JUDGMENT : Mr Justice Blackburne: Chancery Division. 22nd July 2005.

Introduction

1. This is an appeal under the Arbitration Act 1996, brought with the permission of Cooke J, against an award dated 9 June 2004 and issued to the parties on 17 June 2004. The award was made on a preliminary issue in an arbitration between Cooperative Group (CWS) Ltd ("CWS") as claimant and Stansell Ltd (formerly known as Stansell (Builders) Ltd) ("Stansell") as respondent. In the arbitration CWS claims damages against Stansell for the alleged breach by Stansell of its obligations under a contract ("the building contract") entered into on 17 April 1990 in a JCT Standard Form for the construction of a distribution centre on land at Chelston Business Park, Taunton Vale, Somerset. The contract works were completed in December 1990. All payments due under the contract for those works have long since been discharged.

2. The building contract which was under seal was between Co-operative Retail Services Ltd ("CRS") as employer and Stansell as contractor. CWS was not a party. Clause 18.1.1 of the building contract was in the following terms: *"Neither the Employer nor the Contractor shall, without the written consent of the other, assign this Contract."*

3. CRS was at all material items a registered society within the meaning of the Industrial and Provident Societies Act 1965 ("the 1965 Act"). On 4 March 2000, a special resolution was passed at a duly convened general meeting of CRS, and on 25 March confirmed at a duly convened general meeting of CRS, in the following terms: *"This general meeting of Co-operative Retail Services Limited hereby resolves to transfer the whole of the property and assets and all the engagements of the society to the Co-operative Wholesale Society Limited in consideration of the Co-operative Wholesale Society Limited issuing to each member of Cooperative Retail Services Limited paid up shares in the Cooperative Wholesale Society Limited equal in value to the amount standing to the credit of that member in his or her share account in the register of members of Co-operative Retail Services Limited on the date on which this transfer of engagements becomes effective. This resolution shall take effect on 2 April 2000 or on the date of its registration by the Registrar of Friendly Societies, if later."*

   In the meantime, Co-operative Wholesale Society Ltd, which was the then name of CWS (and continued to be until it changed its name to its present name with effect from 14 January 2001), undertook on 8 March 2000 to fulfil the engagements of CRS. The resolution was sent for registration to the Registrar who duly registered it under the 1965 Act on 28 March 2000. Accordingly, the resolution took effect on 2 April. On 13 April 2000, pursuant to section 16 of the 1965 Act, the registration of CRS as an industrial and provident society was cancelled by the Registrar on the ground that, following the transfer of its engagements, it had ceased to exist. The question raised by the preliminary issue referred for decision to the arbitrator, Mr D R Dyer, was whether the transfer of the property and assets and all of the engagements of CRS to CWS was effective to vest in CWS CRS' s rights under the building contract including, in particular, the right to claim damages against Stansell for breach of that contract. Central to the resolution of this question was section 51(1) of the 1965 Act which provides: *"Any registered society may by special resolution transfer its engagements to any other registered society which may undertake to fulfil those engagements; and if that resolution approves the transfer of the whole or any part of the society's property to that other society, the whole or, as the case may be, that part of the society's property shall vest in that other society without any conveyance or assignment."*

5. Stansell contended that, having regard to the prohibition against assignment without written consent contained in clause 18.1.1 of the building contract, the transfer of CRS's engagements and property to CWS effected by the resolution was not capable of extending to any right in CRS under the building contract and that, on its true construction, section 51(1) did not have the effect that the resolution, when duly registered, could override that prohibition. Relevant to this was that CRS had not sought, and Stansell had not given its, consent to the assignment to CWS of any right in CRS to sue Stansell for breach of the building contract (or, for that matter, any other extant right which there might be under that contract). It contended that CRS's right to sue Stansell for breach of the building contract was not "property" or "an asset" or "an engagement" within the meaning of the 1965 Act but was a purely personal right which was not assignable except in accordance with the terms of clause 18.1.1.

6. CWS contended that the rights which, immediately prior to the transfer of engagements and property brought about by the resolution, CRS enjoyed against Stansell under the building contract, including in particular its right to claim damages for Stansell's breach of the contract, vested in CWS under the transfer

in consequence of the effect of section 51 of the 1965 Act pursuant to which the resolution was expressed to be passed.

7. The arbitrator came to the conclusion that clause 18.1.1 did not prevent CWS from pursuing the claim against Stansell. He was of the view, in agreement with the contentions advanced before him on CWS' s behalf, that the transfer effected by the resolution did not constitute an assignment of CRS's interest in the building as envisaged by the building contract (so as to be within the purview of clause 18.1.1) but that, even if there was an assignment, section 51 overrode the restriction on assignment contained in that clause. He therefore decided (and made an award) that CRS's right against Stansell under the building contract had vested in CWS pursuant to section 51.

8. It is against that conclusion which, with the leave of Cooke J, Stansell now appeals.

Clause 18.1.1

9. It is common ground that, ignoring a resolution under section 51, clause 18.1.1 effectively prohibited CRS from assigning to CWS any right of action against Stansell for breach of the building contract except with Stansell's consent, which consent CRS neither sought nor obtained.

10. In **Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd** [1994] 1 AC 85 the House of Lords concluded, inter alia, that (1) a clause (contained in a building contract) in substantially the same terms as clause 18.1.1 *("The employer shall not without the written consent of the contractor assign this contract"*) validly prohibited the assignment by the employer of the benefit of the contract, (2) the prohibition extended to the benefit of accrued rights of action by the employer against the contractor, (3) such a prohibition was not contrary to public policy and (4) a purported assignment (in breach of the clause) was ineffective to transfer any right (in that case, as in this, a cause of action against the contractor for breach of the contract) to the assignee.

11. In reaching the third of those conclusions (concerned with the public policy point), Lord Browne-Wilkinson, who delivered the leading speech, stated (at 107): *"A party to a building contract, as I have sought to explain, can have a genuine commercial interest in seeking to ensure that he is in contractual relations only with a person whom he has selected as the other party to the contract. In the circumstances, I can see no policy reason why a contractual prohibition on assignment of contractual rights should be held contrary to public policy."*

12. In reaching the fourth of those conclusions, Lord Browne-Wilkinson pointed to the difference between property rights (for example a leasehold term) and contractual rights and stated that, in contrast to the position where the prohibition against assignment relates to a right in property, an assignment of a contractual right in breach of a contractual prohibition is ineffective to transfer any rights. He stated (at 108) that: *"If the law were otherwise, it would defeat the legitimate commercial reason for inserting the contractual prohibition, viz., to ensure that the original parties to the contract are not brought into direct contractual relations with third parties."*

13. In **Hendry v Chartsearch Ltd [**1998] CLC 1382 Millett LJ explained (at 1393 to 1394) that whereas a condition against alienation of an estate in land (for example a leasehold term) is repugnant to the right of disposal which is one of the incidents of the estate and is therefore void, an ordinary commercial contract is, as between the parties to it, not property but obligation. He continued: *"There is therefore no objection to making the benefit of the contract non-assignable. There is no need to take a covenant against assignment or reserve a power to treat an assignment without consent as a repudiatory breach of contract, neither of which would provide an adequate or appropriate remedy to the other party. It is sufficient to provide, as the present contract does, that a party should not be entitled to assign the benefit of the agreement without the prior written consent of the other.*

Such a clause takes effect according to its tenor. The assignment which was made without the prior written consent of the defendants was effective as between assignor and assignee, but was ineffective as between the assignor and the defendants. The making of such an assignment did not put the assignor in breach of contract, let alone in repudiatory breach; it simply did not affect the defendants' legal position and could be disregarded by them with impunity."

