Neutral Citation Number: [2009] EWCA Civ 608

Case No: A3/2008/2148

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CHANCERY DIVISION
Mr Justice Norris

[2008] EWHC (Ch) 1758

Royal Courts of Justice
Strand, London, WC2A 2LL

25/06/2009

B e f o r e :

LADY JUSTICE ARDEN
LORD JUSTICE LONGMORE
and
LORD JUSTICE RIMER

Between:

JASON DRUMMOND **Appellant**

- and -

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

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7404 1424
Official Shorthand Writers to the Court)

Mr Patrick Way and Ms Hui Ling McCarthy (instructed by Penningtons Solicitors LLP) for the Appellant
Mr Timothy Brennan QC and Ms Nicola Shaw (instructed by The Solicitor's Office, HM Revenue & Customs) for the Respondents
Hearing date: 23 April 2009

HTML VERSION OF JUDGMENT

Lord Justice Rimer :

Introduction

1. This is the adjourned hearing (directed by Mummery LJ) of Jason Drummond's application for permission to appeal against Norris J's order of 23 July 2008 dismissing his appeal against a decision of the Special Commissioner (Sir Stephen Oliver QC) dated 5 July 2007. The hearing was on notice to the respondents, the Commissioners for Her Majesty's Revenue and Customs ('HMRC'), with a direction for the appeal to follow immediately if permission were to be granted. We have, as is usual on such applications, heard full arguments from both sides as if the hearing were the appeal. Mr Drummond was represented, as below, by Mr Patrick Way and Ms Hui Ling McCarthy. HMRC were represented, as below, by Mr Timothy Brennan QC and Ms Nicola Shaw. The Special Commissioner's decision is reported at [2007] STC (SCD) 682, BAILII: [2007] UKSPC SPC00617, and Norris J's at [2008] STC 2707.

2. The issue relates to the calculation of Mr Drummond's liability to capital gains tax ('CGT') for the tax year ended 5 April 2001. During that year Mr Drummond made a capital gain of some £4.875m upon the sale of shares. It exposed him to a large CGT liability. He claims to have been entitled to set against that gain an allowable loss of £1,962,233 ('£1.962m'), so reducing the CGT liability by some £588,000. HMRC challenge his claim to do so. Their reason is that whilst the £4.875m gain was a real economic gain, the claimed loss was not a real economic loss. Mr Drummond's claim is based on a tax avoidance scheme into which he bought at a cost of some £210,000 (part of the £1.962m). The scheme depends upon a claimed application to the facts of section 37(1) of the Taxation of Chargeable Gains Act 1992 ('TCGA'). HMRC accept that section 37(1) applies, but their position is that it does not enable Mr Drummond to create the magic he claims to conjure from it.

The facts

3. The issue before the Special Commissioner was Mr Drummond's appeal against HMRC's amendment to his self-assessment tax return for the year ended 5 April 2001. The amendment disallowed his claimed allowable loss of £1.962m for CGT purposes.

4. That claim followed from Mr Drummond's adoption of a scheme devised by McKie & Co Limited. Its purpose was to enable customers with otherwise unrelieved capital gains to generate capital losses without suffering a corresponding economic loss. The scheme involved the purchase and surrender by the taxpayer of second-hand, non-qualifying life assurance policies. The Special Commissioner provided a detailed account of the facts, but it is sufficient to adopt Norris J's succinct summary of them, as follows:

