CAPITAL GAINS TAX – Shares – Reorganisation of share capital – All ordinary stock in subsidiary company acquired by Appellant before 6 April 1965 – Scheme of Arrangement in relation to subsidiary effected on 29 April 1965 – Calculation of loss – Whether by straightline apportionment or by reference to value at 29 April 1965 – Preference stock in subsidiary held by public cancelled as part of scheme – Appellant paid holders of preference stock £6.9m as part of scheme – Disposal by Appellant of ordinary stock in 1992 at a loss – Whether ordinary stock to be treated as having been acquired at market value on 29 April 1965 on grounds that they had been concerned in a reorganisation on that date and that they became a new holding – No – Whether the £6.9m paid to holders of preference stock as part of scheme was consideration given by Appellant for its new holding – No – Appeal dismissed – TCG Act 1992 ss.126, 127 and 128 and Sch.2 p.19

THE SPECIAL COMMISSIONERS

UNILEVER (UK) HOLDINGS LIMITED Appellant

- and -

JAMES CHARLES SMITH Respondent

(HM INSPECTOR OF TAXES)

Special Commissioners: Stephen Oliver QC

Malachy Cornwell-Kelly

Sitting in London on 23rd October 2000

Robert Venables QC and James Kessler, counsel, instructed by Unilever (UK) Holdings Limited

Nicholas Warren QC instructed by the Solicitor of Inland Revenue for the Respondent

DECISION

1. This appeal is, in formal terms, against an assessment dated 14th February 2000 in respect of profits chargeable to corporation tax for the year 1st January to 31st December 1998, for which year the appellant (which we refer to as Unilever) sought to set against its chargeable gains a loss which had been made on the disposal on 22nd June 1992 of shares held in a company previously known as The British Oil and Cake Mills Limited (BOCM) for £67,617,391. (The shares in question have in their history also been held in the form of stock of BOCM and it is common ground that the holding has, throughout, consisted of the same quantity of stock or shares, and that nothing turns on this distinction – since they were at the time we are concerned with held as stock, we will use that term.) We find the following facts - none of which is, indeed, in contention.
2. The stock was at all times held by Unilever in the same amount and had been acquired before 6th April 1965. The point at issue is the base cost of the stock and the reason that question arises is that, on 29th April 1965, the share capital of BOCM was the object of a Scheme of Arrangement approved by the Court on 12th April; the Scheme involved the cancellation of all the company's preference capital, leaving in issue as capital only the ordinary stock the subject of this appeal. So, in essence, the issue is: does the legislation require straight-line apportionment of the value of the stock since actual acquisition, or is the base cost referable to the market value of the shares at the time of the Scheme of Arrangement?
3. The Scheme of Arrangement was dated 22nd February 1965 and recited that the Scheme companies (which included another company whose position is not material to these proceedings) were then the only subsidiaries of Unilever in the United Kingdom in which there remained a public holding of preferential capital and that the Scheme, subject to approval by the Court, sought to redeem that capital with the effect that Unilever would emerge as the sole controlling shareholder of BOCM by reason of its holding of all the ordinary stock of BOCM. It is common ground that the Scheme of Arrangement was implemented for commercial reasons and was not in any sense a tax avoidance scheme.
4. As part of the Scheme, Unilever undertook the following:- (a) to appear by counsel on the hearing of the petitions to sanction the Scheme, (b) to undertake to the Court to be bound thereby, (c) to do everything needful for giving effect to the Scheme, and (d) to make payment to the holders of the preference capital of the value of their holdings as detailed in the Scheme. The Order of the Court was duly made and the effective date of the Scheme was 29 April 1965, when it became operative.
5. The various rights attached to the preference stocks redeemed under the Scheme were cancelled. The principal rights so cancelled were: (i) the right to at least a fixed cumulative preferential dividend of either 5.5% or 10%, depending on class, (ii) the entitlement to rank first as regards repayment of capital in the event of a winding up, (iii) the right to resort to the preferential dividend reserve fund for unpaid cumulative preferential dividends, (iv) one vote in general meeting for every £1 nominal capital held, (v) the right to object to the issue of shares ranking pari passu with or in priority to the preference stock, and (vi) the right to prevent borrowing by the directors in excess of the company's issued and paid up

capital without the separate approval of an extraordinary resolution of the preference stockholders.

