TAX AVOIDANCE; cross options and collateral loan; whether cross options to be regarded as single composite transaction with no commercial purpose other than tax saving scheme; loan relationships; gilts; debt contract; Finance Act 1994 as amended sections 147-177; Finance Act 1996 sections 80 & 81

THE SPECIAL COMMISSIONERS

SCOTTISH PROVIDENT INSTITUTION Appellant
- and -
THE COMMISSIONERS OF INLAND REVENUE Respondents

Special Commissioners: J. GORDON REID QC., F.C.I. Arb.

DR JOHN F AVERY JONES CBE

Sitting in private in Edinburgh on 10 to 14 September and in London on 17 December 2001

Graham Aaronson QC (of the English Bar) and Colin Tyre QC for the Appellant

G.J.B. Moynihan QC and Jane Paterson, Advocate for the Respondents

NOT FOR PUBLICATION

DECISION

1. This is an appeal against an assessment for the period ended 31 December 1996. The only matter with which we are concerned is whether a loss of about £20m is allowable. However, the appeal raises questions of interpretation of new rules for the taxation of bonds and gilts introduced by the Finance Act 1996, in the context of call options taken out as part of a tax saving scheme. The appeal also raises the question whether the arrangements entered into, which may yield substantial loss for tax purposes fall with in the *Ramsay* approach as extended and explained by subsequent case law. The Appellants were represented by Graham Aaronson Q.C., of the English Bar, and Colin Tyre Q.C. Mr Aaronson led the evidence of Mr John Paterson, then senior corporate manager of the Appellant, David Woods, FIA and then Chief Executive of the Appellant, Fiona Austin, CA (nee Harrold), then Manager, Citibank and Christopher Taylor, C.A., partner PricewaterhouseCoopers. The Respondents (the "Revenue") were represented by Gerry Moynihan Q.C. and Jane Paterson, Advocate. Mr Moynihan led the evidence of Eugene Mitchell C.A., Inland Revenue. Large Business Office advisory accountant, Christopher Russell, Fellow of the Faculty of Actuaries in Scotland, and Fellow of the Institute of

Taxation, and Thomas Grimes, FIA and member of the Stock Exchange, and an expert in the Gilt Edged market. All witnesses produced and spoke to precognitions or Reports prepared and exchanged in advance of the Hearing except Mr Taylor. He was a late addition. However, he prepared a written statement which was circulated before he gave evidence. No objection was taken to Mr Taylor being added to the Appellant's list of witness or to the lateness of his precognition. Both parties lodged a substantial number of documents. They fell into two bundles. The first a joint bundle, which we shall refer to as J/ and the second a bundle in three volumes which accompanied the Report prepared by Mr Mitchell; we shall, where necessary, refer to this bundle as M1/ etc. There was inevitably some duplication in the documents produced. The authenticity, and where applicable the transmission and receipt, of the documents produced were not in dispute by either party. We found all witnesses generally credible and reliable. There was no cross examination or submissions suggesting otherwise except, in relation to Fiona Austin and we consider that particular submission at paragraph 24 below. Counsel produced skeleton arguments prior to the Hearing. A draft Statement of Agreed Facts was prepared and produced but was not signed by counsel. Counsel were unable to agree its final terms. We have therefore placed no reliance upon it although some of the facts set forth within it have found their way into our findings-of-fact. Mr Moynihan produced written submissions which formed part of his closing address to us. Mr Aaronson produced written proposed findings-in-fact. The Hearing took place on 10-14 September 2001 and 18th December 2001. We shall begin by summarising the scheme, and then set out our principal findings-in-fact. Thereafter, we shall summarise the submissions, consider the scheme in more detail, outlining our views and conclusions on the evidence and arguments.

The scheme in outline

2. This case concerns a tax avoidance scheme relating to two options granted on 30 June 1995:

   Option A. Citibank International plc (Citibank) paid £29.75m to the Appellant for the option to acquire £100m 8% Treasury 2000 (the gilt) at a price of 70 between 30 August 1995 and 1 April 1996;

   Option B. The Appellant paid £9.81m to Citibank for the option to buy £100m of the gilt at a price of 90 between 30 August 1995 and 1 April 1996.

3. The scheme was intended to work in the following way. The Appellant's hope was that under legislation which had been proposed in a consultative document on the taxation of gilts and bonds issued on 25/5/95, the £30m (approximately: we shall use round figures throughout this decision), paid for the grant of Option A before the legislation came into force, would fall out of account; the receipt was not taxable under existing law because options over gilts are not liable to tax on capital gains. They hoped that when the legislation came into force and Option A was exercised the Appellant would receive £70m and transfer out £100m of gilts worth say par thus, it was hoped, making a loss of £30m. Had Option A been the only transaction, the Appellant might have had to buy the gilt at over 100, thus making a commercial loss. The purpose of Option B was to hedge the transaction and protect them from this risk. As it turned out (assuming for the moment that the Appellant is right), Option B was to the Appellant's

tax disadvantage, since the mirror image of the Option A tax treatment applied with the result that it paid £90m to receive gilts worth £100m and made a taxable profit of £10m which reduced its loss to £20m (had they known, the Appellant, assuming their arguments are well founded, could have avoided the result by exercising Option B before 1 April 1996).

4. There is a further component of the scheme. Had there just been the two options, Citibank would have been out of its money by £20m, having received £10m for Option B and paid out £30m for Option A. Citibank would be in the position that it would want to exercise Option A at the earliest possible moment while the Appellant naturally wanted it to wait until the legislation was in force before it exercised Option A; as it turned out, the legislation came into force on the last day of the option period, 1 April 1996 (and the only reason the options extended to that day was that 31 March was a Sunday—the practice in those circumstances being to extend the option period to the next business day). This aspect was dealt with by a Collateral Agreement made on the same day as the options under which the Appellant paid £20m by way of interest-free loan to Citibank, repayable when Option A is exercised. The difference between the two payments on the grant of the options is, in fact, £60,000 short of the £20m, which is effectively Citibank's fee or fixed return, including any hedging costs, for entering into the arrangements built into the option figures. Finally there was a further contract made on the same date under which a success fee of up to £240,000 was payable to Citibank if the scheme succeeded. This is calculated at 10 per cent of the difference between the value of the long term business funds of the Appellant after and before including the options contracts less the £60,000. This we understand is a way of expressing the fee as 10 per cent of the tax saving.

