wholly in cash" for the shares as required by para 1(2)(a), and (ii) para 13(2)(b) applied as the effect of the issue of the shares was to "repay a debt owed to" Mr Blackburn, and therefore para 13(1)(a) precluded the shares from qualifying for EIS relief.
11. The Special Commissioner agreed with this argument. He accepted (in paras 23 and 46) that whenever Mr Blackburn paid money to the Company, there was "a generalised intention on the part of Mr Blackburn that money he put into the Company would be in respect of shares". However, he rejected the contention that, at a time when there was no application, resolution or agreement, "whenever money was

paid, [Mr Blackburn] was informally applying for shares”. Accordingly, he concluded that the payment of money in such circumstances must have amounted to the making of a loan, and that the subsequent allotment of shares could not attract EIS relief for the two reasons advanced by the Revenue. He also held (paras 52 and 53) that this applied to cases where Mr Blackburn paid some of the money after any application for shares and the resolution to allot them to him.

12. Peter Smith J agreed with much of this reasoning. However, he allowed Mr Blackburn’s appeal on the ground that the Special Commissioner had been wrong to accept the contention that, in the cases where the money had been paid before there was a resolution or agreement to allot shares, the money had been advanced as a loan. Following the decision of the Privy Council in *Kellar v Williams* [2000] 2 BCLC 390 (which had not been cited to Dr Avery Jones), he concluded that, in such cases, the payment should be characterised as a contribution to the capital of the Company and not as a loan (para 44). On that ground, he decided that all the payments made by Mr Blackburn were entitled to the benefit of EIS relief, irrespective of the fact that his application for the shares and the Company’s resolution to allot them were made after the payment. However, Peter Smith J also said in para 51 that, if he was wrong on that point, he would have agreed with the Special Commissioner that, if some of the money attributable to an allotment of shares had been paid before the application and resolution, and the balance had been paid thereafter, no part of the payment would have attracted EIS relief.

The relevant facts in more detail

13. In relation to the acquisition of the 149,998 shares, the evidence was as follows. Mr Blackburn wrote to his accountant on 4 September 1998, three days after he had paid £111,000 to enable the Company to complete the purchase of the Property, from which it was to carry on its business. He enclosed a transfer form, saying that he would “take up 150,000 shares at this stage”, and asking the accountant to “complet[e] the formalities”. Thereafter, possibly not until 28 September, 149,998 shares were allotted to him. Mr Blackburn appears to have paid a further £25,863.85 to, or for the benefit of, the Company, during the course of that month. When the £111,000 was paid, Dr Avery Jones said that “no decision had been taken to issue shares”.
14. The evidence in relation to the allotment of the 140,000 shares was as follows. On 30 December 1998, Mr Blackburn wrote to the accountant confirming his potential capital gains tax liability, his intention to inject substantial sums into the Company, and his wish to obtain what he called “reinvestment relief” by “purchas[ing]” shares in the Company “at par”. On 4 January 1999, the accountant replied, explaining that Mr Blackburn should invest £140,000 in the Company “immediately”. He enclosed what I will call a “package”, consisting of a draft board resolution proposing the allotment of shares to Mr Blackburn, a draft share certificate, a draft return recording the allotment, and a draft form claiming EIS relief. These documents all related to 140,000 shares and £140,000, and they and the attendant formalities were completed by 11 January 1999; the £140,000 was paid the following month.