14. None of this is a matter of controversy. Where the parties disagree is on the effect on the contractual prohibition contained in clause 18.1.1 of the special resolution, referred to earlier, passed (with the requisite majority) at a general meeting of CRS held on 4 March 2000 and confirmed at a general meeting of CRS on 25 March 2000 and subsequently registered, all in accordance with section 51.

15. For CWS, Mr David Mabb QC contended, as he successfully contended before the arbitrator, that the effect of section 51, pursuant to which the resolution was passed, was to override the contractual prohibition contained in clause 18.1.1 either because that is the purpose and effect of a resolution passed pursuant to that section (in other words, the transfer takes effect notwithstanding that a third party consent, otherwise necessary to bring about an assignment of the right, has not been obtained) or because it achieved a vesting of the right in CWS as transferee society in circumstances which do not amount to a breach of the contractual prohibition.

16. For Stansell, Mr John Ross QC contended, as he had contended before the arbitrator, that section 51, on its true construction, had no such effect and that, as Stansell's consent to an assignment to CWS of any cause of action (which was not admitted) vested in it against Stansell was not obtained, the transfer of engagements and property brought about by the special resolution (when registered) was ineffective to bring about a transfer of such right.

Did section 51 override the need to obtain Stansell's consent?

17. Was the effect of section 51 on the resolutions passed by CRS to override the contractual prohibition against assignment contained in clause 18.1.1? Although dealt with as the second of the two main contentions raised before the arbitrator in support of the submission that CRS's right of action against Stansell had become vested in CWS, I propose to deal with this issue first. It raises the meaning and effect of a special resolution duly passed (as this one was) under section 51.

18. Before coming to section 51, it is appropriate to mention briefly the origins of the industrial and provident society (and related societies), the extent to which the industrial and provident society features in contemporary life, and a little of the history of the legislation affecting them.

(1) The origins of industrial and provident societies and related organisations

19. The earliest association in this general field which I need mention is the friendly society. Its basic object was (and remains) to raise, by the subscription of its members, funds out of which to make mutual provision for members and their families against contingencies such as sickness, retirement, death and burial. Now registrable (so far as members choose to register them) under the Friendly Societies Acts of 1974 and 1992, the legislation affecting them stretches back to 1793 when an Act was passed to acknowledge their existence and give a measure of protection to them. Later legislation followed. This form of society and the others that grew out of it, in particular the industrial and provident society and the building society, were very much the product of the movement to encourage thrift and mutual help which developed towards the end of the eighteenth century and continued into the nineteenth century and beyond. The building society was and, even after the passage of the Building Societies Act 1986 (which enlarged the scope of its permissible purposes and powers), remains fundamentally an association of members for the purpose of raising funds by subscription from members so that advances may be made to them on mortgage to enable them to acquire their own homes. Another example was the closely related trade union, which provided an outlet for organised labour to better the lot of the working man through regulating relations between employer and employee.

20. Gower's Principles of Modem Company Law, 3rd edition at pages 232 to 233 helpfully sets the scene for the industrial and provident society: *"Like friendly societies, under whose Acts the early societies registered, they are intended to promote their members' welfare; to be 'industrial' in the sense that they make profits by the mutual personal exertion of their members, and 'provident' in the sense that they provide for their members' future. Their history is bound up with that of the co-operative movement, for it is cooperative societies that have always been the most important illustration of this type of association. Since 1862 they have been accorded full corporate status ... Like building societies, however, they are formed by registering rules ... and they enjoy certain advantages in comparison with companies. For example, investments in them up to a maximum of £500 [currently £5,000] can be transferred on death under a written nomination instead of by a formal will and probate - an advantage indeed, which applies to all friendly societies and most of their offshoots. Similarly, they have certain tax advantages. Moreover, the stringent requirements of the Companies Acts designed for the protection of the public were not included in the Industrial and Provident Societies Acts - doubtless it was thought that they were not needed since trading would be mainly restricted to members of the cooperative enterprise whose shareho1dings were limited in size [now £20,000]. And, in contrast*

with companies, shares may be withdrawable; that is, capital may be returned to the members so that share capital may fluctuate from time to time ...

Co-operative societies have captured a considerable part of the retail distributive trade and often deal with all comers (members or not) in effective competition with other traders organised under less favourable codes. They have entered the fields of banking and insurance and, through the vast Co-operative Wholesale Society, are able to exercise some influence on industry generally. The distinguishing feature of co-operative enterprise is that profits are distributed, not to shareholders as such, who obtain merely a limited rate of interest on their investments, but in dividends on members' purchases ... "

(2) Contemporary statistics

21. According to the seventh report of the Chief Registrar of Friendly Societies (for 20002001), the total number of industrial and provident societies (excluding credit unions which are special forms of co-operative society concerned with savings and loans) in Great Britain as at 30 November 2001 was 8,304 with assets of £61.3 billion. The societies so registered comprised retail societies (ranging from one-shop co-operatives to supermarket and departments stores), wholesale and productive societies (covering activities such as printing, brewing, and the manufacture and sale of footwear and clothing), agricultural societies (including seed and animal foodstuff suppliers, WI market societies, and small-holding and allotment societies), fishing societies (for the supply to members of fishing gear and the like), clubs (providing social and recreational facilities for their members), general service societies (including insurance and superannuation societies, societies promoting cooperation in industries, trades, sports and social pursuits, and residents associations providing common services to flats or housing estates) and housing societies (for example, co-operative housing associations). It will be evident that registered industrial and provident societies range from multi-million pound organisations (such as CWS) to tiny allotment societies. More recent statistics produced by the Financial Services Authority, which since 1 December 2001 has assumed the functions of the Central Office of the Registry of Friendly Societies, indicate that the total number of industrial and provident societies has remained more or less the same. These figures are to be contrasted with companies registered under the Companies Acts. As of March 2001 the total number of companies so registered was nearly 1.5 million.

22. As a result of their modest origins, industrial and provident societies, together with associations such as friendly and building societies, have been subject to simpler and less formal regulation than registered companies. A perusal of the 1965 Act or even (as compared with its predecessor Act of 1962) the Building Societies Act 1986, shows that, when contrasted with the Companies Act 1985 (and allied subsidiary legislation), the legislative hand has fallen much more lightly on industrial and provident societies and similar associations than it has on registered companies. This fact and the fact that much of the legislation affecting registered industrial and provident societies is Victorian in origin and lacks the detail which characterises contemporary regulation of trading and allied activities are matters which Mr Mabb urged should induce the court to adopt a more purposive and less formalistic approach to an understanding of the 1965 Act, at any rate section 51 and its related provisions which, with only minor amendments, have appeared in successive Acts stretching back to the last quarter of the nineteenth century.