Principal Findings-in-Fact

5. In the light of the evidence and documents, we found the following principal facts to be admitted or established:-

6. The Appellants are a mutual life office incorporated by Act of Parlaiment. They have their group head office at Edinburgh.
7. Citibank NA ("Citibank") is an American bank with a branch registered in the United Kingdom.
8. On or about 25/5/95 the Inland Revenue published a consultative document entitled "The Taxation of Gilts and Bonds" [J/3]. The document concerned the reform of the tax rules for gilts and bonds. In general terms, it proposed a major simplification of the then current tax rules applicable to gilts and bonds, including derivatives such as options, by treating profits as of an income nature with losses being relievable against income. The rules for corporate holders would parallel the rules for new financial instruments in the 1994 Finance Act. Comments on the proposals were invited by 30/6/95.
9. On or about 20/6/95 [J/4] Citibank proposed to the Appellants a scheme which had as its object the creation of expenses within the new proposed tax regime referred to above. The essence of the Scheme was the purchase by the Appellants from Citibank International plc of a call option at a strike price of 95% of the nominal value of the bond; and the purchase by Citibank International plc from the Appellants of a similar call option but with a strike price of about 70% of the nominal bond value. A premium was to be paid for each purchase. After the commencement of the new tax regime, the options are exercised. The Appellant's loss on the sale of the Bonds is expected to be an "income loss", while the premium

received for the option written by the Appellant is treated as exempt under the old tax regime. Under the new regime the premium paid by the Appellant may be added to the purchase price of the Bonds thus reducing or eliminating the profit on the exercise by the Appellant of the option granted by Citibank.

10. The Citibank scheme was discussed at Board level by the Appellants on 27/6/95 because it did not fall within its normal investment guidelines. The Board granted authority to its senior management to proceed with the proposed scheme giving it discretion on details and implementation.
11. After the drafting and discussion of various documents between the Appellants and Citibank between about 22/6/95 and 30/6/95, four documents were executed on or about 30/6/95.
12. The parties entered into an agreement [J/19] entitled OTC Bond Option Confirmation. They referred to this agreement as Transaction A and gave it the reference number 1224895. It incorporated the terms of the International Swap Dealers Association 1992 Master Agreement ("ISDA") with amendments. Under Transaction A, the Appellants granted a call option to Citibank in respect of £100,000,000 of nominal amount of 8% UK Gilts due 7/12/00 at an option strike price of 70% of the par value of the bond plus accrued interest. The option was exercisable at any time between 30/8/95 and 1/4/96. The premium for the option was £29,750,000 payable by the Appellants on 5/7/95. Provision was made for notice of exercise of the Option to be given. If the Option were to be exercised, then settlement was to be "physical" ie the Bonds were to be delivered in exchange for payment.
13. The parties entered into an agreement [J/18] entitled OTC Bond Option Confirmation. They referred to this agreement as Transaction B and gave it the reference number 1224905. It incorporated the terms of the International Swap Dealers Association 1992 Master Agreement ("ISDA") with amendments. Under Transaction B, Citibank granted a call option to the Appellants in respect of £100,000,000 of nominal amount of 8% UK Gilts due 7/12/00 at an option strike price of 90% of the par value of the bond plus accrued interest. The option was exercisable at any time between 30/8/95 and 1/4/96. The premium for the option was £9.810,000 payable by the Appellants on 5/7/95. Provision was made for notice of exercise of the Option to be given. If the Option were to be exercised then settlement was to be "physical", ie the Bonds were to be delivered in exchange for payment.
14. The ISDA, a print of which the parties signed in about November 1995 [J23], contained a number of general provisions including a single agreement clause agreeing that the confirmation, the ISDA and a schedule thereto, also signed by the parties formed a single agreement between them. Clause 2(c) of the ISDA provided for netting the amounts due to or by either party at settlement at the election of the parties.
15. On or about 30th June 1995, the parties entered into an agreement [J/20] entitled "Collateral Agreement in respect of American call option; Transaction Ref: 1224895". This is a reference to Transaction A referred to above. Under the Collateral Agreement, the Appellants required to pay Citibank on 5/7/95 the Collateral Amount, defined as "An amount of Pounds Sterling equal to the Bond Entitlement of Transaction A multiplied by the difference between the Option Strike Price of Transaction A and the Option Strike Price of Transaction B.." This amounted to £20,000,000. Under the Agreement, it fell to be repaid, without interest, on the earlier of the day on which Transaction A was exercised and 1/4/96.
16. The parties also entered into a further agreement on or about 30/6/95, entitled Structuring Fee [J22]. This entitled Citibank to a structuring fee calculated by reference to the Appellant's long term business funds

including and excluding the two option contracts, less the initial fee of £60,000, and subject to a maximum of £240,000. The maximum total fee was thus £300,000. The agreement provided for payment on 1/9/96.

17. The Scheme, which comprised the two Option Contracts, the agreement for the deposit of collateral, and the Structuring Fee agreement were described by Mrs Austin in a Booking Summary prepared by her for middle management at Citibank on or about 3/7/95 [J/24]. These option contracts created a genuine economic risk for Citibank. That risk was passed to Citibank, Frankfurt. Citibank, Frankfurt managed a pool of options to which the said two options were added. Citibank's bond option trading activities and risk management took place at Citibank, Frankfurt.
18. On 5/7/95, the sum of £60,000 was paid by the Appellants to Citibank. This was the difference between the sums payable by the Appellants to Citibank (£9,810,000+£20,000,000 i.e.29,810,000) and the sum payable by Citibank to the Appellants (£29.750,000).
19. On or about 12/7/95, the Inland Revenue issued a Press Release intimating the introduction of new rules for the taxation of gilts and capital bonds on 1/4/96. An internal memorandum of the Appellants dated 12/795 [J28] recognised that holding the options until 1/4/96 introduced a potential investment risk for Citibank, the risk being the possibility of the underlying gilts, being the subject of the Option contracts, falling below 90% of its nominal value ie below the strike price of Transaction B.
20. By letter to Citibank dated 20/3/96 [J35], the Appellants intimated that in the absence of further instructions, **if** Citibank exercises its option under Transaction A on 1/4/96 [a Monday], then the letter is to be treated as constituting notice by the Appellants of the exercise of its option under Transaction B on 1/4/96. By letter in reply on or about 28/3/96 [a Thursday] [J36], Citibank confirmed that if both options were to be exercised on 1/4/96, stock deliveries and all sums due (including the £20m collateral deposit under Transaction A) would be netted off for settlement purposes, with the result that neither stock nor money would be exchanged. The letter further provided that in the absence of further instructions, if the Appellants exercised its option under Transaction B on 1/4/96, then the letter was to constitute notice by Citibank of exercise of its option under Transaction A on 1/4/96. The terms of that letter were agreed by the Appellants on or about 28/3/96. Neither party provided further instructions.
21. By fax letter dated 1/4/96 to Citibank [J37], the Appellants exercised its option under Transaction B and noted that Citibank's option under Transaction A was also thereby exercised and that settlement was agreed to be by offset. The position was confirmed by fax letter in reply by Citibank on the same day [J38].
22. In the course of the audit of their accounts for the year ended 31/12/95, an error of £20m was noted. It was attributable to a deposit for that amount with Citibank having been taken credit for twice in compiling the balance sheet at 31/12/95. Assets were thus overstated in the year end balance sheet by £20m. The error was reported to the Department of Trade and Industry when the Appellants submitted their statutory returns in terms of the Insurance Companies (Accounts and Statements) Regulations 1983. The error was corrected in the following year's accounts.
23. Transactions A and B were entered into by Appellants and Citibank acting at arm's length. The options and premia payable were negotiated at market rates. When Transactions A and B were entered into along with the Collateral Agreement, there was a genuine commercial possibility of movement of interest rates and gilt prices such that it would be in Citibank's commercial interests to either refrain from exercising Option A