6. At the time of the Scheme, and indeed at all other times, the ordinary stock in issue to Unilever was £6,000,000; the preference stock totalled £3,652,124, the whole issued capital being therefore £9,652,124. There was no other issued capital at any material time. The result of the Scheme of Arrangement, therefore, was as has been indicated to leave Unilever in sole and unqualified control of BOCM, whereas it had before no more than 62% of the voting rights in BOCM and was subject to the disadvantage of the other rights and entitlements enjoyed by the preference stockholders.
7. The total authorised share capital of BOCM both before and after the Scheme of Arrangement was £10,000,000. In the Scheme of Arrangement, the authorised and issued share capital of BOCM was reduced to the extent of the cancellation of all the preference stock, but the authorised capital was increased to the same nominal value by the creation of £1 ordinary shares (though none of those newly authorised shares was in fact ever issued). Tidying up amendments were made to the Memorandum of Association by deleting clauses 6 and 7 dealing with the position of the preference capital. To achieve the overall result, Unilever paid the former holders of the preference capital a total of £6,924,773 in cash.
8. The chronology of the Scheme commences with a public announcement in January 1965 of the proposals to cancel the preference capital. The Scheme was then presented to the Court by BOCM on 5 February 1965, when the Court ordered the convening of separate meetings of the holders of the two classes of preference stock then in issue. The Scheme of Arrangement itself was made on 22nd February 1965 and - though plainly sponsored by Unilever - was in terms made between BOCM and its preference stockholders.
9. The meetings took place on 17 March 1965 when special resolutions of the company were passed under which (a) the Scheme was approved (b) the reductions by cancellation in the preference capital, and the balancing increases in the authorised ordinary share capital mentioned above, were effected. Following that, the definitive hearing of the petition was held on 12th April 1965 and, although Unilever appeared by counsel to give undertakings to the Court, BOCM was again formally the petitioner. In accordance with its terms, the Scheme became effective when the Order made by the Court sanctioning the Scheme and confirming the reduction of capital resolved on 17th March, was registered with the Registrar of Companies on 29th April 1965.
10. These events necessarily produced an effect on the practical entitlements of the ordinary stockholders: the unlimited borrowing power contained in article 3(18) of the Articles of Association could now be conferred on the directors by a majority of ordinary stockholders and was no longer dependant upon the separate consent of the preference stockholders; the right to share in the dividends of the company was no longer subject to the prior rights of the preference stockholders; the preferential dividend reserve fund could now be distributed, or otherwise applied for the advantage of the ordinary stockholders; the repayment of capital on liquidation was no longer subordinated to the entitlements of the preference stockholders; and the proportion of voting rights in general meeting exercisable by the ordinary stockholders increased from 62% to 100%.

The Legislation

11. Much of the legislation relevant to this appeal is in its third re-enactment. We will cite it as it appears in the current consolidation, the Taxation of Capital Gains Act 1992, but indicate its earlier provenance.
12. Section 126 of the 1992 Act, in Chapter II of Part IV, provides:-

(1) For the purposes of this section and sections 127 to 131 "reorganisation" means a reorganisation or reduction of a company's share capital, and in relation to the reorganisation -

(a) "original shares" means shares held before and concerned in the reorganisation,

(b) "new holding" means, in relation to any original shares, the shares in and debentures of the company which as a result of the reorganisation represent the original shares (including such, if any, of the original shares as remain).

(2) The reference in subsection (1) above to the reorganisation of a company's share capital includes -

(a) any case where persons are, whether for payment or not, allotted shares in or debentures of the company in respect of and in proportion to (or as nearly as may be in proportion to) their holdings of shares in the company or of any class of shares in the company, and

(b) any case where there are (sic) more than one class of share and the rights attached to shares of any class are altered.

(3) The reference in subsection (1) above to a reduction in share capital does not include the paying off of redeemable share capital, and where shares in a company are redeemed by the company otherwise than by the issue of shares or debentures (with or without other consideration) and otherwise than in a liquidation, the shareholder shall be treated as disposing of the shares at the time of the redemption.

(This provision was previously found in the Finance Act 1965, Schedule 7, paragraph 4(1) and (7), and the Finance Act 1962, Schedule 9, paragraph 10(1) and (7).)

13 Section 127 of the 1992 Act provides:-

Subject to sections 128 to 130, a reorganisation shall not be treated as involving any disposal of the original shares or any acquisition of the new holding or any part of it, but the original shares (taken as a single asset) and the new holding (taken as a single asset) shall be treated as the same asset acquired as the original shares were acquired.

(This provision was previously found in the Finance Act 1965, Schedule7, paragraph 4(2) and the Finance Act 1962, Schedule 9, paragraph 10(2).)

14 Section 128 of the 1992 Act provides, as far as material:-

(1) Subject to subsection (2) below, where, on a reorganisation, a person gives or becomes liable to give any consideration for his new holding or any part of it, that consideration shall in relation to any disposal of the new holding or any part of it be treated as having been given for the original shares, and if the new

holding or part of it is disposed of with a liability attaching to it in respect of that consideration, the consideration given for the disposal shall be adjusted accordingly.

(This provision was previously found in the Finance Act 1965, Schedule 7, paragraph 4(3), and the Finance Act 1962, Schedule 9, paragraph 10(3).)

