STAMP DUTY RESERVE TAX - amalgamation of two unit trust schemes - whether an agreement to transfer chargeable securities - appeal allowed - FA 1986 s 87(1)

THE SPECIAL COMMISSIONERS

SAVE & PROSPER SECURITIES LIMITED

Appellant

- and -

THE COMMISSIONERS OF INLAND REVENUE

Respondents

SPECIAL COMMISSIONER: DR A N BRICE

Sitting in London on 22 and 23 June 2000

Mr Michael Quinlan of Messrs PricewaterhouseCoopers, Chartered Accountants, for the Appellant

Mr Michael Furness QC, instructed by the Solicitor of Inland Revenue, for the Respondents

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DECISION

The appeal

1. Save & Prosper Securities Limited (the Appellant) appeals against a notice of determination dated 9 July 1998 given under the provisions of Regulation 6 of the Stamp Duty Reserve Tax Regulations 1986 SI 1986 No. 1711 (the stamp duty regulations).

2 The determination was that the amalgamation of two unit trust schemes, known as Save & Prosper Income Units and Save & Prosper UK Equity Income Fund, which took place on Friday 13 December 1996, involved an agreement between the unit holders of Save & Prosper Income Units and the Appellant to transfer chargeable securities for consideration in money or money's worth and that a charge to stamp duty reserve tax in the sum of £327,899.81 arose under section 87 of the Finance Act 1986 in relation to the said agreement.

3. I was informed that the Appellant was involved in other schemes of amalgamation where the amount of stamp duty reserve tax in issue was in aggregate about £2M. The Appellant has agreed with the Inland Revenue that the decision in this appeal will apply to the other schemes of amalgamation.

The legislation

4. Section 87 of the Finance Act 1986 contains the principal charge to stamp duty reserve tax and section 87(1) provides:

"(1) This section applies where a person (A) agrees with another person (B) to transfer chargeable securities (whether or not to B) for consideration in money or money's worth."

5. Section 99 is the interpretation section and the relevant parts of section 99(3) provide:

"(3) Subject to the following provisions of this section, "chargeable securities" means-

(a) stocks, shares or loan capital,

(b) interests in, or dividends or other rights arising out of, stocks, shares or loan capital,

(c) rights to allotments of or to subscribe for, or options to acquire stocks, shares or loan capital, and

(d) units under a unit trust scheme.

The issue

6. Save & Prosper Income Units (the discontinuing scheme) and Save & Prosper UK Equity Income Fund (the continuing scheme) were both authorised unit trust schemes. Both schemes had the same trustee and the same manager (who was the Appellant). On 13 December 1996 both schemes amalgamated. On amalgamation the trustee held the property of the discontinuing scheme as an accretion to the property of the continuing scheme; the units in the discontinuing scheme were cancelled; and the appropriate number of units in the continuing scheme were created and issued to the unit-holders in the discontinuing scheme.

7. The Inland Revenue argued that there was an agreement between the unit holders of the discontinuing scheme and the Appellant to transfer chargeable securities. The Appellant argued that the amalgamation had been effected under the terms of the trust deed of the discontinuing scheme and under the Financial Services (Regulated Schemes) Regulations 1991 (the 1991 regulations) and that there had been no agreement and no transfer within the meaning of section 87(1).

8. Accordingly, the issue for determination in the appeal was whether the amalgamation of the two unit trusts was an agreement to transfer chargeable securities within the meaning of section 87(1).

The evidence

9. A white bundle of documents was produced. There was no dispute about the facts.

The facts

10. From the evidence before me I find the following facts.

11. Both the discontinuing scheme and the continuing scheme were authorised unit trusts under the provisions of the Financial Services Act 1986 (the 1986 Act) and the 1991 regulations.

The Financial Services Act 1986

12. Part I of the Financial Services Act 1986 (the 1986 Act) contains provisions relating to the regulation of investment business. Chapter VIII of Part I (sections 75 to 95) contains provisions relating to collective investment schemes. Section 75 is the interpretation section and section 75(8) defines a unit trust scheme as a collective investment scheme under which the property in question is held on trust for the participants. A collective investment scheme is defined in section 75(1) as arrangements enabling the persons taking part to participate in, or receive profits or income arising from, the holding, management or disposal of the property. Section 75(2) provides that the participants must not have day-to-day control over the management of the property and section 75(3) provides that the property must be managed as a whole by or on behalf of the operator of the scheme.

13. Authorised unit trust schemes are regulated by sections 77 to 85. Section 78 provides that the Secretary of State may make an order declaring a unit trust scheme to be an authorised unit trust scheme for the purposes of the Act if it complies with the provisions of section 81. Later the functions of the Secretary of State under section 78 were transferred to the Securities and Investments Board. Section 78(2) provides that the manager and trustee must be persons who are independent of each other.

14. Section 81 provides that the Secretary of State may make regulations about the constitution and management of authorised unit trust schemes and the powers and duties of the manager and the trustee of any such scheme. The regulations may, in particular, make provision for the amendment of the scheme. Section 81(3) provides that the regulations shall be binding on the manager, trustee and participants, independently of the contents of the trust deed and, in the case of the participants, shall have effect as if contained in it. Later the functions of the Secretary of State under section 81 were transferred to the Securities and Investments Board.

15. Section 82 contains provisions about the alteration of schemes and provides that written notice of such alteration has to be given. Such notice now has to be given to the Securities and Investments Board.

The 1991 regulations

16. The regulations made under the provisions of section 81 are now the 1991 regulations which were made by the Securities and Investments Board.

17. Part 2 of the regulations contains provisions dealing with the constitution of an authorised unit trust scheme. It provides that such a scheme must be constituted by a deed between the manager and the trustee and must set out, among other things, what types of unit may be issued. Regulation 2.01a provides that the deed must conform with Schedule 1 to the regulations. Paragraph 6 of Schedule 1 provides that the trust deed must contain a declaration that the property of the scheme is held by the trustee on trust for the holders of the units pari passu according to the number of units held by each holder and that the

sums standing to the credit of the distribution account are held by the trustee on trust to distribute or apply them in accordance with the regulations. Regulation 2.05 provides that the interests of the holders in an authorised unit trust scheme shall consist of units, each unit representing one undivided share in the property of the scheme.

18. Part 4 of the regulations deals with pricing and dealing. Section B of Part 4 contains provisions relating to the creation and cancellation of units. These provisions make it clear that the trustee creates new units (the manager paying the trustee for the creation price of the units) and the manager issues the units to the holders. Regulation 4.08 provides that a trustee must create units on receipt of instructions from the manager and must not create units otherwise. The trustee may create units in exchange for assets other than money but the obligation to comply with an instruction to create units in such a case arises only if the trustee is satisfied that the acquisition of the assets in exchange for the number of units to be created is not likely to result in any material prejudice to the interests of the participants and, where there is an amalgamation, that the resolution concerned has been duly carried or else is not required. Regulation 4.10 provides that units are cancelled by the trustee on instructions from the manager.

19. Part 7 of the regulations contains provisions about the powers and duties of the manager and trustee. Regulation 7.02 provides that it is the duty of the manager to manage the scheme and to make decisions as to the constituents of the property of the scheme. Regulation 7.09 provides that it is the duty of the trustee to ensure that the scheme is managed by the manager in accordance with the regulations. Regulation 7.10.2 provides that the trustee must take into custody all the capital property of the scheme and hold it in trust for the holders in accordance with the regulations and the trust deed. Regulation 7.12 provides that the duties mentioned in Part 7 are in addition to, and not in derogation from, the duties which are otherwise imposed by law.

