HIGH COURT OF JUSTICE (CHANCERY DIVISION)—5, 6 AND 15 DECEMBER 1989

COURT OF APPEAL—13 AND 14 FEBRUARY AND 27 MARCH 1991

HOUSE OF LORDS—5 AND 6 FEBRUARY AND 14 MAY 1992

Lawson (H.M. Inspector of Taxes) *v.* Johnson Matthey plc[1]

Corporation Tax—Insolvency of taxpayer company's subsidiary—Purchase of subsidiary by Bank of England subject to injection by parent of £50*m into subsidiary—Whether such payment of a capital or revenue nature.*

Johnson Matthey Bankers Limited (JMB), a wholly owned subsidiary of the Respondent Company (PLC), carried on the business of banking and bullion and currency trading. PLC carried on the business of refining and marketing precious metals. During 1984 JMB got into a precarious financial position in its commercial loan business, particularly because of two very large loans which were inadequately secured. At a board meeting of PLC held at the Bank of England (the Bank) during the evening of Sunday 30 September—1 October 1984 it was concluded that JMB was insolvent and could not open its doors for business the next day without further financing and that the resulting loss of confidence in PLC would cause lending institutions to demand the return of metals held on their behalf and monies owed to them by PLC. PLC was unable to provide sufficient funds to meet JMB's requirements nor was it able to meet the likely demands of its own customers (on the collapse of JMB) without further financial support. It was therefore decided to wind up JMB and appoint a receiver for PLC. This decision was communicated to the Bank which made a (non-negotiable) offer to purchase the issued share capital of JMB for £1 provided PLC injected £50m into JMB prior to the sale and agreed to procure the resignation of JMB's directors and the appointment of such new directors as the Bank would require. The Bank also undertook to provide or arrange a stand-by facility of £250m for PLC. The agreement was implemented by the opening of business on 1 October 1984 thereby enabling PLC to continue trading.

On appeal to the General Commissioners PLC contended that the payment of £50m was an expense of a revenue nature because it was made solely to preserve its trade from collapse and had achieved this objective. It further contended that the payment was made wholly and exclusively for the purpose of its trade. Alternatively, it argued, if only part of the sum was paid for the purposes of PLC's trade, there should be an apportionment. It was contended

[1] Reported (ChD) [1990] 1 WLR 414; [1990] STC 149; (CA) [1991] 1 WLR 558; [1991] STC 259; (HL) [1992] 2 AC 324; [1992] 2 All ER 647; [1992] STC 466.

on behalf of the Inspector that the payment was of a capital nature because it was made in connection with and as a condition of the disposal of the shares which were a fixed capital asset and because it was made to free PLC from liabilities of a capital nature relating to the business of JMB. Further, the payment was not made wholly and exclusively for the purposes of PLC's trade because its purpose was *(inter alia)* to rescue JMB and to preserve the businesses and goodwill of the other members of the Johnson Matthey Group. In addition, where expenditure was incurred for a dual purpose no apportionment was possible.

The Commissioners upheld PLC's contentions. The Crown appealed, but did not pursue the contention that the payment had not been made wholly and exclusively for the purposes of PLC's trade.

The Chancery Division held, allowing the Crown's appeal, that:—

(1) The Bank was only willing to provide support if it gained control of JMB by acquiring the shares and gaining the right to remove and appoint JMB's directors and if JMB was rendered less unattractive by the injection into it of £50m.

(2) Whilst PLC's purpose in making the payment was to preserve its business, the means by which that purpose was achieved was to transfer its shares in JMB and, as part of a single transaction, to inject £50m into JMB.

(3) The two elements could not be severed, the one being treated as the disposal for a nominal consideration of a worthless but not onerous (capital) asset and the other as a (revenue) payment to preserve the business of PLC.

PLC appealed.

The Court of Appeal, dismissing PLC's appeal, held that the £50m was capital expenditure. The nature of the rescue operation was that a single agreement was made by which the Bank acquired the shares in JMB for a nominal sum upon terms that PLC provided the £50m to JMB. PLC's purpose was to preserve its own trade, but that was not determinative of the capital/income issue. PLC made the payment to enable it to get rid of a capital asset, the continued retention of which would have been harmful to PLC.

PLC appealed.

Held, in the House of Lords, allowing PLC's appeal, that the £50m payment was a revenue payment. It was paid as a contribution towards the rescue operation of the Bank. PLC made the payment to save its own platinum trade from collapse and to be able to continue in business. The payment was not made to persuade the Bank to take the worthless shares and could not be described as money paid for the divestiture of those shares.

Atherton N. v. *British Insulated & Helsby Cables Ltd.* [1926] AC 205: 10 TC 155, *Mitchell* v. *B.W. Noble Ltd.* [1927] 1 KB 719: 11 TC 372, *Anglo-Persian Oil Co. Ltd.* v. *Dale* [1932] 1 KB 124: 16 TC 253, *Southern* v. *Borax Consolidated Ltd.* [1941] 1 KB 111: 23 TC 597, *Associated Portland Cement Manufacturers Ltd.* v. *Commissioners of Inland Revenue* [1946] 1 All ER 68: 27 TC 103, *Commissioners of Inland Revenue* v. *Carron Co.* 45 TC 18 and

Tucker v. *Granada Motorway Services Ltd.* [1979] 1 WLR 683: 53 TC 92, considered.

Per Lord Goff of Chieveley (with whom Lord Keith of Kinkel and Lord Emslie agreed): the payment did not become a revenue payment simply because PLC paid the money with the *purpose* of preserving its platinum trade from collapse; the question was rather whether, on a true analysis of the transaction, the payment was to be *characterised* as of a capital nature; here that did not depend on PLC's motive or purpose, but depended on whether the sum was paid for the disposal of a capital asset.

CASE

Stated under the Taxes Management Act 1970, s 56 by the Commissioners for the General Purposes of the Income Tax for the Division of Holborn for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the General Purposes of the Income Tax for the Division of Holborn held on 19, 20, 21 and 22 May 1987 the company appealed against an assessment made on 26 November 1985 for corporation tax for the year of assessment 1 April 1984 to 31 March 1985 in the sum of £7,500,000.

2. The following gave evidence before us on behalf of the Respondent:—

Ian Gordon Thorburn	Financial director
Quentin Matthew Morris	Non-executive director
James Ernest Hughes	Managing director at the relevant time (since retired)
Edwin Brian Bennett	Non-executive director
John Francis Trueman	Director of S.G. Warburg & Co. Ltd.
Robert Murray Sears	The Respondent's Solicitor

The following documents were before us in an agreed bundle:

(i) A summary of facts not in dispute.

(ii) A summary of the contentions of the parties.

(iii) *Exhibits A1 and A2*, *exhibits B–F*, *exhibits G1 and G2*, and *exhibit H* as described in the index to the agreed bundle.

(iv) The correspondence between Johnson Matthey PLC and the Inspector of Taxes.

After the hearing of the appeal we were supplied with a transcript of the oral evidence. Neither the transcript of the oral evidence, nor the agreed bundle, are annexed to this Case, but copies are available for inspection by the High Court if required.

3. We found the following facts admitted or proved:—

(a) The Respondent company (PLC) is a UK–quoted company which carries on business refining and marketing precious metals, mainly platinum.

(b) PLC also owns and manages a number of subsidiary companies in the UK and overseas. Prior to 1 October 1984, one of PLC's wholly-owned UK subsidiaries was Johnson Matthey Bankers Ltd. (JMB) which carried on the business of banking, including bullion merchanting and dealing.

(c) In August 1984 it began to emerge that JMB was experiencing difficulties in its commercial loan business. It had made advances, two very large advances in particular, for which security had been inadequate.

(d) A board meeting of PLC was held at the Bank of England during the night of 30 September–1 October 1984 to deal with the crises. At about 12.30 a.m. on 1 October the board of PLC came to the following conclusions:—

(i) That JMB was insolvent and could not open its doors for business later that day unless further financing, which PLC could not afford to supply, was made available.

(ii) That the cessation of business by JMB, and resulting damage to confidence in PLC, was likely to lead to demands by lending institutions for the repayment of metals and monies owing to them by PLC and that PLC would be unable to meet its obligations as they fell due in the absence of further financial support, which did not seem to be available: PLC would therefore have to cease trading.

(iii) That there was no alternative to the winding-up of JMB and that a liquidator should be appointed.

(iv) That they should however do everything in their power to protect the interests of PLC's shareholders and employees and to facilitate the orderly disposal of PLC's assets in which unsecured creditors would be dealt with on an equitable basis, and that therefore they would ask for the appointment of a receiver for PLC.

(v) That these decisions to ask for a liquidator for JMB and a receiver for PLC should be implemented an hour later at 1.30 a.m.

(e) These decisions were immediately communicated to the Bank of England. Shortly afterwards the Bank of England made the following offer, which was not negotiable, to the Board of PLC:—

(i) The Bank of England would acquire the issued share capital of JMB for the sum of £1; and

(ii) Prior to this sale, which would be free of all warranties, PLC would inject £50m into JMB.

The Bank of England also informed PLC that they were assisting in actively pursuing the provision of a stand-by facility for PLC (who later that night assessed the facility required as at least £250m) in the event that the purchase of JMB by the Bank of England proceeded.

(f) In considering these proposals the Board of PLC, with the advice of its legal and financial advisers present at the time, recognised that:—

(i) JMB was insolvent on the advice given by its advisers of the proper level of provision for bad and doubtful debts;

(ii) PLC would be unable to provide sufficient capital for JMB to enable the latter to maintain the prudential ratios appropriate for a recognised bank;

(iii) JMB would be unable to open its doors for business while it remained a subsidiary of PLC;

(iv) If the proposal were not accepted PLC would not be able to meet its obligations if called;

(v) The making of the £50m loan to JMB and the waiver of repayment of such loan (the form proposed by the Bank of England for the £50m payment) was necessary to retain goodwill and confidence in all the remaining group companies and enable them to stay in business;

(vi) The only practical alternative to the Bank of England's proposals was to implement their previous decision to ask for the appointment of a receiver for PLC and a liquidator for JMB.

(g) The Board of PLC resolved, conditionally upon a stand-by facility of at least £250m being agreed and existing drawings by PLC of monies and metals remaining in place, to accept the Bank of England's proposals for the acquisition by the Bank of the whole of the issued share capital of JMB for £1 and for PLC to make the £50m loan and waiver to JMB.

(h) The sole purpose for which (or to serve which) PLC resolved to make the payment of £50m was to enable PLC to open the doors of its platinum trade on the Monday morning.

(i) The Board's decisions were immediately communicated to the Bank of England, implemented by the opening of business later that day, and confirmed in a formal agreement between PLC and the Bank of England signed the following day, 2 October 1984.

4. We were satisfied that we had all the evidence before us necessary to make full and sufficient findings of the facts. All of the witnesses who gave evidence (including the two who were not members of the board) confirmed that those who took the most active role in the crucial overnight meeting comprised some or all of the following: Messrs. Thorburn, Morris, Hughes and Bennett, all of whom gave evidence.

5. The case came before us for our decision on the following points:—

(a) Was the £50m payment of a capital or revenue nature?

(b) If it was of a revenue nature, was it incurred wholly and exclusively for the purpose of the Respondent's trade?

6. It was contended on behalf of the Respondent that:—

(a) The payment was made to preserve the trade of PLC from collapse as the result of the collapse of JMB and achieved the effect of preserving the trade of PLC from collapse. It was therefore an expense of a revenue nature and not of a capital nature.

(b) PLC's whole and exclusive purpose for making the payment was to protect its own business from being dragged down with that of JMB. Thus the payment was made wholly and exclusively for the purpose of

its own trade and is not disallowed by Income and Corporation Taxes Act 1970 s 130(a). A

(c) In opening, counsel for PLC also contended in the alternative that if the whole of the £50m payment was not made wholly and exclusively for the purposes of PLC's trade, part of it was and accordingly an apportionment should be made. However in his reply counsel submitted on the basis of the evidence that it was no longer necessary for him to make that alternative contention, and that the only possible conclusion was that the entire £50m was paid wholly and exclusively for the purpose of PLC's trade. B

7. It was contended on behalf of the Appellant that:— C

(a) The expenditure of £50m was of a capital and not of a revenue nature because it was made in connection with and as a condition of the disposal of its shares in JMB which were a fixed capital asset and because it was made to free PLC from liabilities of a capital nature relating to the business of JMB. D

(b) The expenditure of £50m was not incurred wholly and exclusively for the purposes of PLC's trade, because

(i) one of the purposes of the expenditure was to ensure the rescue and survival of JMB; E

(ii) another of its purposes was the preservation of the businesses and goodwill of the other companies in the Johnson Matthey Group;

(iii) where expenditure was incurred with a dual purpose, no apportionment was possible so as to allow a proportion of it as a deduction in computing taxable profits. F

8. The following cases were cited to us in argument:— *Morgan* v. *Tate & Lyle Ltd.*(1) 35 TC 367; *Southern* v. *Borax Consolidated Ltd.*(2) 23 TC 597; *Cooke* v. *Quick Shoe Repair Service* 30 TC 460; *Tucker* v. *Granada Motorway Services Ltd.*(3) 53 TC 92; *Parke* v. *Daily News* [1962] Ch 927; *Commissioners of Inland Revenue* v. *Carron Co.*(4) 45 TC 18; *Copeman* v. *William Flood & Sons, Ltd.*(5) 24 TC 53; *Kilmorie (Aldridge) Ltd.* v. *Dickinson* 50 TC 1; *E. Bolt Ltd.* v. *Price* [1987] STC 100; *Mallalieu* v. *Drummond*(6) 57 TC 330; *Beauchamp* v. *F.W. Woolworth PLC*(7) [1987] STC 279; *Milnes* v. *J. Beam Group Ltd.*(8) 50 TC 675; *Garforth* v. *Tankard Carpets Ltd.*(9) 53 TC 342; *Commissioner of Taxes* v. *Nchanga Consolidated Copper Mines Ltd.* [1964] AC 948; *Mallett* v. *The Staveley Coal and Iron Company, Ltd.*(10) 13 TC 772; *Marshall Richards Machine Co., Ltd.* v. *Jewitt* 36 TC 511; *Re Horsley & Weight* [1982] Ch 442; *Rolled Steel Products* v. *British Steel* [1986] Ch 246; *Watkis* v. *Ashford Sparkes & Harward*(11) [1985] STC 451. G H

9. We, the Commissioners for the General Purposes of the Income Tax for the Division of Holborn, who heard the appeal gave our decision in principle in writing on 9 June 1987. It was substantially in the following terms, I

(1) [1955] AC 21. (2) [1941] 1 KB 111. (3) [1979] 1 WLR 683.
(4) 1968 SC (HL) 47. (5) [1941] 1 KB 202. (6) [1983] 2 AC 861.
(7) 61 TC 542. (8) [1975] STC 487. (9) [1980] STC 251.
(10) [1928] 2 KB 405. (11) 58 TC 468.