15. Schedule 2, paragraph 16, of the 1992 Act (previously in the Finance Act 1965, Schedule 6, paragraph 24) provides in cases such as the present for the straightline calculation of gains or losses over the period of ownership of assets, but paragraph 17 of Schedule 2 to the 1992 Act (previously in the Finance Act 1965, Schedule 6, paragraph 25) allows an election by the taxpayer for the straight line apportionment not to apply, and for a deemed disposal and reacquisition on 6th April 1965 to provide the base cost of assets subsequently disposed of.
16. Paragraph 19 of Schedule 2 to the 1992 Act (previously in the Finance Act 1965, Schedule 6 paragraph 27) provides:-

    (1) For the purposes of this Act, it shall be assumed that any shares or securities held by a person on 6th April 1965 (identified in accordance with paragraph 18 above) which, in accordance with Chapter II of Part IV, are to be regarded as being or forming part of a new holding were sold and immediately reacquired by him on 6th April 1965 at their market value on that date.

    (2) If, at any time after 5th April 1965, a person comes to have, in accordance with Chapter II of Part IV, a new holding, paragraph 16(3) to (5) above shall have effect as if -

    (a) the new holding had at that time been sold by the owner, and immediately reacquired by him, at its market value at that time, and

    (b) accordingly, the amount of any gain on a disposal of the new holding or any part of it shall be computed -

    (i) by apportioning in accordance with paragraph 16 above the gain or loss over a period ending at that time, and

    (ii) by bringing into account the entire gain or loss over the period from that time to the date of the disposal.

    (3) This paragraph shall not apply in relation to a reorganisation of a company's share capital if the new holding differs only from the original shares in being different in number, whether greater or less, of shares of the same class as the original shares.

    The first issue – was there a reorganisation?

17. That the Scheme of Arrangement constituted a reorganisation within the meaning of section 126 was stated to be common ground simply by reason of there having been a reduction in the company's share capital. Mr Warren Q.C. for the Crown did not argue that there was in the circumstances no reduction in the share capital of the company for the purposes of the section, the authorised capital remaining the same after the exercise as before it, but he did contend that there was no

"reorganisation ... of a company's share capital" in any other sense than that of a reduction of capital.

18. There is no definition of the term "reorganisation" beyond such as is found in section 126. In those circumstances Mr Warren submits that one must look to the evident purpose of the provisions which is, he says, to prevent a chargeable disposal of shares taking place when the shareholders remain the same and hold their shares in the same proportions as previously - where, in effect, the economic ownership of the company remains constant, though the precise means by which it is exercised have changed. For this he relies in particular on the observations of the Court of Appeal in Dunstan v. Young [1989] STC 69. In that case, it was held that an increase in share capital was within the term reorganisation, provided that the new shares were acquired by existing shareholders as such and were in proportion to their previous holdings. Giving the judgment of the court, Balcombe LJ said, at page 74:-

    `We repeat that "reorganisation of a company's share capital" is not a term of art. It derives its colour from the context, and in this connection we were referred in detail to paras 5, 6 and 7 of Schedule 7 [to the Finance Act 1965]. ... We are left with the clear impression that the policy behind those paragraphs of Schedule 7 to which we have been referred is that, for the purposes of capital gains taxation, there shall not be a disposal of the original holding, or the acquisition of the new holding (or any deemed disposal or acquisition) where the shareholders remain the same and they hold their shares in the same proportions, notwithstanding that the number of shares increases (a reorganisation or conversion) or decreases (a reduction) within the same company, or the old shares are replaced by new shares in a company which effectively replaces or represents the old one (takeover, reconstruction or amalgamation).'

19. Balcombe LJ then summarised the alternative approaches to construction (a) on behalf of the taxpayer, that the essential feature of a reorganisation was that the shareholders and their shareholdings should remain the same, or (b) on behalf of the Crown, that the identity of the shareholders was irrelevant and that what mattered was that the aggregate of what had been referred to as the units of participation in the company should remain the same, even if the rights attached to them were varied. The judgment continued:-

    `The question is not an easy one to answer and, like most questions of construction, is ultimately one of impression, but we have to say that we found counsel for [the taxpayer's] submission - under which the continued identity of the shareholders, holding their shares in the same proportions, is the essential feature - the more compelling.'

    `Accordingly, we do not agree with the judge that para 4(1)(a)(i) exhaustively defines those increases of capital which fall within a reorganisation of a company's share capital to which para 4, and in particular subparas (2) and (3) of that paragraph apply. An increase of share capital can be a reorganisation of that capital, notwithstanding that it does not come within the precise wording of subcl. (a)(i), provided that the new shares are acquired by existing shareholders because they are existing shareholders and in proportion to their existing beneficial holdings.'