20. Part 11 of the regulations deals with meetings and modifications. Regulation 11.03 contains provisions for the modification of a trust deed. So far as relevant, regulation 11.05 provides:

"11.05 amalgamation

1. An amalgamation is a scheme of arrangement ... whereby the whole of the property of a collective investment scheme ... becomes the property ... of an authorised or recognised scheme and whereby unit holders ... in the collective investment scheme ... receive units in the authorised or recognised scheme. ...

3. Where it is proposed that two or more authorised unit trust schemes should be amalgamated, the proposals will require-

a. The approval of the holders of the scheme or any scheme which would cease to exist if carried through (the discontinuing scheme or schemes), and

b. Unless paragraph 5 applies, the approval of the holders of the scheme or a scheme which would not cease to exist (the continuing scheme). ...

5. Paragraph 3.b ... does not apply if the trustee of the continuing or absorbing scheme is reasonably satisfied that the inclusion of the property concerned-

a. is not likely to result in any material prejudice to the interests of the participants in the scheme; and

b is consistent and is regarded by the manager as consistent with the objectives of the scheme; and

c. could be effected without any breach, inadvertent or not, of Part 5 above." [Part 5 concerns investment and borrowing powers and is not in issue in this appeal,]

21. Regulation 11.07.3 provides that a manager is not entitled to vote at, or be counted in the quorum of, a meeting of the unit holders. Regulation 11.08 provides that a meeting of unit holders duly convened shall be competent by extraordinary resolution to require, authorise or approve any act in respect of which a resolution is required by the regulations. Regulation 11.10 provides that a quorum for a meeting is the holders of one-tenth in value of all the units in issue. Regulation 11.17 provides that an extraordinary resolution is one carried by a majority consisting of 75% of the total number of votes cast.

22 Part 13 of the 1991 Regulations contains provisions dealing with suspension and termination. Regulation 13.03 provides that, on the effective date of a duly approved scheme of amalgamation, the trustee shall proceed to wind up the scheme in accordance with the scheme of amalgamation.

The trust deeds of the two schemes

23 The discontinuing scheme was established on 6 September 1960. Thereafter it was modified by twenty supplemental trust deeds on dates between 31 January 1961 and 24 February 1988. On 13 September 1988 a Supplemental Trust Deed (the discontinuing scheme trust deed) was made between the Appellant as manager of the discontinuing scheme and the Bank of Scotland as its trustee. The trust deed was stated to be in substitution for all previous trust deeds. It referred to the 1986 Act and to the regulations made under section 81 of that Act (the predecessor of the 1991 regulations). Article 1(A) defined the deposited property as the capital property and the income property of the scheme and defined a unit as one undivided share in the deposited property. Article 4(i) recorded that the deposited property was held by the trustee on trust for the holders pari passu according to the number of units held by each holder. Article 5 stated that the terms and conditions of the trust deed were binding on each holder as if he had been a party to the deed and the trustee and manager were authorised to do all things required of them by the deed. Article 9 stated that the scheme was subject to the provisions of the financial services regulations as they applied to authorised securities schemes. Article 10 stated that an objective of the scheme was to invest anywhere in the world in fixed-interest securities and high yielding equities in any economic sector. Article 11(A) provided that certificates for units should be signed by a person authorised by the trustee. Article 13 provided for the remuneration of the trustee to be agreed with the manager and based upon a percentage of the value of the deposited property. Article 14 provided that the manager was entitled to receive out of the deposited property a periodic charge not exceeding 1.75 per cent. Article 19 contained provisions for amendment and provided that modifications had to be effected by deed entered into by the manager and trustee and approved by an extraordinary resolution passed at a meeting of holders called for that purpose. Article 20 provided that the deed was made under, and governed by, the law of England and Wales.

24. The continuing scheme was established on 23 June 1964. Thereafter it was modified by eleven supplemental trust deeds on dates between 7 June 1967 and 13 December 1988. On 12 July 1996 a Supplemental Trust Deed (the continuing scheme trust deed) was made between the Appellant as manager and the Bank of Scotland as trustee. That deed was stated to be in substitution for all previous deeds. The provisions of the continuing scheme trust deed were similar to (but not the same as) those of the discontinuing scheme trust deed. In particular, Article 12 provided that the investment objective of the scheme was to provide a high income with prospects of capital growth through investment primarily in the securities of companies quoted or trading in the UK. Also, the continuing scheme trust deed contained no provision equivalent to Article 19 of the discontinuing scheme trust deed which provided for modifications by deed.

25. Both the discontinuing scheme and the continuing scheme trust deeds conformed with the provision of the regulations made under the 1986 Act.

The amalgamation

26. Under the 1991 regulations the amalgamation required the approval of the holders of the discontinuing scheme being at least one-tenth in value of all the units in issue (regulation 11.10.1) and of 75% of the votes cast for or against the amalgamation (regulation 11.17.b). As the trustee of the continuing scheme was satisfied about the matters referred to in paragraph 5 of regulation 11.05 the amalgamation did not need the approval of the unit holders of the continuing scheme.

27 On 16 August 1996 the Securities and Investments Board, having received notice of the proposed alterations under section 82 of the 1986 Act, confirmed that the amalgamation of the discontinuing scheme into the continuing scheme would not affect the authorisation of the continuing scheme.

28. On 30 September 1996 the Appellant wrote to the trustee in the following way:

"We, Save & Prosper Securities Ltd, believe that the proposals contained in the Notice of Meeting to Unitholders of 4 October 1996 and involving the sanctioning of the Scheme of Amalgamation by unitholders are fair and reasonable to the said unitholders and in our capacity as Manager of the Save & Prosper Income Units and the Save & Prosper UK Equity Income Fund agree to be bound by the terms of the Scheme."

29. On 4 October 1996 the trustee wrote to the Appellant to say that it considered that the proposals in the letter to unit holders of 4 October 1996 was in a form suitable for submission to the unit holders for consideration.

30. On 4 October 1996 a notice and circular about the scheme of amalgamation was sent by the Appellant to all the unit holders of the discontinuing scheme. It stated that, under the amalgamation, the net assets of the discontinuing scheme would be absorbed by the continuing scheme and that the unit holders of the discontinuing scheme would receive units in the continuing scheme. The reason for the amalgamation was stated to be that in practice the portfolio of the discontinuing scheme had increasingly come to resemble that of the continuing scheme. For that reason it was proposed to amalgamate both schemes, the enlarged trust retaining the name of the continuing scheme.

31. The letter of 4 October 1996 contained a comparison of the two schemes. It recorded that the objective and policy of the discontinuing scheme was:

"To achieve a high and stable income through investments anywhere in the world in fixed-interest securities and higher-yielding equities in any economic sector."

32 The letter of 4 October 1996 also recorded that the objectives and policy of the continuing scheme were:

"To provide a high income with prospects of capital growth through investment primarily in the securities of companies quoted or trading in the UK."

33. Finally, the letter of 4 October 1996 recorded that the expenses of the amalgamation would be met by the Appellant as manager and any duty or tax payable would be met out of the continuing scheme.

34. A copy of the proposed scheme of amalgamation was sent to each unit holder of the discontinuing scheme with the letter of 4 October 1996. Article 2.ii provided that, as from the effective date, the trustee would hold the deposited property of the discontinuing scheme as an accretion to the deposited property of the continuing scheme subject to, and upon the trusts and provisions of, the continuing scheme trust deed. Article 3 provided that, immediately following the effective date, each unit in the discontinuing scheme would be cancelled. Article 4.i provided that on the effective date the trustee would create the appropriate number of income units in the continuing scheme which would be issued by the Appellant as manager to the persons registered as unit holders in the discontinuing scheme pro rata to their respective interests in the discontinuing scheme. Article 7 provided that the Appellant would bear, and indemnify the trustee against, all the costs of the scheme of amalgamation except taxes and duties but including the cost of issuing the units in the continuing scheme.