> '2. … London & Oxford Capital Markets ("London & Oxford"), a small corporate finance and investment company, operated as a market maker in second hand life assurance policies. It created a stock of such policies by procuring an interest free loan to be made to one of its employees (Ms Sedgley) who used the loan to effect non-qualifying policies on her life with American Life Insurance Company ("AIG") on 23 February 2001. The policies were in every respect real. The insurance company was a major institution. The underlying investments were genuine and potentially long term. The rights of the policyholder were in all respects of an arm's length nature. On 26 March 2001 Ms Sedgley assigned the AIG policies to London & Oxford for a small profit. The Special Commissioner found that this had been intended from the outset, and that Ms Sedgley's taking of independent financial advice in respect of apparently personal investments by her had been "a charade". On 28 March 2001 London & Oxford charged the AIG policies as security for an overdraft from its bankers. On 30 March 2001 London & Oxford then drew down on this overdraft facility and used the advance to pay substantial additional premiums on the AIG policies. On 4 April 2001 Mr Drummond agreed to buy five of the AIG policies from London & Oxford for £1.962 million, £1 million being payable that day and the balance of the consideration the following day. The five policies had a surrender value of £1.751 million (equivalent to the premiums paid). The difference between the cost to Mr Drummond of the five AIG policies (£1.962 million) and the surrender value of the five AIG policies (£1.751 million) represented the scheme costs (consisting of London & Oxford's profit, an introductory commission, fees for "independent financial advice", a contribution to a fighting fund, and a contingency fund of about £98,000). On 5 April 2001 (as had been intended from the outset) Mr Drummond surrendered the five policies to AIG, part of the surrender money being used to discharge the obligation to pay the outstanding consideration payable that day. Thus the five policies acquired by Mr Drummond on 4 April were turned into cash on 5 April 2001. The process had cost Mr Drummond about £210,000. The object of the process had been to create an allowable capital gains loss of £1.962 million to set off against a capital gain of £4.875 million which Mr Drummond had made on the sale of his shares in Virtual Internet Plc.'

For completeness (although the precise figures do not matter), the surrender proceeds were £1,751,378 ('£1.751m').

5. The point in issue is how to compute the tax charge on the surrender of non-qualifying, second-hand life policies. There is a complication because the surrender was an event that not only gave rise to a charge to income tax, it was also a disposal for CGT purposes. The appeal concerns the interrelation between the treatment of the surrender for (a) income tax purposes under Chapter II of Part XIII of the Income and Corporation Taxes Act 1988 ('ICTA') and (b) CGT purposes under sections 37 to 39 of TCGA. I will go straight to the legislation, setting out only the material parts of the relevant provisions.

A. Income tax

6. The income tax position arising on the surrender of life policies was governed at the material time by Chapter II ('Life Policies, Life Annuities and Capital Redemption Policies') of Part XIII of ICTA. Section 539 provides:

> '(1) This Chapter shall have effect for the purposes of imposing, in the manner and to the extent therein provided, charges to tax, …, in respect of gains to be treated in accordance with this Chapter as arising in connection with policies of life insurance ….'

It is to be noted that the charge to tax is in respect of *gains*, which connotes the need to make a computation.

7. Section 540 ('Life policies: chargeable events') provides:

> '(1) Subject to the provisions of this section, in this Chapter "chargeable event" means, in relation to a policy of life insurance –
>
> (a) if it is not a qualifying policy, any of the following --
>
> (i) any death giving rise to benefits under the policy;
>
> (ii) the maturity of the policy;
>
> (iii) the surrender in whole of the rights conferred by the policy;
>
> (iv) the assignment for money or money's worth of those rights; and ….'

Only sub-paragraph (a)(iii) is relevant, but I cite the others to show that a surrender is but one of several types of 'chargeable event'.

8. On the occasion of a chargeable event, section 541 ('Life policies: computation of gain') explains the computation of the chargeable event gain:

> '(1) On the happening of a chargeable event in relation to any policy of life insurance, there shall be treated as a gain arising in connection with the policy –
>
> (a) …
>
> (b) if the event is … the surrender in whole of the rights thereby conferred, the excess (if any) of the amount or value of the sum payable or other benefit arising by reason of the event, plus the amount or value of any relevant capital payments, over the sum of the following –
>
> (i) the total amount previously paid under the policy by way of premiums; and
>
> (ii) the total amount treated as a gain by virtue of paragraph (d) below on the previous happening of chargeable events; …
>
> (5) In this section –
>
> (a) "relevant capital payments" means, in relation to any policy, any sum or other benefit of a capital nature, other than one attributable to a

person's disability, paid or conferred under the policy before the happening of the chargeable event; ….'