or exercising or attempting to exercising it on a date different from the exercise by the Appellants of Option B. There was a genuine commercial possibility and a real practical likelihood that the two options would be dealt with separately. Likewise, there was a genuine commercial possibility and a real practical likelihood that Option B would not be exercised by the Appellant.

24. On or about 25/10/00, the Inland Revenue issued to the Appellants a Notice of Assessment for the period 1/1/96 to 31/1/96 [J52] to Corporation Tax. By letter dated 2/11/00 [J53], the Appellants appealed against that assessment.

Our more detailed findings-in-fact emerge in our consideration of the Background to the Scheme, Whether the options are separate transactions, and Mark to Market.

Background to the scheme

25. Citibank approached the Appellants, with whom they had an established relationship, with the scheme on 22 June 1995 following the Appellant's refusal to sign a confidentiality undertaking because of that relationship. The scheme was not given to anyone else. At that time, the scheme was called a "Negative I–generating tax structure" (this being a reference to the I minus E method of taxing insurance companies), about which Mr Moynihan made much play, and later it was called a "cross options scheme." We do not find the name material; it is admitted that it was a tax avoidance scheme. After some negotiations, during which the collateral agreement was introduced and the strike prices changed from 65 and 95 to 70 and 90, the scheme in its final form was put to the Appellant's board on 27 June 1995 since the transactions did not fall within its normal investment guidelines; it was approved by the Board. The options, the collateral agreement and the success fee agreement were all entered into on 30 June 1995. The option prices were based on a price for the gilt of 99.75 which was the price on the day the Appellant's Board approved the transaction. The options were entered into on commercial terms. The options created a genuine economic risk to Citibank; they passed the risk to Citibank NA (Frankfurt) which who managed a pool of option contracts. The fee of £60,000 built into the option prices remained with Citibank in the UK.
26. The Appellant's investments were managed by a subsidiary, which operated in a similar manner to an external investment adviser. This transaction was not managed by the subsidiary and, in its investment records, the options were included with N/A against the valuation.
27. The options were entered into on the last day for commenting on the consultative document on gilts and bonds before the details of the legislation was known. It was then expected that the legislation would come into force during the accounting period to 31 December 1995 in which case it was likely that both options would be exercised. It was announced in July 1995 that the commencement date for companies would be deferred until 1 April 1996, the last day for exercising the options. The options were therefore unexercised on 31 December 1995 and were valued for the purposes of the 1995 accounts (Option A minus £34.875m, Option B plus £14,875m with the collateral deposit being plus £20m so that the net amount was nil). Because of an error caused by the absence of values for the options in the investment summary, the asset of the collateral deposit but not the net liability of the options was included in the accounts, resulting in an overstatement of assets by £20m. This was

discovered when the Department of Trade and Industry return was made. The auditors agreed that the error was not material.

28. On 20 March 1996 Mr Paterson of the Appellant wrote [J/35] to Citibank agreeing to net off payments and stock deliveries if both parties exercised their options. Citibank agreed in a letter, which was countersigned by Mr Paterson on 28 March 1996 [J/36]. This agreement did not commit either party to exercise the options, although Mr Paterson stated in his letter of 20 March that it was the Appellant's present intention to exercise Option B. There was no advance agreement that both options would be exercised on 1 April 1996, although this must have been likely by 28 March 1996. The legislation duly came into force on 1 April 1996 and both options were exercised on that day, the last day for exercise. Because of the agreement to net off the payments, no money or stock changed hands.

Submissions

29. Counsel for both parties produced skeleton Notes of Argument. Mr Moynihan, for the Revenue, produced a detailed written closing submission, which he revised in the course of his submissions, and Mr Aaronson produced written proposed findings-in-fact. Both counsel supplemented the written material with detailed submissions on the law and the evidence. We are grateful to counsel for the wealth of material presented to us and trust that we shall be forgiven for not incorporating all of it into this decision. We have endeavoured in this part of the Decision to distil the essential features of each side's arguments. We consider what seem to us to be the critical points at issue below.

Submissions for the Appellant

30. Underlying the Appellant's case was the acceptance that the purpose behind the transactions under consideration was the exploitation of detailed statutory rules to produce a statute-created loss. This could have been achieved by entering into Option A without entering into the hedging arrangement (Option B). It was anticipated correctly that the new rules relating to "loan relationships" (which would include gilts) would borrow certain features from legislation dealing with financial instruments, the effect of which would be that payments made prior to the commencement date for the new statutory rules would be left out of account in computing profits and losses arising from loan relationships under the new regime (see also the Taxation of Capital Gains Act 1992 section 115 and ICTA 1988 section 128). Thus the £30m paid prior to the commencement of the new regime was excluded from any charge to tax. On the other hand the other elements of Option A, namely the transfer of £100m gilts for £70m was expressly included in the new regime and created a loss of £30m. That all this came to pass, was as a result of educated guesswork by those involved. There were various other possibilities when the Options were entered into, which might have had very different tax consequences. The result, submitted Mr Aaronson, was a drafting "own goal"; the draftsman had not considered the case where initial payments excluded from computation under the new rules were also excluded from tax by the old regime. This appeal was likely to be the only case where the particular own goal would lead to a win for the taxpayer. Mr Aaronson then turned to the detail of the statutory provisions. Chapter II of Part IV of the Finance Act 1994, as amended, has effect from 1/4/96. Transitional provisions contained in paragraph 25 of Schedule 15 to 1996 Act were not relevant for present purposes. He submitted that a *loan relationship* included a gilt