35. Sent with the letter of 4 October 1996, as a separate document, was a list of definitions. "The Effective Date" was defined as:

"9 am on 13 December 1996 or, if implementation of the scheme at that time is not reasonably practicable, such later time as may be agreed between the Manager and the Trustee (not in any event being later than 31 January 1997)."

36. Paragraph 10.2 of the scheme of amalgamation read:

"10.2 Nothing in the Scheme shall be taken as constituting an agreement as between any of the parties involved in the implementation of the Scheme. In particular, and without limiting the generality of the foregoing, nothing in the Scheme shall be taken as constituting an agreement between the Trustee in its capacity as trustee of Income Units and in its capacity as trustee of UK Equity Income Fund or the Manager in its capacity as manager of Income Units and its capacity as manager of UK Equity Income Fund."

37. At a meeting of the unit holders of the discontinuing scheme, which was held on 7 November 1996, the scheme of amalgamation was approved and adopted. The meeting resolved to authorise the trustee and the manager to implement and give effect to the scheme of amalgamation on the basis that, when it had been carried into effect, the discontinuing trust would be terminated. 96.4485% of the votes were cast for the resolution and 3.515% were cast against. 34% of the unit holders voted and 32% of the unit holders voted in favour of the scheme.

38. As at 23 November 1996 the discontinuing scheme had 15,325 unit holders and the continuing scheme had 12,825.

39. As at 13 December 1996 the assets in the discontinuing scheme consisted of cash and gilts together with shares in 135 companies valued at £65,579,962.78. The assets in the continuing scheme consisted of cash and gilts together with shares valued at £117,893,435.00. The discontinuing scheme held shares in 108 of the companies in which the continuing scheme also held shares.

40. On 13 December 1996 the Appellant wrote to the trustee to say that, in accordance with the scheme of amalgamation, it was that day cancelling 49,892,229 units in the discontinuing scheme and creating units in the continuing scheme to the estimated value of £66,866,614.73 which it vested in the trustee as trustee of the fund.

The stamp duty reserve tax position

41 On 19 December 1996 the Appellant, as manager of both schemes, gave notice under regulation 4 of the stamp duty regulations to the Board of Inland Revenue. The notice was given without prejudice to the Appellant's position that the amalgamation did not give rise to a charge to stamp duty reserve tax. Correspondence between the Inland Revenue and the Appellant's advisers followed.

42. On 9 July 1998 the Board gave notice of a determination that the amalgamation involved an agreement between (1) the unit-holders of the discontinuing scheme and (2) the Appellant to transfer chargeable securities for consideration in money or money's worth and that a charge to stamp duty reserve tax in the sum of £327,899.81 arose under section 87 of the Finance Act 1986.

43. It is against that notice of determination that the Appellant appeals.

Reasons for decision

44. The issue for determination in the appeal is whether the amalgamation of the two unit trusts is an agreement to transfer chargeable securities within the meaning of section 87(1) of the Finance Act 1986.

45. More specifically, at the hearing Mr Furness QC for the Inland Revenue argued that section 87(1) applied to the facts of this appeal in the following way. The person (A) was the unit holders of the discontinuing scheme; the person (B) was the Appellant in its capacity as manager of the continuing scheme; the chargeable securities were the beneficial interests of the unit holders of the discontinuing scheme in the assets of their scheme; the recipients of the transfer were the unit holders of the continuing scheme immediately after the amalgamation; and the consideration was the units in the continuing scheme allotted to the unit holders of the discontinuing scheme.

46. The arguments of the parties raised five questions which it is convenient to consider separately before considering the issue for determination. The questions are:

(1) What are the relevant elements of the amalgamation?

(2) Were there chargeable securities?

(3) Was there an agreement?

(4) If there were an agreement, was it nullified by the disclaimer in paragraph 10.2 of the scheme of amalgamation ? and

(5) Was there a transfer?

(1) - What are the relevant elements of the amalgamation?

47. For the Appellant Mr Quinlan argued that at law and in equity a unit holder was the owner of an undivided share in the investments and cash which comprised the property of the unit trust. He relied on regulation 2.05 to support the view that a unit-holder had a free-standing legal right under the regulations, irrespective of the trust deed. He cited M & G Securities Limited v Inland Revenue Commissioners [1999] STC 315 at 322b. He argued that the unit holders in the discontinuing scheme had shares and retained those shares after the amalgamation. He also argued that the amalgamation was an alteration of both schemes because under Regulation 11.05.3b the approval of the unit holders of the continuing scheme was required unless the trustee of the continuing scheme was satisfied with the matters mentioned in regulation 11.05.5.

48. In considering the relevant elements of the amalgamation it is convenient to start with the position under the trust deed before referring to the effect of the regulations and the provisions of the scheme of amalgamation.

49. The position under a unit trust deed was described by Park J in M & G Securities at p 319 in the following way:

"Whereas an investor in an investment company acquires shares, an investor in a unit trust acquires units. The trustees hold a portfolio of underlying investments, typically shares in companies, and no doubt also hold at any time a sum of cash which is not currently invested. A unit, as held by an investor, is an equitable interest under the trust and is an undivided share in whatever the fund of the trust consists from time to time. ...

Investors in unit trusts can, of course, "buy" and "sell" units from time to time (I have placed those terms in quotation marks because the legal mechanics may differ slightly from simple purchases and sales), just as investors in investment trust companies can buy and sell their shares from time to time. Further, under virtually all modern trust deeds the trustee (acting by the manager) can switch investments of its underlying portfolio. ...

I need to say something about the roles of the trustee and the manager under a unit trust scheme. The trustee is typically a major financial institution ... The trustee holds the investment portfolio, performs the custodian role, and generally by its presence engenders a feeling of confidence and security for the investors.

The manager is different, and has several functions. It is likely to have been the original promoter of the scheme, and to have subscribed cash or investments for the initial entitlement to units. It would then have sold the units to investors. It manages the portfolio. A major function of the manager is to make a market in units, and the investors who acquire and dispose of units deal with the manager, not the trustee. ..."

50. Later, at page 322b Park J said:

"In law and in equity a unit-holder is the owner of an undivided share in the investments and cash which from time to time comprise the fund of the unit trust."

51. Thus, in the present appeal, before the amalgamation, under both the discontinuing scheme trust deed and the continuing scheme trust deed, the deposited property was held by the trustee on trust for the unit-holders. Accordingly, the trustee held the legal title to the cash, gilts and shares which comprised the deposited property of both schemes. Each unit was an undivided share in the deposited property. Thus the unit holders had an equitable interest in the deposited property, as they were beneficially entitled to undivided shares in the deposited property. And each unit holder was legally entitled to his units.

52. In the light of that analysis it is now possible to consider the changes effected by the amalgamation.

52. Article 19 of the discontinuing scheme trust deed provided that the trust deed could be modified by deed approved by an extraordinary resolution passed at a meeting of unit holders However, the amalgamation in issue in the appeal was not effected by deed but under the 1991 regulations. Regulation 11.05.1 of the 1991 regulations provides that an amalgamation is a scheme of arrangement whereby the whole of the property of one scheme becomes the property of another. Regulation 11.05.3 provides that normally the amalgamation requires the consent of the unit holders of both schemes. Regulation 11.08 provides that a meeting of the unit holders can approve an act in respect of which a resolution is required. Regulation 13 provides that on the effective date the trustee must wind up the scheme. The scheme of amalgamation provided that, as from the effective date, the trustee would hold the property of the discontinuing scheme as an accretion to the trusts of the continuing scheme; the trustee would cancel the units in the discontinuing scheme and create units in the enlarged trust which retained the name of the continuing scheme; and the new units would be issued by the manager to the unit-holders of the discontinuing scheme.