9. The calculation of the chargeable event gain upon the surrender of the policy therefore requires the deduction from (i) the surrender proceeds plus any 'relevant capital payments' paid out by the insurer before the surrender of (ii) the total amount of the premiums previously paid under the policy plus the amount of any gain referred to in section 541(1)(b)(ii).

10. Section 547 ('Method of charging gain to tax') finally introduces the taxpayer answerable for income tax in respect of the chargeable event. It provides:

> '(1) Where under section 541 … a gain is to be treated as arising in connection with any policy or contract –
>
> (a) if, immediately before the happening of the chargeable event in question, the rights conferred by the policy or contract were vested in an individual as beneficial owner, or were held on trusts created by an individual … or as security for a debt owed by an individual, the amount of the gain shall be deemed to form part of that individual's total income for the year in which the event happened; …'

11. Section 541(1) is therefore the charging provision by which, on the happening of a chargeable event, the amount of the gain will be deemed to form part of the total income of the individual who, immediately before that event, was the beneficial owner of the policy. That is the provision by which in this case the chargeable event gain arising upon the surrender of the policies on 5 April 2001 was deemed to be part of Mr Drummond's total income for tax purposes.

12. It is apparent from section 541 that the chargeable event will or may give rise to a gain whose calculation requires access to information that will not be in the possession of the person who was the beneficial owner of the policy immediately before that event – and even though the gain will be treated as part of *his* total income. In the case (as here) of a surrender, he will know the amount of the surrender proceeds; but if the policy is a second-hand one, he will not necessarily also know the amounts of any previous 'relevant capital payments' or premiums, although this information is needed to calculate the gain. The solution to this problem lies in section 552 ('Information: duty of insurers'), by which the insurers come under an obligation, within three months of a chargeable event, to provide the required information to the Inspector of Taxes, a provision pre-dating the self-assessment era.

13. The calculation of the chargeable event gain in the present case is agreed. There were no 'relevant capital payments' and so it was simply the excess of (i) the surrender proceeds of £1.751m over (ii) the initial premiums paid by Ms Sedgley (£1,250), plus the additional premiums paid by London & Oxford (£1,748,750), plus a small gain arising on the assignment of the policies by Ms Sedgley to London & Oxford (£25). The calculation resulted in a chargeable event gain of £1,351.25 deemed by section 547(1) to be part of Mr Drummond's total income for the year ended 5 April 2001.

B. Capital gains tax

14. Section 210 of TCGA shows why it was essential to Mr Drummond's scheme that the life policies he acquired and surrendered were second-hand ones. That section ('Life assurance and deferred annuities') provides:

> '(1) This section has effect as respects any policy of assurance or contract for a deferred annuity on the life of any person.
>
> (2) No chargeable gain shall accrue on the disposal of, or of an interest in, the rights under any such policy of assurance or contract except where the person making the disposal is not the original beneficial owner and acquired the rights or interests for a consideration in money or money's worth.
>
> (3) Subject to subsection (2) above, the occasion of –
>
> > (a) the payment of the sum or sums assured by the policy of assurance, or
> >
> > (b) the transfer of investments or other assets to the owner of a policy of assurance in accordance with the policy,
>
> and the occasion of the surrender of the policy of assurance, shall be the occasion of a disposal of the rights under the policy of assurance.'

It is agreed that the effect of section 210 is that Mr Drummond's surrender of the life policies was a disposal giving rise to a chargeable gain or allowable loss for CGT purposes. Section 15 provides for the computation of gains accruing on a disposal, with section 16 providing that losses accruing on a disposal are computed in the same way. Section 22 also provides that:

> '(1) Subject to sections 23 and 26(1), and to any other exceptions in this Act, there is for the purposes of this Act a disposal of assets by their owner where any capital sum is derived from assets notwithstanding that no asset is acquired by the person paying the capital sum, and this subsection applies in particular to –
>
> > (a) …
> >
> > (c) capital sums received in return for forfeiture or surrender of rights, or for refraining from exercising rights, and …
>
> (2) In the case of a disposal within paragraph (a), (b), (c) or (d) of subsection (1) above, the time of the disposal shall be the time when the capital sum is received as described in that subsection.
>
> (3) In this section "capital sum" means any money or money's worth which is not excluded from the consideration taken into account in the computation of the gain.'