(1996 Act, section 81(1)); the relationship between the parties constituted a debt contract or option within section 150A of the Finance Act 1994 (subsections (1) and (10)). The Appellant was a *qualifying company* for the purposes of Chapter II (1994 Act section 154); the payments made were *qualifying payments* (1994 Act section 153(1)(ca), 150A(5), 151). Gilts are *money's worth* therefore a transfer of a gilt is treated as a payment (1994 Act section150A(11)). The payment of the sum of £60,000 fell within section 150A(5)(a) or (b); it was part of the price to induce Citibank to become a party to the transactions. Even if it does not fall with section 150A it falls within section 151. In any event it or alternatively it falls to be regarded as *small* within section 152 of the 1994 Act. Each option fell to be treated as a separate contract.

31. The operative part of the statutory scheme was section 155 of the 1994 Act. Section 155(4) applied (mark to market basis). The sum of £30m fell to be left out of account; it was not a *qualifying payment*, having been paid before 1/4/96. Accordingly, under the new statutory rules, a loss of some £34m was made because the Appellant had transferred £104m worth of gilts (£104 being the value of the gilts on transfer) but received only £70m of qualifying payments. Under Option B, they made a profit of £14m; they received £104m worth of gilts but paid only £90m. The net loss is £20m. Without the hedging Option B, the loss under the new statutory regime would have been greater, namely £34m. Although the Appellant entered into the transactions on 30/6/95, it was deemed to have become entitled to rights or subject to duties thereunder on 1/4/96 (1994 Act section 147A(2)). As noted above, the sum of £60,000 fell to be included as part of the price for Option B. It included an element of hedging costs. If contrary, to his primary submission, the options fell to be treated as a single composite transaction, the statutory provisions meant that the single transaction was a debt option and the ultimate result was the same, namely a loss of £20m.
32. Mr Aaronson then dealt with the deeming provisions. There were two deeming provisions, namely section 155(7) and 147A(2) of the 1994 Act. The combined effect of section 147A(2)&(3) was that the Parliamentary draftsman failed to consider the position of a transaction that was exempt from capital gains tax.
33. As to the evidence, Mr Aaronson began by submitting that there was a fundamental flaw in the Revenue's whole approach to this appeal. The flaw was that, as both Mr Mitchell and Mr Russell stated in evidence, the scheme only worked if both options were entered into. This, he submitted, was obviously wrong. On the evidence, there were two legally separate contracts. They were accounted for separately by the Appellant, and there was evidence from Mr Paterson that the Appellant recognised that the options might not be exercised together. He relied upon the terms of a letter dated 22/6/95 9[J/6] to Citibank from their advisers Arthur Andersen, internal Memoranda of the Appellant dated 12/7/95 [J/28], and 9/1/0/95 [M/11], and on the evidence of Mr Paterson and Mr Woods. This recognition was genuine and reasonable, particularly when one considered that there was no certainty what Citibank might do with their option (Option A). He also drew our attention to TCGA 1992 section 144(8)(c))(iii) which recognises that options hedging other options exist and may be taxed separately. The relevant test was not what was expected or most likely, but whether there was any realistic or genuine commercial possibility that the options might not be exercised together or would be dealt with separately. An *outside chance,* as Mr Grimes put it, was a genuine commercial possibility. Mr Paterson stated that letting Option B lapse was regarded as a genuine possibility. Here, the test was passed having regard to the foregoing considerations. Mr Aaronson invited

us to make a series of factual findings to support this contention and other arguments. He accepted that if we held that there was no genuine commercial possibility of the Options not being exercised together, then the appeal failed.

34. On the issue of *mark to market* (section 155(4) of the 1994 Act), Mr Taylor's view, according to Mr Aaronson, was that one should mark to market, even where netting off is carried out. Netting could not change the nature of the arrangements or the operation of the tax code. Even Mr Mitchell, whose view was based upon the proposition that the options had to be exercised together accepted the mark to market basis as appropriate if the options were exercised separately. The policy of the Appellant was to mark to market; and this was consistent with commercial or normal accountancy practice.
35. As to the question of the "loan" it was a collateral contract that could not be treated as part of the options contracts. It was described by the parties as a *collateral deposit* [see J/35 letter dated 20/3/96 Appellant/ Citibank, and J/36 letter dated 28/3/96 Citibank/ Appellant. The legislation did not contemplate such a deposit being treated as a *qualifying payment.* Moreover, it required separate accountancy treatment. In relation to the authorities, Mr Aaronson referred us to the decision of the House of Lords in *MacNiven v Westmoreland 2001 STC 237* and, in particular, paragraphs 47-49, 56, 59-62. He accepted that there was no commercial loss but submitted that that did not matter because we were here dealing with a series of highly technical statutory provisions. It did not matter if the only purpose was the exploitation of a drafting blunder and the creation of a tax loss. He next referred us to *Griffin v Citibank Investments Ltd 2000 STC 1010,* especially paragraphs 33-49 and 52-53. He submitted that paragraph 43 was no longer good law having been superseded by *MacNiven.* He also informed us that the Revenue were refused leave to appeal in *Griffin.* He argued that it would be wrong to say that there was *no practical likelihood* that the options in the instant appeal would not be exercised on the same date. Finally, he referred to the decision of Special Commissioners Cornwell-Kelly and Wallace in *HSBC Life (UK) Ltd v Stubbs 6/11/01, LON/SC00295* paragraphs 54, 71, 73, 81, and 87-89