(3) The legislative history of industrial and provident societies

23. A useful summary of the legislative history of the industrial and provident society is to be found in chapter 2 of the excellent handbook of Industrial and Provident Society Law by Ian Snaith first published in 1993 and now in its 5th revision. He points out that before 1852 there was no statutory recognition of industrial and provident societies. In 1834 and 1846, Friendly Societies Acts were passed which permitted the registration of trading societies. The former allowed the registration of societies for certain purposes and "for any purpose not contrary to the law". The latter related to societies formed for "the frugal investment of the savings of members for better enabling them to purchase food, clothes and other necessaries, or the tools and implements of their trade or calling, or to provide for the education of their children or kindred" .

24. In 1852 the first Industrial and Provident Societies Act became law. By section 1, it enabled societies to be established for "carrying on or exercising in common any labour, trade, or handicraft, or several labours, trades, or handicrafts, except the working of mines, minerals, or quarries beyond the limits of the United Kingdom ... and also except the business of banking, whether in the said United Kingdom or elsewhere".

The Friendly Societies Acts continued to apply to societies registered under the 1852 Act except where they were inconsistent with that Act.

25. The Industrial and Provident Societies Act 1862 was the model for all later legislation dealing with such societies. It repealed the three previous Industrial and Provident Societies Acts (that of 1852 and amending Acts of 1854 and 1856). It re-enacted many of their principal features and conferred further powers and privileges. By section 5, societies were for the first time given corporate status, thus achieving a legal personality separate from that of their members. They were thereby enabled to sue and be sued in their own name and (by section 6) to hold property without recourse to trustees. The Act also conferred limited liability so that, thenceforth, members were not to be liable for the debts of the society beyond the amount unpaid on their shares; their liability ceased altogether a year after their withdrawal from the society.

26. Amendments to the 1862 Act were passed in 1867. Further amending legislation was passed in 1871, principally in connection with dealings in land.

27. In 1876 a consolidating Act was passed which gave to industrial and provident societies an independent and almost self-contained code of law. With the exception of provisions relating to the appointments and duties of the Chief and other Registrars, industrial and provident societies ceased to be subject to any provisions of the Friendly Societies Acts. The 1876 Act also allowed societies with no withdrawable share capital to undertake the business of banking.

28. Further amending legislation was followed by the Industrial and Provident Societies Act 1893 consolidating all past legislation governing registered industrial and provident societies and introducing further minor changes. This Act stood as the principal legislation until the passage of the 1965 Act. In the meantime further amending Acts were passed along with other legislation affecting industrial and provident societies. These included the Prevention of Fraud (Investments) Act 1939, the main provisions of which were re-enacted in the Prevention of Fraud (Investments) Act 1958. This limited the range of organisations which could register as an industrial and provident society. Further amendments were made in 1948, 1952, 1954 and 1961.

29. The Industrial and Provident Societies Act 1965 Act brought together in one statute all the legislation from 1893 to 1965 affecting industrial and provident societies and made a few changes to the law. The Act reduced the range of societies that may register under it. Further amendments were made in 1967 (concerned with borrowing), 1968 (concerning audits and accounts), 1975 (raising the limit on the interest in a society's shares that anyone member may hold), 1978 (raising the amount of deposits which a society may take without thereby carrying on the business of banking) and 2002 (to which I come later).

The meaning of an "industrial and provident society"

30. The precise scope of the kind of society that qualifies as an industrial and provident society has altered from time to time, although its essential nature has not. According to sections 1 and 2(1) of the 1965 Act, a society comprising not less than three members (prior to 1996 the number was seven) which carries on any industry, business or trade (including dealings with land) whether wholesale or retail, may be registered under the 1965 Act (ie as an industrial and provident society, although the Act does not use that expression except in its long title) if, in the case of a society having under its rules a registered office in England or Wales, it is shown to the satisfaction of the Financial Services Authority, previously the chief registrar (or an assistant registrar) of friendly societies appointed under the Friendly Societies Act 1896, either that the society is a bona fide co-operative society or that, in view of the fact that the business of the society is being, or is intended to be, conducted for the benefit of the community, there are special reasons why the society should be registered under the 1965 Act rather than as a company under the Companies Act 1985. The society's rules must also contain certain provisions as set out in schedule 1 to the 1965 Act. Section 1(3) qualifies the scope of the qualifying conditions in the case of a co-operative society and section 7(1) does likewise in the case of a society which carries on the business of banking.

The relevant provisions

31. Section 51 appears in a group of five sections headed "*Amalgamations, transfers of engagements and conversions*". At the time the special resolution was passed (amendments have since been made, principally to reflect the assumption by the Financial Services Authority of the functions of the Registrar of Friendly

Societies), those sections were in the following terms (omitting references exclusive to the application of the sections in Scotland):

"50 Amalgamation of societies

(1) Any two or more registered societies may by special resolution of each of those societies become amalgamated together as one society, with or without any dissolution or division of the funds of those societies or any of them; and the property of each of those societies shall become vested in the amalgamated society without the necessity of any form of conveyance other that that contained In the special resolution.

(2) In this section the expression 'special resolution' means a resolution which is-

(a) passed by not less than two-thirds of such members of the society for the time being entitled under the society's rules to vote as may have voted in person, or by proxy where the rules allow proxies, at any general meeting of which notice, specifying the intention to propose the resolution, has been duly given according to those rules; and

(b) confirmed by a majority of such members of the society for the time being entitled as aforesaid as may have voted as aforesaid at a subsequent general meeting of which notice has been duly given held not less that fourteen days nor more than one month from the day of the meeting at which the resolution was passed in accordance with paragraph (a) of this subsection.

(3) At any such meeting as aforesaid, a declaration by the chairman that the resolution has been carried shall be deemed conclusive evidence of that fact.

(4) A copy of every special resolution for the purposes of this section signed by the chairman of the meeting at which the resolution was confirmed and countersigned by the secretary of the society shall be sent to the appropriate registrar and registered by him; and until that copy is so registered the special resolution shall not take effect.

(5) It shall be the duty of a registered society to send any special resolution for registration in accordance with the last foregoing subsection within fourteen days from the day on which the resolution is confirmed under subsection (2)(b) of this section, but this subsection shall not invalidate registration of the resolution after that time.

51 Transfer of engagements between societies

(1) Any registered society may by special resolution transfer its engagements to any other registered society which may undertake to fulfil those engagements; and if that resolution approves the transfer of the whole or any part of the society's property to that other society, the whole or, as the case may be, that part of the society's property shall vest in that other society without any conveyance or assignment.

(2) Subsections (2) to (5) of section 50 of this Act shall have effect for the purpose of this section as they have effect for the purposes of that section

(3)

52 Conversion into, amalgamation with, or transfer of engagements to company

(1) A registered society may by special resolution determine to convert itself into, or to amalgamate with or transfer its engagements to, a company under the Companies Acts.

(2) If a special resolution for converting a registered society into a company contains the particulars required by the Companies Act 1985 to be contained in the memorandum of association of a company and a copy thereof has been registered by the appropriate registrar, a copy of that resolution under the seal and stamp of the central office ... shall have the same effect as a memorandum of association duly signed and attested under the said Act of 1985.