20. Mr Venables Q.C., for Unilever, did not address argument to this point as such, directing his first submissions to the next question, which we deal with below, whether the ordinary stock was "concerned in" the reorganisation. Whether there was or was not a reorganisation is, strictly speaking, a prior issue. In the light of our conclusions on the subsequent issues, however, it would be enough to assume that the reduction of capital, by which the preference stocks were cancelled, was within the definition of "reorganisation" and pass on to those issues. However, as it was the first plank of the Crown's case we express the view that the Scheme of Arrangement here did not involve a reorganisation within the meaning of the section. While the facts of this case are of course not on all fours with those in Dunstan v. Young, the considered view of the statutory expression adopted by the Court is one which it would be proper to follow, unless there were compelling reasons to see the present facts as giving rise to different considerations.
21. The contrary appears to be the case. Not only was there here no overall identity of shareholders or of beneficial ownership before and after the arrangement was executed, but there is no purpose of legislative policy to be served by extending the scope of a special provision designed to avoid inhibiting acceptable company restructurings or regroupings. The range of transactions affecting share capital included as examples by Balcombe LJ so indicates: a reorganisation or conversion, a reduction, a takeover, a reconstruction or an amalgamation. In the present case, no disposal or deemed disposal of the ordinary stock took place and there could be no need, in this type of situation, for any provision designed to avoid a chargeable event occurring.
22. With those considerations we are driven to the conclusion that there is a necessary implication in section 126(1) that the expression "reduction of a company's share capital" requires a transaction by which "original shares" exist at the start and the holders of those shares become holders of a "new holding" as the result of the transaction. Moreover there must be a common economic ownership of the company before and after. Here the preference stock was cancelled and, as a result, the ownership of BOCM was left in the hands of the holders of the ordinary stock. There was a real change in the economic ownership of BOCM and the case falls outside the intention of the statutory relief. There was in these circumstances no reason to make exceptional provision in relation either to the preference stock or the ordinary stock: the one was disposed of and the other was not: neither result creates any difficulty or anomaly. We conclude therefore that in the circumstances of this case, there was no reorganisation at all within the meaning of section 126.

    The second issue – was the ordinary stock "concerned in" a reorganisation?

23. On the assumption that we are wrong in concluding that there was no "reorganisation", we address all the subsequent arguments advanced for the taxpayer. The first of them is that the ordinary stock held by Unilever both before and after 29 April 1965 was "concerned in" a reorganisation contemplated by section 126.
24. If the Scheme of Arrangement amounted to a reorganisation, it is still necessary for the taxpayer to show that the ordinary stock held by Unilever was "concerned in" that reorganisation. For the taxpayer, it is argued that the word "concerned" has a wide ordinary meaning, and that the Oxford English Dictionary includes the senses of "affected", "interested" and "involved". There is, moreover, a number of cases in

which this expression has, albeit not in a tax context, been relatively widely construed.

25. It must be said at once that if "concerned in" has, or includes, the sense of "affected by", there is a strong case for accepting the taxpayer's argument in so far as it is focussed on the economic realities of the case. The ordinary stock increased considerably in value in the ways indicated above, even though no rights as such attaching to it were added, taken away or altered; there were even fiscal advantages which could have followed BOCM becoming a 100% subsidiary of Unilever. In the economic sense, if not the legal, the ordinary stock was a different kind of asset when held free from the existence of the preference stock, and it was as an asset much more attractive to a buyer.
26. But it does not follow from the statutory wording that the position of Unilever itself is relevant. It is true, as Mr Venables submitted, that Unilever's part in the Scheme of Arrangement was essential: it provided the cash to satisfy the holders of the preference stock, it gave undertakings to the Court whose sanction of the Scheme was indispensable, and it retained power under clause 11 of the Scheme of Arrangement to consent to modifications of it on behalf of "all concerned". If the question arising from section 126 were to be: was Unilever "concerned in" the reorganisation? the answer would have, unhesitatingly, to be Yes. But it does not follow that because Unilever was concerned in the Scheme, and because that company was the holder of all the ordinary stock, therefore the ordinary stock was concerned likewise. It is true that the character of shares in a company derives initially from the contract between the members contained in the articles of association, but the bundle of rights and liabilities which make up a share in a company exists independently of the holder for the time being of it. The share no more takes its character from the holder of it, than the holder derives his from his shares.
27. The statutory test is directed to what happens, or does not happen, to the shares in question because, while it is the taxpayer himself who makes a taxable disposal of assets, it is necessary also to establish whether the assets in question have actually been disposed of for the purposes of the tax. Section 126 directs attention to what happens, or not, to the stock, not what happens to the holders of it. Given therefore that the test relates to the position of inanimate instruments, viewed apart from the circumstances of their owners (which could be infinitely variable), one would expect to find a test which can be applied to the objective characteristics of those instruments. As Mr Warren submitted, it might well be said in some sense that shares in a company are affected by a valuable commercial contract made by that company, if one looks at the economic effect of the contract; but if one has regard only to the legal consequences of the contract, it would be exceptional – in the normal case impossible – for there to be any legal relationship between the contract and the shares.
28. This view of the matter is consistent with the approach adopted by the Court of Appeal in the context of company law in White v. Bristol Aeroplane Co Ltd [1953] 1 Ch 65. The issue of relevance to the present appeal turned on two provisions in the articles of association of a company: the first was that "All or any of the rights or privileges attached to any class of shares forming part of the capital for the time being of the company may be affected, modified, varied, dealt with or abrogated in any manner with the sanction of an extraordinary resolution passed at a separate meeting of the members of that class"; and the second was that the holders of preference stock were only to receive notice of a general meeting if it had been convened "to consider a resolution directly affecting their rights or privileges as a separate class".