53. Thus, after the amalgamation there was no change in the legal title to the deposited property of both schemes; that remained with the trustee. There was, therefore, no change in the ownership of the chargeable securities comprised in the deposited property. The units in the discontinuing scheme were cancelled and new units were created in the enlarged scheme. There was, therefore, no transfer of the units in the discontinuing scheme. However, the equitable interests in the deposited property changed. Before the amalgamation each of the unit holders in the discontinuing and the continuing schemes had an equitable interest in the deposited property of his scheme; after the amalgamation each unit holder had an equitable interest in the deposited property of the enlarged trust which retained the name of the continuing scheme. It is this change in the equitable interests which falls to be characterised for the purpose of this appeal. It is also worth noting that the change was effected in the equitable interests of the unit holders of both schemes, and not just of the discontinuing scheme.

2. Were there chargeable securities?

54 The above characterisation enables an answer to be given to the second question. Section 99(3) of the Finance Act 1986 gives four meanings to "chargeable securities" for the purposes of section 87(1). The meaning in section 99(3)(c) is not relevant in this appeal. The meaning in section 99(3)(a) is that of

stocks, shares or loan capital. As, in this appeal, there was no change in the legal title to the underlying investments of both the discontinuing scheme and the continuing scheme there was no transfer of stocks, shares or loan capital. The meaning in section 99(3)(d) is units under a unit trust scheme. As in this appeal the units of the discontinuing scheme were cancelled there was no transfer of units under a unit trust scheme. The meaning in section 99(3)(b) is interests in, or other rights arising out of, stocks, shares or loan capital. Such interests are chargeable securities and it is only that definition of chargeable securities which can be relevant in this appeal.

55. Accordingly, section 87(1) could only apply in this appeal if the unit holders of the discontinuing scheme agreed to transfer their equitable interests in the deposited property of the discontinuing scheme. This was the analysis adopted by Mr Furness QC.

3. Was there an agreement?

56. The arguments in connection with the question as to whether there was an agreement centred around three areas, namely the meaning of the word "agrees" in section 87(1); the relevance of the operation of the trust deeds and the 1991 regulations; and the relevance of the letter of 30 September 1996 from the Appellant to the trustee.

57. Dealing first with the meaning of the word "agrees", Mr Quinlan for the Appellant argued that stamp duty reserve tax was aimed primarily at share trades which were not completed by an instrument of transfer chargeable to stamp duty. It was not intended to interfere with the manner in which stamp duty operated. The charge on agreements was both broader and narrower than the stamp duty charge on conveyances on sale under section 54 of the Stamp Act 1891. Stamp duty applied to all property and stamp duty reserve tax only to chargeable securities. On the other hand stamp duty applied to an instrument whereas stamp duty reserve tax applied to an agreement which could include an oral agreement. He went on to argue that, within the context of section 87(1), the word "agrees" meant something in the nature of a legal contract. The fact that the word agreement rather than contract was used was not relevant and he cited Wm Cory & Son Ltd v Inland Revenue Commissioners [1965] AC 1088 at 1106F to 1107C as authority for the view that the words agreement and contract meant the same thing.

58. For the Respondents Mr Furness QC argued that the word "agreement" in section 87(1) was wide enough to cover consensual arrangements which were not strictly contracts. He did not agree that the word agreement was the same as contract. "Agreement" was wider than "contract". If section 87(1) had been intended to apply only to contracts then it would have been easy for the section to have used the word contract. If A agreed with B to sell his shares to B if B paid A £1M in seven days that was a contract to transfer shares. If A declared a trust for B contingently upon B paying £1M to A in seven days that was a trust but it could also be an agreement as it was a consensual arrangement; when the offer was accepted A had agreed to transfer his equitable interest to B. A contract was not required by section 87(1) but, even if it were required, a contract existed. The authorities on stamp duty were not relevant. Section 114(2) of the Finance Act 1986 did not provide that the provisions of the stamp duty reserve tax had to be construed with the stamp duty legislation. It followed that references to section 54 of the Stamp Act 1891 were not helpful.

59. Section 114(4) of the Finance Act 1986 provides that Part III of that Act should be construed as one with the Stamp Act 1891. Part III contains provisions relating to stamp duty whereas the provisions relating to stamp duty reserve tax are in Part IV. I agree, therefore, with Mr Furness that the authorities which consider stamp duty are not relevant when considering stamp duty reserve tax. In this appeal it is necessary to decide whether there has been an agreement within the meaning of section 87(1); in my view it is not necessary to decide whether that word has the same meaning as a contract. What is necessary is for a person (A) to agree with a person (B) to transfer chargeable securities. That, and that only, is the consensual arrangement which comes within the section.

60. The second area of dispute concerned the relevance of the operation of the trust deeds and the legislation. Mr Quinlan argued that the rights created on the commingling of the assets of the two schemes were a function of the trust deeds and the regulations and a contract was not needed to implement the amalgamation. If either the manager or the trustee had failed to implement the scheme of amalgamation the remedies of the unit holders would have been either for breach of trust or for breach of statutory duty. The scheme of amalgamation was not in the form of a contract and regulation 11.05 spoke of proposals and approval and not of offer and acceptance. Further, the resolution approving the scheme of amalgamation could have been passed with a small majority and that was not consistent with a contract; the lower the level of consensus that was required the less likely it was that there was a contract and here there was not the mutual assent required for a contract. A contract could not be implied and section 82 of the 1986 Act was not consistent with a contract. There was no contract because once approved the scheme of amalgamation took effect; nothing further was required and none of the participants could resile from it. They were all bound under clause 5 of the trust deeds and under regulation 11.05. He cited W and Others v Essex County Council and Another CA [1998] 3 All ER 111 at 128f as authority for the view that, if there were a statutory obligation to enter into a form of agreement the terms of which were laid down, there was no contract.

61. Mr Furness QC argued that there was nothing in the regulations which said that the scheme was binding and effective from the date of the approval. It was necessary to have the agreement of the Appellant. The beneficiaries could not direct the trustee to do something at his own expense. The Appellant was obliged to issue the new units at its own expense. The agreement of the Appellant was required to implement the scheme but there was nothing in the regulations which bound the Appellant. The commitment of the Appellant to pay the costs and to issue the new units was contractual and was not in the regulations. That is why the Appellant had written to the trustee to say it would implement the arrangements. It was necessary to have a contractual bond between the unit holders of the discontinuing scheme and the Appellant as manager of both schemes for the scheme of amalgamation to proceed. Without that contractual obligation there was no fiduciary obligation and no regulatory obligation. There was nothing in the regulations which said that the trustee and the Appellant had to comply with the scheme of amalgamation and the statutory duties only arose when the Appellant had agreed to carry out the scheme. He distinguished Essex County Council because in this appeal the actions of the Appellant were not governed by the regulations.

62. In considering the arguments of the parties I first consider the legislation. Section 81 of the 1986 Act provides that the regulations may regulate the powers and duties of the manager and the trustee and may make provision for the amendment of a scheme. Section 81(3) provides that the regulations are binding

on the manager, the trustee and the unit holders independently of the contents of the trust deed. Section 82 provides that written notice of alteration of a scheme has to be given (and in this appeal it was given and acknowledged by the letter of 16 August 1996 from the Securities and Investments Board).

63. Pausing there, it is clear that the 1986 Act governs the amendment (including the amalgamation) of authorised unit trust schemes. Also, the 1991 regulations are, by virtue of section 81(3), binding on the manager, the trustee and the unit holders independently of the contents of the trust deed.