15. The first issue before us concerns a claimed 'exclusion' from the consideration for the surrender of the policies. The critical provision is section 37(1), but I must also set out the material provisions of sections 38 and 39. They provide:

> '37. Consideration chargeable to tax on income
>
> (1) There shall be excluded from the consideration for a disposal of assets taken into account in the computation of the gain any money or money's worth

charged to income tax as income of, or taken into account as a receipt in computing income or profits or gains or losses of, the person making the disposal for the purposes of the Income Tax Acts. …

38. Acquisition and disposal costs etc

(1) Except as otherwise expressly provided, the sums allowable as a deduction from the consideration in the computation of the gain accruing to a person on the disposal of an asset shall be restricted to –

(a) the amount or value of the consideration, in money or money's worth, given by him or on his behalf wholly and exclusively for the acquisition of the asset, together with the incidental costs to him of the acquisition or, if the asset was not acquired by him, any expenditure wholly and exclusively incurred by him in providing the asset. …

39. Exclusion of expenditure by reference to tax on income

(1) There shall be excluded from the sums allowable under section 38 as a deduction in the computation of the gain any expenditure allowable as a deduction in computing the profits or losses of a trade, profession or vocation for the purposes of income tax or allowable as a deduction in computing any other income or profits or gains or losses for the purposes of the Income Tax Acts and any expenditure which, although not so allowable as a deduction in computing any losses, would be so allowable but for an insufficiency of income or profits or gains; and this subsection applies irrespective of whether effect is or would be given to the deduction in computing the amount of tax chargeable or by discharge or repayment of tax in any other way.'

A. The section 37(1) issue

16. Mr Drummond's case on this is simple. The surrender of the policies was a disposal. The gain (or loss) for CGT purposes was, in essence, the 'consideration' for the disposal of the policies (computed in accordance with section 37) less their allowable acquisition cost (computed in accordance with sections 38 and 39). Apart from section 37(1), the consideration was the surrender proceeds, or £1.751m. The acquisition cost is claimed by Mr Drummond to be £1.962m, but was held by the judge (and for the purposes of the section 37(1) argument can be assumed) to be £1.751m. If the two figures of £1.751m were the relevant ones, the surrender would have resulted in neither a gain nor a loss: and no loss could have been set against the gain on the share sale.

17. This, however, is to ignore section 37(1). In computing the gain or loss, that subsection requires the *exclusion* from the 'consideration' for the disposal (the surrender proceeds of £1.751m) of (i) 'any money or money's worth charged to income tax as income of … [Mr Drummond] for the purposes of the Income Tax Acts'; or (ii) 'any money or money's worth … taken into account as a receipt in computing income or profits or gains or losses of, [Mr Drummond] for the purposes of the Income Tax Acts.' I shall call these alternatives 'limb (i)' and 'limb (ii)'. Mr Drummond's case is that they are mutually exclusive and that the one that applies here is limb (ii).

18. If limb (i) applies, the only exclusion from the 'consideration' would be the £1,351.25 deemed by section 547 of ICTA to be part of Mr Drummond's total income for the year ended 5 April 2001. That would, on the figures assumed in the last sentence of paragraph [16], give rise to a loss of £1,351.25 to be set against the gain on the share sale. But Mr Way rejects that and says that limb (i) does *not* apply because whilst the figure of £1,351.25 was deemed to be part of Mr Drummond's total income for the year, it was neither 'money' nor 'money's worth' within the meaning of limb (i). It was, he said, merely the result of the computation required by section 541(1)(b) of ICTA. Mr Drummond could not, it is said, have gone out and *spent* what was represented by the figure arrived at by that computation. It is said that 'money' within the meaning of limb (i) means, and means only, pure income profit such as, for example, dividends or building society interest which are included as part of the taxpayer's total income without being arrived at by computing other figures.

