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Case No: CH/2007/APP/0298

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/02/2008

Before :

MR JUSTICE PETER SMITH

Between :

Alan Blackburn
Alan Blackburn Sports Ltd — **Appellants**

- and –

The Commissioners for Her Majesty's Revenue and Customs — **Respondents**

Patrick Way (instructed by **Fishburns**) for the **Appellants**

Michael Gibbon (instructed by **Solicitor for HM Revenue & Customs**) for the **Respondents**

Hearing dates: 30th and 31st January 2008

Judgment

Peter Smith J :

INTRODUCTION

1. This is an appeal by the Appellants from a decision of the Special Commissioner Dr John Avery Jones CBE released on 28th March 2007.

2. The appeal concerns the availability of relief ("EIS Relief") under the Enterprise Investment Scheme pursuant to the Taxation of Chargeable Gains Act 1992 ("TCGA 1992") in respect of shares issues made by Alan Blackburn Sports Limited ("the Company") between 1998 and 2000 to Mr Alan Blackburn ("Mr Blackburn").

3. This case has been extremely well presented by both sides both in the preparation and the written and oral presentations and I am grateful for that assistance.

BACKGROUND

4. The EIS is a tax incentive scheme which encouraged individuals such as Mr Blackburn to invest in unquoted trading companies such as the Company itself and affords the investors various forms of tax relief where they acquire shares (EIS shares) by such companies. In this case the appeal was concerned with the availability to Mr Blackburn of deferral relief in respect to the EIS shares issued to him by the Company. Deferral relief takes effect so that Capital Gains Tax that would otherwise have arisen on a disposal by an individual of chargeable assets is deferred until the EIS shares are disposed of. Mr Blackburn invested a total of approximately £1,200,000 in the Company by a total of 10 subscriptions and issues of shares between September 1998 and January 2001. This reflected Capital Gains that he had made in respect of other disposals during the period and as I have said above the object of the EIS investment was to invest under that scheme with a view to deferring the Capital Gains Tax liability which would otherwise accrue on the disposal of other assets.

THE COMPANY

5. The Company was acquired by Mr Blackburn off the shelf with the intention of being a qualifying company under the EIS. He and his wife were the only directors and his wife was in addition the Company Secretary. It was submitted by Mr Way who appeared for Mr Blackburn and the Company that it was a classic example of an archetypal one man band; the Company being very much the alter ego of Mr Blackburn. It was also conceded from time to time Mr Blackburn's paperwork was not prepared contemporaneously and was prepared when he and his accountant found the time to do it and not always instantaneously. I think with respect to Mr Way that understates the position. The Special Commissioner found that documents had been put forward which were backdated. All of the documents were apparently prepared by the accountant who unfortunately is now dead.

6. Mr Blackburn over a period of time invested money informally with the Company without a contract of allotment or a share application. Mr Way submitted this was entirely normal state of affairs in the circumstances of the Company where Mr Blackburn was the sole investor and he and his wife were sole directors. It might be the situation that small companies do not carry out the formalities required from time

to time but the Court has to be wary of enabling people to be in a better position by inadequate recording and dealing with matters than those who record them at the time they happen.

BASIS OF APPEAL

7. The appeal is based on a decision against the refusal of HMRC to issue forms EIS2 and EIS3 in relation to 10 EIS1 forms submitted by Mr Blackburn on 1/10/02. The Special Commissioner refused the appeal against that refusal in principle insofar as it related to 7 of the EIS1 forms and allowed an appeal in principle insofar as it related to 3 of the EIS1 forms. Attached to this judgment is a schedule in respect of the share issues and the determinations in each case which was helpfully provided by Mr Way.

8. As appears from the schedule ultimately all of the monies which Mr Blackburn provided to the Company were used by it to discharge his liability for share subscriptions. Of course the Company used the expenditure for company purposes.

9. Mr Blackburn provided the money to the Company informally. It is suggested on behalf of Mr Blackburn and the Company that the consequence of that is that without a contract an investor such as Mr Blackburn becomes a volunteer to whom technically speaking the Company owes a debt. When the Company then issues shares to that investor (by writing his name in a share register a little later) then the "technical" debt owed to the investor as a volunteer is extinguished.