A but in what follows we have, in the light of observations by the parties on a draft Case circulated by us, made certain minor changes and additions:—

(a) This appeal by Johnson Matthey Public Limited Company ("PLC") against an assessment to corporation tax for the year 1984–1985 was heard by us on 19 to 22 May 1987. PLC were represented by Mr. Andrew Park, Q.C., and Mr. Tom Ivory and the Inspector of Taxes by Mr. C.J.C. Baron.

(b) The case hinges on the nature of a payment of £50m made on 1 October 1984 by means of a loan and waiver by PLC to its subsidiary Johnson Matthey Bankers Ltd. ("JMB") at the time of, and as a condition of, the acquisition of the issued share capital of the latter by the Bank of England for the sum of £1. Briefly stated, PLC contends that this £50m payment is an allowable expense in computing the profits of its trade under Sch D Case 1. The Appellant contends that the £50m is of a capital nature or, alternatively, was not made wholly and exclusively for the purposes of PLC's trade and therefore, not an allowable deduction in computing its profits for corporation tax purposes.

(c) We have to consider first whether the £50m payment was capital or revenue in nature. It is common ground that:—

(i) The circumstance that the payment was made on one occasion and was a large sum is entirely neutral on the distinction between revenue and capital.

(ii) The payment was not laid out to acquire a capital asset.

(iii) The payment was not laid out to improve a capital asset already held.

(d) We heard much evidence about the intentions of the Board of PLC when they accepted the offer by the Bank of England and committed themselves to make this payment. Following *Commissioner of Taxes* v. *Nchanga Consolidated Copper Mines Ltd.*[1], *Tucker* v. *Granada Motorway Services Ltd.*[2] and *Beauchamp* v. *F.W. Woolworth PLC*[3] we have sought to see what PLC actually did when they accepted the Bank of England's offer, without placing undue reliance on its intentions. Before the Bank of England made its offer the Board of PLC had resolved to ask for a liquidator for JMB and for a receiver for themselves. The result of their acceptance of the Bank of England's offer was to reverse these two decisions: any responsibility of PLC for JMB was transferred to that of the Bank of England and PLC was enabled to continue in business as, indeed, it continues to this day. The effects of the £50m payment by PLC to JMB were, in fact, those which PLC had desired, namely, the disposal of JMB (by liquidation or otherwise) and their own continuance in business.

(e) What then was the nature of the benefit which PLC received for their £50m? First, the issued share capital of JMB passed from themselves to the Bank of England. The Inland Revenue, following the *Granada* case, contended that this involved the disposal of a capital asset, onerous but still a capital asset, and, therefore, was itself a capital payment. But we accept the Appellant's view that these assets were worthless rather than onerous, and that PLC did not have to pay £50m

(1) [1964] AC 1948. (2) 53 TC 92. (3) 61 TC 542.

or any other sum to dispose of them as they could, and had already decided, to do so at no cost by means of liquidation. A

(f) The Appellant alternatively contended that the payment was made to free PLC from liabilities of a capital nature relating to the business of JMB. This is an allusion to clause 5 of the written agreement of 2 October 1984 referring to the release of PLC from any guarantees of liabilities of JMB, from indemnities and other obligations assumed by PLC in respect of JMB, and indemnification by the Bank of England against any claims against PLC resulting from them. There was ample, uncontested, evidence that the matters covered by clause 5 formed no part of the Bank of England's terms as made known to PLC, had not featured in the Board of PLC's discussions at the overnight meeting on 30 September—1 October, and there was no evidence to suggest that any part of the £50m payment required by the Bank of England related to matters covered by clause 5. Indeed there was a good deal of evidence to the effect that if there had been no clause 5 and no matter to which clause 5 could relate, a payment would still have been made of exactly the same amount, and in the same manner. There was also unanimous evidence that the company was bound when the Bank of England's terms were accepted by the Board early on the Monday morning, which was prior to any agreement in writing. We accordingly find that the payment was not made to free PLC from liabilities of a capital nature relating to the business of JMB as contended by the Inland Revenue. B C D

(g) We, therefore, find on the evidence and arguments put before us, that the £50m payment was made to preserve the trade of PLC from collapse, that it did, in fact, preserve the trade from collapse and, as a payment to preserve an existing business, it was of a revenue nature. We further find that the payment was not converted into a payment of a capital nature by the circumstance that it was associated with the disposal of the JMB shares. E F

(h) Having found that the £50m payment was of a revenue nature, we turned to the provisions of s 130(a) of the Income and Corporation Taxes Act 1970—was it made wholly and exclusively for the purposes of PLC's trade? The Inland Revenue contended that it was not so made because it was incurred partly for the purposes of preserving the goodwill and business of other companies in the Johnson Matthey Group and because, in particular, it was made to meet PLC's responsibilities as the parent company of JMB. G

(i) Our attention was drawn to *Mallalieu* v. *Drummond*, and to the words of Lord Brightman (on page 370 at C):[1] H

> "I reject the notion that the object of the taxpayer is inevitably limited to the particular conscious motive in mind at the moment of expenditure. Of course, the motive of which the taxpayer is conscious is of vital significance, but it is not inevitably the only object which the Commissioners are entitled to find to exist."

There is no doubt that, at the moment in the early hours of 1 October 1984 when the Board of PLC resolved to accept the Bank of England's offer and hence the commitment to pay the £50m, their conscious motive was to preserve PLC from collapsing as a result of the collapse of JMB. There was ample evidence of this, and it was not effectively I

[1] [1983] 2 AC 861, at page 875D.

challenged. But what, if any, unconscious motive could they also have had? To answer this question it is necessary to examine the position of JMB in connection with the agreement with the Bank of England. At the beginning of the overnight meeting at the Bank of England there is evidence that the Board of PLC viewed the collapse of JMB from two aspects—their responsibilities to the creditors of JMB and the effect that the failure of JMB would have on the future liquidity for trading purposes of PLC. It rapidly became clear to them that there was nothing they could do to save JMB. It could not meet its liabilities and was insolvent. It was, as one witness put it, "gone" and PLC had insufficient resources to bring it back again. In any case, Mr. Sears, their legal adviser, told us that he had at the time advised the board of PLC that it could only pay money to JMB if there was benefit to PLC. This benefit the board saw as the preservation of their platinum trade. We were also told that, at the time, the annual profits from the platinum trade were £19m out of the total group profits of £20m. We find that if the other group companies had not existed, PLC would still have paid the £50m to preserve its platinum trade. Conversely if PLC did not have its platinum trade, it would not have paid the £50m to preserve the rest of the group; witnesses told us that it made sound business sense to pay £50m to preserve annual profits of £19m, but the reverse of sound business sense to pay this sum to preserve annual profits of only £1m. In any case, as we have said, PLC did not have to pay anything to dispose of JMB; they had already decided to do so without expense by liquidation. Finally, the two advisers (Mr. Sears of Messrs. Taylor Garrett and Mr. Trueman of S.G. Warburg & Co. Ltd.) both told us that, throughout the board discussions on the Bank of England offer, they heard no mention of any other companies which were to remain members of the group. All this evidence was not effectively challenged and we accept it. We find no trace in the facts of any other, unconscious, motive on the part of the board of PLC, and that their sole motive was their conscious one of preserving the platinum business of PLC. We find that the expenditure was not incurred to serve any purpose other than the conscious purpose of preserving the platinum trade of PLC. It is true that JMB was saved from liquidation by passing into the control of the Bank of England as a result of the agreement, but this effect of the transaction was secondary and incidental and not a co-ordinate purpose.

(j) In the event we were not asked to consider what the position would have been in the whole of the payment was not made wholly and exclusively for the purposes of PLC's trade but a part of it was made to preserve the goodwill and business of other companies in the group (see para 6(c) above). However in case it be of assistance to the Court, we consider that if we were wrong in finding that the entire payment was made wholly and exclusively for the purpose of PLC's trade, then apportionment should follow the group profits at that time—96 per cent. for the preservation of PLC's platinum trade and 4 per cent. for other companies in the group.

(k) For the reasons given above we find that the payment of £50m by PLC to JMB was of a revenue nature, and that it was incurred wholly and exclusively for the purpose of PLC's trade and is an allowable expense in computing the profits of its trade under Sch D Case I.

10. Following our decision in principle, figures for the determination of the appeal were agreed between the parties and reported to us on 30 July

1987, and on 20 August 1987 we determined the appeal by reducing the corporation tax assessment for the chargeable accounting period ended 31 March 1985 to nil.

11. Immediately after the determination of the appeal, dissatisfaction therewith as being erroneous in point of law was expressed to us on behalf of the Inspector of Taxes, and on 22 August 1987 we were required to state a Case for the opinion of the High Court pursuant to s 56, Taxes Management Act 1970, which Case we have stated and do sign accordingly.

12. When the draft Case, in accordance with precedent, was submitted to the parties on 3 November 1987, the same was returned on 31 December 1987 on behalf of H.M. Inspector of Taxes including a request that "the Commissioners, as well as stating their findings of the facts in the ordinary way, must in addition include all the evidence before them on the relevant point". We were referred to *Hinchcliffe* v. *Crabtree*[1] 47 TC 419 and *Ransom* v. *Higgs*[2] 50 TC 1. The draft Case as returned by the Revenue included extensive quotations from the oral evidence taken from the full transcript of the oral evidence.

The draft Case so amended was submitted by us, without comment, to the Respondents. Our draft Case was returned by the Respondents on 13 April 1988 in alternative forms. Firstly, the case as originally drafted by us, amended, but excluding the extensive references to the oral evidence suggested by the Revenue, and a second version in which the Respondents added quotations from the evidence in addition to those suggested by the Revenue. The Respondents informed us they regarded the Revenue's suggested amendments " ... as seriously unsatisfactory in that although they purported to set out the evidence, they have clearly failed to do so". The Respondents in their additional amendments had endeavoured to correct this imbalance.

Although we have accepted certain amendments to our Case Stated we have excluded long selective quotations from the evidence because we feel these would not help when the full transcript of the witnesses' evidence is available to the Appellate Court.

13. The questions for the opinion of the High Court are—

(1) Whether our decision that the payment of £50m was of a revenue nature was correct in law.

(2) Whether there was evidence to support our conclusion that the payment of £50m was incurred solely to preserve the business of PLC.

(3) Whether our decision that the said payment was incurred wholly and exclusively for the purposes of the trade of PLC within the meaning of s 130(a), Income & Corporation Taxes Act 1970 was correct in law.

Question (3) is added in the above terms as requested by the Appellant. But we should observe that it was common ground at the hearing that the only question under ICTA 1970, s 130(a) was whether PLC paid the £50m

---

[1] [1971] 3 All ER 967. [2] [1974] 1 WLR 1594.

A solely to preserve its platinum trade; as to which the only question for the opinion of the High Court seems to us to be encompassed in question 2.

19 May 1988

B

The case was heard in the Chancery Division before Vinelott J. on 5 and 6 December 1989 when judgment was reserved. On 15 December 1989 judgment was given in favour of the Crown, with costs.

C *Alan Moses* for the Crown.

Andrew Park Q.C. and *Thomas Ivory* for the Company.

The following cases were cited in argument in addition to the cases referred to in the Judgment:—*Beauchamp* v. *F.W. Woolworth PLC* 61 TC 542; [1987] STC 279; *Rolfe* v. *Wimpey Waste Management* [1989] STC 454; D *Morgan* v. *Tate & Lyle Ltd.* 35 TC 367; [1955] AC 21; *Southern* v. *Borax Consolidated Ltd.* 23 TC 597; [1941] 1 KB 111; *Cooke* v. *Quick Shoe Repair Service* 30 TC 460; *Commissioners of Inland Revenue* v. *Carron Co.* 45 TC 18, 1968 SC (HL) 47; *Garforth* v. *Tankard Carpets Ltd.* 53 TC 342; [1980] STC 251; *Walker* v. *Cater Securities Ltd.* 49 TC 625; [1974] 1 WLR 1363; *Mitchell* v. *B.W. Noble Ltd.* 11 TC 372; [1927] 1 KB 719; *Commissioner of Taxes* v. E *Nchanga Consolidated Copper Mines Ltd.* [1964] AC 948.

Vinelott J.:—The question in this appeal (which comes by way of Case F Stated from the General Commissioners for the Holborn Division) is whether a sum of £50m paid by Johnson Matthey plc ("JMPLC") to its subsidiary Johnson Matthey Bankers Ltd. ("JMB") at the time when the shares of that company were acquired by the Bank of England ("the Bank") is an allowable expense in computing the profits of its trade for the accounting period during which that sum was paid.

G The circumstances in which this payment was made are fully set out in the Commissioners' admirably concise and lucid Case Stated. A brief summary will suffice to bring the issues in this appeal into focus.

In 1984 JMB was a subsidiary of JMPLC. It had been formed some years before to take over JMPLC's bullion and currency trading and banking H business. In 1984 JMPLC itself carried on business refining and marketing precious metals, in particular platinum, which formed overwhelmingly the largest part of its business. In 1984 JMB was in a precarious financial position. It had made two very large loans for which it had taken inadequate security. The precarious financial position of JMB was not known to the board of directors of JMPLC until late August, when it was disclosed to the I executive directors. They commissioned a report by the group's auditors. Draft reports were received on Thursday 20 and Friday 21 September. These reports showed that if proper provision were made for these loans the provision would exceed JMB's capital and reserves. On 25 September the executive directors informed the Bank of the situation that had been revealed and on the following day they reported the position to the full board of directors of JMPLC.