19. That leaves limb (ii) as the applicable one, and it is said by Mr Way to fit the case. There is, he said, no doubt that the 'consideration' for the disposal of the policies (the surrender moneys of £1.751m) was 'taken into account as a receipt in computing [Mr Drummond's] income or profits or gains …' for income tax purposes: they were brought into account in the section 541 computation which resulted in the chargeable event gain of £1,351.25 which was treated as part of Mr Drummond's total income. Therefore it follows that the *entirety* of the consideration of £1.751m is required by section 37(1) to be excluded from the consideration for the disposal of the policies, which is thus reduced to nil. Mr Drummond remains entitled to deduct from that his acquisition costs under section 38, with the result that he has incurred an allowable loss of at least £1.751m (and he claims it is in fact the full £1.962m).

The decisions below

20. The Special Commissioner rejected that argument and held that limb (i) applied. His reasons were these:

> '16. In common with the Revenue, I disagree with Mr Drummond's construction. The calculation required by s 541(1)(b) brings into the reckoning amounts that may have had nothing to do with the surrendering policyholder. Neither the premiums paid by, nor the chargeable event gain, of Ms Sedgley, nor the topping-up premium paid by London & Oxford, nor the surrender proceeds of £1,751,376 were, in terms of s 37(1), moneys taken into account as receipts in computing Mr Drummond's income or profits or gains or losses for income tax purposes. The only amount so taken into account is the actual chargeable event gain, i.e. £1,351.25. That is a discreet [sic] amount produced from the calculation of gain "treated as arising in connection with" the policy; and the amount, as a stand-alone figure of income, is deemed by s 547(1)(a) to form part of Mr Drummond's total income.'

The decision of Norris J

21. Norris J also rejected the argument. His reasoning was as follows. The purpose of section 37 was to avoid a taxpayer suffering double taxation in relation to a single event occasioning a charge both to income tax and CGT. It achieves that end by adjusting (for CGT purposes) the consideration for the disposal by excluding amounts

already charged to income tax. It was undisputed that the surrender proceeds were 'money' and in Norris J's view the £1,351.25 figure arrived at by the section 541 computation was also 'money', being part of the proceeds of £1.751m from which other sums of 'money' had been deducted. It did not cease be 'money' because it was the product of a calculation. This money was then treated as the chargeable event gain and was directly charged to tax as part of Mr Drummond's income for the year without any intervening calculation. The £1,351.25 was therefore allowable in full as an exclusion from the consideration received on the surrender of the policies.

22. The judge considered further that, as this reasoning showed that there was 'money' that had been charged to income tax as part of Mr Drummond's income for the year, there was no warrant in section 37 for seeking some *other* money that might be used to create a further deduction from the policy proceeds. Limbs (i) and (ii) were mutually exclusive alternatives, which was why Mr Way had been at pains to submit that Mr Drummond's case did not fall within limb (i). The case was not, however, a limb (ii) one. The policy proceeds were not brought directly into the computation of Mr Drummond's total income. They merely provided the starting point for a statutory calculation involving the deduction from the proceeds of sums not expended by Mr Drummond. Norris J said that:

> '20. … "taken into account as a receipt" is not the equivalent of "featuring in some prior calculation which results in a figure to be added to income". The money must in some real sense be taken into account *as a receipt* and as such a receipt have a direct effect on the sum charged to income tax.'

Discussion and conclusion on the section 37(1) issue

23. Mr Way was politely critical of the judgments below as having been driven by a desired result rather than by an objective analysis of the language of section 37(1). I regard that criticism as unjustified. The interpretation of legislation involves more than black letter literalism. In a case such as the present, in which there is a question as to which of limbs (i) and (ii) applies, it is necessary to give the statute a purposive construction; and '… the question is always whether the relevant provision of the statute, upon its true construction, applies to the facts as found' (*Barclays Mercantile Business Finance Ltd v. Mawson (Inspector of Taxes)* [2005] 1 AC 684, paragraph 32, per Lord Nicholls of Birkenhead, giving the opinion of the committee). There is no dispute that the *purpose* of sections 37 to 39 is to prevent the double taxation that might otherwise arise from the circumstance that the disposal of an asset will or may give rise to a charge to income tax and also be a disposal for CGT purposes. Their purpose is to prevent such double taxation by excluding from the computation for CGT purposes amounts that (putting it neutrally) have been taken into account for income tax purposes. It is not their purpose to enable the creation of an imaginary loss that the taxpayer can set against a real gain and so reduce a CGT liability. Their purpose is not the avoidance of taxation, but the avoidance of *double* taxation. It is important to have that in mind when construing section 37(1).