(3) Subsections (2) to (5) of section 50 of this Act shall have effect for the purposes of this section as they have effect for the purposes of that section but as if in paragraph (a) of the said subsection (2) for the words 'two-thirds' there were substituted the words 'three-fourths'.

(4) Subject to subsection (5) of this section, if a registered society is registered as, or amalgamates with, or transfers all its engagements to a company under the Companies Acts, the registration of that society under this Act shall thereupon become void and, subject to section 59 of this Act, shall be cancelled by the chief registrar ...

(5) Registration of a registered society as a company shall not affect any right or claim for the time being subsisting against the society or any penalty for the time being incurred by the society; and-

(a) for the purpose of enforcing any such right, claim or penalty, the society may be sued and proceeded against in the same manner as if it had not become registered as a company; and

(b) every such right or claim, or the liability to any such penalty, shall have priority as against the property of the company over all other rights or claims against or liabilities of the company.

53 Conversion of company into registered society

(1) A company registered under the Companies Acts may, by a special resolution as defined by section 378 of the Companies Act 1985, determine to convert itself into a registered society; and for this purpose, in any case where the nominal value of the company's shares held by any member other than a registered society exceeds the maximum for the time being permitted by section 6(1) of this Act in the case of a member of a registered society, the resolution may provide for the conversion of the shares representing that excess into a transferable loan stock bearing such rate of interest as may be fixed, and repayable on such conditions only as are determined by the resolution.

(2) Any such resolution as aforesaid shall be accompanied by a copy of the rules of the society therein referred to and shall appoint three persons, being members of the company, who, together with the secretary, shall sign the rules and who may either-

(a) be authorised to accept any alterations made by the appropriate registrar therein without further consulting the company; or

(b) be required to lay any such alterations before the company in general meeting for acceptance as the resolution may direct.

(3) A copy of the resolution aforesaid shall be sent with a copy of the rules aforesaid to the appropriate registrar who, upon the registration of the society under this Act, shall give to it, in addition to an acknowledgement of registration under section 2(3) of this Act, a certificate similarly sealed or signed that the rules of the society referred to in the resolution have been registered.

(4) A copy of any such resolution as aforesaid under the seal of the company together with the certificate issued as aforesaid by the appropriate registrar shall be sent for registration to the office of the registrar of companies within the meaning of the Companies Act 1985 and, upon his registering that resolution and certificate, the conversion shall take effect.

(5) The name under which any company is registered under this section as a registered society shall not include the word 'company'.

(6) Subject to the next following subsection, upon the conversion of a company into a registered society under this section, the registration of the company under the Companies Acts shall become void and shall be cancelled by the registrar of companies aforesaid.

(7) The registration of a company as a registered society shall not affect any right or claim for the time being subsisting against the company or any penalty for the time being incurred by the company; and -

(a) for the purposes of enforcing any such right, penalty or claim the company may be sued and proceeded against in the same manner as if it not been registered as a society.

(b) any such right or claim and the liability to any such penalty shall have priority as against the property of the registered society over all other rights or claims against or liabilities of the society.

54 Savings for rights of creditors

An amalgamation or transfer of engagements in pursuance of section 50, 51 or 52 of this Act shall not prejudice any right of a creditor of any registered society which is a party thereto. "

"**Engagements**"

32. The expression "engagements" has appeared in successive Acts regulating industrial and provident societies in connection with a transfer of engagements and has done so since 1855. The expression has also appeared, and in the same context, in legislation regulating friendly societies (see now section 86 of the Friendly Societies Act 1992), building societies (see now section 94 of the Building Society Act 1986) and trade unions (see now section 97(2) of the Trade Union and Labour Relations (Consolidation) Act 1992). Despite this long usage, no definition of the term has ever been provided and, so far as counsel's researches have gone, no judicial attempt has ever been made to give it one.

33. Both Mr Ross and Mr Mabb proceeded - at any rate initially - on the basis that "engagements" means obligations and liabilities, and does not include property. In so doing they could rely for support on paragraph 12.3.2 of Mr Snaith's Handbook where the author expresses the view that *"the concept of 'engagements' seems to mean obligations or liabilities"*. In Halsbury's Laws of England, 4th edition, volume 24 at

paragraph 160, it is stated that "a transfer of engagements [would seem] to mean the transfer of a society's liabilities in respect of its creditors, shareholders or other [sic] to another society or registered company ... " Successive editors of Wurtzburg and Mills on Building Society Law, on the other hand, have stated in reference to a transfer of engagements from one building society to another (where, so far as material to this point, the legislative language is the same) that the expression "denotes more than a mere transfer of property from one society to another" and that "it can be inferred that the expression 'transfer of engagements' denotes (as the words themselves imply) a transfer from one society to another of powers, rights and responsibilities vested in the transferor society ... together with a block of assets of the transferor society (though not necessarily all its assets) to the transferee society". (See the 14th edition at page 295 and 15th edition at paragraph 16.08.)

34. In **Sun Permanent Benefit Building Society v Western Suburban and Harrow Road Permanent Building Society** [1921] 2 Ch 438 **("Sun Permanent"),** a decision to which I shall refer in greater detail later, Warrington LJ said (at 456) in reference to section 33 of the Building Societies Act 187 4 (the predecessor provision but one to section 94 of the Building Societies Act 1986) that a transfer of engagements involved, in effect, "*a transfer of the entire business*". Section 86 of the Friendly Societies Act 1992 (headed "Transfer of engagements by or to friendly society") states in subsection (1) that a friendly society may, in accordance with Part VIII of that Act, *"transfer its engagements to any extent to any of the following persons, that is to say (a) to another friendly society ... "*. It goes on in subsection (5) to refer to "property, rights and liabilities" of the transferor society becoming, to the extent provided in the instrument of transfer of engagements, *"the property, rights and liabilities"* of the transferee society. Section 94 of the Building Societies Act 1986 is to the same effect (see section 94(8)).

35. In my view, the expression "engagements" as used in section 51(1) means the business undertaking of the society in question. I reject the narrower understanding of the expression which appears in Halsbury's Laws of England and also in Mr Snaith's valuable handbook.

Section 51 of the 1965 Act

36. Section 51 can be traced back to section 14 of the Friendly Societies Act 1855 which was in the following terms:

> *"14. It shall be lawful for any two or more societies established under this or any of the Acts hereby repealed to unite and become incorporated in one society, with or without any dissolution or division of the funds of such societies or either of them; or a society formed and established under any of the said repealed Acts may be allowed to transfer its engagements to any other friendly society, if any other such society shall undertake to fulfil the engagements of such society, upon such terms as may be agreed upon by the major part of the trustees, and also of the committee of management of both societies, or the majority of the members of each of such societies at a general meeting convened for the purpose."*

By virtue of section 8 of the (earlier) Industrial and Provident Societies Act 1852 (the first legislation specific to industrial and provident societies) it was provided that the laws relating to friendly societies should apply to industrial and provident societies constituted under the 1852 Act except insofar as such legislation might be expressly varied by that Act or by any rules regulating industrial and provident societies expressly authorised under the Act or the Registrar of Friendly Societies should otherwise certify in writing.