Submissions for the Revenue

36. Mr Moynihan began by making submissions on the evidence. He submitted that (1) the transaction (he used the singular) had no other commercial purpose than the securing of a tax advantage; (2) given the strike prices, there was no commercial (practical or realistic) likelihood of there being any financial consequence for either party; this was the expectation of both the Appellant and Citibank; (3) the relevant contract had to be identified for the purposes commercial accountancy issues, the proper interpretation of the statutory provisions, and the *Ramsay* argument; the relevant contract was a single composite transaction, or it least it became so by the relevant date, if not before; (4) there were five steps in the transaction, namely (i) Option A, (ii) Option B; (iii) the Collateral Agreement; (iv) the premium payable for Option B ie £9.75m plus the initial fee of £60,000; and (v) the Structuring Fee, which was the lesser of (a) 10% of the tax saved less £60,000, or (b) the sum of £240,000; (5) the transaction itself was unique; (6) steps (i) to (iii) of the transaction were inter-linked and were the constituent parts of the tax scheme, and (iv) and (v) were Citibank's fee for licensing its scheme to the Appellant; (7) what actually happened, ie both options being exercised on the same day, was the most likely outcome and what parties expected to occur; (8) Steps (i) to (iii) were self cancelling and there was no commercial purpose

other than an attempt at tax avoidance in exchange for a success fee, (9) there were various inbuilt checks and balances to ensure that the options had no separate commercial value, such as the Collateral Agreement and the reduction of the strike price from 95 to 90; (10) by 28/3/96, if not before, the operative parts of the scheme had become indivisible and self cancelling; an agreement was entered into on that date whereby it was agreed that if the Appellant exercised its option on 1/4/96 both options would be exercised on that date and netting off would apply, (11) Option B was not simply a hedge; it was thought that it would produce its own tax advantage, but this has now been conceded by the Appellant.

37. Mr Moynihan then referred us to *Griffin, Piggott v Staines Investments Co Ltd1995 STC 114 at 134E-H,* and *MacNiven,* particularly paragraphs 33, 34, 40, 49, 58. He submitted that we should approach matters in a commercial manner. He accepted the test could be expressed in terms of *genuine commercial possibilities.* There was no justification for applying *mark to market* separately to the two options. It had to be established that doing so accorded with *normal accountancy practice*; this requires an examination of the substance as well as the form of the transaction; the question whether there was no genuine commercial possibility of a fall in the value of the gilt to less than 90 or 70 was not considered by the Appellant's management.
38. In relation to the Collateral Agreement, Mr Moynihan submitted that even if the two options were *qualifying contracts* it was wrong to exclude the payment under the Collateral Agreement from the aggregate of qualifying payments; the Collateral amount was part of the consideration for Option A; it was part of the consideration for the debt contract and is therefore a qualifying payment. Mr Moynihan then submitted that the fee for the proprietory tax scheme was not a *debt contract*; moreover, there has to be a debt contract as at 1/4/96 for the Appellant's scheme to work. Given the agreement on 28/3/96 to net off with the result that neither stock nor money would be exchanged it would be nonsensical to speak of any subsisting rights or duties under a debt contract or of any entitlement or duty to become a party to a loan relationship.
39. Mr Moynihan made a number of subsidiary arguments. He submitted, in particular, that section 155(7)(a) of the 1994 Act did not apply to *deemed* acquisitions; deemed acquisitions fall to be entered at their market value as at midnight on 31/3/96. He referred us to *Marshall v Kerr 67 TC 56 and Jenks v Dickinson 69 TC 458 at 487-8* for the proposition that deeming provisions may be limited in effect if a literal application would produce unjust or absurd results. He attached two computations to his written submissions to demonstrate his arguments.

Whether the options are separate transactions

40. In relation to a series of transactions, it is well recognised that the only time they can be considered as a single transaction is when there is no practical likelihood that the events will not take place in the order ordained. As was stated by Patten J in *Griffin v Citibank Investments* [2000] STC 1010, 1038 this does not refer to a theoretical possibility but a genuine practical likelihood. In the words of Lord Oliver in *Craven v White* [1988] STC 476, 503h the test is whether "the successive transactions are so indissolubly linked together, both in fact and intention, as to be properly and realistically viewed as a composite whole." We approach the question of the separate nature of the options and the collateral agreement in this light.
41. The combined effect of the two options is that so long as the price of the gilt is above 90 neither party makes a profit or a loss when they are both

exercised; the profit on one option is always offset by the loss on the other. If the price of the gilt was below 90, the Appellant would not exercise Option B but would buy cheaper in the market and make a profit of the amount by which the price was below 90 and Citibank would make a corresponding loss. The maximum profit for the Appellant and loss for Citibank is £20m which occurs when the price of the gilt falls to 70. The options are therefore self-cancelling if there is no practical likelihood or no genuine commercial possibility of the price falling below 90. Accordingly we examine this aspect first.

42. On this point there was the following evidence. At the time of grant of the options the price of the gilt was very volatile. There had been a 4 point rise in May 1995 then a 3.5 point fall in June 1995. The price was 101.28 on 22 June 1995 and 99.06 on 29 June 1995, a fall of 2.2 points in a week. Mr Grimes showed that a drop from 99.16, the price on 30 June 1995 when the options were granted, to 90 represented a rise in interest rates of 2.25%. The chance of a change of this magnitude occurring, based on the Financial Times 5 year gilt indices, was 0.26% (based on 1990 to 2000) to 0.45% (based on 1984 to 1990) in the 2 months during which the options could not be exercised, the latter period being in his view more relevant because of the degree of volatility in the market in May and June 1995. During the 9 month life of the options the chance was about 3% which he said might be an over-estimate. Mr Paterson, acknowledging that the future was unknown, said that the chances were similar to that on an outsider winning a horse race. In re-examination his assessment was 20-1 to 25-1 which was 5%-4%. It is interesting that in an internal note (written on the notepaper of a subsidiary of the Appellant, Prolific Life Asset Management Limited) on 12 July 1995 [J/27], Mr Simon Burke, then Group Tax Manager of the Appellant, drew to the attention of his colleagues the announcement that the legislation would come into force on 1 April 1996 and referred as a consequence of the postponement of the expected date to the possibility of making a profit if the price dropped below 90.
43. In evaluating this aspect of the appeal, we emphasise that the price of the gilt depends on market forces, particularly interest rates, which are outside the control of the parties. In asking the question (whether there was any practical likelihood or genuine commercial possibility of the strike price of the gilt falling below 90) we are also speculating about the future about which there can be no certainty (it is worth recalling that we were sitting during the events of 11 September 2001). The past occurrence of price movements during a 9 month period is a guide to the future but only that. It is also relevant that Citibank was willing to enter into a transaction under which it made a loss if the price of the gilt fell below 90 but, apart from the fee built into the option price, it could never make a profit. This suggests that they did not consider that making a loss was particularly likely, although as a dealer in options they would be able to offset the liability. They regarded the £60,000 as including the cost of hedging the risk they were taking. We accept Mrs Austin's evidence to this effect; she was clear and firm on this point and we can find no reason to disbelieve her; Mr Grimes was of the view that the sum of £60,000 would have included a risk element; we therefore reject the Respondent's attack on her reliability. Mr Burke's note of 12 July 1995 [J/28] showed that the possibility of making a profit was in the minds of officers of the Appellant shortly after entering into the options. Our decision, based on this evidence, is that the price falling below 90 was unlikely but not so unlikely that one could say that there was no practical likelihood of its occurring, and accordingly that there was a genuine practical likelihood or to put it another way a genuine commercial possibility that the Appellant would not