10. The Special Commissioner has held that in the situation under review whenever the Company's share register was written up after Mr Blackburn had put money into the Company without a contract then there was a return of value to Mr Blackburn in that his (to use the Appellants' words) ***"technical"*** debt was repaid. That has the effect the Special Commissioner determined of denying him EIS relief under the ***"value received"*** provision.

THE ISSUE

11. It is submitted on behalf of Mr Blackburn and the Company that he has received no value in any real sense and that he is out of pocket in the circumstances by reference to the entirety of the money that he has put in to the Company. Thus it is submitted that even though the technical debt is written off as a matter of law it is the case that he no value back from the Company as part of this exercise so it is submitted there is no room for EIS relief to be denied in the circumstances.

12. The Special Commissioner was required to make detailed findings of fact before the law could be applied. Having heard all evidence the Tribunal reached factual conclusions which as will appear are materially different to the contentions in various of the 10 EIS applications.

NATURE OF APPEAL

13. The forum for fact finding is the Specialist Tax Tribunal and an appeal to the High Court only lies on points of law unless the Appellants argue that the Special Commissioner's factual findings can be challenged as erroneous in point of law under the principle of ***Edwards v Bairstow [1956] AC 14.*** The Appellants make no such

submission. Therefore the fact findings of the Special Commissioner are definitive for the purpose of this appeal.

14. The Special Commissioner made three determinations:-

1 Where there was a delay in writing up the share register there was a disqualification of the EIS requirements on the basis that this delay meant that the notional (the Appellants' words) discharge of the debt created by the paying of money to the Company was a receipt of value in Mr Blackburn's hands which is prohibited under TCGA 1992 Schedule 5 B paragraph 13.

2 That where there was a discharge of that debt on the issued shares this was a breach of the requirements ***"all the shares comprised in the issue are issued in order to raise money for the purpose of a qualifying business activity".***

3 That various share issues which are otherwise separate and which taken in isolation would qualify should be treated as being comprised in a single issue in relation to which the qualifying rules mentioned in paragraph 13 applied thus tainting all of the shares issued treated by the Special Commissioner as one single share issue.

FIRST ISSUE – VALUE RECEIVED

15. The Special Commissioner held that the value received rules applied to issues (1), (6) and (10) in relation to all of which Mr Blackburn paid money into the Company before the share register was written up.

16. It is necessary to consider the value received provisions. The legislation contained various checks and balances to protect against abuse and the value received rules are included amongst those. The purpose of the scheme was to encourage investment. The purpose was therefore to attract fresh money and any device or arrangement which did not attract new money was not allowable. Take a simple example. A Director could not utilise his pre-existing loan account in his favour with a Company to discharge a debt that would fall on him for a subscription for shares.

17. The Appellants contend that when the monies were utilised to pay for the share subscription even though the money had been provided earlier to the Company that debt was a "technical" debt. Accordingly it is submitted Mr Blackburn received nothing back from the Company as a matter of fact and Mr Blackburn has been denied relief on the basis that the value received rules apply ***"whenever there is a delay in writing up a share register unless there has been some form of contract entered in to beforehand".***

18. The Appellants submit that the Special Commissioner's approach is not in accordance with an earlier decision of the Special Commissioner, and ***Inwards v Williamson (Inspector of Taxes) [2003] STC (STD) 355.***

RELEVANT PROVISIONS

19. The relevant provisions are as follows:-

> ***"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 …

(b) the company is a qualifying company in relation to the shares

(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 in order to raise money for the purpose of a qualifying business activity

Para 13(1) provides:

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, 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.

Para 13(2) 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."

20. Paragraph 19 provides:-

"*19 (1) for the purpose of this schedule –*

Arrangements includes any scheme, agreement or understanding, whether or not legally enforceable"

21. The ***Inwards*** case considered the provisions of sections 164 L(1) to (3) which provide as follows:-

"[164L] Anti-avoidance provisions"

(1) For the purposes of this Chapter an acquisition of shares in a qualifying company shall not be treated as an acquisition of eligible shares if the arrangements for the acquisition of those shares, or any arrangements made before their acquisition in relation to or in connection with the acquisition, include-

(a) arrangements with a view to the subsequent re-acquisition, exchange or other disposal of the shares;

(b) arrangements for or with a view to the cessation of the company' s trade or the disposal of; or of a substantial amount of, its chargeable business assets; or

(c) arrangements for the return of the whole or any part of the value of his investment to the individual acquiring the shares.