37. It will be observed that, with one exception, section 14 contained a combined form of what, in the case of industrial and provident societies, is now to be found in sections 50(1) and 51(1) of the 1965 Act. That exception is the provision which for convenience I call "the property vesting provision" which is to be found in section 50(1) (in the case of an amalgamation) stating that "the property of each of those societies shall become vested in the amalgamated society without the necessity of any form of conveyance other than that contained in the special resolution" and in section 51(1) (in the case of a transfer of engagements) stating that "if that resolution [the special resolution for the transfer of engagements] approves the transfer of the whole or any part of the society's property to that other society, the whole or, as the case may be, that part of the society's property shall vest in that other society without any conveyance or assignment".

38. At the time that the Friendly Societies Act 1855 was passed there was no provision enabling friendly (or industrial and provident) societies to become incorporated: property was vested in trustees for the benefit

of the society in question (in effect its members). There was instead a vesting provision (contained in section 18 of the Friendly Societies Act 1855) enabling all real and personal property to vest in succeeding trustees "without any conveyance or assignment whatsoever, save and except in the case of stocks and securities in the public funds of Great Britain and Ireland, which shall be transferred into the name or names of [the new trustees] ... ". That provision only applied, however, upon the death or removal of any trustee. There was no provision equivalent to what I have earlier described as the property vesting provision in relation to the vesting of property on the amalgamation of two societies (when the property of the two societies would, in the ordinary course, be vested in the trustees who, following amalgamation, were to be the trustees of the amalgamated society) or on a transfer of engagements from one society to another. Such property would have to be separately conveyed or assigned in whatever way was appropriate to the property in question and, prime facie, subject to any restriction that there might be in respect of the conveyance or assignment of that property.

39. The equivalents of sections 50, 51 and 54 of the 1965 Act first appeared in a statute concerned exclusively with industrial and provident societies in section 16 of the Industrial and Provident Societies Act 1876, which, so far as material, provided as follows:

> *"(3) Any two or more societies may, by special resolution of both or all such societies, become amalgamated together as one society, with or without any dissolution or division of the funds of such societies or either of them; and any society may by special resolution transfer its engagements to any other registered society which may undertake to fulfil the engagements of such society.*
>
> *(4) A society may by special resolution determine to convert itself into a company under the Companies Acts, or to amalgamate with or transfer its engagements to any such company.*
>
> *(5) No amalgamation or transfer of engagements shall prejudice any right of a creditor of either or any society party thereto.*
>
> *(6) A copy of every special resolution for any of the purposes mentioned in this section, signed by the chairman of the meeting and countersigned by the secretary, shall be sent to the central office and registered there, and until such copy is so registered, the special resolution shall not take effect."*

Subsection (1) defined what was meant by a special resolution (namely, a resolution passed by a majority of not less than three-quarters of the members of the society entitled to vote as might be present in person or by proxy at the meeting in question and confirmed by a bare majority of members present in person or proxy at a subsequent meeting) and contained provisions relating to the giving of notice for such meetings.

40. Save for the property vesting provision and a later modification of the meaning of a special resolution now to be found in sections 50(1) and 51(1), the above provisions are in all material respects the same as sections 50, 51, 52 and 54 of the 1965 Act.

41. Those provisions were re-enacted in the Industrial and Provident Societies Act 1893. Section 53(1) of that Act, taken with section 51 (which defined a special resolution in the same terms as section 16(1) of the 1876 Act) and section 56 (stipulating for registration of a special resolution before it could take effect), provided in all material respects what is now to be found in section 50(1) of the 1965 Act. Section 53(1) of the 1893 Act provided that: *" Any two or more registered societies may, by special resolution of both or all such societies, become amalgamated together as one society, with or without any dissolution or division of the funds of such societies or either of them, and the property of such societies shall become vested in the amalgamated society without the necessity of any form of conveyance other than that contained in the special resolution amalgamating the societies."*

It is to be noted that it contained the property vesting provision.

42. Section 53(2) of the 1893 Act set out what is now section 51(1) of the 1965 Act but without the property vesting provision. Section 53(2) was in these terms: *"Any registered society may by special resolution transfer its engagements to any other registered society which may undertake to fulfil the engagements of such society."*

As was the case with section 53(1) of the 1893 Act, the provisions of sections 51 and 56 of the 1893 Act applied to define what was meant by a special resolution. Section 57 set out a saving for creditors in the case of an amalgamation or transfer of engagements in pursuance of the 1893 Act. It did so in terms which, in all material respects, are identical to section 54 of the 1965 Act.

43. The Industrial and Provident Societies (Amendment) Act 1954 made two changes which are relevant to amalgamations and transfers of engagements. Section 6(1) altered the definition of a special resolution to mean a majority of not less than two thirds, in place of a majority of not less than three-fourths, of members present and voting at the relevant meeting. Section 6(2) applied (for the first time) to transfers of engagements the property vesting provision now to be found in section 51(1) of the 1965 Act and which had applied to amalgamations of societies since the 1893 Act. It stated that:

> *"(2) If a registered society transfers its engagements to another registered society by a special resolution taking effect under subsection (2) of the said section fifty-three [of the 1893 Act] and by that resolution approves the transfer of the whole or any part of its property to the other registered society, the whole, or as the case may be, that part, of its property shall without any conveyance or assignment vest in the other registered society."*

44. It is convenient at this point to note a submission by Mr Ross concerned with the reference to "part" in section 6(2) and (now) in section 51(1). "Part" was included, he said, because Parliament contemplated that there would be circumstances in which a transferor society was *obliged* to retain part of its property, for example because of a contractual restraint such as clause 18.1.1. Mr Mabb submitted that its inclusion was readily explicable by reference to the case where the remaining part of the property is to be distributed among the members of the transferor society or perhaps used in a new business. In my view, the reference to "part" is simply a recognition by Parliament that, for whatever reason, a transferor society may not wish to transfer all of its engagements to the transferee society or the transferee society may not wish to take on all of the engagements. I do not think that Parliament had any particular circumstances in mind.

45. With effect from 1 December 2001 the Financial Services Authority replaced the role previously fulfilled by the Chief Registrar (or one of the assistant registrars) of Friendly Societies.

46. Finally, I should mention briefly the Industrial and Provident Societies Act 2002. That Act introduced (by section 1) a provision, confined to section 52 of the 1965 Act (conversion into, amalgamation with, or transfer of engagements to a company), to ensure that at least half of all the eligible members of a registered industrial and provident society must have participated in the vote which resulted in the passing of the special resolution. Section 2 enables the Treasury through secondary legislation to assimilate certain parts of industrial and provident society legislation to that applying to companies and, in so doing, to bring industrial and provident society law into line with similar provisions applying to building societies to be found in Part **III** of schedule 2 to the Building Societies Act 1986. However, the provisions of sections 50 to 54 of the 1965 Act are, with other provisions, expressly excepted from the operation of this delegated legislative power.

Does section 51(1) have an "overriding" effect?

47. With that review of the relevant industrial and provident society legislation and of sections 50 to 54 of the 1965 Act in particular, I come to the central question: properly construed, did section 51(1) enable CRS, by the passing of the appropriate resolutions and upon obtaining registration of the special resolution with the Chief Registrar of Friendly Societies (then still functioning), to effect a transfer to CWS of its engagements, including in particular the right to sue Stansell for breach of the building contract, without obtaining Stansell's consent under clause 18.1.1 to the transfer? In short, does a transfer effected pursuant to section 51 (1) override a provision such as clause l8.l.l? In the context of a contractual provision such as clause 18.1.1, that must mean that the section operates either as if that clause were not a term of the building contract or as if Stansell's consent under the clause is given to the transfer. The question assumes, without deciding, that the transfer effected is an assignment for which Stansell's consent under 18.1.1 would otherwise be needed.