29. The preference stockholders objected to proposals by the company to issue new and large amounts of preference stock and ordinary shares, all to be issued to the ordinary stockholders and paid for from a reserve fund held by the company and they sought to restrain the intended issue without the approval of a separate meeting of that class. The Court of Appeal, in unanimous judgments, reviewing a number of authorities, refused the relief sought and distinguished between a business or economic effect and a legal effect, Lord Evershed M.R. saying, at page 74:-

    "It is no doubt true that the enjoyment of, and the capacity to make effective, those rights [of the preference stockholders] is in a measure affected; for as I have already indicated, the existing preference stockholders will be in a less advantageous position on such occasions as entitle them to register their votes, whether at general meetings of the company or at separate meetings of their own class. But there is to my mind a distinction, and a sensible distinction, between an affecting of the rights and an affecting of the enjoyment of the rights, or of the stockholders' capacity to turn them to account; and that view seems to me to flow necessarily from certain other articles ...".

30. Even therefore if "concerned in" is wide enough to mean "affected by", the effect in question must in our judgment be a legal effect and not merely an economic effect. We can find no warrant for interpreting the legislation as requiring or permitting an economic effects test. Such a test would, by its nature, tend both towards uncertainty in its application, and to the extension of the scope of the special statutory regime found in Chapter II of Part IV of the Act beyond what appears clearly the policy of the legislation – namely, to avoid the consequences of a disposal where the ownership of a company remains constant, but the precise means by which it is exercised are changed.
31. To this view of the policy of Chapter II, Mr Venables raises two objections, which relate essentially to the subsequent questions of whether Unilever had a "new holding" as a result of the Scheme of Arrangement, and whether paragraph 19 of Schedule 2 to the 1992 Act is in point. We address those issues further below, but it is useful to refer here to the two authorities cited: IRC v. Beveridge [1979] STC 592, and Westcott v. Woolcombers Ltd (1987) 60 TC 575.
32. In Beveridge, the precise issue before the Court of Session was whether shares subject to a restriction on transferability were of the same class as shares for which they had been exchanged, which were freely transferable, and the legislation at issue was paragraph 27(3) of Schedule 6 to the Finance Act 1965 (now paragraph 19(3) of Schedule 2 to the 1992 Act). It was held that the shares acquired following the exchange were not of the same class as those held before it, and that paragraph 27(3) therefore disapplied paragraph 27 as a whole. In the course of the judgment, Lord Avonside said, at page 596f, rejecting a submission that "reorganisation" in paragraph 27 had a wider meaning than in paragraph 4 of Schedule 7:-

    "Paragraphs 4 to 6 of Schedule 7 are concerned to identify "original shares" and a "new holding" in circumstances in which it might be supposed that there had been, inter alia, a chargeable disposal of the "original shares". In particular, the principal purpose of para 4 is to provide that where "original shares" have become a "new holding" as a result of the reorganisation or reduction of a company's share capital, the

reorganisation or reduction shall not be treated as involving any disposal of the original shares or any acquisition of the new holding or any part of it. The original shares (taken as a single asset) and the new holding (taken as a single asset) are to be treated as the same asset acquired as the original shares were acquired."

33. Dealing with what is now paragraph 19 of Schedule 2 to the 1992 Act, Lord Avonside continued, at pages 596 to 597:-

"Part II of Schedule 6 is concerned with the very different question of how, when a chargeable disposal of assets held on 6th April 1965 occurs, gain or loss shall be computed. In particular, para 27 is concerned to prescribe, subject only to the exception defined in para 27(3), a special method of computation of gain or loss for cases in which the straight line growth method would be difficult to apply, i.e. to cases in which part of a "new holding" has been disposed of. When one comes to para 27(3) one finds that the exception is in terms conceived only in relation to "a reorganisation of a company's share capital if the new holding differs only from the original shares in being different in number, whether greater or less, of shares of the same class as the original shares." There is nothing in that subparagraph to indicate that the words "reorganisation of a company's share capital" should not receive their ordinary meaning. We are perfectly satisfied that that is the only meaning which these words should bear and that there is nothing in the language of paras 4 to 7 of Schedule 7, which are designed to deal with a quite different issue, to cast any doubt on that conclusion.