The auditors, at the request of the board, carried out a further review of JMB's loan book and the Bank commissioned a separate examination by its own accountants. It emerged that the position was even worse than had at first been feared, and that JMB would have to cease trading at the end of the week unless a very large amount of capital could be injected into it or unless a guarantee of its liabilities was given by a substantial bank or other financial institution. The scale of the support needed was far beyond the resources of JMPLC. Moreover, it was apparent that if JMB were forced to cease trading the loss of confidence on the part of its customers and in the market generally that would be suffered by JMPLC would bring its own business to an end; in the course of its trade JMPLC holds large stocks of precious metals to the order of its customers and the withdrawal of those stocks and calls for the repayment of loans would make the continuance of JMPLC's trade impractical. The Bank was seriously concerned about the wider repercussions that the failure of JMB would have on the banking system as a whole. Moreover, JMB was a member of the gold fixing and the only member which was a part of a group with a refining capacity. The collapse of JMB followed by the cesser of trading by JMPLC would imperil this facility, which is an important element in the pre-eminence of the London gold market. Together with the uncertainty that would be created as to the stability of the other members of the London gold market the position of the London market and the reserves of gold in London would be seriously threatened.

During the few remaining days of that week and over the weekend of 29–30 September JMPLC and the Bank sought ways of averting the collapse of JMB. Discussions were entered into with other parties to explore, amongst other things, the possibility that a bank or a consortium of members of the gold market could take over the shares of JMB and continue its business. However, by the late evening of Sunday 30 September it was clear that there was insufficient time available for any outside purchaser to complete the investigation that would have to be undertaken before it could make a commitment to rescue JMB and undertake its liabilities. The situation was critical. Without some such commitment JMB would not be able to open its doors for business on Monday 1 October and the collapse and the feared consequences of the collapse would follow rapidly and irretrievably.

At 10 p.m. on 30 September a meeting of the full board of directors of JMPLC was held at the offices of the Bank. The board was advised that on the footing that proper provision for bad debts would have to be made in the accounts of JMB, JMB was insolvent, and that if JMB was unable to open its doors for business that morning the probable consequence was that JMPLC itself would be unable to meet its obligations as they fell due. In the light of that advice the board resolved to invite the trustee of its debenture stock to appoint a receiver in order to ensure the orderly realisation of the assets of the group. JMPLC's financial advisers informed the Bank of this resolution and informed the Bank also that the board proposed to act on it at 1.30 a.m. The Bank then invited the board to consider a proposal whereby JMPLC would inject £50m into JMB and the Bank would purchase the shares of JMB for a nominal consideration.

The board did not accept that offer at once. It did not have £50m readily available and the Bank was not willing to accept a promissory note. That difficulty was overcome when Charter Consolidated PLC, the principal shareholder of JMPLC, offered to subscribe for £25m 8 per cent. preference shares convertible into ordinary shares. The balance would be provided by

JMPLC's bankers. The board were anxious about the effect that the revelation of JMB's difficulties would have on its business even if JMB were acquired by the Bank. They sought and obtained an assurance that the Bank would provide or arrange a standby facility of £250m. The board then resolved (a) that the offer from the Bank

> "... to acquire the whole of the issued share capital of JMB for £1 (subject to the making of the loan and its waiver as referred to below) be accepted and that the proposal from its principal shareholder (to subscribe for convertible preference shares to the amount of £25 million) be put to an extraordinary general meeting and (b) to make a loan of £50 million to JMB and to waive repayment of it."

At 9.15 a.m. a statement was issued to the Stock Exchange explaining these transactions. The Bank also issued a public statement in which it was made clear that

> "These arrangements enable Johnson Matthey Bankers to trade normally and meet all its commitments. Its close trading relationships with Johnson Matthey PLC will be maintained. Under its new ownership it will continue to participate in the London gold fixing, and the London gold market will be carrying on its business as normal."

On the following day a written agreement was entered into between JMPLC and the Bank recording the terms of this agreement. One provision which had not been specifically mentioned at the meeting in the early hours of 1 October was that

> "The Bank shall use its best endeavours to procure the release of PLC and its subsidiaries from any guarantees of the liabilities of Bankers and its subsidiaries (the "Banking Group") and indemnities given to the Banking Group by PLC and its subsidiaries and other obligations assumed by PLC in favour of third parties in respect of the obligations of the Banking Group and pending such release shall indemnify PLC against any claims hereafter resulting therefrom."

I should also mention that it was throughout made clear by the Bank and is recorded in the minutes of the meeting and in the written agreement that JMPLC would procure the resignation of directors of JMB without compensation as required by the Bank and appoint any new directors of JMB nominated by the Bank.

As I have said the question in this appeal is whether the £50m so paid is allowable as a deduction in computing the profits of JMPLC's trade for the accounting period in which the payment was made.

Before the Commissioners JMPLC's claim that the £50m paid to JMB was an allowable deduction in computing its trading profits was resisted on three grounds. The first was that the payment was made to procure the disposal of a capital asset—the shares of JMB—and so was a payment on capital account. The second was that the payment was made in part to free JMPLC from liabilities of a capital nature—the liabilities undertaken by the Bank under clause 5 of the written agreement of 2 October—and so at least to that extent was a payment on capital account. The third was that even if the payment would have been allowable if made wholly and exclusively for the preservation of the goodwill and trade of JMPLC alone it was in fact

made for the preservation of the goodwill and trade of JMPLC and of other companies which would remain in its group; the deduction was accordingly precluded by s 130(a) of the Income and Corporation Taxes Act 1970.

The Commissioners accepted JMPLC's contention that the undertaking embodied in clause 5 of the written agreement had formed no part of the agreement reached in the early hours of 1 October and that that agreement was binding on JMPLC at least after the opening of JMB's business on the morning of 1 October. As to the third ground they held that if the other companies in the group had not existed JMPLC would still have paid £50m to preserve its own trade. JMPLC would not have paid any substantial sum to preserve the goodwill and trade of the other companies in the group. They contributed profits of only £1 million to group profits of over £20m; the other £19m was earned by JMPLC from its platinum trade. They also held that if any part fell to be treated as paid for the preservation of the trade of other members of the group 96 per cent. of the £50m should nonetheless be apportioned to the preservation of the goodwill and trade of JMPLC.

The Commissioners also rejected the Crown's first and main contention on the grounds that([1])

> "We . . . find on the evidence and arguments put before us, that the £50m payment was made to preserve the trade of PLC from collapse, that it did, in fact, preserve the trade from collapse and, as a payment to preserve an existing business, it was of a revenue nature. We further find that the payment was not converted into a payment of a capital nature by the circumstance that it was associated with the disposal of the JMB shares."

Later they make it clear that they accepted the evidence adduced on behalf of JMPLC that when the board resolved to accept the Bank's offer and the commitment to pay £50 million to JMB([2])

> ". . . their conscious motive was to preserve PLC from collapsing as a result of the collapse of JMB", and they found that there was([3]) ". . . no trace in the facts of any other, unconscious, motive on the part of the Board of PLC, and that their sole motive was their conscious one of preserving the platinum business of PLC. We find that the expenditure was not incurred to serve any purpose other than the conscious purpose of preserving the platinum trade of PLC. It is true that JMB was saved from liquidation by passing into the control of the Bank of England as a result of the agreement, but this effect of the transaction was secondary and incidental and not a co-ordinate purpose."

Mr. Moses, while not conceding that the Commissioners' decision rejecting the second and third contentions was incapabable of review in an appeal under s 56 of the Taxes Management Act 1970, did not advance any argument on these two conclusions before me. He attacked the Commissioners' rejection of the Crown's first and main contention. He submitted that the Commissioners erred in law in that they treated the purposes for which the payment was made (the preservation of JMPLC's existing trade) as determinative and ignored the way in which that purpose was achieved: adapting the words of Lord Fraser in *Tucker* v. *Granada Motorway Services Ltd.* 53 TC 92 at page 115, they concentrated on the reason why the payment was made

([1]) Page 46E/F *ante*. ([2]) Page 46I *ante*. ([3]) Page 47E/G *ante*.

A when they ought to have looked to see for what the payment was made. The payment was made on and for the disposal of a capital asset which (in the words of Lord Wilberforce in *Tucker* v. *Granada*) had become a "disadvantageous" one. It was accordingly stamped indelibly as capital expenditure.

B Mr. Park, Q.C., who appeared for JMPLC, submitted that this approach ignores the commercial reality of the transaction which was properly appreciated by the Commissioners. A payment made to get rid of a capital asset which has become onerous is capital expenditure. So in, *Mallett* v. *Staveley Coal & Iron Co. Ltd.*(1), [1928] 2 KB 405 the payment made on the surrender of the lease of 1919 which had become onerous was expenditure on capital account. Similarly, expenditure made to modify a capital asset and so
C make it more advantageous or less disadvantageous for the purposes of the taxpayer's trade is prima facie expenditure on capital account. That was the purpose of the payment made in *Mallett* v. *Staveley Coal & Iron Co. Ltd.* to secure the release from the lease of 1882 of the seams of coal underlying part of the land comprised in that lease and the purpose of the payment made in *Tucker* v. *Granada Motorway Services Ltd.* to secure a modification to the
D variable rent by excluding tobacco duty from the gross takings on which the variable rent was calculated.

However, in the instant case the shares of JMB were not an onerous asset. Fully paid shares in a limited company may be a valueless asset but they cannot be an onerous one. It was open to JMPLC to disembarrass itself
E of these shares without any outlay either by winding up JMB or by transferring it to another company for no consideration—if necessary to a company formed specifically for that purpose. Thus the payment was not made for or to secure the disposal of the shares of JMB. It was made to secure a public assurance by the Bank that it would stand by JMB and a standby facility for
F JMPLC itself. That public assurance and the standby facility were sought and obtained to preserve JMPLC's own trade. In summary the Bank were willing in the public interest to undertake the considerable risk involved in continuing the business of JMB and underwriting its liabilities; the £50m was JMPLC's contribution to that rescue operation. The Commissioners have found that the preservation of the business of JMPLC was both the purpose
G and the result achieved by the payment. And a payment made to preserve an existing trade or business is a payment on revenue account.

I do not find it necessary to examine in detail the authorities relied on by Mr. Park in support of this last proposition. It has more than once been observed that the question whether expenditure is expenditure on revenue or
H capital account cannot be decided by the application of any simple test or rule of thumb. Templeman J. (as he then was) observed in *Tucker* v. *Granada Motorway Services Ltd.* (at page 97(2)) that "analogies are treacherous" and that "... precedents appear to be vague signposts pointing in different directions". I have come to the clear conclusion that in the instant case there is only one reliable signpost and that it points in the direction opposite to the
I route taken by the Commissioners. The position in which JMPLC found itself in the early hours of 1 October 1984 was that unless the Bank were willing to support JMB and to make its support known to the public JMB would be forced into liquidation and that a receiver would have to be appointed of the assets of JMPLC itself—not with a view to preserving its trade but to ensure the orderly realisation of its assets. The Bank was not

(1) 13 TC 772. (2) 53 TC 92.

willing to give that support unless it was given control of JMB by the transfer of its entire shareholding and pending transfer of the shares by the right to remove and appoint its directors, and unless JMB was made if not an attractive at least a less unattractive acquisition by the injection of £50m into it. The purpose of the board of JMPLC in agreeing to make that payment was no doubt to preserve the business of JMPLC. But the means by which that purpose was achieved and indeed in the situation of crisis in the early hours of 1 October the only means by which it could be achieved was to transfer the shares of JMB to the Bank and as part of a single transaction or arrangement to pay £50m to JMB and to release JMB from any obligation to repay it. These two elements cannot be severed, the one being treated as the disposal for a nominal consideration of a worthless but not an onerous asset and the other as a payment made to preserve the business of Johnson Matthey.

In my judgment, therefore, this appeal succeeds on that short ground.

Appeal allowed, with costs.

The Company's appeal was heard in the Court of Appeal (Fox, McCowan and Beldam L.JJ.) on 13 and 14 February 1991 when judgment was reserved. On 27 March 1991 judgment was given in favour of the Crown, with costs. Leave to appeal to the House of Lords refused.

Andrew Park Q.C. and *Thomas Ivory* for the Company.

Jonathan Parker Q.C. for the Crown.

The following cases were cited in argument in addition to the cases referred to in the judgment:—*Usher's Wiltshire Brewery Ltd.* v. *Bruce* 6 TC 399; [1915] AC 433; *Cooke* v. *Quick Shoe Repair Service* 30 TC 460; *Walker* v. *Cater Securities Ltd.* 49 TC 625; [1974] 1 WLR 1363; *Beauchamp* v. *F.W. Woolworth PLC.* 61 TC 542 [1990] AC 478; *Milnes* v. *J. Beam Group Ltd.* 50 TC 675; [1975] STC 487; *Hallstroms Proprietary Ltd.* v. *Federal Commissioner of Taxation* [1946] 72 CLR 634.

Fox L.J.:—This is an appeal by Johnson Matthey PLC ("PLC") from a decision of Vinelott J. that a payment of £50m by PLC to its subsidiary Johnson Matthey Bankers Ltd. ("JMB") at the time when the shares of JMB were sold to the Bank of England is not an allowable expense in computing the profits of PLC's trade for tax purposes.

The facts as found by the General Commissioners were as follows.

PLC is a UK-quoted company which carries on business in refining and selling precious metals, particularly platinum. It also manages a number of subsidiaries in the UK and abroad. Prior to October 1984 one of PLC's wholly-owned UK subsidiaries was JMB, which carried on the business of bankers including the merchanting of bullion.

In August 1984 JMB got into difficulties on its commercial loan business. Large advances had been made on what turned out to be inadequate security.