48. It is common ground that, as stated by Lord Hope in **Wisely v John Fulton (Plumbers) Ltd** [2000] 1 WLR 820 at 823H to 824A: *"As a general rule Parliament must be taken to have legislated against the background of the general principles of the common law. It may be found on an examination of the statute that Parliament has decided not to follow the common law. In that situation the common law must give way to the provisions of the statute. But an accurate appreciation of the relevant common law principles is nevertheless a necessary part of the exercise of construing the statute."*

The question here is whether, on an examination of section 51, it appears that, even though not expressly provided for in the legislation, Parliament demonstrated an intention to override a term of a freely

negotiated contract (in the instant case the need for Stansell's written consent if the benefit of the building contract, and in particular the right to bring a claim against Stansell under that contract, is to be assigned to a third party) to which, in accordance with the common law as demonstrated by the decision in **Linden,** the courts would otherwise give effect.

49. It is to be noted that the "transfer" takes effect provided only the necessary resolutions are passed and the special resolution is registered. Registration by the registrar is a purely ministerial function. There is no requirement to consult or notify third parties (whether creditors of the transferor society or persons, like Stansell, whose consent is contractually necessary before there can be a transfer of rights). There is no need to obtain confirmation of the transfer either by a court of law or by a regulatory body. The transfer is merely a matter for the decision of the transferor and transferee societies and then only, in the case of the special resolution of the transferor society, if the resolution has been passed by two-thirds (reduced from the original requirement of three-quarters) of the members of the society who choose to vote, either in person or by proxy, at the meeting in question. Since a society may have as few as three members (see paragraph 30 above), the special resolution may be passed, in the case of a society having the minimum number of members, by as few as two persons. The transfer does not have to be of all of the property of the transferor society: it may choose, for whatever reason, to transfer only some of its property. The transferor society may be wholly unconnected with the transferee society. The only requirement is that both are societies registered under the 1965 Act (or under one of the predecessor Acts). The respective financial positions of the two societies, both before and after transfer, and the financial consequences of the transfer to both societies are immaterial: the legislation lays down no solvency requirements. The fact, as I understand it to be, that in the instant case CRS and CWS are closely related is likewise immaterial: they could as easily have been wholly unrelated.

50. Given the ease with which a transfer may be effected and the brevity of the material provisions in the legislation, both now and when the power of transfer first appeared in the legislation (effectively in the Friendly Societies Act 1855), my strong inclination is to doubt that, as a matter of clear implication (let alone as a matter of express provision), section 51 has the effect of overriding the contractual rights of third parties.

51. Moreover, it is difficult to think what reasons of policy there could be to suppose that Parliament intended that an industrial and provident society should have conferred upon it the exceptional power - exercisable in the entirely unregulated circumstances that I have set out - to render alienable, at the instance of that society, a chose in action which it and its contractual counterparty have, quite legitimately, declared by their contract to be inalienable. There are, for example, none of the reasons of policy which are in play when a person is made a bankrupt and his estate (comprising all of his property save as excepted by clear statutory provision) vests in his trustee for the benefit of his creditors.

52. I am reinforced in this view by the fact that, at the time that provision for the transfer of engagements was first introduced (by section 14 of the Friendly Societies Act 1855 made applicable to industrial and provident societies by section 6 of the Industrial and Provident Societies Act 1852 - see paragraph 36 above), there was nothing in the legislation equivalent to the property vesting provision. The trustees of the society (incorporation of a society being still not possible at that time) had to execute a conveyance or assignment if property was to be transferred to the trustees of the transferee society. That remained the position until the property vesting provision was introduced to transfers of engagements by section 6(2) of the Industrial and Provident Societies (Amendment) Act 1954. See paragraph 43 above. I find it difficult to see how, prior to the enactment of section 6(2), exercise of the power to transfer engagements, by passing the requisite resolutions, could, without more, have achieved the overriding effect for which CWS contends and can think of no reason why section 6(2), designed in my view to simplify the process of vesting the property of the transferor society in the transferee society, should have made any difference to the position.

53. But Mr Mabb submits, and the Arbitrator accepted, that there are reasons why I should conclude that section 51(1) does indeed have that effect. He advanced five particular reasons: (1) the wide language of the section; (2) what he submitted was the ability of the section to bring about a novation of liabilities without the need to obtain the consent of the creditor; (3) the scheme of the 1965 Act; (4) the fact that other statutes

have dispensed with (or assumed) the consent of a third party to the transfer of property and (5) the support of certain observations of Warrington LJ in Sun Permanent. I consider each of these five points in turn.

(1) The unlimited language point

54. Mr Mabb emphasised what he described as the *"wholly unlimited language"* of the section. It is language, he submitted, which is apt to include property expressed to be non-assignable without consent, such as the building contract in this case. The resolution (set out at paragraph 3 above) specifically approved "the transfer of the whole ... of [CRS]'s property" so taking advantage of the property vesting provision. He pointed out that the definition of property set out in section 74 of the 1965 Act (expressed to "*include all realty, personal or heritable and moveable estate, including books and papers")* was apt, ignoring clause 18.1.1, to include the chose in action represented by the right to bring proceedings against Stansell for breach of contract.

55. I accept that the expression "property" as defined by the 1965 Act is apt to include a right of action for breach of contract. I do not accept that merely because a special resolution approved the transfer of the whole of CRS's property, CRS was able on that account to override the need to obtain the consent of a third party (such as Stansell in the case of the building contract) to the transfer in question where such a consent is otherwise necessary if the benefit of the property or right in question is to be transferred to another. The fact that the language of the section is unlimited does not of itself answer the enquiry. Nor for the reason already explained in paragraph 51 above does it assist that the special resolution refers to a transfer of property, thereby taking advantage of the property vesting provision contained in section 51 (1). It cannot be supposed that before the property vesting provision was inserted into the legislation - by section 6(2) of the Industrial and Provident Societies (Amendment) Act - property could not be transferred as part of a transfer of engagements. What as I have already mentioned section 6(2) achieved was a means of effecting a vesting in the transferee society of the property to be transferred without the need for the execution of a separate assignment/conveyance/transfer of each item of property, title to which could only otherwise become vested in the transferee society by such means.

(2) The novation point

56. Although this case is not concerned with a transfer of liabilities, a cornerstone of Mr Mabb's submissions was that a transfer of engagements effected under section 51(1) enables the transferor society's liabilities and other obligations to third parties to be transferred to the transferee society without obtaining the consent of those third parties to the transfer of obligation. As a matter of general principle, he pointed out, an obligor cannot assign or transfer its obligations: they must be novated, that is assumed by the replacement obligor *with the agreement of the obligee.* Accordingly, insofar as section 51 (1) enables liabilities or obligations to be transferred, it operates by dispensing with the agreement or concurrence of the obligee. Consistent with that effect of the section (if correct) is the vesting of property pursuant to the property vesting provision: if the vesting of property pursuant to that provision would otherwise require the consent of a third party, the section dispenses with it. All the more must this be so, he submitted, if the property in question is inextricably bound up with liabilities which can be transferred (ie novated) without the consent of the obligee.