(2) If, after any eligible shares in a qualifying company have been acquired by any individual, the whole or any part of the value of that individual's investment is returned to him, those shares shall be treated for the purposes of this Chapter as ceasing to be eligible shares.

(3) For the purposes of this section there shall be treated as being a return of the whole or a part of the value of the investment of an individual who is to acquire or has acquired any shares in a company if the company-

(a) repays, redeems or repurchases any of its share capital or other securities which belong to that individual or makes any payment to him for giving up his right to any of the company's share capital or any security on its cancellation or extinguishment;

(b) repays any debt owed to that individual, other than a debt which was incurred by the company-

(i) on or after the acquisition of the shares; and

(ii) otherwise than in consideration of the extinguishment of a debt incurred before the acquisition of the shares;

> ***(c) makes to that individual any payment for giving up his right to any debt on its extinguishment; (d) releases or waives any liability of that individual to the company or discharges, or undertakes to discharge, any liability of his to a third person;***
>
> ***(e) provides a benefit or facility for that individual;***
>
> ***(f) disposes of an asset to that individual for no consideration or for a consideration which is or the value of which is less than the market value of the asset;***
>
> ***(g) acquires an asset from that individual for a consideration which is or the value of which is more than the market value of the asset; or***
>
> ***(h) makes any payment to that individual other than a qualifying payment***

22. The provisions are a little tortuous. An individual receives value (amongst other things) if the Company repays ***in pursuance of any arrangements for or in connection with the acquisition of the shares*** any debt owed to the individual. Thus if as part of the share subscription an existing debt is repaid then value is received. The sub-section (B) then provides for an exception in the case of a debt (i) incurred on or after the date on which the subscription for the shares was made and (ii) otherwise and in consideration an extinguishment of a debt before that date.

23. The wording in paragraph 13 (2) (b) is no different to the wording in section 164 L (3) (b) the necessity for an arrangement for the return of value is to be found in section 164 L (1) (c) which is applied to sub-section (3).

24. The Appellants contend that the ***Inwards*** case is in effect identical and that the Special Commissioner ought to have followed that decision. HMRC do not before me contend the ***Inwards*** decision was wrongly made on the provisions of section 164 L.

25. In the ***Inwards*** case £375,000 was paid to the relevant Company in June 1995. The allotment of shares did not occur until March 1996 (some 8 months later). The decision of the Special Commissioners was that nevertheless the £375,000 was not disallowed as a return of value.

26. The reasons are to be found in paragraphs 43 to 49 as follows:-

> ***"43. We do, however agree with Mr Way's third proposition that the repayment of the debt by Parking, owed to the appellant, on the issue of the shares on 29 March 1996 is outside of the mischief of the return of value provisions in s 164L(3). Section 164L(3)(a) to (h) provides an exhaustive definition of a return of value. All of the categories of a return of value involve money or money's worth which travel from the direction of the investee qualifying company to the reinvestor, that is, in***

the opposite direction to the subscription funds paid by the reinvestor to the company.

44. The self-evident rationale of the return of value provisions in s 164L(3) is to ensure that the reinvestor truly has increased his investment in the qualifying company, by reason of his acquisition of eligible shares, whether by subscription or on the acquisition of such shares from another person. The implementation of an arrangement for a return of value within s164L(3) would mean that a reinvestor who had not, economically, increased his investment in the qualifying company to the extent of the amount the return of value received. In other words, the making of a 'qualifying investment' for the purposes of s 164A(1) requires a true divestiture of the acquisition funds, whether on an acquisition from another party of existing shares, or on the subscription of new shares. The relief, it seems from the terms of s164L(I) and (3), ought not to be available if the flow of funds from the investor to the company is linked in any way with arrangements for a flow of value in the other direction, from the company to the reinvestor. The draftsman is not concerned with a flow of money or money's worth from the company to a person other than the reinvestor, although we note that s 164L(3) would catch any return of value made indirectly to, or to the order of, the reinvestor, or any 'associate' of his: s 164L(9). The draftsman is only concerned with securing that the reinvestor who seeks relief has made a real investment of the amount of the relief he seeks. The fact that s 164L(I) and (3) applies to deny relief entirely even if only a part of the value invested is returned merely emphasises that the relief is only available if an amount equal to the chargeable gain the reinvestor seeks to shelter has been truly reinvested.