A board meeting of PLC was held at the Bank of England ("the Bank") on the night of 30 September/1 October 1984 to deal with the resulting crisis. At about 12.30 a.m. on 1 October the board reached the following conclusion:

"(i) That JMB was insolvent and could not open its doors for business later that day unless further financing, which PLC could not afford to supply, was made available;

(ii) That the cessation of business by JMB, and resulting damage to confidence in PLC, was likely to lead to demands by lending institutions for the repayment of metals and monies owing to them by PLC and that PLC would be unable to meet its obligations as they fell due in the absence of further financial support, which did not seem to be available: PLC would therefore have to cease trading;

(iii) That there was no alternative to the winding up of JMB and that a liquidator should be appointed;

(iv) That they should however do everything in their power to protect the interest of PLC's shareholders and employees and to facilitate the orderly disposal of PLC's assets in which unsecured creditors would be dealt with on an equitable basis, and that therefore they would ask for the appointment of a receiver for PLC;

(v) That these decisions to ask for a liquidator for JMB and a receiver for PLC should be implemented an hour later at 1.30 a.m."

The Bank was told of these decisions at once. The Bank at once made the following offer, which was not negotiable, to the board of PLC.

(1) The Bank would acquire the issued share capital of JMB for the sum of £1.

(2) Prior to this sale, which would be free of all warranties, PLC would inject £50m into JMB.

The Bank also informed PLC that it was assisting in actively pursuing the provision of a stand-by facility for PLC in the event of the Bank purchasing the JMB shares. Later that night JMB assessed the necessary facility as £250m.

In consequence of these arrangements, on the advice of its legal and financial advisers the board of PLC recognised that:—

"(i) JMB was insolvent on the advice given by its advisers of the proper level of provision for bad and doubtful debts;

(ii) PLC would be unable to provide sufficient capital for JMB to enable the latter to maintain the prudential ratios appropriate for a recognised bank;

(iii) JMB would be unable to open its doors for business while it remained a subsidiary of PLC;

(iv) If the proposal were not acceptable PLC would not be able to meet its obligations if called;

(v) The making of the £50 million loan to JMB and the waiver of repayment of such loan (the form proposed by the Bank for the £50m repayment) was necessary to retain goodwill and confidence in all the remaining group companies and enable them to stay in business;

(vi) The only practical alternative to the Bank's proposals was to implement their previous decision to ask for the appointment of a receiver for PLC and a liquidator for JMB."

The board of PLC resolved conditionally upon a stand-by facility of at least £250m being agreed and existing drawings by PLC of monies and metals remaining in place, to accept the Bank's proposals for the acquisition by the Bank of the whole of the issued share capital of JMB by the Bank for £1 and for PLC to make the £50m loan and waiver to JMB.

The Commissioners found that the sole purpose for which (or to serve which) PLC resolved to make the payment of £50m was to enable PLC to open the doors of its platinum trade on the Monday morning.

The board's decisions were communicated to the Bank and were implemented by the opening of business later that day and confirmed by a formal agreement between PLC and the Bank on 2 October 1984.

In PLC's accounts to 31 March 1985 it deducted the £50m as an expense of its platinum trade. The Revenue disputed that deduction on two grounds:

(1) that it was an expense of a capital nature;

(2) that it was not paid out wholly and exclusively for the purposes of the trade.

The Commissioners stated([1]):

"We, therefore, find on the evidence and arguments put before us, that the £50m payment was made to preserve the trade of PLC from collapse, that it did, in fact, preserve the trade from collapse and, as a payment to preserve an existing business, it was of a revenue nature. We further find that [it] was not converted into a payment of a capital nature by the circumstance that it was associated with the disposal of the JMB shares."

Thus, the Commissioners decided both those points in favour of the taxpayer.

The Revenue appealed to the High Court. On the appeal the Revenue did not dispute that the monies were laid out wholly and exclusively for the trade. The Revenue did (and do), however, contest the decision that the payment was a revenue expense. The Judge accepted the Revenue's contention as to that. He said([2]):—

"The purpose of the board of JMPLC in agreeing to make that payment was no doubt to preserve the business of JMPLC. But the means by which that purpose was achieved and indeed in the situation of crisis in the early hours of 1 October the only means by which it could be achieved was to transfer the shares of JMB to the Bank and as

([1]) Page 46E/F *ante*. ([2]) Page 54A/C *ante*.

A part of a single transaction or arrangement to pay £50m to JMB and to release JMB from any obligation to repay it. These two elements cannot be severed, the one being treated as the disposal for a nominal consideration of a worthless but not an onerous asset and the other as a payment made to preserve the business of Johnson Matthey."

B Accordingly, the Judge concluded that the £50m was a capital payment. From that decision PLC appeals.

The question arises in determining whether a payment is to be treated as being of an income nature, the Court should look at the matter subjectively (what was the purpose of the transaction) or objectively (what did the trans-
C action actually do). The authorities are not conclusive. In *Atherton* v. *British Insulated & Helsby Cables Ltd.*[1] [1926] AC 205 at 213 Lord Cave said:

> "But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the
D absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

That, as Lord Wilberforce observed in *Tucker* v. *Granada Motorway Services Ltd.*[2] 53 TC 92 at 107, was regarded as having quasi-statutory
E force until it was revealed that it might cover an advance more of a revenue character.

In *Commissioners of Inland Revenue* v. *Carron Co.*[3] 45 TC 18 Lord Reid said: "In a case of this kind what matters is the nature of the advantage for which the money was spent". And Lord Guest at page 70 said: "It is
F legitimate, in my view, to consider what the expenditure was intended to effect".

On the other hand, Lord Radcliffe giving the advice of the Board (Lord Radcliffe, Lord Morris and Lord Upjohn) in *Commissioner of Taxes* v. *Nchanga Consolidated Copper Mines Ltd.* [1964] AC 948 at 958 refers to
G ". . . the undesirability of determining the nature of a payment by the motive or object of the payer".

It seems to me that the Court has to consider all the circumstances of the case, one of which is the purpose of the transaction.

H In *Commissioners of Inland Revenue* v. *Carron* (*supra*) Lord Wilberforce at page 74 said: "To make the distinction between capital and revenue, by nature a commercial distinction, it is necessary to go further and to ascertain the nature and purpose of the changes made".

Although it is necessary to consider all the circumstances, the problem
I in the end is the true nature of the transaction. Intentions may throw some light on the matter, but cannot relieve the Court from analysing in terms of capital and income account the true nature of what the parties actually did.

There are numerous decided cases on the question whether a payment is to be treated as being a capital or revenue account. They vary widely in their

---

(1) 10 TC 155 at pages 192–193. (2) [1979] 1 WLR 683. (3) 1968 SC (HL) 47.

facts. The facts in the present case are unusual and derive from very special circumstances. Authorities are accordingly of limited value, but I should refer to some of the cases cited by Mr. Park.

Morgan v. *Tate & Lyle Ltd.*(1) 35 TC 367. The taxpayers were sugar refiners. They claimed to deduct in the computation of their trading profits for tax purposes the expenses incurred in a propaganda campaign designed to show that nationalisation of the sugar refining industry would be harmful to workers, consumers and stockholders alike.

The Commissioners found that the primary object of the campaign was to prevent the company losing its business and to preserve its assets intact. The Revenue contended that, so far as that was the object of the campaign, the expenditure was not incurred directly for the earning of its profits. The Commissioners held that the expenses were incurred wholly and exclusively for the purpose of the company's trade. The House of Lords held that the Commissioners were entitled so to find.

Accordingly, the case was concerned with that limited issue of fact.

Southern v. *Borax Consolidated Ltd.*(2) 23 TC 597. The taxpayer company held all the shares in an American company whose business fell to be treated for tax purposes as a branch of the company's business. The company acquired land in America and put the subsidiary company into possession. The company's title was challenged and the American company incurred substantial legal costs on litigation. The Commissioners found that the legal expenses were incurred wholly and exclusively by the American company for the purposes of its trade. On appeal, the High Court upheld that determination.

That again was a limited issue which does not seem to me to throw light on the present case.

Commissioners of Inland Revenue v. *Carron Co.* 45 TC 18. Lord Guest at page 70 cited a statement of Lord Reid in *Strick* v. *Regent Oil Co. Ltd.*(3) [1966] AC 295 at 313G:—the determination of what is capital and what is income "... must depend rather on common sense than the strict application of any single legal principle".

I quite accept that and it seems to me to be an approach of some importance in the present case.

Mr. Park makes the following submission:—

(1) There is a finding of fact by the Commissioners that the £50m was laid out to preserve the platinum trade of PLC from collapse.

(2) There is no ground for saying that it was laid out to secure the disposal of a capital asset (the JMB shares). That is because:

(1) [1955] AC 21. (2) [1941] 1 KB 111. (3) 43 TC 1 at page 30A.

A (i) The shares were not an onerous asset (as, for example, were the leases in *Mallett* v. *The Staveley Coal & Iron Co. Ltd.*[1] 13 TC 772) but were a worthless asset.

(ii) PLC did not need to pay £50m or any other sum apart from some costs, to get rid of the JMB shares. PLC could have disposed of B them to a shelf company or could have liquidated JMB.

(3) Prior to receiving the Bank's offer PLC had, in fact, decided that it would put JMB into liquidation.

(4) Accordingly, it is said, it does not represent the realities of the mat- C ter to say either that the £50m was paid to dispose of the JMB shares or that it achieved a disposition of the shares.

(5) It is not a case of a "negative consideration or reverse premium" being paid for the JMB shares. The essence of the transaction was that JMB paid £50m to preserve its own trade. The Commissioners, it is emphasised, D found that the monies were wholly and exclusively laid out for the purpose of PLC's trade. At the end of it all, PLC lost its JMB shares (which were worthless and would be lost anyway) but saved its platinum trade.

I think it is necessary first of all to be clear as to the position in which PLC found itself on the night of Sunday 30 September. It was as follows:

E

(1) JMB was a wreck. It would not be able to continue trading on the Monday morning.

(2) That state of affairs, in relation to a wholly owned subsidiary, produced in turn a perilous situation for PLC because the resulting loss of confi- F dence in PLC was likely to produce demands for repayments by its own customers which it could not meet.

The core of the problem so far as PLC was concerned was its close association with the insolvent JMB. The Bank, for its part, was presumably concerned with the stability of an English banking company. The matter was G solved by the Bank taking over JMB by acquiring all PLC's shares in JMB. That secured financial confidence in JMB.

The sale of the JMB shares by PLC to the Bank was for a nominal consideration of £1 only. But the Bank was not prepared to take over the shares unless prior to the sale (see Case Stated para 3(d)[2]) PLC injected £50m into H JMB.

The Commissioners found that the Bank also informed PLC that it was "... assisting in the provision of a stand-by facility for PLC".

I Mr. Park says that this was a rescue operation by the Bank. I think that is right. But the description, accurate as it is, does not take one any distance in solving the present dispute. The real question is, what was the nature of the rescue operation? Mr. Park says, in effect, that the £50m was not for, and did not have the effect of, securing the sale of the JMB shares. I do not feel able to accept that. There was a single agreement. The terms of that agree-

---

(1) [1928] 2 KB 405. (2) Page 42D *ante*.

ment were simple. PLC would sell the JMB shares to the Bank for £1. Prior to the sale, PLC would inject £50m into JMB. PLC could not be extricated from its predicament unless somebody with adequate resources took over JMB. The Bank was ready to acquire the shares in JMB but only on terms that prior to the sale, PLC paid JMB £50m. I can only regard that as a transaction in which the Bank acquired the shares in JMB (for a nominal sum) upon terms that PLC provided the £50m to JMB. There was no other way in which PLC could rid itself of JMB without disaster. No other terms were on offer. PLC could have got rid of the JMB shares by transferring them to a shelf company or by putting JMB into liquidation, but it would not have solved PLC's problem simply to detach itself from an insolvent JMB. The solution offered by the Bank was the only way out. JMB had to be rescued, not liquidated or ignored.

It is true that the purpose of PLC was to preserve its own trade. But that is not determinative of the capital/income issue. Thus, in *Mallett* v. *The Staveley Coal & Iron Co. Ltd.*[1] (*supra*) the payments were made "for the enduring benefit of the trade" (*see* per Sargant L.J. at page 786) but the expenditure was held to be of a capital nature.

The position then, it seems to me, is as follows:

(i) JMB was a capital asset of PLC.

(ii) PLC disposed of JMB to the Bank.

(iii) The only terms upon which the Bank was willing to acquire JMB was upon payment of the £50m by PLC to JMB.

The position was, in reality, the same as if the Bank had said "We will take over JMB if you pay us £50m". Whichever way it was done, the payment seems to me to be a payment by PLC to enable it to get rid of a capital asset. That asset was not onerous in the sense that the leases in *Mallett* v. *The Staveley Coal & Iron Co. Ltd.* were onerous, but its continued retention was harmful to PLC. In my view the common sense of the matter is that the £50m was capital expenditure.

In my opinion Vinelott J. was right. I would dismiss the appeal.

McCowan L.J.:—In his skeleton argument Mr. Park said: "Given that JMB was a limited company the JMB shares were not an onerous asset: they were a worthless asset". In elaboration of this in oral argument, he submitted that the £50m could not be said to have been paid for the divesting by PLC of the shares in JMB when PLC could easily have divested itself of any responsibility for the shares by putting JMB into liquidation. To do this, he said, would have cost PLC virtually nothing. In a revealing phrase, however, he added: "But that would not have suited it, because of the knock-on effect on its own shares". That, to my mind, is the clue to the case. Simply letting JMB go into liquidation would have been extremely damaging to PLC's financial status. It was their association with an insolvent JMB that was onerous to them.

Mr. Park further argued that PLC would not have paid £50m just to get rid of the shares in JMB. I agree. But what they did, and what they wanted

---

(1) [1928] 2 KB 405.

A to do, was to get rid of the shares to a body that would keep JMB solvent and trading. They were not of course being altruistic. Their purpose was, it is true, to preserve their own platinum trade; but that does not, in my judgment, turn the payment into a revenue payment.

One of the cases cited to the Court was *Mallett* v. *The Staveley Coal &* B *Iron Co. Ltd.*(1) 13 TC 772. There, at page 786, Sargant L.J. said:

> "... the payment was being made for the purpose of putting an end to the existence of a disadvantage or onerous asset for the enduring benefit of the trade."