57. The submission only assists Mr Mabb's case if the effect of the transfer is to bring about a novation of the liability (ie, it requires the creditor, following transfer, to look for payment exclusively to the transferee as substituted obligor in place of the transferor society as original obligor) and if it achieves this without the need, which a novation would otherwise require, to obtain the creditor's consent as obligee. Only if it has this effect is Mr Mabb able to say that, just as the creditor's consent (otherwise needed) is dispensed with, so, in the case of a transfer of rights, may the consent of a third party be dispensed with if such consent were otherwise required.

58. Is then the premise correct? Does a transfer of engagements have this effect as regards liabilities? The difficulty about the submission is the existence of section 54, a provision which can be traced back to section 16(5) of the Industrial and Provident Societies Act 1876. That section stipulates, so far as material, that a transfer of engagements is not to prejudice any right of a creditor of the transferor society. There was much debate before me over what precisely section 54 means and how it operates in practice. Does it mean,

as the editor of Halsbury's Laws of England, 4th edition, volume 24, paragraph 160 supposes (there being no authority directly on the point), that "the transferor society is discharged from the liabilities, which are assumed instead by the transferee society ... " (thereby suggesting a novation without having to obtain the creditor's consent) or does it mean, as the same editor states in a later part of the same paragraph, that "Its effect would seem to be that the creditor retains his rights against the ... transferor society, and it may be that he can exercise those rights against their assets, after the transaction, in priority to creditors of the ... transferee society ...."?

59. If it was the latter, the point would not assist Mr Mabb since the effect would not be to deprive the creditor of his rights against the transferor society. Mr Mabb suggested that the later passage from Halsbury was to be understood - and consistency achieved with the earlier passage - as if the words *"which he formerly enjoyed*" had appeared between "*his rights"* and "*against the ... transferor society".*

60. I do not so read section 54. To my mind that section makes reasonably plain that, whatever else a transfer of engagements may achieve, it is not to affect adversely the creditor's rights. In my view, to deprive him, without his consent, of his right to pursue the transferor society - if that is otherwise the effect of a transfer of engagements - is adversely to affect his rights. Section 54 makes clear that this not the consequence of a transfer.

61. I am supported in this view by an observation in the judgment of Lord Hanworth MR in **Re Fryer & Hampson's Contract [**1929] AER Rep 332 (referred to by Mr Mabb in another context). In that case it was held by the Court of Appeal that a mere uniting of two building societies under section 33 of the Building Society Act 1874 (the equivalent, in the case of building societies, of what, in the case of industrial and provident societies, is now section 50(1) of the 1965 Act) did not have the effect, without more, of vesting all of the property of the amalgamating societies in the new society: it had to be shown by evidence (for example the resolution to unite) what properties (whether the whole or only some and if so what part) had become vested in the new society under what I have described, in relation to industrial and provident societies, as the property vesting provision. A provision similar to the property vesting provision had been introduced into the legislation affecting building societies by section 5 of the Building Societies Act 1877. It contained a proviso which stated that *"such union or transfer of engagements shall not affect the rights of any creditor of either or any society uniting or transferring its engagements"*. In his judgment (at [1929] AER Rep at 336A to B) Lord Hanworth said this: *"In the course of the argument it was pointed out that these societies [ie the uniting societies] which have power to borrow, might have obtained a loan. A creditor might desire to take suit in respect of the loan against the society to which the loan had been made. By reason of the proviso [a reference to the section 5] it appears that the creditor has still the right reserved to him not to take the substituted society in place of the original debtor, but to have the right of taking proceedings against the original debtor."*

62. I therefore consider that a novation of liabilities, in the sense of substituting the transferee society for the transferor society in respect of liabilities owed to a third party and achieving this without obtaining the consent of that third party, is not how a transfer of engagements effected under section 51 (1) operates. If therefore a transfer of engagements cannot override the rights of a creditor, there is no basis for contending, by a parity of approach, that a transfer is to be understood as overriding the rights of others, such for example as the right of an employee under a building contract to deal only with, and be answerable under the contract only to, the employer.

(3) The legislative scheme point

63. Mr Mabb went on to point out that, as outlined in paragraph 3 above, CRS's registration as an industrial and provident society was cancelled by the registrar on 13 April 2000 following registration of CRS' s resolution to transfer its engagements to CWS, pursuant to section 16 of the 1965 Act and that the cancellation was on the ground that, following the transfer of its engagements, CRS had ceased to exist. He submitted that the scheme of the 1965 Act envisages that when a society has transferred its engagements to another society and has resolved, as CRS did in the instant case, that the whole of its property should be transferred to that other society, it ceases to exist, thus providing a ground for the cancellation of its registration. Consistent with this objective, he submitted, is that a resolution for the transfer of engagements which approves a transfer of all of the society's property should be effective to bring about a

transfer of all of its assets, including property which, in other circumstances, could only be transferred with the prior consent of a third party.

64. Section 16 sets out a variety of grounds on which the registration of an industrial and provident society may be cancelled and the procedure that is to be followed which leads to cancellation. So far as material, that section provides as follows:

"(1) Subject to the provisions of this section and sections 18(1)(c) and 59 of this Act, and without prejudice to section 52(4) thereof, the appropriate registrar may, by writing under his hand or seal ... cancel the registration of any registered society -

(a) if at any time it is proved to his satisfaction-

(i) that the number of members of the society has been reduced, in the case of a society for the time being consisting solely of registered societies, to less than two or, in any other case, to less than three; or

(ii) that an acknowledgement of registration has been obtained by fraud or mistake; or

(iii) that the society has ceased to exist;

(b) if he thinks fit, at the request of the society, to be evidenced in such manner as he shall from time to time direct;

(c) with the approval of the Treasury ... "

There are then provisions set out which relate to Treasury approved cases and (by sections 16(3) to (5)) the procedure to be followed where cancellation is to occur otherwise then at the society's own request, or as a result of a society converting into, amalgamating with or transferring its engagements to a registered company (under section 54), or after a certificate has been lodged under section 59. Sections 16(6) and (7) then provide:

"(6) Notice of every cancellation under this section of a society's registration shall, as soon as practicable after it takes place, be published in the Gazette and in some local newspaper circulating in or about the locality in which the society's registered office is situated.

(7) As from the date of publication in the Gazette under subsection (6) of this section of notice of cancellation of a society's registration, the society shall absolutely cease to be entitled to any of the privileges of this Act as a registered society, but without prejudice to any liability actually incurred by the society which may be enforced against it as if the cancellation had not taken place"

Section 18(1)(c) and 52(4) are not material. Section 59 provides, so far as material, as follows: *"Where ... a registered society's engagements are transferred under section 51 ... of this Act, ... the registration of the society shall not be cancelled, until there has been lodged with the appropriate registrar a certificate signed by ... the secretary or some other officer of the society approved by that registrar that all property vested in the society has been duly conveyed or transferred by the society to the persons entitled."*

65. I do not consider that these provisions assist Mr Mabb's submission. They are of a piece with section 54 to the effect that a society cannot shed its liabilities to a third party by a transfer of engagements or an amalgamation of societies. The registrar's role is largely ministerial: for example, he is under no duty, when furnished with a certificate signed in conformity with section 59 that all property vested in the society has been duly conveyed or transferred to the persons entitled to it, to check that this is so.