Having regard to the subject matter with which para 27 is concerned, namely computation of gains or losses as the result of a chargeable disposal, it is easy to see that the elaborate formula of computation therein provided for disposals of new holdings in general is quite unnecessary for the simple case in which the original shares and the new holding consist of shares of the same company of the same class, and where the only difference between the two is one of number. For such a simple case the straight line growth method of computation prescribed by para 24 of Schedule 6 is readily applicable. A further reason for giving para 27(3) its literal and obvious meaning is that a comparison of classes of shares only has meaning in the context of a single company."

34. From this, it is clear that the Court of Session was adopting the same approach as the Court of Appeal in England subsequently in Dunstan v. Young, that these provisions aim to deal with the situation in which there would, normally, be a chargeable disposal by the taxpayer without any corresponding change of substance in the ultimate ownership of the underlying company. And that what is now paragraph 19 of Schedule 2 comes into play only where section 126 (and its associated provisions) is already in point: it would not be correct to determine the application of section 126 in the light of the requirements of paragraph 19.
35. The second authority is Westcott v. Woolcombers, and leads - in so far as it is relevant at all - to the same conclusion. Paragraph 4(2) of Schedule 7 to the Finance Act 1965 (now section 127 of the 1992 Act) was not directly applicable to the case, which turned on the provisions of paragraph 2(1) of Schedule 13 to the 1965 Act (dealing with transfers within a group of companies), but the Court of Appeal had occasion to make certain observations about paragraph 4 which are of help.

Describing paragraph 4(2) and paragraph 6(1) (company amalgamations), Fox LJ said, at page 589:-

"The combined effect of para 4(2) and para 6(1) is to impose two fictions. The first of these is the "no disposal fiction". That is the consequence of the words "... shall not be treated as involving any disposal of the original shares or any acquisition of the new holding ...". Those words seem to assume that a reorganisation or reduction can give rise to a disposal, and the paragraph is artificially displacing that. The second is the "composite single asset fiction". That is the consequence of the words "the original shares (taken as a single asset) and the new holding (taken as single asset) shall be treated as the same asset acquired as the original shares were acquired."

34 And at page 590, Fox LJ continued:-

"The purpose of para 4(2) is to exclude any claim for gains tax on the reorganisation or reduction of a company's share capital. That is achieved by treating the reorganisation or reduction as not involving any disposal, and by treating the new shares and the original shares as a single holding acquired when the original holding was acquired. In effect, one simply treats the new shareholding as if it were the original shareholding."

36. Sir Denys Buckley, at page 594, makes the same observations about paragraph 4(2). We do not see anything in either of these decisions to displace the understanding we have expressed that sections 126 and 127 are designed to apply to a situation in which (a) there is a reorganisation, as defined, and (b) there would otherwise be a chargeable disposal of shares which it is the policy of the legislation to avoid.
37. A number of authorities drawn from outside the context of taxation were cited in support of the view that "concerned in" was an expression of either wide or narrow import. They are of little, if any, assistance in this case, if only because they all answer the question whether an individual person was "concerned in" a particular matter; and, as indicated above, there is a decisive difference between what may be said to concern shares, and what may be said to concern the holders of them. The fact that they all relate to contractual obligations touching restraint of trade or, in one case, a local government statute designed to prevent corruption, further distances them from the issue arising on section 126.

The third question – is the ordinary stock held after the Scheme a "new holding"?

38. If, contrary to the conclusions reached so far, the correct view of this were to be that there was a reorganisation as defined in section 126, and that the ordinary stock was concerned in it, the question would then be whether that stock falls within the definition of a "new holding" in subsection (1)(b).
39. For Unilever, it is said that the statute clearly recognises the possibility that the original shares may be found in the new holding and that the case - albeit the exceptional case - in which all the shares in the new holding are the same as those originally held cannot be excluded. In support of this, Mr Venables cites this comment of Sir Denys Buckley in Westcott v. Woolcombers, at page 593:-

"When a company reorganises or reduces its share capital, shares theretofore held by members of that company may be cancelled, rights theretofore attached to issued shares of that company may be varied, and shares not theretofore in issue may be issued to members of that company in proportion to their pre-existing holdings of shares, or of some class of shares, of the company. In para 4(2) of Schedule 7 to the Finance Act 1965, read together with para 4(1)(b) of the same Schedule, any shares "held before and concerned in the reorganisation or reduction of capital" are referred to as "original shares". That expression must embrace any shares which may have been cancelled or the rights attached to which may have been varied and must also, in my judgment, include any shares which continue in issue after the reorganisation or reduction of capital without any variation of the rights attached to them. The term "new holding" is used to describe the issued share capital of the company resulting from the reorganisation or reduction.

The purposes of para 4(2) appear to me to be: (1) to ensure that no shareholder of the company shall be treated as having realised a chargeable gain or sustained an allowable loss in consequence of the reorganisation or reduction of capital, and (2) to ensure that on any subsequent disposal by any shareholder of the company of any part of the "new holding", the cost to him of the shares so disposed of shall, for capital gains tax purposes, be treated as having been the historical cost to him of acquiring the "original shares" represented by the shares disposed of."