64. The 1991 regulations make provision for the amendment or amalgamation of schemes. They provide that it is the trustee who cancels and creates units (albeit on the instructions of the manager) but that where units are to be created in exchange for assets other than money (as happened in this appeal) there is no obligation to create units unless the trustee is satisfied that there will be no prejudice to the participants and that the requisite amalgamation resolution has been carried. Regulation 11.05 says that an amalgamation is a "scheme of arrangement" whereby the property of one scheme becomes the property of another. Normally the approval of the unit holders of both schemes is required (although, by virtue of regulation 11.01.5, the approval of the unit holders of the continuing scheme can be dispensed with under certain conditions). Such approval is given by voting at a meeting. Regulation 11.10 and 11.17 provide that a resolution passed by the stated majority can bind all the unit holders. Regulation 13 provides that on the effective date the trustee shall wind up the scheme in accordance with the regulations.

65. These provisions are not merely descriptive of an amalgamation but also impose duties and create powers; for example they give the requisite majority of unit holders of the discontinuing scheme power to bind all the unit holders and also provide that the unit holders of the continuing scheme are bound, sometimes without approval being given by vote.

66. Although Article 19 of the discontinuing scheme trust deed contains provisions for its amendment by deed there is no similar provision in the continuing scheme trust deed. However, the amalgamation was not carried out by deed but under the 1991 regulations.

67. The scheme of amalgamation stated that the net assets of the discontinuing scheme would be absorbed by the continuing scheme and that the unit holders of the discontinuing scheme would receive units in the continuing scheme. It also provided that, as from the effective date, the trustee would hold the deposited property of the discontinuing scheme as an accretion to the deposited property of the continuing scheme; that the units in the discontinuing scheme would be cancelled; and that the trustee would create the units in the continuing scheme for issue by the manager. Thus the scheme of amalgamation described to the unit holders of the discontinuing scheme what would happen on the effective date. The scheme of amalgamation was subject to, and took effect under, the 1991 regulations. It could not have departed in its terms from the 1991 regulations.

68. The resolution passed by the unit holders of the discontinuing scheme authorised both the trustee and the manager to implement and to give effect to the scheme of amalgamation. That resolution, in turn, derived its validity from the 1991 regulations.

69. Thus, the provisions of the 1986 Act and the 1991 regulations, when taken with the scheme of amalgamation and the resolution of the unit holders of the

discontinuing scheme, point to the conclusion that the amalgamation took effect by operation of law under the provisions of the 1986 Act and the 1991 regulations. Further, the same provisions also point to the conclusion that the parties to the amalgamation were the trustee, the manager and the unit-holders of both the continuing and the discontinuing schemes. The trustee had to hold the deposited property of the discontinuing scheme as an accretion to the deposited property of the continuing scheme; it had to cancel the units of the discontinuing scheme; and it had to create the units in the continuing scheme. Further, because the creation of the new units was in exchange for assets other than money, the trustee had to be satisfied that such creation was not likely to result in material prejudice to the interests of the unit holders of the continuing scheme; that the procedure satisfied the other requirements of regulation 11.05.5; and that the amalgamation resolution had been properly carried. The manager had to give instructions to the trustee to cancel the units in the discontinuing scheme; to request the trustee to create the units in the continuing scheme and, when they were created, issue them to the unit holders of the discontinuing scheme. The unit holders in the discontinuing scheme had to approve the scheme by passing the appropriate resolution by the stated majority. Although the unit holders of the continuing scheme did not have any direct part in the scheme of amalgamation they would have been involved if the trustee had not been satisfied of the matters mentioned in regulation 11.05.5; also it is relevant that their interests changed as, after the amalgamation, they had beneficial interests in the enlarged scheme.

70. These factors lead to the conclusion that the amalgamation is best characterised by the words in regulation 11.05, namely as a "scheme of arrangement" involving a multiplicity of parties with interlocking and inter-dependent rights and obligations. The essential ingredient in the scheme of amalgamation was the vote of the requisite number of unit holders in the discontinuing scheme That obtained its validity by means of the regulations. Accordingly, the amalgamation did not take effect as a contract or agreement; the stated percentage of unit holders who voted in favour of the resolution could only bind all the other unit holders because of the provisions of regulation 11 of the 1991 regulations. And the consent of the unit holders of the continuing scheme could only be dispensed with under the provisions of regulation 11.05.5. A simple contract or agreement would have required the consent of all the unit holders, including the unit holders of the continuing scheme. Accordingly, in my view the amalgamation cannot properly be characterised as an agreement between the unit holders of the discontinuing scheme and the Appellant as manager of the continuing scheme. Neither can I identify such an agreement as one element in the whole transaction. There is no evidence of such an agreement (apart from the possible exception of the letter of 30 September 1996 which I consider shortly).

71. Mr Furness QC argued that there was nothing in the regulations which said that the scheme was binding and effective from the date of the approval. However, such a provision is implicit in the scheme of amalgamation which was sent to each unit holder of the discontinuing scheme with the letter of 4 October 1996. That said the certain events would occur on the effective date which was defined as 13 December 1996 or a later date not after 31 January 1997. Further, the reason that the letter of 4 October 1996 was sent was to comply with the statutory requirement for a meeting to approve the scheme. Thus the letter was sent as part of the statutory obligations. In addition, regulation 13.03 provides that on the effective date of a duly approved scheme of amalgamation the trustee shall proceed to wind up the discontinuing scheme.

72. Mr Furness also argued that there was nothing in the regulations which bound the Appellant as manager. However, section 81(3) of the 1986 Act provides that the regulations are binding on the manager as well as on the trustee and the unit holders.

73. I accept that the amalgamation was most probably proposed by the Appellant as manager of both schemes because, as stated in the scheme of amalgamation, the portfolio of the discontinuing scheme had come to resemble the portfolio of the continuing scheme and no doubt it was more convenient for the Appellant to manage one scheme rather than two. That explains why the Appellant agreed to bear the costs of the amalgamation. However, those factors alone cannot support the conclusion that the scheme of amalgamation was an agreement between the unit holders of the discontinuing scheme and the Appellant as manager of the continuing scheme.

74. The third area of dispute centred around the effect of the letter of 30 September 1996 from the Appellant to the trustee.

75. Mr Quinlan argued that, as the letter was to the trustee, it could not evidence a contract between the unit holders of the discontinuing scheme and the Appellant. Further the letter was not indicative of a contract; it was sent in performance of the duty imposed by regulation 7.09 and under the trust deeds. It enabled the trustee to show that it had discharged its duties.

76. Mr Furness QC on the other hand argued that the letter of 30 September 1996 was needed to say that the Appellant would implement the new scheme. The Appellant was not obliged to go on with the scheme unless it agreed with it. It was unlikely that the letter was required if the Appellant had an obligation without it. He further argued that the letter was addressed to the trustee on behalf of the unit holders. Further, the letter of 4 October 1996 from the Appellant to the unit holders of the discontinuing scheme, read with the letter of 30 September 1996 from the Appellant to the trustee, amounted to an offer by the Appellant as manager of the continuing scheme to implement the scheme of amalgamation and to issue units in the continuing scheme in return for the approval by the unit holders of the discontinuing scheme of the scheme of amalgamation. The offer was accepted by the conduct of the unit holders of the discontinuing scheme in passing the amalgamation resolution. Under the terms of the regulations the requisite majority could bind all the unit holders and so the majority could declare that the investments in the discontinuing scheme were held on new trusts. By virtue of the resolution the majority agreed that on the effective date the entire beneficial interest in the investments of the discontinuing scheme should be held on the trusts of the continuing scheme. This created a legally enforceable right on the part of the unit holders of the continuing scheme to be treated as the beneficial owners of the assets of the discontinuing scheme subject to the allotment of units to the unit holders of the discontinuing scheme.