C Those words, in my judgment, are most apt to describe what happened here. The JMB shares represented "a disadvantage or onerous asset" and PLC paid £50m to put an end to the existence of that disadvantage or onerous asset for the enduring benefit of PLC's trade. I conclude, therefore, that the £50m payment can properly be described as a negative consideration for the shares.

D

Mr. Park made the further submission, however, that, as seen at the material time, what might save JMB was a rescue operation, not a transfer of the shares; and what in fact saved JMB was that it was the Bank of England that did the rescuing. The answer to that, in my judgment, is that had there been no transfer of the shares there would have been no rescue operation. It E was in fact a package deal; and both parts of the package were necessary. On that analysis, it becomes plain that Vinelott J. was right in concluding(2):

> "These two elements cannot be severed, the one being treated as the disposal for a nominal consideration of a worthless but not an onerous asset and the other as a payment made to preserve the business of Johnson Matthey."

F

I would dismiss the appeal.

Beldam L.J.:—Johnson Matthey PLC ("PLC") specialises in the refining of precious metals and the production of chemicals, catalysts and by-G products widely used in industry.

It has divided its activities among a number of subsidiary companies. One of the most important, Johnson Matthey Bankers Ltd. ("JMB"), was wholly owned by PLC. It carried on business as bankers, dealing in gold bullion on the markets of the world and making loans of metal and money to its H customers. Established in 1965, it was one of the five members of the London gold fixing, concentrating its business on bullion and foreign exchange dealing, commercial banking and trade finance.

By 1984 JMB's reputation had become so associated and its business and credit so intimately bound up with that of its parent, PLC, that the fortunes of PLC were particularly susceptible to any serious decline in the busi-I ness or standing of its subsidiary. In the consolidated accounts for the year ended 31 March 1984 there was no hint of any such decline. JMB's net assets were put at £102m, and the value of PLC's interest was shown as £99.7m. By September 1984 there had come to light a very different state of affairs. Liabilities of JMB so far exceeded its assets that it was insolvent. Unless it

(1) [1928] 2 KB 405. (2) Page 54B/C *ante*.

could be recapitalised or its operations refinanced in some other way it would have to go into liquidation. The deficiency was so great that it was beyond the resources of PLC to rescue the position. Worse, if JMB was not rescued, PLC itself would be unable to survive the demands on its funds which loss of confidence would stimulate.

This state of affairs had come to the attention of the Bank of England, who were concerned that the failure of JMB would undermine general confidence in the banking system and might lead to disorder in the bullion markets. One solution which had been explored was a proposal by the Bank of Nova Scotia ("Nova Scotia") to purchase the issued share capital of JMB and all save two of its subsidiaries but, according to minutes of a meeting held on 30 September 1984, the Board of PLC had previously been informed by the Bank of England that ". . . it was considered essential that agreement be reached on proposals for the recapitalisation or disposal of JMB by midnight on 30 September 1984".

The Board met at 10.00 p.m. on that day, a Sunday. During the meeting it became apparent that Nova Scotia would not go ahead and that in the absence of further finance JMB was insolvent and could not open for business the following day. The Board also recognised that PLC would be unable to meet its obligations when they fell due unless it could obtain further resources. With the object of securing an orderly realisation of the group's assets, it was decided to invite the trustee of the company's debenture stocks to appoint a receiver of the company. When the Bank of England was told of this decision it put forward a proposal that:

(a) The Bank of England would acquire the issued share capital of JMB for £1; and

(b) Prior to the sale, PLC should inject £50m cash into JMB.

As PLC did not have the resources to provide the £50m, it accepted an offer from one of its shareholders, Charter Consolidated, to subscribe for £25m of convertible preference shares and arranged a standby facility from which the remaining £25m could be raised. The Board then resolved to accept the offer of the Bank of England to acquire the issued share capital of JMB for £1 and to provide £50m to JMB by way of loan, "repayment thereof to be waived".

On 2 October 1984 PLC agreed to sell to the Bank of England the whole of the issued share capital of JMB ". . . subject to PLC advancing a loan of £50m to JMB and waiving repayment of the same today" for the sum of £1. The Bank of England undertook to use its best endeavours to procure the release of PLC and its subsidiaries from any guarantees, indemnities and other liabilities and obligations assumed by PLC in favour of third parties in respect of JMB. Thus, with the backing of the Bank of England, catastrophe was averted; JMB was able to open on the Monday morning and the assets and business of PLC were saved.

In due course PLC was assessed for corporation tax for the year of assessment, 1 April 1984 to 31 March 1985, in a sum of £7,500,000. It sought to set off as a revenue expense the £50m it had paid on the disposal of JMB. The Inland Revenue refused to accept such a deduction, contending that the payment was a payment of a capital nature. PLC appealed to the Commissioners. They found that the £50m payment was made to preserve

A the trade of PLC from collapse, that it did in fact do so and, as a payment to preserve an existing business, it was of a revenue nature. In their view the payment was not converted into a payment of a capital nature by the circumstance that it was associated with the disposal of JMB shares. They found that the payment was made wholly and exclusively for the purposes of PLC's trade. That finding was accepted by the Inland Revenue, but it B appealed by way of Case Stated to the High Court against the finding that the payment of £50m was of a revenue nature. The Revenue's appeal was allowed by Vinelott J. He held that, although the purpose of the board of PLC in making the payment was to preserve the business of PLC, the means by which it was achieved was by transferring the shares of JMB to the Bank of England and as part of a single transaction or arrangement to pay £50m C to JMB and to release JMB from any obligation to repay it. He said:([1])

> "These two elements cannot be severed, the one being treated as the disposal for a nominal consideration of a worthless but not an onerous asset and the other as a payment made to preserve the business of Johnson Matthey."

D

In his argument before this Court on behalf of PLC, Mr. Andrew Park Q.C. relied upon the finding of the Commissioners that the £50m payment was made to preserve the trade of PLC from collapse, that it did in fact preserve the trade from collapse and, as a payment to preserve an existing business, it was of a revenue nature and he relied upon statements in the E judgments in *Commissioners of Inland Revenue* v. *Carron Co.*([2]) 45 TC 18 by Lord Reid at page 68:—

> "In a case of this kind what matters is the nature of the advantage for which the money was spent. This money was spent to remove antiquated restrictions which were preventing profits from being earned. It created no new asset. It did not even open new fields of trading which F had previously been closed to the Company. Its true purpose was to facilitate trading by enabling the Company to engage a more competent manager and to borrow money required to finance the Company's traditional trading operations under modern conditions."

G And by Lord Guest at page 70:([3])

> "It is legitimate, in my view, to consider what the expenditure was intended to effect and the way in which the advantage was to be used."

And by Lord Wilberforce at page 74:([4])

H

> "... it is necessary to go further and to ascertain the nature and the purpose of the changes made."

Further Mr. Park relied on passages in the judgments in *Morgan* v. *Tate & Lyle Ltd.*([5]) 35 TC 367, but the issue in that appeal was confined to the question whether money expended on a campaign to resist nationalisation I was exclusively laid out for the purposes of the taxpayer's trade.

I approach the question for decision with the words of Lord Wilberforce in his judgment in *Tucker* v. *Granada Motorway Services Ltd.*([6]) 53 TC 92 at page 106 very much in mind:—

([1]) Page 54B/C *ante*. ([2]) 1968 SC (HL) 47 at pages 57–58. ([3]) *Ibid* at page 60.
([4]) *Ibid* at page 64. ([5]) [1955] AC 21. ([6]) [1979] 1 WLR 683 at page 686.

"It is common in cases which raise the question whether a payment is to be treated as a revenue or as a capital payment for *indicia* to point different ways. In the end the courts can do little better than form an opinion which way the balance lies. There are a number of tests which have been stated in reported cases which it is useful to apply, but we have been warned more than once not to seek automatically to apply to one case words or formulae which have been found useful in another (see *Commissioner of Taxes* v. *Nchanga Consolidated Copper Mines Ltd.* [1964] AC 948). Nevertheless reported cases are the best tools that we have, even if they may sometimes be blunt instruments. I think that the key to the present case is to be found in those cases which have sought to identify an asset. In them it seems reasonably logical to start with the assumption that money spent on the acquisition of the asset should be regarded as capital expenditure. Extensions from this are, first, to regard money spent on getting rid of a disadvantageous asset as capital expenditure and, secondly, to regard money spent on improving the asset, or making it more advantageous, as capital expenditure. In the latter type of case it will have to be considered whether the expenditure has the result stated or whether it should be regarded as expenditure on maintenance or upkeep, and some cases may pose difficult problems."

As an unaccustomed "traveller in these regions", I have found guidance from the passages in the judgment of Dixon J. in *Sun Newspapers Ltd.* v. *The Federal Commissioner of Taxation* [1938] 61 CLR 337 quoted by Lord Pearce in *B.P. Australia Ltd.* v. *Commissioner of Taxation of the Commonwealth of Australia* [1966] AC 224 at 261E:

"There are, I think, three matters to be considered, (a) the character of the advantage sought, and in this its lasting qualities may play a part, (b) the manner in which it is to be used, relied upon or enjoyed, and in this and under the former head recurrence may play its part, and (c) the means adopted to obtain it; that is, by providing a periodical reward or outlay to cover its use or enjoyment for periods commensurate with the payment or by making a final provision or payment so as to secure future use or enjoyment."

And in the same page at F:

". . . the expenditure is to be considered of a revenue nature if its purpose brings it within the very wide class of things which in the aggregate form the constant demand which must be answered out of the returns of a trade or its circulating capital and that actual recurrence of the specific thing need not take place or be expected as likely."

With this guidance, I return to the facts of the case. The Commissioner's finding that the payment was made to preserve the trade of PLC from collapse, and as such was of a revenue nature, selects from the complex circumstances with which the directors of PLC were faced on 30 September 1984 only one of the manifest purposes for which the payment of £50m and the disposal of JMB were made. The payment was made because there was no other means by which to divest PLC of the by now disastrous association with JMB and to avoid the realisation of all PLC's assets. The meeting to discuss the crisis was, according to the minutes, to consider various proposals for the refinancing of the group and the disposal of JMB. The discussions with the Bank of England were for the recapitalisation or disposal of JMB. It was recognised that PLC on its own was unable to provide sufficient capital

A for JMB to maintain the appropriate liquidity ratio for a recognised bank. At the same time it was essential to provide further capital for PLC and this was done by the issue of convertible loan stock to Charter Consolidated. Had PLC been able to raise sufficient funds, or if the amount required to recapitalise JMB had been no more than £50m, the method which would have been adopted would no doubt either have been to make a loan to JMB
B or to recapitalise it in a similar way to PLC by an issue of convertible stock. If either of those courses had been adopted, the payment would unquestionably have been of a capital nature. Can it make any difference that the liabilities of JMB were so extensive that the payment of £50m had to be made as an out-and-out payment to persuade the Bank of England to acquire the capital of JMB? I do not think that it can. One consequence of the payment
C was the preservation of their subsidiary JMB as a going concern with the backing of the resources of the Bank of England. That, in turn, "preserved the existing business" of PLC. It did so by saving its assets from realisation, by releasing it from an existing risk of catastrophic liabilities and from the consequences of being unable itself to recapitalise JMB. Thus merely to characterise the payment by the label "preservation of an existing business" does
D not determine how the payment should be regarded for accounting and revenue purposes. In short it is merely descriptive and not definitive.

To my mind the payment has to be seen against the background of the search by the directors for a means of recapitalising JMB. But for the size of sum needed PLC would have retained its interest in JMB and in one way or
E another the sum of £50m would have been reflected in its balance sheet as a long-term capital asset. It was a lump sum paid to procure an immediate advantage for the long-term; it did not represent an aggregation of day to day payments which would have been incurred in the ordinary way in running the business. Considering the three matters highlighted by Dixon J. against the background to the payment, I have no doubt it was a capital pay-
F ment for tax purposes. The advantage sought was of a lasting non-recurring nature. It was to be used once and for all to secure existing assets and to avoid liabilities which threatened immediate final collapse. The advantage was obtained by making the payment as a final provision to secure the disposal of a capital asset. It appears to me to have none of the attributes of a revenue payment and every appearance of an outlay for capital purposes.

G

I would dismiss the appeal.

Appeal dismissed, with costs. Leave to appeal to the House of Lords refused.

H

The Company's appeal was heard in the House of Lords (Lords Keith of Kinkel, Emslie, Templeman, Goff of Chieveley and Jauncey of Tullichettle) on 5 and 6 February 1992 when judgment was reserved. On 14 May 1992 judgment was given unanimously against the Crown, with
I costs.

([1])*Andrew Park Q.C.* and *Thomas Ivory* for the taxpayer company. Expenditure on the preservation of the goodwill and assets of a trade is revenue expenditure unless the means by which the trade is preserved are such that the expenditure is laid out as consideration for or otherwise upon (a) the

([1]) Argument reported by J.A. Griffiths Esq., Barrister-at-Law.

acquisition of a capital asset, or (b) the improvement of a capital asset already owned, or (c) the divestiture of an onerous capital asset already owned.

The taxpayer company's expenditure of £50m. was expenditure on the preservation of its platinum trade and thus revenue expenditure. That is so whether the matter is viewed subjectively or objectively. Subjectively, the taxpayer company expended the £50m wholly and exclusively for the purpose of preserving the platinum trade. Objectively, the expenditure did preserve the platinum trade. If the taxpayer company had not accepted the Bank of England's terms and expended the £50m, that trade would have collapsed. The means by which the trade was preserved were not such that the £50m was laid out as consideration for or otherwise upon (a), (b) or (c) above. The means did include the divestiture by the taxpayer company of a capital asset already owned, namely the JMB shares, but those shares were a worthless capital asset, not an onerous capital asset, and the £50m expenditure was not laid out by the taxpayer company as consideration for or otherwise upon the divestiture of the JMB shares. Those shares were divested by the taxpayer company and acquired by the Bank of England for £1, not for a negative consideration of minus £50m.