exercise Option B. We were attracted by Mr Paterson's horse race analogy which gets away from seemingly exact figures. If the chance of the price movement occurring was similar to an outsider winning a horse race we consider that this, while it is small, is not so small that there is no reasonable or practical likelihood of its occurring; outsiders do sometimes win horse races. It follows that there was a genuine practical likelihood or a genuine commercial possibility that the Appellant would not exercise Option B. The result would be that the Appellant would make a profit and Citibank a loss.

44. We consider that, while it is near the limit, this degree of uncertainty saves the transactions from being ignored for tax purposes. Mr Moynihan tried to argue that nobody would carry out the transaction for that small possibility of profit. The Appellant admits that; they did it for tax reasons, not in any expectation of making a profit from the price of the gilt falling below 90, but the point is that they did something that had a sufficient degree of uncertainty attached to it that we cannot ignore what they did. Mr Moynihan argued strongly that (as the Appellant admits) this is nothing but a tax avoidance scheme in which no money passed, apart from the fee of £60,000, nobody acquired any gilts, and in the end everything cancelled out as was always expected. These are serious considerations but they do not enable us to ignore the transactions. They were genuine transactions under which the parties could make a profit or loss even though the expectation was that they would not. In our assessment of the evidence, this was clearly more than a mere theoretical possibility. We can add to all this that it was, according to the evidence of Mrs Austin, which we accept, as at 30/6/95 by no means a foregone conclusion that the proposed legislation contained in the Consultative Document {J/3] would be enacted.
45. In the light of this finding, we turn to the remaining facts. There was no agreement that the options would not be exercised early. Each party was free to exercise the options if it wanted. Had Citibank done so early and deprived the Appellant of the opportunity of making a tax loss there was no obligation on it to return the fee built into the price. Although it might appear that Citibank would exercise Option A if the price approached 90 in order to force the Appellant to exercise Option B and thereby prevent Citibank from making a loss, it did not follow that the Appellant would exercise Option B if Option A was exercised. It was possible that Citibank would exercise Option A without the Appellant exercising Option B, even though that would leave the Appellant immediately out of pocket because it would have to buy in the market above 90, perhaps because the price was close to 90 when that option would have significant time value. In any case, Option A was held in an options pool, and it would not be looked at by Citibank in isolation. It was unlikely that the Appellant would exercise Option B (which necessarily means that the price would be above 90) without Citibank exercising Option A. If by 1 April 1996 the price was below 90 (but above 70) it is certain that Citibank would have exercised Option A and the Appellant would not have exercised Option B. Accordingly, there are various circumstances in which the options might not be exercised together.
46. There was a dispute between the parties about whether the Appellant thought that there might be a tax benefit to Option B. If the Appellant were of that view, it strengthens the Respondent's argument that the two options should be considered together because they would need to be exercised together. Citibank's original proposal of 22 June 1995 expected that Option B would be exercised before the commencement date of the new legislation in which case any profit would be exempt. However, Citibank's later "deal structure" document faxed to Mr Paterson on 27 June

1995 [J/10] states: "...it is conceivable that the premium paid on [Option B] may be added to the purchase price of the bonds when the option is exercised (since no relief has been obtained under the capital gains tax rules)." No mention of this possibility is made in Mr Burke's memorandum of 23 June [J/7], revised on 26 June [J/9] or the supplementary note of 26 June [J/11] by Mr Gillon for the Appellant's Board meeting. All of these were made before the 27 June deal structure document and refer to a loss of £30m entirely from Option A. We find therefore that it was not part of the Appellant's plan to obtain any tax advantage from Option B and it is therefore to be regarded as hedging the risk relating to Option A. Accordingly, it was not part of the Appellant's plan that both options must be exercised at the same time. Indeed it may have been their original intention to exercise Option B before the legislation coming into force, which, with the benefit of hindsight, would have been the better course of action.

47. We find that the Collateral Agreement [J/20] is separate from the two options. It consisted of a genuine loan or at least a genuine deposit. Its purpose was to provide Citibank with security and to remove the incentive for Citibank to exercise Option A early. There was no right to offset it against payments under the options.

Mark to market

48. For the Appellant to succeed under the legislation which we consider below it has to show that the mark to market basis of accounting, that is that the options should be valued in the accounts on each accounting date and the profit determined by the difference, is applicable to the transactions; if the alternative accruals basis of accounting applied there would be no loss accruing on 1 April 1996. Section 156 of the Finance Act 1994 provides:-

(1) Where, for the purposes of a qualifying company's accounts, profits and losses for an accounting period on a qualifying contract held by the company are computed on—

(a) a mark to market basis of accounting which satisfies the requirements of this section, or

(b) an accruals basis of accounting which satisfies those requirements,

profits and losses for the period on the contract shall be computed on that basis for the purposes of this Chapter.

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3) A mark to market basis of accounting satisfies the requirements of this section as regards a qualifying contract if—

(a) computing the profits or losses on the contract on that basis is in accordance with normal accountancy practice;

(b) all relevant payments under the contract are allocated to the accounting periods in which they become due and payable; and

(c) the method of valuation adopted is such as to secure the contract is brought into account at a fair value.