77. I have already concluded that the amalgamation is best characterised by the words in regulation 11.05, namely that it is a "scheme of arrangement" involving a multiplicity of parties with inter-dependent and inter-locking rights and obligations which took effect by operation of law on the vote of the requisite majority of the unit holders of the discontinuing scheme. The letter of 30 September 1996 has to be considered within that context. The letter was written by the Appellant in its capacity as manager of both schemes to the trustee. The trust deeds of both schemes were made between the Appellant and the trustee. It is therefore likely that the trustee required the agreement of the Appellant to be bound by the scheme of amalgamation, which was a statutory modification of

both schemes. Further, the trustee had obligations under the regulations. It had an obligation under regulation 4.08 to satisfy itself that, if it created units in the continuing scheme in exchange for assets other than money, that was not likely to result in material prejudice to the interests of the unit holders. It had an obligation under regulation 7.10.2 to hold the trust property in trust for the unit holders in accordance with the regulations and the trust deeds. That meant that it would need to be reassured that the Appellant would instruct it to cancel the units in the discontinuing scheme; would request it to create the new units in the continuing scheme; and would issue the new units to the unit holders in the discontinuing scheme. The trustee also had an obligation under regulation 11.05.5 to satisfy itself that the amalgamation was consistent with, and was regarded by the manager as consistent with, the objectives of the continuing scheme. For all these reasons the trustee would have wished for reassurance from the manager. It is also relevant that the letter of 30 September 1996 was written before the letter of 4 October 1996 was sent to the unit holders. That is consistent with the view that the letter of 30 September was to reassure the trustee that the manager would comply with its obligations under the scheme of arrangement.

79. Thus, although the letter of 30 September 1996 may evidence an agreement between the Appellant and the trustee, it does not evidence an agreement between the Appellant and the unit holders of the discontinuing scheme. In my view it was a part of the whole scheme of arrangement which comprised the scheme of amalgamation.

80. For the above reasons I conclude that the unit holders of the discontinuing scheme did not agree with the Appellant within the meaning of section 87(1). That conclusion means that I do not have to consider the other questions raised by the arguments of the parties. However, as arguments were put to me I briefly express my views.

(4) If there was an agreement was it nullified by the disclaimer in paragraph 10.2 of the scheme of amalgamation ?

81. For the Appellant Mr Quinlan argued that the inclusion of paragraph 10.2 in the scheme of amalgamation had been approved by the Securities and Investments Board who must have realised that the remedies of the unit holders were under the trust deed and the legislation and that there was no need for an agreement. He agreed that paragraph 10.2 could not be determinative but argued that it was relevant when considering the intention to create legal obligations. He referred to Chitty on Contracts (1999) Twenty-eighth Edition Volume 1 at paragraph 2-148 as authority for the view that, in deciding whether the parties intended to create contractual relations, the objective test is normally applied but that that did not apply where the parties had expressed their actual intention in the document alleged to constitute the contract. The question whether they intended the document to have contractual force then became one of construction. He also cited Rose and Frank Company v J. R .Crompton and Brothers Limited [1925] AC 445 and [1923] 2 KB 261 at 287, 293 as authority for the view that a disclaimer clause should only be rejected if it was impossible to harmonise the whole of the language used in the document. In this appeal it was possible to harmonise the disclaimer in paragraph 10.2 with the legal obligations. Mr Quinlan also cited Ogwr Borough Council v Dykes [1989] 1 WLR 295 at 302H as authority for the view that a provision which specifically and definitively negatived an intention to create a tenancy created another interest; that case concerned the interaction between a contract and the recognition of statutory rights as also did the present appeal.

82. For the Respondents Mr Furness QC argued that paragraph 10.2 was inconsistent with the letter of 30 September 1996. Also, the paragraph said that "nothing in the scheme" should be taken as constituting an agreement; in that context the scheme meant the circular letter of 4 October 1996 and the scheme of amalgamation. The letter of 30 September 1996 was not part of the circular letter or the scheme of amalgamation. Mr Furness accepted that the courts would accept a declaration that there was no intention to contract but he distinguished Frank and Rose as in this appeal the Appellant accepted that it was obliged to implement the scheme and the only way in which that obligation could be created was by contract as it was not under the trust deed or the regulations. It followed that the attempt in paragraph 10.2 to attach a label was ineffective. He cited Street v Mountford [1985] AC 809 as authority for the view that the legal consequences of a transaction followed from its true construction notwithstanding that it might be called by another name.

83. In considering the arguments of the parties I remind myself that, for the purpose of this question, I have to assume that the scheme of amalgamation created an agreement between the Appellant and the unit holders of the discontinuing scheme to transfer chargeable securities and then to ask whether such an agreement was nullified by paragraph 10.2.

84. Rose and Frank (1925) concerned a document signed by an English firm and an American firm which set out some understandings and which specifically stated that it was not a formal legal agreement. The English firm terminated the relations with the American firm who brought an action for breach of the contract alleged to be contained in the document. The Court of Appeal and the House of Lords both held that the document was not a legally binding contract. In the Court of Appeal, at page 287, Scrutton L J said that it was necessary to seek the intention of the parties in the whole of the language used in the document. No clause should be rejected unless it was clearly impossible to harmonise the whole of the language used. And at page 293 Atkin J said that, to create a contract, there had to be a common intention of the parties to enter into legal obligations, mutually communicated, expressly or impliedly. Such an intention could be negatived expressly and in the document in that appeal that had been done.

85. In Street v Mountford (1985) the question was whether a document which was called a licence created a tenancy; if it did then the occupation of the property was protected by the Rent Acts. Lord Templeman identified the grant of a term at a rent with exclusive possession as a tenancy and at page 819E said:

"Both parties enjoyed the freedom to contract or not to contract and both parties exercised that freedom by contracting on the terms set forth in the written agreement and on no other terms. But the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence."

86. However, Street v Mountford was distinguished in Ogwr (1989) which also concerned a document which was called a licence. It granted exclusive possession but specifically and definitively negatived an intention to create a tenancy. The Court of Appeal held that some other interest than a tenancy had been created.

87. From those authorities I derive the principles that it is necessary to seek the intention of the parties in the whole of the language used in the document. No clause should be rejected unless it is clearly impossible to harmonise the whole of

the language used. An intention of the parties to enter into legal obligations can be negatived expressly. The consequences in law of a document can only be determined by consideration of its effect. If a document satisfies all the requirements of an agreement then it will produce an agreement unless it specifically and definitively negatives an intention to create an agreement.

88. Applying those principles to the facts of the present appeal one would first have to seek the intention of the parties from the whole of the language used in the document. If the amalgamation did not take effect by operation of law, but relied upon the agreement of all the parties, including the trustee, the manager and the unit holders of both the discontinuing and the continuing schemes, then it is very likely that the document would have indicated an intention by all the parties to be bound. The consequences of some of the parties being bound and others not being bound would have been undesirable. In that event, it may not have been possible to harmonise clause 10.2 with the rest of the document and so there would still have been an agreement. However, this exercise is hypothetical and conjectural. It does, however, illustrate the advantages of effecting the scheme of amalgamation under the 1991 regulations and not by way of agreement.

(5) Was there a transfer?

89. In considering whether there was a transfer, I remind myself of the conclusion reached above, namely that section 87(1) can only apply in this appeal if the unit holders of the discontinuing scheme agreed to transfer their equitable interests in the deposited property of that scheme. If Mr Furness's application of section 87(1) is applied then the recipients of the transfer would be the unit holders of the continuing scheme immediately after the amalgamation.

90. The arguments of the parties on this question centred around two areas, namely the meaning of the word "transfer" in section 87(1) and the question whether the declaration of new trusts was a transfer.