The authorities on whether an expense is of a capital or a revenue nature direct attention to the nature of the advantage secured by the expenditure. They are somewhat ambivalent as to whether the matter should be viewed subjectively—for what purpose was the payment made? or objectively—what did the payment achieve? In support of the subjective approach are, *inter alia*, the celebrated formulation in *Atherton* v. *British Insulated and Helsby Cables Ltd.* [1926] AC 205, 213 and *dicta* in *Commissioners of Inland Revenue* v. *Carron* Co. 45 TC 18, 68, 70, 74. In support of the objective approach are *dicta* of Lord Edmund-Davies and Lord Fraser of Tullybelton in *Tucker* v. *Granda Motorway Services Ltd.* [1979] 1 WLR 683 and Viscount Radcliffe in *Commissioner of Taxes* v. *Nchanga Consolidated Copper Mines Ltd.* [1964] AC 948, 958.

Expenditure incurred on the acquisition or improvement of an identifiable capital asset is capital expenditure: *Tucker* v. *Granada Motorway Services Ltd.* However, expenditure to preserve a capital asset already owned is revenue expenditure. This principle covers expenditure to preserve a business as well as expenditure to preserve, for example, title to land and buildings. It is of critical importance in the present case. It is supported and established by *Morgan* v. *Tate & Lyle Ltd.* [1953] Ch 601, 615–616, 628, 646; [1955] AC 21, 47; *Southern* v. *Borax Consolidated Ltd.* [1941] 1 KB 111, 116–117, 118, 120; *Cooke* v. *Quick Shoe Repair Service* 30 TC 460, 465–466 and *Commissioners of Inland Revenue* v. *Carron Co.* 45 TC 18, 68C–F, 70C–71E, 74C–D, 75D–H. The expenditure in *Morgan* v. *Tate & Lyle Ltd.* improved the value of the lease, a capital asset, and was therefore a capital expense; the case is thus distinguishable. *Mallett* v. *Staveley Coal & Iron Company Ltd.* [1928] 2 KB 405 is also distinguishable because shares in a limited company are not an onerous asset in the sense that a lease at a rent above market levels may be.

The circumstance that a payment may be large and made on one occasion is neutral: *Commissioner of Taxes* v. *Nchanga Consolidated Copper Mines Ltd.* [1964] AC 948. Thus, if one has a case where a payment is made outright that (i) is for the purpose of preserving the trade from collapse and (ii) achieves that purpose, and where that is all there is to it, a payment sim-

pliciter for the preservation of the trade, then it is a revenue payment. If, on the other hand, there is something that associates it with a capital asset in one of the ways referred to in (a), (b) and (c) above, it may be a capital payment; but there was no association of the payment of £50m with the JMB shares of a kind to make it a capital payment.

The present case cannot be equated with those where parent companies have put money into their subsidiaries and failed in their argument that that was a revenue expense. There, they were keeping the subsidiaries, and so there was an investment of a capital nature of the parent comapny and it can be seen as the improvement of a capital asset already owned: one could say "already owned *and being retained*". This expenditure cannot be said to have been capital expenditure because it improved the value of the taxpayer company's shareholding in JMB. It was not worth any more to the taxpayer company than it had been before the money was paid.

It was wrong to say that the preservation of the taxpayer company's platinum trade was achieved by the disposal of the JMB shares to the Bank of England and that that disposal was achieved by the payment of £50m. (the Crown's "package" argument). Although the transer of the shares was an essential condition insisted on by the Bank of England, that does not mean that the £50m was expended on the disposal of the shares. The taxpayer company could have divested itself of the shares for nothing (beyond incidental costs). Where one has a "package" with two or more elements, it does not follow that because one is a capital element the other must be of a capital nature. That depends on the intrinsic quality of the element itself. For the taxpayer company's platinum trade to survive, JMB had to continue to carry on its banking business and meets its obligations. The critical requirement for that was not that the taxpayer company should cease to be the owner of the JMB shares.

Ivory following. Whether any immediate benefit resulted to JMB or other parties (apart from the taxpayer company itself) from the preservation of JMB's trade cannot make any difference: see *per* Lord Sumner in *Usher's Wiltshire Brewery Ltd.* v. *Bruce* [1915] AC 433, 469. That case, although not directly concerned with the distinction between capital and income expenditure, shows that expenditure does not cease to be deductible merely because it benefits someone else's trade. There was only one purpose or motive here: the preservation of the taxpayer company's own trade. The preservation of JMB was not in itself an advantage to the taxpayer company.

Alan Moses Q.C. and *Launcelot Henderson* for the Crown. The question whether a transaction is of a revenue or capital nature is a question of law to be determined in the light of the facts found by the Commissioners: see *Beauchamp* v. *F. W. Woolworth PLC* [1990] 1 AC 478, 491A–492G and *Tucker* v. *Granada Motorway Services Ltd.* [1977] 1 WLR 1411; [1979] 1 WLR 683. The question is normally to be answered by an objective analysis of the true nature of what the parties have actually done, not by examining the motives or intentions that lead them to act as they did: see *Beauchamp* v. *F.W. Woolworth Plc* at pages 498E–499A; *Commissioner of Taxes* v. *Nchanga Consolidated Copper Mines Ltd.* [1964] AC 948, 958 and *Tucker's* case [1979] 1 WLR 683, 688A–C, 690H, 692H–693E, 695B–C, 696D. The reason why an examination of motive or purpose is usually unfruitful is that the purpose of any payment made by a trader will normally be to further or promote, directly or indirectly, the profitability of his busi-

ness. That in itself, however, tells one nothing about whether the payment is of a capital or revenue nature. A

In examining the nature of a payment, there is no single test or criterion for determining whether it is made on capital or revenue account. The reported cases indicate that there are a number of tests or indicia that may be relevant, but these often point in different directions, and "In the end the courts can do little better than form an opinion which way the balance lies": *per* Lord Wilberforce in *Tucker's* case, at page 686; see also, *Strick* v. *Regent Oil Co. Ltd.* [1966] AC 295, 313G, 343E–F, 345B–E; *Commissioners of Inland Revenue* v. *Carron Co.* 45 TC 18, 70 and *Tucker's* case [1977] 1 WLR 1411, 1412H–1413B. B C

In the present case, there is one sure guide through the minefield, to be found by the identification of a capital asset with which the expenditure in question is linked: see *Tucker's* case [1979] 1 WLR 683, 686D–E, 687H. The necessary tie or link between the expenditure and the capital asset will be found "... where a lump sum is paid to acquire, dispose of, improve or modify a fixed capital asset": see [1977] 1 WLR 1411, 1416F–G. In particular, money spent, on getting rid of a disadvantageous asset is, as a matter of law, capital expenditure: see [1979] 1 WLR 683, 686D. It is wrong to disregard the identifiable asset test by representing that the underlying commercial purpose of the payment is just the same as if there had been no disposal of a capital asset: see pages 686, 692. D E

The shares of JMB were a fixed capital asset owned by the taxpayer company. By August 1984, they had become a disadvantageous asset, not in the sense that they had a negative value in themselves, or that it was impossible for the taxpayer company to dispose of them without paying somebody to acquire them, but in the sense that JMB's imminent insolvency would, unless averted, have catastrophic effects on the taxpayer company's own business. In theory, the rescue of JMB's business could have taken various forms and need not have involved a disposal by the taxpayer company of the JMB shares. However, the rescue that actually took place, indeed the only one that was in practice available, did involve a disposal by the taxpayer company of the JMB shares to the Bank of England. The terms on which the Bank of England was prepared to acquire the shares were not open to negotiation and required the taxpayer company to inject £50m into JMB before the sale took place. £50m was paid in consideration of the acquisition by the Bank of England of those shares. Accordingly, the payment of £50m is correctly characterised as the payment of a lump sum necessary to procure the disposal of the JMB shares and as such must be a payment of a capital nature. Its characterisation as a capital payment is not altered by the obvious facts that in order to preserve its own trade the taxpayer company had to ensure that JMB would continue trading; that it was therefore an essential element of the arrangements agreed between the taxpayer company and the Bank of England that JMB would continue to trade following is acquisition by the Bank of England; and that the taxpayer company's sole motive in entering into the arrangements, and in paying the £50m as part of those arrangements, was to preserve its own trade. F G H I

The arrangements agreed between the taxpayer company and the Bank of England must be regarded as a whole. It is unrealistic, and flies in the face of common sense, to seek to dissect the arrangements into two separate elements: see *per* Vinelott J. [1990] 1 WLR 414, 421. As Fox L.J. [1991] 1 WLR

A 558, 565 pointed out, the position was in reality the same as if the Bank had said "We will take over J.M.B. if you pay us £50m." Fox L.J., at pages 564G–565A, accurately assessed the commercial reality of the situation. It is unreal and artificial to regard the taxpayer company as having disposed of the shares of JMB for £1 and as having paid £50m for the separate purpose of preserving its own trade. This was an indivisible package. The B £50m was just as necessary to enable the Bank of England to dispose of the shares as it was to rescue JMB.

It is irrelevant to the characterisation of the payment that the sole purpose of the board of the taxpayer company in agreeing to make it was the preservation of the taxpayer company's own business. What matters is the C means by which that purpose was achieved; as to that, see *per* Vinelott J. [1990] 1 WLR 414, 421A.

It does not assist the taxpayer company to say that the payment was made for the enduring benefit of its trade. It could hardly have justified the D payment if that had not been the case, but that is not determinative of the capital/income issue, any more that it was in *Mallet* v. *Stavely Coal & Iron Co. Ltd.* [1928] 2 KB 405, 420. So, too, in the present case, the payment of £50m was made by the taxpayer company in order to enable it to dispose of a disadvantageous assset, namely the shares of JMB for the enduring benefit of the taxpayer company's trade.

E

The key to the correct determination of the nature of the expenditure lies in the nature of what happened: the nature of the rescue operation. The means by which the rescue was achieved itself demonstrates that it was capital expenditure. The fact that the disposal of the shares was, and had to be, to a body prepared and able to stand by JMB does not mean that the expen- F diture was not incurred on the disposal of the asset. By reason of the terms imposed by the Bank of England the taxpayer company had to spend £50m. It is thus immaterial that the benefit that it got from the expenditure was the rescue. One cannot divorce the expenditure from the capital asset. One can establish a proper and substantial link between the disposal of the shares and the expenditure. One cannot break the link by virtue of the fact that the tax- G payer company's purpose was to preserve its trade by getting rid of a disadvantage to it. This is the answer to all the taxpayer company's possible analyses. At the end of the day there is always *some* purpose. It does not matter that disposal of the shares by itself would not have achieved anything. The rescue and the disposal are not two separate elements. They have to be considered together.

H

Park Q.C. in reply. The fact that this was a very large, non-recurring payment is not a factor of any real significance and almost neutral (as in *Commissioner of Taxes* v. *Nchanga Consolidated Copper Mines Ltd.* [1964] AC 948): see *Commissioners of Inland Revenue* v. *Carron Co.* 45 TC 18, 68C–F. The other factor to consider is the enduring nature of the advantage.

I

This was in a sense a single, indivisible deal, but under the whole deal there is no doubt at all that the Bank of England did two things: (i) it accepted a transfer of the shares and (ii) it organised a rescue of the business. The crucial question is: to which did the payment of the £50m relate? It related to the Bank of England's conduct in organising the rescue, not to its accepting a transfer of the shares.

It is correct to say that one looks at what the payment achieved objectively, but one does so from the point of view *of the payer.*

The following cases were cited in argument in addition to the cases referred to in the speeches:—*Beauchamp* v. *F.W. Woolworth PLC* 61 TC 542; [1990] AC 478; *Commissioner of Taxes* v. *Nchanga Consolidated Copper Mines Ltd.* [1964] AC 948; *Usher's Wiltshire Brewery Ltd.* v. *Bruce* 6 TC 399; [1915] AC 433.

Lord Keith of Kinkel:—My Lords, when at the end of September 1984 Johnson Matthey Bankers Ltd. ("JMB") was found to be in deep financial waters it was apparent to the directors of its parent company Johnson Matthey PLC ("JM PLC") that if JMB collapsed its collapse would involve the destruction of the business of JM PLC. So they set about finding ways and means of averting the collapse of JMB and the agreement with the Bank of England was the result.

The agreement with the Bank of England did not include any contractually binding undertaking by the latter that it would stand by JMB, but there was certainly a clear understanding between it and JM PLC that that was what would happen.

The reason why the Bank of England was prepared to rescue JMB was not, of course, because the Bank had any particular regard for JM PLC's position, but because it considered that the collapse of JMB would have extremely serious repercussions for the banking world and would therefore be contrary to the public interest. The conditions upon which the Bank of England was willing to rescue JMB were first, that the whole share capital of JMB should be transferred to it for a nominal consideration, and second, that JM PLC would inject £50m into JMB. JM PLC satisfied these conditions and so brought it about that the Bank of England rescued JMB and thus saved JM PLC's own business. The transfer to the Bank of England of the share capital of JMB was not an end and purpose in itself, but was merely incidental to the purpose of achieving the rescue operation which was in fact achieved. The injection of £50m into JMB was on a proper analysis not the payment of the price for getting rid of a burdensome asset, but a contribution required by the Bank of England towards its planned rescue operation, the rest of the funds needed for it being supplied by the Bank of England.

A number of decided cases make it clear that a payment made to get rid of an obstacle to successful trading is a revenue and not a capital payment. I refer in particular to *Mitchell* v. *B.W. Noble Ltd.*[1] [1927] 1 KB 719; *Anglo-Persian Oil Co. Ltd.* v. *Dale*[2] [1932] 1 KB 124; and *Commissioners of Inland Revenue* v. *Carron Co.*[3] 45 TC 18. This must be no less true of a payment made to save the whole of an existing business from collapse. I am accordingly of the opinion that the decision of the General Commissioners in the

---

[1] 11 TC 372. [2] 16 TC 253. [3] 1968 SLT 305.

present case was correct, and those of Vinelott J. and the Court of Appeal were wrong.