45. However, the repayment of a debt, where the debt itself only arises as an incidence of the share acquisition, which does not involve the utilisation, by the reinvestor, of any part of the funds which he uses to acquire the eligible shares, and which leaves him with a net increased investment in the qualifying company of an amount equal to the chargeable gain he seeks to relieve, is in our judgment outside the scope of s164L(3). We agree with Mr Way that the application of s164L(l) and (3) to deny relief, in such circumstances, simply because subscription funds were advanced to the issuing company, otherwise than under a contract of allotment, before the share issue, thus creating a debt which is repaid or discharged by the share issue, would be an absurdity.

46. In this case the appellant did not in the intervening period have the use of any part of the £375,000 he deposited with Parking on 30 June 1995. There was simply a technical repayment of a debt when Parking issued its shares to the appellant on 29 March 1996. The appellant, upon the full implementation in March 1996 of the arrangements proposed in the BDO Stoy Hayward letter of 11 May 1995, had an increased investment of £375,000 in Parking.

47. Before setting out what we consider to be the correct approach to s164L, we record our rejection of Mr Smith's approach to that provision. Mr Smith submitted that s 164L(1) and (3) would apply to an arrangement for the repayment of any debt, incurred prior to the acquisition of shares. Technically, he submitted, s 164L(1) and (3) would apply to every case where subscription funds were deposited with a company before that company issued shares to the subscriber, unless the payment was made pursuant to a contract for the allotment of shares; in any case where the payment was not made under such a contract, including where a cheque sent to a company together with an application for an allotment of shares was cashed before allotment, the Revenue could, according to Mr Smith, apply s 164L(1) and (3). Mr Smith described what he had been advised was a Revenue practice, which was that, provided that a company's authorised share capital, at the time that the payment was received, was sufficient to issue the shares ultimately issued and any delay between the deposit of the subscription funds and issue was not 'unreasonable' the Revenue would forbear from applying s 164L(1) and (3) by concession. Mr Smith was unable to specify the criteria which would make a delay 'unreasonable' but submitted that the nine-month delay in the present case, between 30 June 1995 and 29 March 1996 was "unreasonable on any view. However, in any event; if the company's authorised share capital, at the time at which he subscribed, was insufficient for the issue of the shares ultimately issued to the investor, as was the case for the appellant's subscription for the Parking shares, Mr Smith submitted that s 164L(1) and (3) did apply, no matter how short a period of time (even a day or so) there was between the deposit of the subscription funds with the company and its increase in authorized share capital.

48. We find this approach untenable. We would, without the clearest statutory guidance, be most reluctant to adopt an approach to the construction of a statutory provision which, in order to make the provision workable in common commercial circumstances, is dependant on

the exercise of Revenue discretion and concession, see Vesty v IRC (Nos 1 and 2) [1980) STC 10, AC 1148. The results of such an approach is in our view arbitrary and unpredictable. For example the focus on the issued company's authorised share capital strikes us as wholly misconceived. Whether or not the Revenue sought to apply s 164L might depend on whether a company ultimately chose to issue shares with a low nominal value but at a large premium, or a large number of shares with a low nominal value but at a large premium, or a large number of shares at par, which required, as in the present case, an increase in its authorised share capital.

49. We consider the correct approach to s 164L(1), in the context of the relationship between s 164L(1)(c) and (3), to be as follows: arrangements fall within the scope of s 164L(1),if the arrangements are 'for the acquisition of' the shares, or are arrangements 'in relation to, or in connection with' the acquisition and 'include', in the context of this case, 'arrangements' for the return of the whole or any part of the value of the investment: s 164L(1)(c). Here it is said, by the Revenue, that the arrangements included arrangements 'for the repayment of any debt owed' to the appellant: s 164L(3). As a matter of language the offensive 'arrangements' caught by s 164L(1) and (3) must, in fact, contain two distinct features. Firstly, they must be 'for', or 'in relation to, or in connection with' an acquisition of eligible shares. Secondly, and distinctly, they must include arrangements for a return of value (here the repayment of a debt). We agree with Mr Smith that there need be no actual repayment of a debt to invoke s 164L(1), merely an 'arrangement' for such a repayment (actual returns of value, post acquisition of eligible shares, are governed by s 164L(2) which is of no application in this case). However, the 'arrangements' for or in relation to, or in connection with the acquisition of the shares and the 'arrangements' for the repayment of the debt are separate features, used in contra-distinction, of the 'arrangements' described by the draftsman in s 164L(1) and (3). In our judgment, arrangements for the repayment of a debt, when the debt itself only arises as a necessary incident of the share acquisition are not within s 164L(1). There are not two distinct features of the 'arrangements' in such a case, one 'for' (or 'in relation to, or in connection with') a share acquisition and another 'for' the repayment of a debt but only one 'arrangement', being 'for' the acquisition of shares; the debt has no existence independent of the arrangement for the acquisition of the shares. When a debt arises under arrangements as a mere