91. Dealing first with the meaning of the word transfer, Mr Quinlan argued that stamp duty applied to cases where property was transferred to or vested in a purchaser whereas stamp duty reserve tax applied only to a transfer and there was no reference to "or vested in". He argued that that meant that the word transfer in section 87(1) had a technical meaning and did not refer to any disposition and he cited Littlewoods Mail Order Stores Limited v Inland Revenue Commissioners [1963] AC 135 at 152 for the definition of a conveyance on sale. In the context of a charge introduced to complement stamp duty the word transfer should be read in the Littlewoods sense, namely a disposal of the absolute property in what the transferor possessed. The unit holders in the discontinuing scheme continued to have an undivided interest in the trust property after the amalgamation. There was no absolute alienation.

92. Littlewoods concerned section 42 of the Finance Act 1930 which relieved from stamp duty a conveyance or transfer of a beneficial interest in property from one associated company to another and section 50 of the Finance Act 1938 which provided that section 42 was not to apply under certain conditions. The issue in that appeal was whether a deed which was called a deed of exchange, under which the freehold of property was transferred in exchange for the assignment of a lease, was a conveyance or transfer on sale within the meaning of section 54 of the Stamp Act 1891. In deciding that it was not Viscount Simmonds said, at page 152, that it was neither in form nor substance a sale according to ordinary legal terminology. He defined a sale as the transfer of the absolute or general property

in a thing for a value in money. The exchange was not a conveyance on sale because no price or money was paid or promised on one side to the other.

93. As mentioned above, section 114 of the Finance Act 1986 does not provide that the provisions relating to stamp duty reserve tax should be construed as one with the Stamp Act 1981. I have not therefore found the decision in Littlewoods to be of assistance in deciding whether there was a transfer within the meaning of section 87(1).

94. The second area of dispute was whether the declaration of new trusts was a transfer. Mr Quinlan argued that the word transfer meant assignment and not the creation of new rights. The creation of rights was not a transfer and he cited In re VGM Holdings Limited [1942] Ch, 235 at 240 and 241. Even if the unit holders of the discontinuing scheme had directed the trustee to hold their property on the trusts of the continuing scheme their beneficial interests in the trust property would have been created not transferred. He cited Grey v IRC [1958] Ch 375 at 381 to 382 as authority for the view that a direction to trustees to hold property on trust for a donee operated as a transfer of an equitable interest to the donee by way of trust and not by way of assignment. By giving directions to trustees the donor deliberately chose the path of declaring new trusts rather the path of assignment. In the Court of Appeal [1958] 1 Ch 600 at 710 to 711 Lord Evershed MR, and in the House of Lords [1960] 1 AC 1 at 16 Lord Radcliffe, had affirmed that view. Also, even if the extinguishing of the units in the discontinuing scheme and the creation of the units in the expanded continuing scheme, constituted a vesting there was no reference to vesting in section 87(1). Section 87 was not directed to trusts or the issue of shares. In another context, sections 93 and 96 of the Finance Act 1986 specifically mentioned the transfer or issue of chargeable securities and so, if section 87 was intended to apply to the creation of rights, the words "or issue" would have been included. When the amalgamation took place there was no assignment or vesting of any property but an intermingling of property. All the requirements for the amalgamation were in place when the vote was taken at the meeting on 7 November 1996 and the amalgamation was not subject to any later event.

95. For the Inland Revenue Mr Furness QC argued that, in approving the scheme of amalgamation, the unit holders of the discontinuing scheme agreed to transfer their beneficial interests in the deposited property of that scheme so that the deposited property became held upon the trusts of the continuing scheme. Thus the unit holders of the discontinuing scheme declared new trusts of the deposited property of their scheme. After amalgamation the unit holders of the discontinuing scheme no longer had undivided shares in the deposited property of the discontinuing scheme but instead had undivided shares in the enlarged continuing scheme which had different trusts. After the amalgamation all the unit holders of the discontinuing scheme had a 35% interest in the continuing scheme rather than a 100% interest in the discontinuing scheme. These smaller interests in a larger fund meant that they had different interests. Either the unit holders of the discontinuing scheme had agreed to assign their beneficial interests, or they gave a direction to the trustee to hold the deposited property on new trusts, or the change operated as a result of the regulations. However the change was effected, there had been a transfer of the beneficial interests of the unit-holders of the discontinuing scheme to the trusts of the continuing scheme. He relied upon the very wide definition of the word transfer in Gathercole v Smith (1881) 17 Ch D 1 at page 7. He also relied upon Grey at 381-2, 715-716 and 720-721 as authority for the view that the word transfer included not only assignments of existing equitable interests but also the declaration of new trusts. Finally, he relied upon In re Chrimes, Locovich v Chrimes [1917] 1 Ch 30 as authority for the

view that an equitable interest could be transferred even if the beneficial ownership did not alter. Mr Furness QC also argued that the notification of the new trusts to the trustee was an assignment in equity of the beneficial interests in the discontinuing scheme; if there had been a different trustee the legal title would have had to be assigned. The trustee had to assent to the new assets and the new trusts.

96. Within the context of section 87(1), Mr Furness's argument was that the unit holders of the discontinuing scheme transferred their equitable interests in the deposited property of their scheme and that the recipients of the transfer were the unit holders of the continuing scheme immediately after the amalgamation. Before considering whether there was a transfer it is useful to note that the unit holders of the continuing scheme immediately after the amalgamation included the unit holders of the discontinuing scheme. Thus, if Mr Furness is correct, the unit holders of the discontinuing scheme transferred some of their beneficial interests to themselves.

97. In Gathercole (1881) a statute provided that the pension of a retired clerk in Holy Orders was a charge upon the revenues of the benefice and was recoverable as a debt from the incumbent "but shall not be transferable in law or in equity". The incumbent had a judgment debt against the retired clerk and did not pay the pension. The Court of Appeal held that the incumbent could not set the judgment debt off against the arrears of pension. Lord Jessel M R held that the pension was not a debt due from the incumbent but a charge on the income which the incumbent received. The pension was not a debt, it was only recoverable as if it was a debt. The provision that the pension was not transferable made it an inalienable provision and so there could be no set off. At page 7 James L J agreed with that conclusion and said;

"What I am principally influenced by is the very strong words used in the Act It does not say "shall not be assigned" but it said "shall not be transferable". Now "transfer" is one of the widest terms that can be used. It appears to me that very word was used by the Legislature not only to prevent the incumbent from assigning it himself, but for preventing any transfer by operation of law in invitum - not only to prevent a voluntary dealing by an incumbent with an annuity, but to prevent the annuity vesting in a trustee in bankruptcy, or being seized or attached under a garnishee order by an execution creditor, or otherwise transferred."

98 Thus Gathercole is authority for the view that the word "transfer" is a very wide term. Within the context of the statute at issue in that appeal the word could include not only a voluntary dealing but also a disposition by operation of law. However, in this appeal the statutory context in which the word has to be considered is section 87(1) of the Finance Act 1986 and that context makes it clear that it is only a transfer which is the subject of an agreement which is relevant, not a transfer by operation of law.

99. In re Chrimes (1917) concerned a single woman who was entitled to a reversionary interest under a will. The interest was subject to a restraint on anticipation in the event of her marriage. Before she married she executed a deed poll stating that in the event of her marriage the interest should be held for her separate use and that she should have power to dispose or charge it by way of anticipation or otherwise. The deed was notified to the trustees. The woman married and later entered into three mortgages of her interest. In deciding that they were valid Sargant J held that the deed poll was a direction to the trustees

and thus amounted to a complete transfer of the woman's share upon a new and modified trust. At page 36 he said:

"Now, after a very careful consideration of the deed poll. I have come to the conclusion that it did constitute a complete assignment. ...Now it is well established that in the case of an equitable interest outstanding in trustees or other holders a voluntary direction by the owner to the trustees or holders to hold the whole or part of that interest upon trust for a third person operates as a complete and effectual transfer of the interest to which the direction extends. ... And, this being so, I can see no reason why a similar direction should not be sufficient to transfer to the owner herself a new or modified interest such as she could certainly have transferred by the same means to another."