15. The evidence relating to the 210,000 shares began with a letter of 18 June 1999 from Mr Blackburn to his accountant explaining that he expected to pay some £225,000 into the Company. On 24 June, the accountant replied, “suggest[ing] a further £210,000 investment”, enclosing a package referring to 210,000 shares to be allotted for £210,000. The documentation and formalities were duly completed before the money was paid.
16. As to the 100,000 shares, the package was sent to Mr Blackburn by the accountant under cover of a letter dated 29 September 1999, in answer to a letter in which Mr Blackburn said that he was intending to inject a further £100,000 into the Company. Again, the documentation and formalities were duly completed before the £100,000 was paid.
17. In respect of the 350,000 shares, Mr Blackburn informed the accountant in a letter of 6 March 2000 that he needed to inject “at least a further £300,000” into the Company. This was followed by a letter of 26 April 2000, in which he wrote that the Company “ha[d] additional expenditure to complete [building] works [to the Property] amounting to £350,000”. He then said that he had already “made cash advances to the Company in March and April amounting to £96,000”, which had been paid in two instalments on 6 March and 4 April. He went on to say that he would “transfer the balance of £254,000 during April to June”. He asked for the “necessary returns for signing and submission”. The accountant sent a package, relating to 350,000 shares and £350,000, on 3 May 2000, and the documents were executed and the formalities completed a day or two later. It appears that the £254,000 was paid in part before the documents were executed, and in part afterwards.
18. Finally, the evidence on the 240,000 shares. In reply to a fax of 13 December 2000 (which was not before the Special Commissioner), the accountant sent a package (although the draft resolution was slightly differently worded) recording the issue of 240,000 shares for £240,000, under cover of a letter dated 27 December 2000. Those documents were executed, and the appropriate formalities completed, a day or two later. It appears clear that the payments had already been made between early July and early October, some three to six months earlier.
19. In relation to the 140,000, 210,000 and 100,000 shares, where the formalities in relation to the shares were completed before the money was paid, the Special Commissioner held in para 41 that, on the unusual facts, “Mr Blackburn agreed to become a member conditionally on payment of the money even though he was registered before the money was paid”. In that connection, he relied on the fact that the relevant resolutions for the allotment of the shares made it clear that “the intention was to issue fully paid shares ... on receipt of the money” (para 40). As to the requirement in para 1(2)(a) that Mr Blackburn “ha[d] subscribed” for such shares, the Special Commissioner relied in para 34 on Wynn-Parry J’s equating of subscription with “taking or agreeing to take shares for cash” – see *Governments Stock and Other Securities Investment Co Ltd v Christopher* [1956] 1 WLR 237, 242. Accordingly, the shares had all been subscribed for by Mr Blackburn, and they had not been allotted to him until he had paid, so that the requirements of Schedule 5B were satisfied.
20. So far as the 149,998, 350,000 and 240,000 shares were concerned, the Special Commissioner concluded that, where Mr Blackburn had paid at least some of the money before any proposal to issue shares had been raised, that must mean that “a

debt [was] created in his favour because at that stage the directors have not resolved to allot the shares, [so] there is no value received from the Company resulting in the shares not being eligible shares, because the debt is incurred on or after the subscription for shares” (para 47). Accordingly, he said, the shares which were subsequently allotted may, at least in part, have been issued other than for cash, and did, at least in part, serve to extinguish the debt. Therefore, he held that, in relation to those three allotments, the requirements of schedule 5B were not satisfied. On Mr Blackburn’s appeal to the Judge, it was held that the money paid in advance of the resolution to allot shares should properly be treated as a payment “on account of capital and not a loan” (para 42). Accordingly, the Judge decided that these three allotments satisfied Schedule 5B.

Discussion: the allotments of 350,000 and 240,000 shares

21. It is appropriate first to consider the status of the money paid to the Company by Mr Blackburn, at a time when he had made no application for shares, and there was no resolution to allot him any shares, in respect of the payment. The Special Commissioner accepted that, when he paid money to the Company, Mr Blackburn had a “generalised intention” that the payment was “in respect of shares”, but went on to reject the argument that, by paying money, Mr Blackburn was thereby “informally applying for shares”. I see the force of that, as did the Judge. The Special Commissioner concluded that it followed that any money advanced to the Company by Mr Blackburn before any application for shares had been made must have been a debt or a loan. I am not convinced that this necessarily follows.
22. When it comes to the last two allotments, of the 350,000 and 240,000 shares, I have real difficulty with the notion that any money paid in advance of those allotments should be treated as giving rise to a debt, in the normal sense of that word. The payments totalling £96,000 in March and April 2000 were made against the background of a consistent previous course of dealing between Mr Blackburn and the Company, during the period September 1998 to October 1999. During that period, Mr Blackburn had paid about £600,000 to the Company, and for every pound he paid, the Company, on four occasions, had issued him with a £1 share. Further, it was clear from the correspondence with his accountant during that period that Mr Blackburn, the director, and effectively the controller, of the Company, appreciated that it was necessary, or at least highly desirable, for his tax requirements that the Company should allot an equivalent number of shares to him in respect of any payments of cash.
23. In those circumstances, it seems to me that, when Mr Blackburn made the payments amounting to £96,000, he, both in his individual capacity and as a director and effective controller of the Company, appreciated and intended that the payments would be reflected by the allotment of 96,000 shares in the Company. In other words, the money was, as Peter Smith J held, a payment into the capital account of the Company, but, crucially, it was also made in the word used by the Special Commissioner, conditionally on, 96,000 shares being allotted to Mr Blackburn. Accordingly, as I see it, the payments totalling £96,000 were made and accepted in circumstances in which it is right to infer that Mr Blackburn was “agreeing to take