> ***incident of the share acquisition with no commercial life or rationale of its own, in that it only arises in the implementation of the arrangement for the acquisition of the shares and is then repaid on the share issue, this does not invoke the application of s 164L(1).***

27. It can be said that the Special Commissioners in ***Inwards*** were looking at the reality of the transactions in the sense that the monies that were subscribed were always intended to be in respect of a future share issue and there was simply a technical repayment of a debt when the company issued a share. It is to be noted that Mr Way who appears for the Appellants in the present case appeared for the Appellants in the ***Inwards*** case.

28. HMRC did not appeal that decision.

29. The Special Commissioner dealt with the ***Inwards*** case in paragraph 43-45. His conclusion (paragraph 45) was that simply looking at paragraph 13 when there was repayment of any debt in connection with the acquisition of shares value was received. This led him to conclude that there was a debt in existence at the time of the application for subscription for shares and ***"I have found that at best there was a generalised intention eventually to issue shares for cash paid to the Company but there was no application for a specific number of shares at the time these payments were made".***

30. This echoed what is in my view a significant factual finding which is not challenged in paragraph 23 where he said:-

> "***23 While I accept the existence of a generalised intention on the part of Mr Blackburn that money that he put in to the Company would be in respect of shares I am unable to accept that whenever money was paid he was informally applying for shares. In my view he was putting money into the Company to meet the Company's cash requirements with intention to sorting out the issue of shares later".***

31. This has to be considered against the factual findings of the Special Commissioner.

32. The documents provided by the Appellants to support the case could not be relied upon as there were some that were clearly wrongly dated. As the Special Commissioner found in paragraph 9 Mr Blackburn was not a details man and was content to sign anything that was put in front of him by the accountant even though the dates on the face of the documents were obviously wrong. The Special Commissioner went on to find that many of the documents were not signed on the date they bore and that a statement that a document was signed on a particular date was not taken by him to imply that it was signed on that particular date.

33. Against that he had in mind that Mr and Mrs Blackburn were the only directors of the Company; Mr Blackburn owning all the shares except for one owned by Mrs Blackburn. I will not set out in this judgment various factual findings that led to the Special Commissioner coming to that conclusion. Nothing turns on the reasons why these documents came to be erroneously dated. The Special Commissioner has

reconstructed what went on and there is no challenge to his factual findings in that regard. It is not suggested by HMRC that the provision of documents with false dates on them invalidates the Appellants' case.

34. HMRC accept that the date of subscription for shares is the date on which the application is made to subscribe. However where the shares are not issued to the public an application for shares can be made more informally taking a form of a letter applying for shares or verbal application. Nevertheless there must still be an application. It follows that not much is required in the case of a private company for there to be an application for shares.

35. It is important however to appreciate that the Special Commissioner in the first sentence of paragraph 23 of his decision rejected that there was any informal application until shares were expressly applied for at a later date. He acknowledged that there was a generalised intention on the part of Mr Blackburn that money be put in to the Company would be in respect of shares. The Appellants do not suggest that the generalised intention as found by the Special Commissioner can be treated as an application to subscribe for shares with the consequent allocation at a later stage. If the generalised intention had been treated as an application for a subscription of shares then all of the payments made by Mr Blackburn would be post that date and therefore there would be no value received when the shares are subsequently allocated.