40. Taken together, these two paragraphs do not support the thesis for which Mr Venables contends. The emphasis is on the overall scheme of the legislation: the policy of avoiding chargeable disposals in the circumstances of a reorganisation as defined, and the need to identify the composite reality of what is held by a shareholder before and after the event. Where there is no need to avoid a chargeable disposal occurring, because none does occur, and no difficulty in making the correspondence between old and new holdings, because there is nothing but exactly the same holding, there can be no virtue in attempting to fit such circumstances to a mould not designed for them.
41. There is, however, one further authority which the taxpayer prays in aid to support the view that the ordinary stock after the Scheme of Arrangement had taken place was materially different from that which existed before it, albeit that it was in nominal terms the same stock. The case, Fitch Lovell Ltd v. Inland Revenue Commissioners [1962] 1 W.L.R. 1325, is one on the relief given in section 58(4) of the Stamp Act 1891 for subsales. The issue arose from circumstances in which ordinary shares initially of substantial value, had, at the time of what was intended to be their effective transfer to the ultimate transferee, been rendered almost worthless by the creation of preference shares in the same company with overwhelming rights. It was contended therefore that the stamp duty on the transfer of the shares should be assessed by reference only to their depreciated value at the point at which the subsale was to be perfected.
42. In the event, the primary finding was that duty was due on the full original value of the ordinary shares transferred, by reason of uncompleted transfers of them taking effect as the conveyance of the shares. Only in the event that that view was wrong was it relevant to consider the question of the duty on the transfers to the subpurchaser as finally completed. On that alternative basis, Wilberforce J reached three conclusions, one of which is relied upon by Mr Venables here. It was that the relief from double duty provided by section 58(4) of the 1891 Act in

cases where a person "having contracted for the purchase of any property ... contracts to sell the same to any other person" did not apply to the transfer of the devalued ordinary shares on their transfer to the subpurchaser. Why?

43. The learned judge gave three reasons. The first was that it unacceptable for the dutypayer to rely on the mere fact of the ordinary shares being at all times nominally and formally the same. Wilberforce J summarised this ground, at page 1343, by saying: "I cannot accept that it is adequate here to rely on a mere label without inquiring into the content of the package." Secondly and thirdly, the effect of the company's articles of association and the purpose of the statutory relief were considered, the judge saying, at pages 1343 and 1344:-

    "Looked at purely technically, therefore, it seems to me that there is much to be said for the proposition that the chose in action was not the same before and after the these irrevocable transactions [the creation of the preference shares]. A potential displacement of rights, as to which the shareholder in question held the master key, had been replaced by an actual irreversible and total loss of rights. But I think that the matter requires to be looked at more fully in the light of the evident purpose of section 58(4), which is to give a concession as regards stamp duty where property passes unaltered. ... It seems to me that an analysis of this transaction which seeks to produce the result that the property resold is the same as that first sold, if it can be made at all, involves a degree of formalism which the law in the application of section 58(4) should not endorse. I therefore decline to hold that section 58(4) would apply to this case."

44. This, says Mr Venables, supports the view that the ordinary stock after the Scheme of Arrangement was, in terms of its new value and the newly acquired possibilities for turning it to account, materially different from that bearing the same outward appearance before the Scheme was executed; and that there is, accordingly, no artificiality in regarding the latter stock as a new holding representing the former holding.
45. There is undoubtedly force in the analogy drawn between the nature of the change in the ordinary shares in Fitch Lovell and that affecting the ordinary stock held by Unilever: in neither case was there a formal alteration of the rights attaching to the ordinary stock, but in both cases the business reality of the change was undeniable. It is apparent, however, that the real distinction between these two superficially similar situations lies in the different purposes of the statutes applicable to them. They are both designed to provide what Wilberforce J described as a concession, or perhaps one might describe it as a disapplication of the normal incidence of the tax or duty concerned. In declining to apply section 58(4) to the circumstances of Fitch Lovell, it is clear that the court was declining to apply a relieving section to a situation for which it was evidently not designed. The same logic supports the conclusion that section 126 was not designed to apply to the circumstances of Unilever's holding of ordinary stock.
46. For the Crown, it is argued that one must look at the new holding as a single asset, and at the old holding likewise, and see if it can fairly be said that the former one "represents" the latter; and that, in that perspective, it is an abuse of language to say that the same parcel of stock can represent itself. It is true that one speaks, in litigation, of a person "representing" himself but, properly analysed, that expression does no more than indicate that the litigant is appearing in person and has in truth no representative at all.

47. For the reasons already indicated, our conclusion on this question is that the ordinary stock held after the Scheme of Arrangement was not a "new holding" within the meaning of section 126(1)(b).

The fourth question - is paragraph 19 of Schedule 2 applicable?