100. Thus Chrimes is authority for the view that a voluntary direction by the owner of an equitable interest to trustees to hold the interest upon new or modified trusts for the owner himself is a transfer of the interest within the context of the modification of a restraint on anticipation.

101. The original issue in Grey (1957) was whether six declarations of trust were liable to ad valorem stamp duty as voluntary dispositions. The appellants were trustees of six settlements made in 1949 by a settlor for his grandchildren. In February 1955 the settlor transferred shares to the trustees and orally directed them to hold the shares on the trusts of the settlements. In March 1955 the trustees executed six declarations of trust which recited the oral directions and which acknowledged that the trustees held the shares upon the trusts of the six settlements. The settlor executed the declarations of trust. Section 53(1)(c)of the Law of Property Act 1925 provided that a disposition of an equitable interest or trust subsisting at the time of the disposition must be in writing signed by the person disposing of the same.

102. At first instance Upjohn J held that the disposition of an equitable interest by oral direction to the trustees operated as a disposition by way of trust and not by way of assignment; that a disposition by way of trust was not required by section 53(1)(c) of the Law of Property Act 1925 to be in writing, and so the equitable interest had passed to the trustees at the time of the oral direction. Accordingly, there was nothing left to pass at the time of the declaration of trusts which, therefore, did not attract ad valorem stamp duty. At page 380 he said that a donor could effect a transfer of an equitable interest to the donee in one of three ways. First, the donor could assign the equitable interest to the donee directly. Such an assignment had to be in writing. Secondly, the donor could declare himself a trustee of the equitable interest for the benefit of the donee. Such a declaration could be by parol or in writing. Thirdly the donor could direct the trustees to hold the whole or part of the equitable interest on trust for a third person. That operated as a complete and effectual transfer. Whichever of these methods of transfer was employed the result was the same; the equitable interest was effectually transferred from donor to donee. If it was done by way of assignment it had to be in writing; if done by way of declaration of trust it could be by parol. He rejected the view that a declaration of trust was equivalent to an assignment and, at page 381 said:

"In my judgment a direction to trustees to hold trust property on trust for a donee operates as a transfer of the equitable interest to the donee by way of trust and not by way of assignment."

103. Thus Upjohn J regarded both an assignment of an equitable interest and a declaration of trust as a transfer of the equitable interest although he held that

the latter was not a transfer by way of assignment. Within the context of section 53(1(c) of The Law of Property Act 1925 the word which had to be construed was "disposition". Within the context of section 87(1) the word which has to be construed is "transfer" and not "transfer by way of assignment". Following the principles outlined by Upjohn J a declaration of trust would be a transfer.

104. However, the decision of Upjohn J was reversed by the Court of Appeal who held that the oral directions given to the trustees, while not being an assignment of the settlor's equitable interests, were a disposition within the meaning of section 53(1)(c) of the Law of Property Act 1925; accordingly, as they were not in writing they were ineffective; it followed that the written declarations of trust were effective and were chargeable with ad valorem stamp duty. At page 721 Ormerod L J said:

"There can be no doubt that up to the moment of the oral direction being made there was a subsisting equitable interest in the shares vested in the settlor. At that moment the equitable interest ceased to be vested in him. Either it was transferred from him to the trustee for them to hold the shares in trust for the beneficiaries or it ceased to exist and a new equitable interest was created in the terms of the directions. If what took place was a transfer of the settlor's interest, then it could not be argued that it was not a disposition within the meaning of the section. I do not think, however, that it was a transfer. It was certainly not in my judgment a transfer by way of assignment. The more difficult question is whether the transaction was a "disposition" in spite of the fact that it should not be regarded as a transfer."

105. He went on to hold that the word "disposition" was wide enough to include both a grant and an assignment. Accordingly, only the written grant was effective. The passage quoted indicates that there is a distinction between a transfer of the equitable interest (which is a transfer) on the one hand and its cessation followed by the creation of a new equitable interest (which is not a transfer but is a disposition) on the other hand.

106. Mr Furness QC relied upon the words of Lord Evershed at page 715. However, Lord Evershed dissented from the majority. He also relied upon the words of Morris L J at page 720 -721 where he said:

"The notion of a transfer of the equitable interest is involved both where the transfer takes place by way of assignment and where it takes place by way of direction to trustees to hold on trust for a donee or donees."

107 On the other hand Lord Radcliffe in the House of Lords (who upheld the decision of the Court of Appeal) at page 16 said:

"Moreover, there is warrant for saying that a direction to his trustee by the equitable owner of trust property prescribing new trusts of that property was a declaration of trusts. But it does not necessarily follow from that that such a direction, if the effect of it was to determine completely or pro tanto the subsisting equitable interest of the maker of the direction, was not also a grant or assignment for the purposes of section 89 [of the Statute of Frauds] and therefore requiring writing for its validity. Something had to happen to that equitable interest in order to displace it in favour of the new interests created by the direction and it would be at any rate logical to treat the direction as being an

assignment of the subsisting interest to the new beneficiary or beneficiaries or, in other cases, a release or surrender of it to the trustee."

108. However, Lord Radcliffe did not decide the point.

109. Thus the issue in Grey concerned the meaning of the word disposition and not the meaning of the word transfer. Also, there appears to be a difference of view as to whether there was a transfer where an equitable interest ceased to exist and a new equitable interest was created

110 There are a number of difficulties in applying the above authorities to the facts of the present appeal. The main difficulty is that they deal with different words in different statutes. Another difficulty is that they concern only the acts of the owners of the equitable interest disposed of. In this appeal changes were effected not only in the equitable interests of the deposited property of the discontinuing scheme but also in the equitable interests of the deposited property of the continuing scheme. Although the unit holders of the discontinuing scheme could declare new trusts of their equitable interests the fact is that new trusts must also have been created for the equitable interests of the continuing scheme. As those unit holders did not approve the change, that had to be effected by operation of law under the 1991 regulations. Any analysis of the transaction cannot ignore the changes to the continuing scheme. A characterisation which takes account of all the factors would be that the unit holders in both schemes surrendered their equitable interests in their separate schemes and received in return new equitable interests in the enlarged scheme. That characterisation is not a transfer from the unit holders of the discontinuing scheme to the unit holders of the enlarged scheme as argued by Mr Furness. If Mr Furness's argument were correct then there was also another transfer by the unit holders of the continuing scheme of their equitable interests in the deposited property of that scheme to the unit holders of the enlarged scheme. However, that was not argued.

111. The conclusion, therefore, is that there was not a transfer from the unit holders of the discontinuing scheme to the unit holders of the enlarged scheme.

Conclusions

112. The conclusions to the questions posed by the arguments of the parties may be summarised as:

(1) that the relevant element of the amalgamation was the change in the equitable interests of the unit holders of both schemes;

(2) that the only relevant chargeable securities were those equitable interests

(3) that the amalgamation took effect by operation of law and there was no agreement between the unit holders of the discontinuing scheme and the Appellant as manager of the continuing scheme;

(4) that it is not therefore necessary to decide whether, if there was an agreement, it was it nullified by the disclaimer in paragraph 10.2 of the scheme of amalgamation but that if the amalgamation had been effected by agreement than the disclaimer might have been ineffective; and

(5) that there was no transfer between the unit holders of the discontinuing scheme and the unit holders of the enlarged scheme.

Decision

113. Accordingly, the decision on the issue for determination in the appeal is that the amalgamation of the two unit trusts was not an agreement to transfer chargeable securities within the meaning of section 87(1).

114. The appeal is, therefore, allowed.

DR A N BRICE

SPECIAL COMMISSIONER

Date of Release: 9th August 2000

SC3070/98