My Lords, for these reasons, and those more fully set out in the speeches of my noble and learned friends Lord Templeman and Lord Goff of Chieveley, I would allow this appeal.

Lord Emslie:—My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Keith of Kinkel and the speeches to be delivered by my noble and learned friends Lords Templeman and Goff of Chieveley.

These speeches have persuaded me, on reflection, that the analysis by and the conclusions of Vinelott J. and of the Court of Appeal which, initially, I found attractive, are too narrowly based. For the reasons given by my noble and learned friends I would allow this appeal.

Lord Templeman:—My Lords, the taxpayer, Johnson Matthey PLC, trades in platinum. In 1984 the taxpayer owned all the shares in Johnson Matthey Bankers Ltd. ("JMB"), a company which carried on a banking business and thereby assisted the financing of the taxpayer's platinum trade. On Sunday 30 September 1984 JMB and the taxpayer realised that JMB was unable to pay its debts in full as they fell due and that unless further capital was forthcoming JMB could not open for business the following day. The taxpayer also realised that if JMB ceased business as a result of being unable to meet its debts as they fell due, then the creditors of the taxpayer and in particular the creditors of the taxpayer who were also creditors of JMB would demand immediate repayment of the monies owed to them by the taxpayer and would withdraw the credit facilities which enabled the taxpayer to finance its activities. If JMB could not open for business the following day then the taxpayer could not continue to trade. In these circumstances the taxpayer agreed to sell the shares in JMB to the Bank of England for £1 and to contribute the sum of £50m to the resources of JMB The Bank of England agreed to buy the shares of JMB on those terms. The Bank of England intended and the taxpayer expected that the Bank of England would procure the sums in excess of £50m required to satisfy JMB's creditors. The payment of £50m by the taxpayer was necessary and was made to enable the taxpayer to continue to trade in platinum or at all. The objects of the taxpayer were achieved and the taxpayer continued to trade.

Section 74 of the Income and Corporation Taxes Act 1988, repeating earlier legislation in force in 1984, provides that in computing the amount of the profits of a trade for the purposes of income tax and corporation tax "... no sum shall be deducted in respect of—(*a*) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade...". The General Commissioners found and it is not now disputed that the taxpayer's disbursement of £50m to JMB was wholly and exclusively laid out for the purposes of the taxpayer's platinum trade; the disbursement was made for the purpose of preserving that trade and for no other purpose. But this finding does not automatically enable the taxpayer to deduct £50m in the computation of its profits; the deduction can only be made if the £50m was a revenue expenditure and not a capital expenditure. Profits are confined to receipts of an income nature: *per* Atkin L.J. in *Cooper* v. *Stubbs* [1925] 2 KB 753 at 775. Conversely, expenses deductible in the computation of profits must be expenditure of a revenue nature: *per* Viscount

Cave L.C. in *Atherton* v. *British Insulated and Helsby Cables Ltd.* [1926] AC 205 at page 212 *et seq.* "... the problem of discriminating between ... an income disbursement and a capital disbursement ... where the item lies on the borderline and the task of assigning it to income or to capital becomes one of much refinement .... While each case is found to turn upon its own facts, and no infallible criterion emerges, nevertheless the decisions are useful as illustrations and as affording indications of the kind of considerations which may relevantly be borne in mind in approaching the problem:" *per* Lord Macmillan in *Van den Berghs Ltd.* v. *Clark* [1935] AC 431 at 438.

In the present case the General Commissioners held([1]):

> "... that the £50m payment was made to preserve the trade of [the taxpayer] from collapse ... and, as a payment to preserve an existing business, it was of a revenue nature. We further find that the payment was not converted into a payment of a capital nature by the circumstance that it was associated with the disposal of the JMB shares."

Vinelott J. and the Court of Appeal (Fox, McCowan and Beldam L.JJ.) on the other hand concluded that the £50m were paid to get rid of the shares. Vinelott J. [1990] STC 149 at page 160 said([2]):

> "The purpose of the board of the taxpayer company in agreeing to make that payment was no doubt to preserve the taxpayer company's business. But the means by which that purpose was achieved and indeed ... the only means by which it could be achieved was to transfer the shares of JMB to the Bank and part of a single transaction or arrangement to pay £50m to JMB and to release JMB from any obligation to repay it. These two elements cannot be severed, the one being treated as the disposal for a nominal consideration of a worthless but not an onerous asset and the other as a payment made to preserve the business of the taxpayer company."

In the Court of Appeal Fox L.J. delivering the leading judgment said at [1991] STC 259 at p. 265([3]):

> "JMB was a capital asset of the taxpayer company ... the payment seems to me to be a payment by the taxpayer company to enable it to get rid of a capital asset. That asset was not onerous ... but its continued retention was harmful to the taxpayer company. In my view the common sense of the matter is that the £50m was capital expenditure."

The facts in the present case are unprecedented but the authorities which speak of the relationship between a payment and a capital asset must be considered.

In *Atherton* v. *British Insulated and Helsby Cables Ltd.*([4]) [1926] AC 205 the taxpayer paid a lump sum as the nucleus of a pension fund for its staff. By a majority the House held that the payment was an expenditure of capital. Viscount Cave said at page 213 that a "once and for all" payment could be chargeable against profits and instanced a payment made to an employee on retirement and then he continued([5]):

> "... when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for

([1]) Page 46E/F *ante*. ([2]) Page 54A/C *ante*. ([3]) Page 60F *ante*.
([4]) 10 TC 155. ([5]) *Ibid*, at pages 192/193.

A treating such an expenditure as properly attributable not to revenue but to capital. ... The object and effect of the payment of this large sum was to enable the company to establish the pension fund and to offer to all its existing and future employees a sure provision for their old age, and so to obtain for the company the substantial and lasting advantage of being in a position throughout its business life to secure and retain
B the services of a contented and efficient staff."

In the present case the payment of £50m did not bring an asset into existence and did not procure an advantage for the enduring benefit of the trade. The payment removed once and for all the threat to the whole business of the taxpayer constituted by the insolvency of JMB. So unless the payment of
C £50m was made for the transfer of an existing asset, namely the shares in JMB, the sum of £50m was not capital expenditure.

In *Mitchell* v. *B.W. Noble Ltd.* [1927] 1 KB 719, a director could have been dismissed for misconduct but was allowed to retire and was paid
D £50,000 in order to avoid publicity injurious to the company's reputation. The payment was held to be an income expense. Lord Hanworth M.R. said, at page 737(1):

"It was a payment was made in the course of business, with reference to a particular difficulty which arose in the course of the year, and
E was made not in order to secure an actual asset to the company but to enable the company to continue to carry on, as it had done in the past, the same type and high quality of business, unfettered, and unimperilled by the presence of one who, if the public had known about his position, might have caused difficulty in his business and whom it was necessary
F to deal and settle with at once."

In the present case the payment of £50m was made in the course of business, dealing with the particular difficulty which arose on 30 September 1984 as a result of the insolvency of JMB, and the payment was made to enable the taxpayer to continue to carry on business unimperilled by the association of
G the taxpayer with JMB.

In *Anglo-Persian Oil Co. Ltd.* v. *Dale*(2) [1932] 1 KB 124, a payment terminating a disadvantageous agency contract was held to be a revenue payment. Romer L.J. pointed out at page 146 that in applying the test laid down
H by Lord Cave in *Atherton's* case "... enduring" means "enduring in the way that fixed capital endures." The advantage need not be of a positive character but may consist in the getting rid of an item of fixed capital that is of an onerous character. In *Dale's* case the payment got rid of a disadvantageous agency contract but did not procure any enduring capital benefit.

I In the present case the item of fixed capital which was got rid of, namely the shares in JMB, were not themselves of an onerous character. The payment of £50m had no enduring effect on the capital of the taxpayer. The payment of £50m prevented the whole business of the taxpayer from being brought to a grinding halt.

---

(1) 11 TC 372, at pages 420/421. (2) 16 TC 253.

In *Southern* v. *Borax Consolidated Ltd.*[1] [1941] 1 KB 111, the taxpayer incurred legal expenses in defending its title to land. Lawrence J. held that the payments were revenue and not capital and at page 116 said[2]: A

> "...where a sum of money is laid out for the acquisition or the improvement of a fixed capital asset it is attributable to capital, but ... if no alteration is made in the fixed capital asset by the payment, then it is properly attributable to revenue, being in substance a matter of maintenance, the maintenance of the capital structure or the capital assets of the company." B

By "maintenance" I take the Judge to mean "preservation". The expenditure in that case procured for the taxpayer the maintenance or preservation of its capital asset, namely its title to land. In the present case the expenditure preserved the whole business of the taxpayer although it did not preserve any particular asset. C

In *Associated Portland Cement Manufacturers Ltd.* v. *Inland Revenue Commissioners*[3] [1946] 1 All ER 68, the taxpayer paid a sum to a retiring director to obtain a covenant by the director that he would not compete with the company's business. This was held to be a capital payment because the company had thereby improved the value of its goodwill and brought into existence an advantage for the enduring benefit of the trade. D

In the present case the goodwill of the taxpayer was not improved but was saved from extinction. E

In *Commissioners of Inland Revenue* v. *Carron Co.*[4] 45 TC 18 the taxpayer was incorporated by charter and incurred expense in obtaining a new charter the terms of which facilitated the administration and management of the company. The expense of obtaining the new charter was held to be a revenue expense because the object was to remove obstacles to profitable trading. The association between the taxpayer and JMB in the present case was a formidable obstacle to trading at all. F

Finally, in *Tucker* v. *Granada Motorway Services Ltd.*[5] [1979] 1 WLR 683 the price paid by the taxpayer for procuring a reduction in the rent payable under a lease for the unexpired term of 40 years was held to be a payment attributable to capital. Lord Wilberforce at page 686 said[6]: G

> "It is common in cases which raise the question whether a payment is to be treated as a revenue or as a capital payment for indicia to point different ways. In the end the courts can do little better than form an opinion which way the balance lies. There are a number of tests which have been stated in reported cases which it is useful to apply, but we have been warned more than once not to seek automatically to apply to one case words or formulae which have been found useful in another. ... Nevertheless reported cases are the best tools that we have, even if they may sometimes be blunt instruments. I think that the key to the present case is to be found in those cases which have sought to identify an asset. In them it seems reasonably logical to start with the assumption that money spent on the acquisition of the asset should be regarded as capital expenditure. Extensions from this are, first, to regard money H I

(1) 23 TC 597. (2) *Ibid*, at page 602. (3) 27 TC 103.
(4) 1968 SLT 305. (5) 53 TC 92. (6) *Ibid*, at pages 106I/107C.

A spent on getting rid of a disadvantageous asset as capital expenditure and, secondly, to regard money spent on improving the asset, or making it more advantageous, as capital expenditure. In the latter type of case it will have to be considered whether the expenditure has the result stated or whether it should be regarded as expenditure on maintenance or upkeep, and some cases may pose difficult problems."

B

In the light of the authorities it seems that if the £50m were paid to procure the transfer of the shares in JMB to the Bank of England, the payment is attributable to capital. If, on the other hand, the £50m were paid to remove the threat posed by the insolvency of JMB to the continuation in business of the taxpayer, it seems that the payment is attributable to revenue.
C In agreement with the General Commissioners and with the submissions forcefully made by Mr. Park on behalf of the taxpayer I have come to the conclusion that the £50m were paid, and paid solely, to enable the taxpayer to be able to continue in business. The shares in JMB were fully paid and worthless. The shares were freely transferable and did not constitute a threat to anybody. The insolvency of JMB was a threat to the taxpayer and £50m
D were paid to remove that threat. It is true that the Bank of England were not contractually bound to ensure that the creditors of JMB were satisfied but £50m were paid and accepted in the expectation, which was fulfilled, that the creditors of JMB would be satisfied and that in consequence the taxpayer would be able to continue in business. It is true also that the Bank of England required that the taxpayer should both contribute £50m to JMB and
E also transfer the shares in JMB to the Bank. But the £50m were not paid to persuade the Bank to take the shares. The £50m were paid to persuade the Bank to rescue JMB.

I would therefore allow the appeal and restore the decision of the General Commissioners.

F

Lord Goff of Chieveley:—My Lords, this appeal is concerned with the question whether a sum of £50m expended by the Appellant, Johnson Matthey PLC, in circumstances which I shall describe, should be characterised for tax purposes as a capital payment, or alternatively as a revenue payment deductible for the purposes of corporation tax. The income tax
G Inspector disallowed the deduction, but the General Commissioners allowed an appeal from that decision, holding that the payment was a revenue payment and further that it was laid out wholly and exclusively for the purposes of the taxpayer's trade and as such was properly deductible. However, Vinelott J. allowed an appeal by the Revenue from the decision of the General Commissioners on the ground that the payment was to be char-
H acterised as a capital payment; and the Court of Appeal upheld the decision of Vinelott J., refusing leave to appeal to your Lordships' House. The Appellant now appeals to your Lordships with the leave of this House. I shall refer to the Appellant as "JM PLC", to distinguish it from its former wholly owned subsidiary, Johnson Matthey Bankers Ltd., which I shall refer to as "JMB".