36. However that case is not put by the Appellants.

HMRC'S CASE

37. The case of the Respondent is straightforward. It follows the reasoning of the Special Commissioner. When the monies were paid over to the Company at that time there was no application for shares. The money cannot be said to exist in a vacuum and there is no such thing as "technical" debt. The Company becomes under an obligation by way of an implied loan or quasi contractural obligation as there is no gift element to repay the monies it had received on demand. Thus at the time of the subsequent application and subscription there was a pre-existing debt. Accordingly paragraph 13 (2) (b) applies because Mr Blackburn utilises the money that is owed to him (thus an arrangement) to discharge his liability to pay for the subscribed for shares. Thus he has had the benefit of a repayment of a loan of monies which is due to him.

38. This is reinforced by the situation that would have appertained had the Company's records been properly written up. It would have been inevitable that the monies paid over to the Company but not immediately utilised for the subscription of shares would have been attributed to a director's loan account. There would therefore arise a pre-existing debt which was repaid by the utilisation of those funds to discharge Mr Blackburn's liability to pay for the shares for which he was subsequently subscribing. As I posed in argument why should Mr Blackburn's Company be better off than a Company which keeps proper records.

39. In answer to that suggestion Mr Way in effect (at a later stage of the hearing) produced a Privy Council decision of ***Kellar v Williams [2000] 2 BCLC 390.***

40. In that case there was an agreement to increase the capital of the Company and the Appellant provided funds for that increase. There was no clear indication whether he intended that the monies would be by way of loan or capital contribution. The funds were treated in the Company's records as capital contributions to make up the total of the owners equity. The question then arose as to whether or not on subsequent liquidation of the Company the monies thereby contributed by the Appellant were capital contributions or share holders loans.

41. The opinion of the Privy Council was that where shareholders of the Company agreed to increase capital without a formal allocation of shares that capital became like share premium and became part of the owner's equity. Accordingly a payment made to on behalf of a company other than by way of payment of shares or by way of a gift was not repayable to the payer. Accordingly the funds were not by way of a loan.

42. Accordingly Mr Way contended in his supplemental written submissions that paragraph 23 of the Special Commissioners judgment should be looked at in the light of that decision. Mr Way accordingly submitted that Mr Blackburn was putting the money into the Company with intention of sorting out the issue of shares and that this was identical to the position in ***Kellar***. And the second part of the first sentence of paragraph 23 is a mis-statement or a misapplication of the law. This is a little unfair to the Special Commissioner because this point was never put to him. It was also sprung on Mr Gibbon who appears for HMRC in that the ***Kellar*** authority was only provided to him as an adjunct to submissions on a different aspect (as to which see below). In effect Mr Way submits that the first sentence of the finding of the Special Commissioner (which he does not challenge) ought to have led him (and thus me) to conclude that given the generalised intention as found by him any monies that were received by the Company were on account of capital and not a loan. The Company could never become under an obligation to repay them; it would become under an obligation to issue shares pursuant to the receipt of that money to capital account.

43. If this is the correct analysis then the monies paid by Mr Blackburn are capital and cannot be a loan.

44. In my view this is the correct analysis on the particular facts of this case. It represents the generalised intention as found by the Special Commissioner and I respectfully disagree with his conclusion that the legal analysis meant that the monies would be treated as a loan. As I have said this argument was not put before the Special Commissioner so it is hardly surprising he did not deal with it.

45. I should say that I reject the Appellants' submissions that the loan can be disregarded as being technical. Equally whilst I have sympathy with the Appellants' stance based on the ***Inwards*** case and the broad approach to the construction of the provisions in the context of the need for the value received provisions I do not see that that can be used to overturn the plain meaning of the words which involve any arrangement whereby any loan is repaid. To invite an analysis on the ***Inwards*** basis would mean that each transaction would have to be minutely examined no doubt by the tax payer to find some kind of generalised intention when a pre-existing loan was repaid. I cannot believe that the anti avoidance legislation was drafted so as to lead to such a necessary inquiry. The plain words provide clarity and certainty. It is unfortunate that the arrangements were caught if I had come to the conclusion that it was a loan

but that is with respect a consequence of the failure on the part of the Appellants to organise their affairs properly so as to come within the requirements of the section.

46. It follows therefore that I would have dismissed the appeal on the first issue but for the ***Kellar*** decision.

47. That conclusion makes it unnecessary to deal with the other points as the consequence is that the appeal is allowed in its entirety. Nevertheless in case I am wrong I will deal with those other arguments.