[96,000] shares” to quote Wynn-Parry J in *Governments Stock* [1956] 1 WLR 237, 242 , and the Company was agreeing to allot him 96,000 shares.

24. That view is reinforced by the improbability of the payments giving rise to debts. If they had given rise to debts, they must have been repayable on demand (as there appears to be no other basis for repayment), an unlikely notion given the financial position of the Company, and the fact that the money was largely going into building works. I am unimpressed in this connection by the fact, relied on by the Revenue, that, in his 26th April 2000 letter, Mr Blackburn referred to his having made “cash advances” of £96,000; the word “advances” could refer to loans or it could refer to money advanced in anticipation of receiving shares.
25. The conclusion may be tested by considering the position the day after the payments totalling £96,000 had been made, if the Company had been owned and controlled by someone other than Mr Blackburn, but with the same knowledge of the previous payments and allotments, and of the tax concerns of Mr Blackburn. If Mr Blackburn had demanded repayment, he would have been met with the response from the Company that much of the money had been spent on the basis that it was intended to be the Company’s, and that he could be allotted 96,000 shares, in accordance with what must have been the common understanding and expectation of both him and the Company as to the basis upon which the £96,000 had been paid and received, when viewed in the light of the previous history. Equally, if the Company had refused to allot him 96,000 shares, Mr Blackburn would have been able to contend that he was entitled to insist on such an allotment, in the light of the previous four allotments of one share per pound injected, and his having paid the £96,000 to the Company, with the intention, well known to the Company, of obtaining tax benefits through such an allotment of shares. The fact that the Company was effectively owned and run by Mr Blackburn, rather than being controlled by others, should not assist his case, but it should not make it any more difficult either.
26. Accordingly, unless precluded by some legal principle, I consider that the proper characterisation of the arrangement was that the £96,000 was paid by Mr Blackburn to the Company, and accepted (and spent) by the Company on the clear mutual understanding, indeed implied agreement, that the Company would allot 96,000 shares to him. In those circumstances, it does not appear to me that the £96,000 gave rise to a “debt” (either as a matter of ordinary English or within para 13(2)(b)), which existed at the time the 350,000 shares were allotted to him. 96,000 of those shares were allotted to him in return for the £96,000 which he had paid for them. To use the language of the Special Commissioner, Mr Blackburn had paid the £96,000 “conditionally” on 96,000 shares being issued to him. As a matter of commercial reality and of ordinary English, he “subscribed wholly in cash” for those shares, and the money was at no time a “debt” as between the Company and him.
27. Two possible problems with this conclusion have to be considered. The first is that it may be said that the Company could not be compelled to issue shares; the second is that there is no basis as a matter of principle for treating the payments as anything other than loans.
28. It is unnecessary to decide whether the Company could have been compelled to allot 96,000 shares to Mr Blackburn once it had accepted the £96,000. Unless there was a technical company law reason why it could not have been so compelled, it seems to

me that it could have been. However, assuming that it could not have been so compelled, then, if it had refused to allot any shares to him, the £96,000 would, I think, have been recoverable by Mr Blackburn. But this would not be because the money had been a debt throughout; it would be because the money would have been paid for a consideration which, as it transpired, had failed, or because it had been paid in anticipation of an event which had not occurred. Once the Company had refused to allot the shares, the £96,000 would become repayable, and, at that point, I would have thought that it could well be characterised as a debt, but not until that point.