I

The facts have been helpfully summarised by the parties in an agreed statement of facts; indeed the facts are in any event not in dispute. The payment in question was made under an agreement reached between JM PLC and the Bank of England during the night of Sunday 30 September and Monday 1 October 1984, which was embodied in a written agreement on Tuesday 2 October. JM PLC is a company which carries on a large trade in precious metals, mainly platinum. JMB carries on a banking business, which

includes dealing in bullion. In August and September 1984 it emerged that JMB was in major financial difficulties. The Bank of England was duly informed. By the weekend of 29 and 30 September, JMB's banking business was on the brink of collapse and it appeared' that, unless it was rescued, JMB would not be able to open its doors for business on the Monday morning, and further that, if JMB collapsed, there would be a consequential knock-on effect on JM PLC's own platinum trade, which too would collapse. By late Sunday evening, what seemed to be the last hope of saving JMB (a transaction involving the Bank of Nova Scotia) had fallen through; and the Board of JM PLC concluded that a receiver had to be appointed for JMB, not for the continuation of its trade, but for the orderly realisation of its assets. The Bank of England was informed of this decision, which was to be implemented at 1.30 a.m. on Monday 1 October. However, before that time the Bank of England put forward a non-negotiable offer to the Board of JM PLC, to the effect that the Bank of England would purchase the shares in JMB for the nominal consideration of £1, subject to JM PLC having previously injected £50m into JMB

The Bank of England made it plain that its proposal had to be accepted in its entirety; but it was obvious that the Bank intended to mount a rescue operation for JMB, and indeed the Bank assured the board of JM PLC that a standby facility of at least £250m would be made available to JMB to enable it to continue trading. In the result, JM PLC obtained funding of £25m from Charter Consolidated, and with that assistance was able to accept the proposal of the Bank of England. The board of JM PLC resolved that, conditionally upon a standby facility of at least £250m being agreed, the offer of the Bank of England should be accepted. The resulting agreement was implemented over the next two days. The £50m was injected by JM PLC into JMB in the form of a loan and waiver of repayment (it is agreed that nothing turns on the form of the advance). The Bank of England organised a rescue of JMB. Press releases were issued by JM PLC and the Bank of England early on the Monday morning, and both JMB and JM PLC traded as normal on that day. The agreement between JM PLC and the Bank of England was reduced to writing in a document dated 2 October 1984. Clauses 1 and 2 of the agreement read as follows:—

"1. *Assets to be sold*

The whole of the issued share capital of Bankers (the 'shares'), subject to PLC advancing a loan of £50 million to Bankers and waiving repayment of the same today.

2. *Price*

The price to be paid by the Bank will be the sum of £1."

No mention is made in the agreement of any rescue of JMB by the Bank of England.

I have already recorded that, in assessing JM PLC to corporation tax for the year 1984–85, the Revenue disallowed the deduction of £50m as an expense of its platinum trade, on the grounds, first that it was a capital payment and not a revenue payment, and second that the money was not laid out wholly and exclusively for its platinum trade; and further that, on JM PLC's appeal to the General Commissioners, they decided both points in its

A favour. The second point has not been pursued; and your Lordships, like the Courts below, are concerned only with the first. The conclusion of the General Commissioners was expressed as follows(1):

> "We, therefore, find on the evidence and arguments put before us, that the £50m payment was made to preserve the trade of PLC from col-
B lapse, that it did, in fact preserve the trade from collapse and, as a payment to preserve an existing business, it was of a revenue nature. We further find that the payment was not converted into a payment of a capital nature by the circumstance that it was associated with the disposal of the JMB shares."

C Vinelott J. reversed the decision of the General Commissioners. He said (see [1990] STC 149, at pages 160–161)(2):

> "The position in which the taxpayer company found itself in the early hours of 1 October 1984 was that unless the Bank was willing to support JMB and to make its support known to the public JMB would
D be forced into liquidation and that a receiver would have to be appointed of the assets of the taxpayer company itself—not with a view to preserving its trade but to ensure the orderly realisation of its assets. The Bank was not willing to give that support unless it was given control of JMB by the transfer of its entire shareholding and pending transfer of the shares by the right to remove and appoint its directors, and
E unless JMB was made if not an attractive at least a less unattractive acquisition by the injection of £50m into it. The purpose of the Board of the taxpayer company in agreeing to make that payment was no doubt to preserve the taxpayer company's business. But the means by which that purpose was achieved and indeed in the situation of crisis in the early hours of 1 October the only means by which it could be achieved
F was to transfer the shares of JMB to the Bank and as part of a single transaction or arrangement to pay £50m to JMB and to release JMB from any obligation to repay it. These two elements cannot be severed, the one being treated as the disposal for a nominal consideration of a worthless but not an onerous asset and the other as a payment made to preserve the business of the taxpayer company."

G The Court of Appeal affirmed the decision of Vinelott J. Fox L.J., who delivered the leading judgment, said (see [1991] STC 259 at p. 265)(3):

> "The position then, it seems to me, is as follows: (i) JMB was a capital asset of the taxpayer company; (ii) the taxpayer company disposed
H of JMB to the Bank; (iii) the only terms on which the Bank was willing to acquire JMB was on payment of the £50m by the taxpayer company to JMB.
>
> The position was, in reality, the same as if the Bank had said 'We will take over JMB if you pay us £50m.' Whichever way it was done, the payment seems to me to be a payment by the taxpayer company to
I enable it to get rid of a capital asset. That asset was not onerous in the sense that the leases in *Mallett* v. *Staveley Coal and Iron Co. Ltd.* were onerous, but its continued retention was harmful to the taxpayer company. In my view the common sense of the matter is that the £50m was capital expenditure."

---

(1) Page 46E/F *ante*. (2) Pages 53I/54A/C *ante*. (3) Page 60D/F *ante*.

Before your Lordships, Mr. Park Q.C. for JM PLC advanced the following submissions. He submitted that the expenditure of £50m could only be a capital payment if expended as consideration for or otherwise upon (a) the acquisition of a capital asset; or (b) the improvement of a capital asset already owned; or (c) the divestiture of an onerous capital asset already owned. Here the question was whether the payment fell into the third of these categories. In his submission it did not, because the JMB shares were a worthless asset, not an onerous capital asset; and the sum of £50m was not paid to the Bank of England to get rid of the worthless shares, but as a contribution towards the rescue operation mounted by the Bank. In these circumstances the payment, which was in reality paid out to protect the platinum trade of JM PLC, was not a capital payment but a revenue payment expended wholly and exclusively for the purposes of that trade. For the Revenue, Mr. Moses Q.C. submitted that the sum of £50m was indeed expended by JM PLC to enable it to get rid of the JMB shares to the Bank of England and accordingly the payment was one of a capital nature. He recognised that, from JM PLC's point of view, the advantage of the agreement with the Bank of England was that JMB would be rescued; but he submitted that, because of the terms of the proposal put forward by the Bank, the agreement consisted of an indivisible package comprising the injection of £50m by JM PLC into JMB, and the transfer of the shares in JMB to the Bank of England for a nominal consideration, and the agreement of the Bank to accept the shares upon those terms. Because of the terms of the Bank's offer which JM PLC had to accept, it was forced to spend £50m for the disposal, even though the advantage to JM PLC was the rescue. Accordingly the sum was expended to get rid of the shares, and so constituted a capital payment.

I approach the matter as follows. I proceed on the basis, which was accepted by both parties, that for the £50m to constitute a capital payment it must have been paid for the divestiture by JM PLC of a capital asset, i.e. the transfer of the shares in JMB to the Bank of England. I accordingly turn to the agreement between JM PLC and the Bank. Here I find that the Bank agreed to purchase the shares for a nominal consideration, subject to JM PLC injecting £50m to JMB (by way of a loan and waiver of repayment). On the face of the agreement, therefore, it can be said that the money was paid as a necessary step to achieve the acceptance of the shares by the Bank. This is because there is nothing in the agreement to the effect that the money was paid for any other consideration furnished by the Bank. In particular, there is no provision that it was paid in consideration for a rescue operation to be mounted by the Bank. On this reasoning, on a true analysis of the agreement JM PLC did not inject the money into JMB (with the £50m injected into the company) to the Bank for a nominal consideration. It therefore paid the money to JMB in order to achieve that transfer. This is the analysis which was accepted both by Vinelott J. and by the Court of Appeal.

I must confess that at first I too found this analysis attractive. But on reflection I have come to the conclusion that it is too narrowly based, and ignores the reality of the situation. For the reality was that, even though the Bank did not (and no doubt could not) promise JM PLC that it would rescue JMB, nevertheless it was plainly planning to do so, not in JM PLC's interest but in the public interest, and it exacted the £50m cash injection by JM PLC into JMB as JM PLC's contribution to that rescue. That explains why the sum was not payable to the Bank, but was stipulated to be a cash injection into JMB before the shares in JMB were transferred to the Bank.

A JM PLC knew that it could safely proceed in this way, without any promise by the Bank to rescue JMB, because matters had gone so far that the Bank was bound to mount that rescue as soon as JMB's doors were open for business the following morning. Strictly speaking, the money was not paid *for* the rescue; but it was nevertheless a contribution *towards* the rescue which the bank was inevitably going to mount in the public interest. JM PLC was of
B course prepared to make the contribution to the rescue because it was in its interest to do so, to save its own platinum trade from collapse. But in these circumstances the payment cannot be described as money paid *for* the divestiture of the shares; it was rather a contribution to the rescue of JMB planned by the Bank, which was a prerequisite of the transfer of the shares in JMB to the Bank for a nominal consideration. As such it was, in my opinion,
C a revenue payment.

It is important to observe that the payment does not become a revenue payment simply because JM PLC paid the money with the *purpose* of preserving its platinum trade from collapse. That was the approach of the General Commissioners, which I do not feel able to accept. The question is
D rather whether, on a true analysis of the transaction, the payment is to be *characterised* as a payment of a capital nature. That characterisation does not depend upon the motive or purpose of the taxpayer. Here it depends upon the question whether the sum was paid for the disposal of a capital asset. I have come to the conclusion that, on a true analysis, the sum was not paid for the disposal of the shares. It was paid by JM PLC as a contribution
E towards the rescue of JMB which JM PLC knew the Bank was going to mount immediately in the public interest. As such, it is in my opinion to be properly characterised as a revenue payment.

For these reasons, I would allow the appeal.

F

Lord Jauncey of Tullichettle:—My Lords, the authorities demonstrate how narrow can be the question whether a substantial payment for the purposes of preserving the trading position of a taxpayer company is of a revenue or capital nature for the purposes of computing its trading profit. On the one hand are cases such as *Morgan* v. *Tate & Lyle Ltd.*(1) 35 TC 367 and
G *Commissioners of Inland Revenue* v. *Carron Co.*(2) 45 TC 18 and on the other hand such cases as *Mallett* v. *Staveley Coal & Iron Co. Ltd.* (3) [1928] 2 KB 405 and *Tucker* v. *Granada Motorway Services Ltd.*(4) [1979] 1 WLR 683.

In *Morgan* v. *Tate & Lyle* it was held both in the Court of Appeal and in your Lordships' House that it had been open to the General
H Commissioners as a matter of law to find, as they did that expenditure incurred in carrying out a propaganda campaign against nationalising the sugar refining industry was wholly and conclusively laid out for the purposes of the taxpayer's trade and was accordingly an admissible deduction for income tax purposes. The expenditure was, as Hodson L.J. said at page 406(5):

I

> "... a proper debit item to be charged against the incomings of the trade when computing the balance of the profits of it, and is none the less a proper revenue charge because it is laid out for the purpose of preserving the assets of the Company."

(1) [1955] AC 21. (2) 1968 SLT 305. (3) 13 TC 772.
(4) 53 TC 92. (5) [1955] AC 21, at page 47.

In *Commissioners of Inland Revenue* v. *Carron Co.*, a company incorporated by charter incurred substantial expenditure in obtaining a supplementary charter which removed certain restrictions in the original charter which had become archaic and unsuited to the successful operation of a company in modern conditions. The greater part of the expenditure was incurred in buying off two dissenting shareholders who sought to prevent the alteration of the original charter. In rejecting the Revenue's argument that the expenditure was of a capital nature because it produced an enduring advantage to the company, Lord Reid at page 68 said([1]):

> "Of course they obtained an advantage: companies do not spend money either on capital or income account unless they expect to obtain an advantage. And money spent on income account, for example on durable repairs, may often yield on enduring advantage. In a case of this kind what matters is the nature of the advantage for which the money was spent. This money was spent to remove antiquated restrictions which were preventing profits from being earned. It created no new asset."

In *Mallet* v. *Staveley Coal & Iron Co. Ltd.* the Court of Appeal held that payments made by a lessee company for the acceptance of a surrender of one mining lease and its release from certain onerous obligations under a second mining lease were capital payments. At page 420 Sargant L.J., referring to the payment made in relation to the second mining lease said([2]):

> "It is a payment made for the purpose of modifying the conditions of an existing asset so as to make the resultant term more advantageous or less disadvantageous for the enduring benefit of the trade. In that case it seems to me that the words of the Lord Chancellor, in themselves applicable to the acquisition of a positive asset or possible advantage, are equally applicable to the case where the payment is made for the purpose of getting rid of a permanent disadvantage or onerous liability arising with regard to the lease, which was a permanent asset of the business."

The reference to the words of the Lord Chancellor was to the observations of Viscount Cave L.C. in *Atherton* v. *British Insulated & Helsby Cables Ltd.* [1926] AC 205 at page 213.

In *Tucker* v. *Granada Motorway Services Ltd.* the taxpayer paid a sum to procure a reduction in rent for the remaining 40 years of a lease. Lord Wilberforce at [1979] 1 WLR 686C, after pointing out that it was common in cases which raised the question whether a payment was to be treated as one of revenue or capital for indicia to point different ways, said([3]):

> "I think that the key to the present case is to be found in those cases which have sought to identify an asset. In them it seems reasonably logical to start with the assumption that money spent on the acquisition of the asset should be regarded as capital expenditure. Extensions from this are, first, to regard money spent on getting rid of a disadvantageous asset as capital expenditure and, secondly, to regard money spent on improving the asset, or making it more advantageous, as capital expenditure. In the latter type of case it will have to be considered

([1]) 1968 SLT 305, at page 307. ([2]) 13 TC 772, at page 786.
([3]) 53 TC 92, at page 107 B/C.

A whether the expenditure has the result stated or whether it should be regarded as expenditure on maintenance or upkeep, and some cases may pose difficult problems."

The question in this appeal is therefore whether the £50m was paid to dispose of the shares in JMB or whether it was paid to enable the taxpayer B company to continue to trade by removing the danger of JMB's insolvency. My Lords, I must confess that I was attracted by the argument for the Crown that the payment was made to enable the taxpayer to dispose of the shares. However, the issue is narrow and I do not feel inclined to dissent from what I understand to be the view of the majority of your Lordships. I therefore agree that the appeal should be allowed and the decision of the C General Commissioners restored.

Appeal allowed, with costs.

[Solicitors:—Messrs. Taylor Joynson Garrett; Solicitor of Inland Revenue.]

D