ISSUE 2

48. This arises out of the Special Commissioner's decision (paragraph 53) but each of the two share issues (1) and (6) were issued by way of set off of the technical debt. Once again as a result of my application of the ***Kellar*** decision this decision is incorrect.

49. However had that decision not been provided to me I would have concluded that the Special Commissioner's decision was correct in that the legal analysis was that the money was provided by way of a loan when given to the Company and not allocated for shares. That loan then "disappeared" in the sense that it was deemed to be repaid when the monies thus provided by Mr Blackburn were subsequently utilised by him to discharge his separate liability to the Company from the latest subscription for the shares. That is plainly an arrangement whether enforceable or not within paragraph 13. It does not matter whether or not Mr Blackburn and his wife were directors or Mr Blackburn in the capacity of an investor had any notion of the existence from time to time of what is called a technical debt. One looks at the facts and then decides what happened as a matter of law. Absent the ***Kellar*** decision the monies were received by the Company under an obligation to repay them if required by Mr Blackburn. It is not suggested that they were acquired under an obligation to issue shares (decision of the Special Commissioner under paragraph 23). It follows therefore that there would be an implied loan that would arise as a matter of law from the provision of the monies without any other further explanation. When Mr Blackburn subsequently subscribed for the shares he appropriated the debt due to him to discharge his liability. Otherwise he would have to provide fresh funds which plainly he does not do.

ISSUE 3 – ALL SHARES COMPRISED IN THE SAME SHARE ISSUE

50. The Special Commissioner held that a number of shares (specifically those comprised in issue (2) and issue (7) – (9)) were part of larger issues in relation to which again on the Special Commissioner's interpretation the receipt of value. It followed therefore that he held that issue (2) which otherwise would have qualified is tainted by being linked to issue (1) and issues (7) – (9) are tainted by being linked to issue (6).

51. It seems to me that the Respondents' submissions are correct. To obtain relief the entirety of the shares comprising the issue are issued in order to raise money for the purpose of the qualifying business activity. If the Special Commissioner has decided that part of those shares were affected by a return of value then it cannot be said that "***all the shares***" are issued to raise money for the purpose of qualifying business activity. I can see no reason for separating up different parts of one issue.

52. The Special Commissioner identified the relevant issues and the linkage between for example what is being called issue 1 and issue 2 and issues 6 to 9. That is a decision on facts as to whether in fact there were separate issues as per the numbered issues subject matter of the appeal or whether there were a set of shares issued together which are part of a single global issue. I do not see how the Appellants can challenge that factual finding.

53. It follows therefore that if this was for consideration I would have rejected the Appellants' appeal on this point.

QUISTCLOSE

54. During the course of argument I raised the possibility as to whether or not given the Special Commissioner's finding in the first sentence of paragraph 23 of his decision it could be argued by the Appellants that all of the monies were received by the Company impressed with a trust that required them in the event that the monies were utilised to treat the monies as being received for the purposes of issuing shares pro rata to the amount of money provided. If that was the correct analysis there would again be no loan that would be repaid that would fall foul of paragraph 13.

55. Perhaps unsurprisingly Mr Way on consideration decided that this was an argument worth running. Mr Gibbon quite properly did not object to the argument being raised but equally properly sought and obtained a reasonable short period of time (by an adjournment) to deal with the arguments. I am grateful to both Counsel for providing comprehensive skeleton arguments supplemented by oral submissions dealing with this point.

56. It is clear of course that Mr Blackburn never considered creating a trust. However as Lord Millett observes in ***Twinsectra Ltd v Yardley [2002] 2 AC 164*** at paragraph 71 that whilst the settlor must possess the necessary intention to create a trust his subjective intention are irrelevant.

57. I have come to the conclusion that a ***Quistclose*** argument will not be applicable. As the ***Twinsectra*** case shows a ***Quistclose*** trust is an entirely orthodox example of the kind of default trust known as a resulting trust (paragraph 100 per Lord Millett). Thus the claims in the ***Quistclose*** type cases are that money is provided to be applied to a particular purpose only and if that purpose is not carried out then the money is held upon resulting trust for the person providing the funds.