49. This requires determining whether computing the profits or losses on these particular options on a mark to market basis is in accordance with normal accountancy practice. There is the obvious difficulty that the options were left out of the 1995 Accounts of the Appellant in error. However, the fact that they were valued for the purpose of including in the accounts suggests that this is what the Appellant intended to do.
50. Paragraph 14 of FRS 5 [M/Accounting Texts, tab 3] (ie Financial Reporting Standard issued in April 1994) provides that the substance of transactions should be reported in the accounts. In the case of options, paragraph 19 provides that "their commercial effect should be assessed in the context of all the aspects and implications of the transaction in order to determine what assets and liabilities exist." Paragraph 59 explains that normally an option should be treated as a separate asset from the underlying asset on which it is based. Paragraph 61 provides that "in determining the substance of a transaction incorporating options, greater weight must be given to those aspects and implications more likely to have a commercial effect in practice. This will involve considering the extent to which there is a genuine commercial possibility that the options will be exercised or, alternatively that they will not be exercised."
51. Taking these together, we find that normally a life assurance company would account for options by considering each to be a separate asset or liability. It would be normal accounting practice to mark to market such options (unless designed as a hedge). In relation to Options A and B in the light of our previous finding about the possibility of the price of the gilt falling below 90, we find that there was a genuine commercial possibility of Option B not being exercised. Such a view must be made at the time of grant of the options and the treatment does not vary because of later events. In particular, the agreement made on 28 March 1996 to net off the transactions if both options were exercised does not affect this point.
52. The policy of the Appellant was to compute the profit and loss of each of the options for the accounting period to 31 December 1995 separately on a mark to market basis. Because of an error, the valuations that had been made of the options were omitted from the balance sheet on that date. They were included in the returns to the Department of Trade and Industry, which resulted in the error being spotted. It was accordingly the view of the Appellant’s management at the time of grant of the options that there was a commercial possibility that one of them might not be exercised. We find that the treatment that the Appellant intended to apply was in accordance with normal commercial accountancy that the options should be accounted for as separate assets on a mark to market basis.
53. Finally, in relation to the correct accounting treatment, we find that the £20m under the collateral agreement could not be netted off against the options. This is because there was no right to insist on a net settlement of the amount payable under the options and the receivable under the Collateral Agreement. Following the agreement to set-off on 28 March 1996, it was proper to net them off. The mark to market basis still applied because that had to be determined at the time of grant of the options. But following the agreement to net off, it applied to the net amount.

The approach to interpreting legislation in relation to a tax avoidance scheme

54. We remind ourselves that judicial anti-avoidance doctrines are an approach to statutory construction. Following *McNiven v Westmoreland* [2001] STC 237, one must identify the concept to which the statute refers and determine whether this is a legal one or a commercial one. As Lord Hoffmann said at p.257a "The fact that steps taken for the avoidance of

tax are acceptable or unacceptable is the conclusion at which one arrives by applying the statutory language to the facts of the case. It is not a test for deciding whether it applies or not." The statute which we consider below uses commercial concepts like normal accounting practice and couples these with extremely detailed legislation involving formulae for computing profit or loss. Such detailed statutory material does not generally leave room for a commercial interpretation; the concepts are in the main legal concepts.

Application of the legislation

55. Accordingly, we turn to attempting to apply this complex statutory code to the transactions. Section 154 of the Finance Act 1994 provides:-

(1) Subject to subsections (2) and (3) below, any company is a qualifying company for the purposes of this Chapter.

Subsections (2) and (3) are not relevant. The Appellant is accordingly a qualifying company.

56. Section 150A provides:

(1) A contract is a debt contract for the purposes of this Chapter if, not being an interest rate contract or option or a currency contract or option—

(a) it is a contract under which, whether unconditionally or subject to conditions being fulfilled, a qualifying company has any entitlement, or is subject to any duty, to become a party to a loan relationship; and

(b) the only transfers of money or money's worth for which the contract provides (apart from those that will be made under the loan relationship) are payments falling within subsection (5) below and payments falling within section 151 below.

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(5) The payments falling within this subsection are—

(a) a payment of an amount representing the price for becoming a party to the relationship;

(b) a payment of an amount determined by reference to the value at any time of the money debt by reference to which the relationship subsists;

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(11) For the purposes of this section and, so far as it relates to a debt contract or option, of section 151 below the transfer of money's worth having a value of any amount shall be treated as the payment of that amount.

Section 151(1) provides:

(1) An interest rate contract or option, [a currency contract or option or a debt contract or option] may include provision under which the qualifying company—

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(b) becomes subject to a duty to make a payment in consideration of another person's entering into the contract or option.

57. Subsection (1)(a) of section 151 is satisfied as the Appellant and Citibank have an entitlement to become party to a loan relationship, namely the gilt. Subsection (1)(b) is satisfied because the only payments are within subsection (5) of section 150A, being the price paid for the options, the price paid for the exercise of the options, and, reading subsections (5)(b) together with subsection (11), the transfer of the gilts pursuant to the options. The fee of £60,000 built into the option price is part of the price for becoming party to the relationship within subsection (5)(a). There is no entitlement to rewrite the contract on the basis that Citibank treated it separately for their internal accounting. The success fee is within section 151(1) as a payment that the Appellant is under a duty to make in consideration of Citibank's entering into the options.
58. The Collateral Agreement is clearly linked to the options but it is a separate agreement making a loan or deposit that is not part of the options. Mr Moynihan argued that in any practical sense the collateral amount is part of the consideration for Option A, and legally that is so, also because it is payable when Option A is exercised. We do not agree. It is a loan or deposit which is repaid when the options are exercised. The only consideration is the interest foregone which is neither "the payment of an "amount" within subsection (5) of section 150A nor "the transfer of money's worth" within subsection (11) of that section. If we are wrong about this, it can be ignored under section 152 as being small Section 152 provides:-

(1) Where—

(a) but for the inclusion in a contract or option of provisions for one or more transfers of money or money's worth, the contract or option would be a qualifying contract; and

(b) as regards the qualifying company and the relevant time, the present value of the transfer, or the aggregate of the present values of the transfers, is small when compared with the aggregate of the present values of all relevant payments,

the contract or option shall be treated for the purposes of section 149 or, as the case may be, section 150 [or 150A] above as if those provisions were not included in it.

(2) For the purposes of subsection (1) above—

(a) any present value of a relevant payment which is a negative value shall be treated as if it were the equivalent positive value; and

(b) any relevant payment the amount of which represents the difference between two other amounts shall be treated as if it were a payment of an amount equal to the aggregate of those amounts.

(3) In this section—

"relevant payments" means—

(a) in relation to a contract, qualifying payments under the contract; ....

The computation of what is small depends on comparing the interest foregone on £20m for 9 months, say £1m, with the total of the positive and negative qualifying payments, that is (ignoring the 9 month delay and taking the value of the gilts as it turned out to be on the day of exercise of 104) of 90+70+104+104=368m. The amount is clearly small.

If we are wrong about either the £60,000 fee built into the option price or the success fee of up to £240,000 these are separately or together small in relation to this total.