24. Mr Way's submission is that, whilst all that may be so, there is no getting away from the fact that limbs (i) and (ii) in section 37 are mutually exclusive, that the present facts fall more naturally within the language of limb (ii) than that of limb (i), and that the consequences for which he contends therefore necessarily follow. If he is right

that this *is* a limb (ii) case, then no doubt the rest does follow. The consequence is, however, one that can at least be described as anomalous; and one that many would be content to describe as absurd. An interpretation of a statute leading to an anomalous or absurd result *may* be a correct one. But the court will ordinarily lean against an interpretation that produces such a result on the basis that this is unlikely to reflect the legislative intention.

25. In my judgment, attractively though he advanced the argument, Mr Way's submission as to how section 37 applies to the facts of the present case is incorrect. First, I have no difficulty at all in regarding the case as falling naturally within limb (i) of section 37: that is, in regarding the chargeable event gain of £1,351.25 as 'money … charged to income tax as income of … [Mr Drummond]'. It may be that the figure was arrived at by a statutory computation; but, once the computation had been performed, the resultant figure was 'money' charged to income tax as his income. It is that figure that would feature in his tax return, in like manner as any dividends or building society interest. Why is it not 'money'? Secondly, I do have a real difficulty in regarding this as a limb (ii) case: that is, in regarding the surrender proceeds as having been 'taken into account as a receipt in computing income … of, [Mr Drummond]' That formula applies most naturally (although not necessarily exclusively) to the case of a trader whose receipts are brought into account in computing the profits of his trade and against which he is entitled to deduct allowable expenditure in computing the profits chargeable to income tax. In such a case the receipts will be excluded from the disposal consideration under section 37(1) and the expenditure will be excluded by section 39 from being deducted under section 38: thus the two elements by reference to which a computation for income tax will have been made will be excluded from account for CGT purposes and double taxation will be avoided.

26. The limb (ii) formula does not, however, apply at all naturally to the facts of the present case. Quite apart from the fact that the attempt to force this case into limb (ii) produces a financial result that cannot have been intended by the legislation, it requires an interpretation of the language of section 37(1) that it cannot naturally bear. The surrender proceeds were *not* taken into account in computing Mr Drummond's income. Those proceeds would feature nowhere in his tax return, or in any accounts that he might have to prepare for the purpose of its completion. Their amount was, for the purposes of his tax return, a matter of complete irrelevance. The only figure he would require when making his return is the amount of the chargeable event gain. The fact that that figure was at an earlier stage arrived at by a statutory formula in which the surrender proceeds formed one element (and in which the other elements may have had nothing to do with Mr Drummond at all) is neither here nor there. No doubt the surrender proceeds can be regarded as a 'receipt' taken into account in that statutory calculation: but they were not a 'receipt' taken into account in the computation of Mr Drummond's income for income tax purposes. That, in my view, is the beginning and end of Mr Drummond's section 37(1) point.

27. In my judgment, therefore, the only exclusion from the disposal consideration permitted by section 37(1) is the chargeable event gain of £1,351.25. That produces an entirely just result, namely to avoid the imposing on Mr Drummond of any burden of double taxation arising from the disposal of the policies. It follows that I agree with the Special Commissioner and Norris J on the section 37(1) issue.

B. The section 38 issue

28. The other issue argued before the Special Commissioner and, on appeal, before Norris J was what sum, if any, was allowable under section 38 as a *deduction* from the consideration for the surrender. Mr Drummond claimed that the whole £1.962m was so deductible. HMRC claimed that none was. I have earlier set out the relevant provisions of section 38(1), the key words for the purposes of the argument being that the amount of the claimed deduction had to be 'given … wholly and exclusively for the acquisition of the asset ….'