58. In the present case Mr Blackburn provided monies to the Company with a view to the Company spending the money on qualifying expenditure. The Company duly spent it. Mr Blackburn's difficulties have arisen over the failure to obtain the shares at the proper time as set out earlier in this judgment. There was not question therefore of there being a residual beneficial interest in favour of Mr Blackburn. It is only that he wished (in the generalised way as set out in paragraph 23 of the judgment) in the future to utilise the monies provided for shares. By that the Special Commissioner is deciding that not that the monies cannot be used by the Company but that the receipt of the monies creates a liability at the behest of the Company which can be utilised by Mr Blackburn to discharge his future liability when he subscribes for further shares.

59. The possibility of a ***Quistclose*** trust in my view therefore would actually be contrary to the principle finding in paragraph 23. There is no finding that there was any intention that Mr Blackburn would have a possibility of a resulting trust if the monies were not applied as intended. On the facts the monies were applied by the Company.

60. I therefore conclude that the ***Quistclose*** argument has no application in this case.

61. Accordingly therefore for the reasons set out in this judgment I allow the Appellants' appeal.

A SUMMARY OF THE SHARE ISSUES IN TURN AND THEIR CONSEQUENCES

First Issue - £111,000

Paid - £111,000	-	1st September 1998.
Informal application	-	4th September 1998.
Share register	-	28th September 1998 (paragraph 12)
Result	-	Value received – under appeal

Second issue - £25,938

Informal application	-	4th September 1998
Paid - £76	-	18th September 1998
*Paid - £1	-	28th September 1998
Share register	-	28th September 1998 (paragraph 12)
*Paid - £25,862.85	-	30th September 1998
Result	-	Satisfactory but fails as being part of the First Issue – under appeal

*Relief has been claimed on £25,938 only, so the £1 and the 0.85p can be ignored.

Third issue - £140,000

- Board resolution - 6th January 1999
- Paid - £140,000 - 10th February 1999
- Result - Satisfactory – not under appeal, nor cross appeal

Fourth issue - £210,000

Cash of £210,000 was received on the same day as the share register was written up (30th June 1999). Accordingly, EIS relief is available.

- Result – satisfactory – not under appeal, nor cross appeal

Fifth issue - £100,000

- Application - 5th October 1999 (paragraph 17(3))
- Share register - 6th October 1999 (paragraph 17(9))
- Payment - 29th October 1999 (paragraph 17(10))
- Result - Satisfactory – not under appeal, nor cross appeal

Sixth issue (£96,000)

Paid £51,000	-	6th March 2000 (paragraph 19(2))
Paid £45,000	-	4th April 2000 (paragraph 19(2))
Informal application	-	26th April (paragraph 20)
Share register	-	9th May 2000 (paragraph 20)
Result	-	Value received – under appeal

Seventh issue (£90,000)

Informal application	-	26th April 2000 (paragraph 20)
Paid £90,000	-	2nd May 2000 (paragraph 19(11))
Share register	-	9th May 2000 (paragraph 20)
Result	-	Satisfactory but fails as being part of Sixth Issue – under appeal

Eighth issue (£20,000)

Informal application	-	26th April (paragraph 20)
Paid - £20,000	-	5th May 2000 (paragraph 20)
Share register	-	9th May 2000 (paragraph 20)
Result	-	Satisfactory but fails as being part of Sixth Issue – under appeal

Ninth issue (£144,000)

Informal application	-	26th April 2000 (paragraph 20)
Paid - £144,000	-	15th May 2000 (paragraph 20)

Share register - 9th May (paragraph 20)

Result - Satisfactory but fails as being part of Seventh Issue – under appeal

Tenth issue (£240,000)

Paid - £240,000 - between 5th July 2000 and 9th October 2000 (paragraph 22)

Informal application - 13th December 2000 (paragraph 22)

Share register - 8th January 2001 (paragraph 22)

Result - Value received – under appeal

Further information relating to the sixth, seventh, eighth and ninth issues

Share issue	Payment where it precedes share application	Application for shares	Payment where it post-dates share application but precedes register	Register	Payment if post-dates register	Conditional/ unconditional	Category
Sixth issue £96,000	6th March 2000 (£51,000) and 4th April 2000 (£45,000)	26th April 2000		9th May 2000		unconditional	Category (a)
Seventh issue £90,000		26th April 2000	2nd May 2000	9th May 2000		unconditional	Category (b)
Eighth issue £20,000		26th April 2000	5th May 2000	9th May 2000		unconditional	Category (b)
Ninth issue £144,000		26th April 2000		9th May 2000	15th May 2000	conditional	Category (b)