29. If that is right, I can see no reason why the payments totalling £96,000, when they were made, should nonetheless have to be characterised as loans or debts, as a matter of law, simply because they were paid to a limited company. It was suggested that a limited company cannot effectively accept capital contributions other than in the form of loan capital or share capital. Even if that suggestion was, in general, correct, I cannot accept that it would extend so as to prevent a company from accepting and holding money on the basis that it is bound (or at least entitled) as against the payer, to allot shares to him in return for the payment (with the possibility of having to repay the money if the shares are not then allotted).
30. In any event, I severely doubt that there is any reason in terms of principle, authority or practice for accepting that suggestion. In practical terms, I find it impossible to see, for instance, why a company should not be able to treat a gift as a contribution to its capital. As to authority, far from there being any case which confirms the suggestion, the Privy Council in *Kellar* [2000] 2 BCLC 390, 395e-f indicated precisely the opposite. Lord Mackay of Clashfern, giving the judgment of the Committee (which included Lord Browne-Wilkinson and Lord Millett) said that “there was nothing in the law of the Turks and Caicos Islands or in the company law of England” which prevented giving effect to an agreement between “the shareholders of a company ... to increase its capital without a formal allocation of shares”. In such an event, he said, such capital would “become like share premium part of the owner’s equity”. So far as principle is concerned, I do not see why the fact that accountancy convention may make it difficult to decide how to record a particular type of payment in the Company’s accounts means that, as a matter of law, the payment cannot be characterised as being of that type. While accountancy convention has an important part to play in some areas of tax law and company law, this would, I think, be a case of the tail wagging the dog.
31. This reasoning, which I have so far applied to the £96,000 paid in March and April 2000, appears to me to apply with equal force to those parts of the balance of the £254,000 paid before the allotment of the 350,000 shares, and, indeed, to the later sums paid before the allotment of the 240,000 shares.

Discussion: the 149,998 shares

32. The position with regard to the initial 149,998 shares is, however, more problematical for Mr Blackburn, as he is unable to point to any prior course of dealing, or an understanding as to the need for him to be allotted shares in order to obtain EIS relief, before he paid the £111,000 on 1 September 1998. Not only was there no prior course of dealing, but the first evidence of Mr Blackburn discussing his being allotted

“150,000 shares” was in his letter of 4 September 1998 to the accountant, which admittedly refers to a telephone conversation, but there is nothing to suggest that even that conversation took place before the payment of the £111,000, or indeed to indicate what was said in the conversation.

33. In those circumstances, it does not appear to me to be possible to characterise the payment of £111,000 on 1 September 1998 in the same way as the later payments totalling £96,000 in March and April 2000. Given that £111,000 was paid by Mr Blackburn to enable the Property to be transferred to the Company, it appears to me that, in the absence of any other explanation, there could be three possible conclusions. The Property could have been given to the Company by Mr Blackburn, the Property could have been held by the Company on trust for Mr Blackburn, or the money could have been repayable as a debt. I do not consider that any of those possibilities would assist him.
34. The third possibility was that adopted by the Special Commissioner, and presents Mr Blackburn with the problem which the Special Commissioner identified. The possibility is not as improbable as it is in relation to later payments, such as the £96,000. The notion that Mr Blackburn made a repayable loan to the Company shortly after he acquired it, in order to enable it to buy land is much less unlikely than his making repayable loans to the Company (a) much later on, (b) after he had consistently acquired shares, on a strictly share for pound basis every time he had paid money into the Company, (c) when he (and, through him, the Company) knew that this was the financially sensible way for him to fund the Company, and (d) where the money was paid for running costs and building works.
35. The first possibility would be consistent with the Judge’s finding that the money was effectively a capital contribution to the Company, but, in my view, that would not, of itself, be enough to get Mr Blackburn home. It is true that it would dispose of the problem raised by para 13 of Schedule 5B, as there would be no debt to be redeemed on the allotment of 110,000 shares (as part of the 149,998 shares). However, as far as I can see, it could not meet the point that para 1(2) would not be satisfied, as those shares would not have been “subscribed [for] wholly in cash” and, when issued, they would not have been “fully paid up”, as the £111,000 would at best have been past consideration. In other words, unlike with the £96,000, there is no basis upon which it can be said that the payment of £111,000 was conditional on the allotment of an appropriate number of shares.
36. The possibility that, when it was purchased by the Company, the Property was held on trust for Mr Blackburn was not raised in argument. However, in my view, even if it represented the right analysis, it would not assist Mr Blackburn. The subsequent allotment of shares would have discharged the trust, but, once again, as I see it, the shares would not have been “subscribed [for] wholly in cash”, but in return for the discharge of the trust (or the surrender of Mr Blackburn’s beneficial interest in the Property). Further, it may well be that the allotment of the shares would fall foul of para 13 of Schedule 5B, but I would not want to decide that without the benefit of argument.
37. That leaves one outstanding question in relation to the 149,998 shares. If (as is by no means clearly the case) only £111,000 was paid in advance of the resolution to allot, and the balance of some £40,000 was paid after, and Mr Blackburn loses his claim for