29. The Special Commissioner held that no part of the £1.962m was so given, on the basis that it was paid not to acquire the policies but the tax shelter that it was hoped the scheme would confer. But if he was wrong on that, and the correct analysis was that Mr Drummond *had* made an acquisition of the policies, he held on the facts that:

> '74. … it would, I think, be unreal to view the transaction as one in which Mr Drummond acquired assets known to have a value of £1.75m for £1.96m. There was no evidence that he wanted to acquire and hold the policies. The entire weight of the evidence was to the contrary. As Mr Drummond put it (see para 50 above) his concern was with the amount he could offset for tax and the costs if successful. The only possible inference, viewing the transaction realistically, is that the £210,000 was not incurred "exclusively" (let alone "wholly") for the acquisition of the five policies. It was in reality money spent for the services of Simon McKie, London & Oxford and KPMG. I am therefore against Mr Drummond on the "£210,000 wholly and exclusively issue".'

30. On appeal Norris J took a different view from the Special Commissioner on the first point. He held that there was no doubt that Mr Drummond had made a real purchase of the five policies and that he had disposed of them. The task was to calculate the gain on the disposal. In that calculation Mr Drummond was entitled to deduct that which he had expended on the acquisition, confined to 'the consideration in money … given by him … wholly and exclusively for the acquisition of the asset.' The total of £1.962m could be broken down into its constituent elements and matched to benefits or services. Norris J's conclusion was that (in round figures) £210,000 of the £1.962m was plainly not paid 'wholly and exclusively' for the acquisition of the policies (see the summary of the facts in paragraph [4] above). (I add that Norris J pointed out that it was not argued that the £210,000 was 'incidental costs' within the meaning of section 38(1)). It followed, he held, that the £210,000 could not be deducted under section 38(1). As the Special Commissioner had said in his alternative finding, with which Norris J agreed, it was only the balance of the consideration that could be so deducted. Norris J therefore allowed Mr Drummond's appeal to this extent.

31. Mr Way sought to persuade us that Norris J should have allowed Mr Drummond's appeal to the extent of allowing the whole of the £1.962m as a deduction under section 38(1). In my view that was, with respect, a hopeless endeavour. The Special Commissioner was in error in finding that no part of the £1.962m was incurred in the acquisition of the policies and Norris J was right to correct his decision in that respect. But, in case he was wrong in that respect, the Special Commissioner had also made a reasoned finding that the £210,000 element of the £1.962m was *not* 'given … wholly

and exclusively for' their acquisition and Norris J agreed with him. In my judgment that was a finding of fact that was properly open to the Special Commissioner. Mr Drummond's challenge to this part of Norris J's decision is, in substance, a challenge to that finding. I see no basis on which this court can, might or should take any different view on it. I would accordingly also express my respectful agreement with Norris J's decision on the section 38 issue.

Disposition

32. The matter before the court is the adjourned application of Mr Drummond's permission to make a second appeal, with the appeal to follow if permission is given. Success on the application requires the court to be satisfied that one of the two limbs of CPR Part 52.13 is satisfied, namely that (a) the appeal would raise an important point of principle or practice, or (b) that there is some other compelling reason for the court to hear the appeal. Lloyd LJ's view on the paper application for permission was that he was not satisfied that, in the absence of substantial prospects of success, the point was of sufficient importance to justify a second appeal. Mummery LJ's view at the renewed oral hearing was that as, so he was told, something in the order of a hundred other cases were dependent on the outcome of this one, there might be a case for saying that the first limb of Part 52.13 was satisfied, although the court's disposition of the application would be likely to depend on whether it regarded an appeal as having a real prospect of success. In the light of the arguments addressed to us, I would give Mr Drummond permission to appeal, but would dismiss the appeal.

Lord Justice Longmore :

33. I agree.

Lady Justice Arden :

34. I also agree.