59. Accordingly the options are debt contracts within section 150A. We turn to whether they are qualifying contracts. Section 147A provides:

(1) For the purposes of this Chapter a debt contract or option is a qualifying contract as regards a qualifying company if the company becomes entitled to rights, or subject to duties, under the contract or option at any time on or after 1st April 1996.

(2) For the purposes of this Chapter a qualifying company which is entitled to rights, or subject to duties, under a debt contract or option both immediately before and on 1st April 1996 shall be deemed to have become entitled or subject to those rights or duties on that date.

(3) This section has effect subject to paragraph 25 of Schedule 15 to the Finance Act 1996 (transitional provisions).

This must be read with section 177(2):

(2) For the purposes of this Chapter—

(a) a company becomes entitled to rights or subject to duties under an interest rate contract or option,[a currency contract or option or a debt contract or option], when it becomes party to the contract or option; and

(b) a company holds such a contract or option at a particular time if it is then entitled to rights or subject to duties under it;

and it is immaterial for the purposes of paragraph (b) above when the rights or duties fall to be exercised or performed.

It is common ground that the transitional provisions referred to in section 147A(3) do not apply because we are dealing with a mutual insurance company and gilts which are not within the capital gains regime. Mr Aaronson also raised an argument that the transitional provisions only apply to assets and not liabilities, with which Mr Moynihan did not agree.

It is not necessary for us to decide the point. Mr Moynihan argues that because of the agreement to net-off made on 28 March 1996 there were no subsisting rights and duties under the options. We do not agree. The agreement to net off said merely that if both parties exercised their options, then neither stock nor money would be exchanged; and if the Appellant did exercise its option then Citibank should be taken to have exercised its option. Both options continued in place and although, by 28 March 1996, both parties expected to exercise their options, their rights and duties under the two options continued to subsist. Since the Appellant is entitled to rights and subject to duties under the options before and on 1 April 1996 for the purpose of section 147A(2), the Appellant is deemed to have become entitled to rights or subject to duties on 1 April 1996. By virtue of section 147A(1), the options are accordingly qualifying contracts.

60. Section 155(7) provides:

(7) Subject to subsection (8) below, where a qualifying contract—

(a) becomes held by a qualifying company at any time in an accounting period, or

(b) ceases to be so held at any such time,

it shall be assumed for the purposes of subsection (4) above that its value is nil immediately after it becomes so held or, as the case may be, immediately before it ceases to be so held.

Subsection (8) is not relevant. Section 147A(2) deems the Appellant to have become entitled to rights under the contracts on 1 April 1996. Mr Moynihan argued that it did not follow that the contracts became held on 1 April 1996 so as to make section 155(7) apply because that did not apply to deemed acquisitions. He argued that deeming should not be allowed to produce an unjust or absurd result following cases such as *Marshall v Kerr* 67 TC 56 at 79A-C, per Peter Gibson J and 92H per Lord Browne-Wilkinson. It seems to us that since by section 177(2)(b) a company holds a contract at a particular time if it is then entitled to rights or subject to duties under it, it follows that where a company is deemed to have become entitled to rights under a contract on 1 April 1996, the contract is deemed to have become held on that date so as to make section 155(7) applicable. The result is that it is to be assumed that the value of the contract is nil immediatedly after it is deemed to have become held on 1 April 1996. At first sight the provision is odd but the reason for it seems to be that, ignoring the transitional date, payments for entering into the contract are taken into account and so it is not appropriate for the value of the contract to be taken into account at the same time. It is not a case of deeming producing an unjust or absurd result but of detailed statutory language avoiding double counting.

61. We have at last reached the point. Section 155(4) contains the calculation to be made.

Where, as regards a qualifying contract held by a qualifying company and an accounting period, amount A exceeds amount B, a profit on the contract of an amount equal to the excess accrues to the company for the period.

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(4) Where as regards a qualifying contract a qualifying company's profit or loss for an accounting period falls to be computed on a mark to market basis incorporating a particular method of valuation—

(a) amount A is the aggregate of—

(i) the amount or aggregate amount of the qualifying payment or payments becoming due and payable to the company in the period, and

(ii) any increase for the period, or the part of the period for which the contract is held by the company, in the value of the contract as determined by that method, and

(b) amount B is the aggregate of—

(i) the amount or aggregate amount of the qualifying payment or payments becoming due and payable by the company in the period, and

(ii) any reduction for the period, or the part of the period for which the contract is held by the company, in the value of the contract as so determined.

We have already found that the correct basis of accounting was to mark to market so that subsection (4) applies. For option A and assuming that the price of the gilt on the date of exercise is 104 (as put forward by the Appellant; Mr Moynihan worked on the basis that the value was 101, but whatever the price the amount will cancel out) and ignoring any increase in value during the day, amount A is £70m and amount B is £104m, resulting in a loss of £34m. For option B amount A is £90m and amount B is £104m, resulting in a profit of £14m. The net effect is a loss of £20m (using the round figures we have used throughout).

62. At this point we stand back and, like Mr Moynihan, ask whether, having accepted that a mark to market basis of accounting is appropriate on the basis of normal accountancy practice, a loss of £30m and a gain of £10m can occur in the course of 1 April 1996 when plainly the value of the options did not change and such a loss and gain is not in accordance with normal accountancy practice. In particular, it cannot have been Parliament's intention to tax the gain on Option B which could occur in circumstances far removed from any tax avoidance scheme. We agree that the result is unexpected but it follows from the application of detailed statutory provisions that do not leave room for application of a different result. The legislation, while stating in section 156(1), that profits and losses are computed for tax purposes on the mark to market basis, where this is applicable, requires one to apply the formula set out in section 155 regardless of whether the result is in accordance with normal accountancy practice. The mark to market basis of accounting in accordance with normal accountancy practice precedes the application of the formula, and is not the result of applying the formula. What is wrong here is that the transitional provisions do not apply in the circumstances of this case, presumably because the draftsman did not foresee those circumstances (hence the own goal analogy), which is not a reason for not giving the statutory provisions anything other than their normal meaning, particularly so in the case of detailed legislation of this type.

63. Accordingly, the appeal is allowed in principle. We have used round figures in this decision and we expect the parties will be able to agree the precise figures. We authorise them to apply for further Directions etc if they cannot agree.

J GORDON REID Q.C., F.C.I. Arb.

JOHN F AVERY JONES C.B.E.

SPECIAL COMMISSIONERS

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