EIS relief in relation to the 111,000 shares, can he nonetheless succeed in relation to the balance of 38,998 shares? The Special Commissioner and the Judge held that he could not, because there was a single “issue” of 149,998 shares, given that there was a single resolution to allot all the shares, and, indeed, a single share certificate, and a single recording in the share register. The requirement in para 1(2)(f) of Schedule 5B has to be satisfied in relation to “all the shares comprised in the issue”, and, it seems to me inescapable that, if it applies only to some of those shares, then the paragraph is not satisfied. An ingenious contention was advanced on behalf of Mr Blackburn that the allotment of 149,998 shares could be treated as more than one issue for the purpose of para 1(2)(f), based on the reasoning of Lord Templeman in *National Westminster Bank plc v Inland Revenue Commissioners* [1995] 1 AC 119. However, that reasoning does not begin to undermine the plain and natural meaning of para 1(2)(f) when applied to the facts of this case.

Conclusion

38. In relation to the two last allotments of shares, it might appear to be wrong to reverse, or to sanction a reversal of, a decision of the Special Commissioner on a new point, which could be said to involve inferences of fact. I have nonetheless concluded that it is unnecessary to remit this case. The issue ultimately turns on whether certain payments of money should be treated as having given rise to debts or to rights to an allotment of shares. It seems to me that, having accepted that there was a “generalised intention” to allot shares, Dr Avery Jones went wrong on two points. (It is only fair to add that this implies no criticism of the way he dealt with the case, as neither point appears to have been put to him: as not infrequently happens, the issues have become refined and altered as the case has proceeded.)
39. First, he did not go further and ask whether, in the light of the previous course of dealing and the obvious interests of Mr Blackburn when he paid the money, there was effectively an agreement or enforceable understanding that he would be allotted a corresponding number of shares. Instead, the Special Commissioner considered each of the two last allotments, together with any associated payments, as self-contained events. That is well demonstrated by the fact that he analysed the first allotment of 149,998 shares in the same way as he analysed the last two allotments of 350,000 and 240,000 shares. Secondly, he appears to have considered that, ultimately, there were only two possible analyses of the payments made in advance of the resolution to allot – the payment immediately gave rise to a debt or it represented an “application for a specific number of shares” (para 46 of his decision); having rejected the latter, he was left with the former. The notion of an implied agreement or enforceable understanding between Mr Blackburn and the Company does not seem to have been raised: for the reasons I have given, it appears to me to be the most satisfactory analysis.
40. Further, all the documents which were before Mr Avery Jones are available to us, Dr Avery Jones has made all the necessary findings of primary fact, and he was not much influenced or impressed by the oral evidence. It is also worth mentioning that, very sensibly, the Revenue do not appear to be keen to have the matter remitted. Thus, it was not a significant part of their case that Peter Smith J should have taken such a course, in the light of his conclusions.

41. For these reasons, I would allow the Revenue's appeal, but only in relation to the first allotment of 149,998 shares, and I would dismiss their appeal in relation to the last two allotments of 350,000 and 240,000 shares.

Lord Justice Wilson:

42. I agree.

Lord Justice Sedley:

43. I also agree.