48. It is only if the post-Scheme ordinary stock constitutes a new holding acquired after 6th April 1965 that paragraph 19(2) of Schedule 2 to the 1992 Act can apply; there would otherwise be straightline apportionment. If it did apply, there would have been a deemed disposal at the market value of the stock at 29th April 1965, which would be the base cost against which the 1992 disposal would be measured, subject only to time apportionment for the period between 6th and 29th April 1965. We were told that there could have been, but had not been, an election under paragraph 17 of Schedule 2 for a 6th April 1965 valuation to apply. So much is not in issue, but the result could be reversed if paragraph 19(3) affects the case and disapplies paragraph 19 altogether.
49. On the face of it, subparagraph (3) is not in point because the "new holding" does not differ at all from the original one, and the subparagraph applies only where there is a difference, albeit only in the number of shares and where they are of the same class. Mr Warren, however, contends that there are several reasons of policy why it would be inappropriate for the special regime of paragraph 19(2) to apply: the basic regime of straight line apportionment is apt where the new holding can be expected to behave no differently from the original holding; where there has been no difference in the type of share held, there is no need for a special regime; the drafting is imperfect, and subparagraph (3) must be read purposively as referring to a difference only in number between the old and new holdings if there is a difference at all; it must be inferred that the there would always be some differences between the old and new holdings.
50. Mr Venables answers this by reference to the passages from Lord Avonside's judgment in IRC v. Beveridge cited above. It is clear to us that subparagraph (3) must, indeed, be construed as the Court of Session indicated there that it should be, namely as an exception to the use of the formula in subparagraph (2) where there is no need for it. As Mr Warren himself submitted in explaining the place of paragraph 19 in the scheme of things, it may be expected that the new holding following a reorganisation will behave differently from the way in which the original holding did, and it is therefore right that the computation of gains or losses should be distinct on either side of the event. Where such an expectation of difficulty is not warranted there is no need for the remedy, and it is not surprising to find that it is not applicable.
51. We conclude therefore that paragraph 19(3) of Schedule 2 does not apply to the circumstances of this case.

The fifth question - were the payments by Unilever within section 128?

52. No direct, or indeed indirect, authority was cited in relation to the question whether the £6.9M paid by Unilever to obtain the cancellation of the preference stock was "consideration for its new holding". The question only arises of course if all the previous questions have been resolved in the taxpayer's favour. The matter must therefore be approached from first principles.
53. Consideration is classically defined as "some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or

responsibility given, suffered or undertaken by the other": Currie v. Misa (1875) L.R. Ex. 162. While the agreement of the preference stockholders to the Scheme of Arrangement is capable of forming the counterparty to the payment by Unilever of the cash sum they received from BOCM, there is no evidence that any contract as such existed between Unilever and the stockholders. If there had been such a contract, it is not clear why Unilever should have had to give undertakings to the court which sanctioned the Scheme that it would pay the cash value of their holdings to the preference stockholders; and, of course, Unilever was not itself a party to the Scheme.

54. It is not argued that BOCM was in any sense the agent of Unilever to make a contract with the stockholders, or indeed that there was a contract between Unilever and BOCM for the latter to procure the concurrence of the stockholders. And without a contract between Unilever as the provider of the money, and the stockholders whose action or forbearance enabled the Scheme to proceed, it cannot be said that the cash paid by Unilever was consideration for the ordinary stock, even assuming that it is accepted that the post-Scheme stock had the character of a new holding by reason of its enhanced value and the opportunities associated with that. The facts presented in this appeal – and it must be recalled that they were not in contention – do not justify a conclusion that what was paid by Unilever can be described as consideration given for its "new" stock.

Conclusions

55. We have been asked to make a determination in principle only. For the reasons given above, we determine that (i) there was no reorganisation within the meaning of section 126 of the Taxation of Capital gains Act 1992; (ii) Unilever's ordinary stock was not "concerned in" the reorganisation if there was one; (iii) Unilever's stock did not constitute a "new holding" following any reorganisation there may have been; (iv) paragraph 19(2) of Schedule 2 to the 1992 Act would apply if the previous questions had been determined in favour of the taxpayer, and (v) if questions (i), (ii) and (iii) had been determined in favour of the taxpayer, the payment by Unilever to the preference stockholders was not "consideration for [its] new holding" within the meaning of section 128 of the 1992 Act.

STEPHEN OLIVER QC

MALACHY CORNWELL-KELLY

SPECIAL COMMISSIONERS

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Cases cited in argument but not referred to in the Decision:-

Batts Combe Quarry Ltd v Ford [1943] Ch.51

Hill (George) & Co v Hill (1886) 55 LT 769

Borland's Trustee v Steel [1901] 1 Ch.279

IRC v Crossman [1937] AC 26

Aberdeen Construction Group v IRC 52 TC 281

IRC v McGuckian 69 TC 1

Everett v Griffiths [1924] 1 KB 941

Cory v Harrison [1906] AC 274