66. Moreover, as section 16(7) makes clear, the consequence of cancellation of the registration is merely that the society loses the privileges conferred by the 1965 Act on a registered society. Registration causes the society so registered to be a body corporate, able to sue and be sued in its own name, with perpetual succession and enjoying limited liability. It causes property for the time being vested in any person in trust for the society to vest in it as its beneficial owner. See section 3 of the 1965 Act. Loss of registration means, in effect, that the society, if it still otherwise exists, becomes an unincorporated association: it loses the privileges conferred by section 3. See **Boyle & ors v Collins & ors** [2004] EWHC 271(Ch) [2004] 2 BCLC 471 a decision of Lewison J given on 18 February 2004, in particular paragraph 34 of the judgment in that case. Cancellation does not, of itself, destroy the society. See **Hole v Garnsey** [1930] AC 472 at 499 (referred to in paragraph 33 of the judgment in **Boyle).** If in fact the society, at the time its registration is cancelled, continues to hold property, the property will be available for the purposes of the unincorporated association, as it will have become if it continues to exist, or for distribution to its members if it has ceased to exist. See **Re Ruddington Land** [1909] 1 Ch 701 (a case concerned with the property of a registered

industrial and provident society which had been dissolved under an instrument of dissolution and referred to in paragraph 30 of the judgment in **Boyle).**

(4) The assumed licence point

67. Mr Mabb submitted that it is not unusual for a statute to dispense with a requirement for the consent of a third party to an assignment of property, even though the statute makes no express provision for this to happen. It is dispensed with, or statutorily assumed to have been given, in the case of an assignment of a bankrupt's leasehold property to his trustee in bankruptcy. Mr Mabb referred me in this context to **Wadham v Marlowe** (1785) 8 East 315 (note) where Lord Mansfield is reported as stating " *... the estate is transferred and vested in the assignees [the commissioners on a commission of bankruptcy] by virtue of the Acts of Parliament respecting bankrupts: every man's assent is virtually included in an Act of Parliament, and therefore it is equivalent to an express assent ... ".*

68. He referred also to **Slipper v Tottenham and Hampstead Junction Railway Company** (1867) LR 4 Eq 112 where the defendant company served a notice under the Lands Clauses Act on the plaintiff to take the land held by him under a lease. The lease contained a proviso against assignment without the lessor's licence which, however, was not obtained. It was held that the need for the licence was removed by the operation of the Act. Lord Romilly MR observed (at 114) that:

"As soon as the land is required for the purposes of the railway, and notice is given to take it under the Act [the Lands Clauses Consolidation Act 1845], the license to assign is no longer required, being virtually taken away by the clause of the Act of Parliament, as it is laid down in an analogous case in Wadham **v Marlowe.** The lessor can neither refuse the license to assign, nor assent to the assignment, for he has nothing more to do with it."

69. It is to be noted, however, that in **Slipper** the railway company had served notice not just on the tenant, Slipper, but also on the lessor. This probably explains why, in the passage from the judgment in that case referred to above, Lord Romilly said that *"the lessor can neither refuse the license to assign, nor assent to the assignment, **for he has nothing more to do with it**"* (emphasis added). It probably explains why, later in his judgment, Lord Romilly said: *"I apprehend that it [the licence to assign] is virtually included in the clauses of the Act of Parliament [the Lands Clauses Consolidation Act 1845], which compel all the persons who are entitled to the land to give it up to the company ... "*

70. In my judgment, neither of these cases provides Mr Mabb with much, if any, support. In any event, the fact that Parliament removes (or assumes) a third party's consent to a transfer of rights in particular circumstances (for example bankruptcy or the compulsory acquisition of land) provides, at best, very slender support for the proposition that Parliament intended to remove the need for (or assume) the giving of consent by a third party to a transfer of rights in the case of a transfer of engagements under section 51(1). Not the least is this so when, as I have mentioned, two societies may have recourse to the power to transfer entirely at the behest of their respective members (a special resolution in the case of the transferor society) and without the need to obtain the sanction of the court or any other regulatory body.

(5) The Sun Permanent point

71. In **Sun Permanent** the liquidator of the plaintiff building society had contracted to sell and transfer to the defendant building society a number of the freehold and leasehold mortgages which the plaintiff society held as security for advances made to its members. The defendant society resisted an action to enforce the sale on several grounds, one of which was that the mortgages were not transferable without the concurrence of the various mortgagees. The grounds were argued as preliminary points of law in advance of the action coming on for trial. P 0 Lawrence J, before whom the preliminary points came for decision, held (at [1920] 2 Ch 144 at 156-158) that, on the wording of the securities in question, the mortgages were indeed transferable. He also decided the other points in the plaintiff society's favour.

72. The action for specific performance subsequently came on for trial, again before P 0 Lawrence J. One of the defences raised by the defendant society, seeking to resist specific performance, was that the parties had entered into the contract under the mistaken belief that the transaction was a transfer of engagements under section 33 of the Building Societies Act 1874 when it was not, alternatively that the directors of the defendant society had entered into it in that belief, so as to entitle the defendant society to be relieved from

the contract. Another defence was that the plaintiff society was unable to assign to the defendant society the benefit of the mortgagors' covenants to pay the fines and other payments (other than the principal and interest) secured by the mortgages in question. PO Lawrence J (at [1921] 2 Ch 83) rejected the various defences and decreed specific performance of the contract. The defendant society appealed (see [1921] 2 Ch 438). It sought but was refused permission to appeal against the conclusions reached by P 0 Lawrence J on the preliminary issues decided by him at the earlier hearing (see [1921] 2 Ch 439 at 441). The appeal, however, succeeded and the decree of specific performance was set aside. Lord Sterndale MR considered that specific performance should be refused because it would have involved the defendant society in ultra vires actions. He also found that, even if (as P 0 Lawrence J had held) the terms of the mortgages empowered the plaintiff society to transfer the mortgages without the mortgagors' consent, nevertheless the plaintiff society was not in a position to transfer to the defendant society all of the rights which the plaintiff society itself had under the mortgages essentially obligations (involving the payment of subscriptions, fines, fees and other amounts) owed by the mortgagors as members of the plaintiff society under the latter's rules and regulations - and for that reason the plaintiff society was not able to perform its side of the contract with the defendant society. The claim in the action therefore wholly failed. Warrington LJ agreed with Lord Sterndale MR on both points. So also did Younger LJ.

73. In his judgment ([1921] 2 Ch at 456) Warrington LJ pointed out that *" ... the chairman of the defendant society undoubtedly thought that in entering into the contract he was not merely purchasing the mortgages and entitling the defendant society to a transfer of them, but that he was arranging for what, in the Building Societies Act, 1874, s.33, is called a transfer of its engagements - a very different thing, because a transfer of the engagements of the society means that the members of the one society become members of the other society; and the mortgages are not merely transferred as a separate item of property, but as part of the transfer of the entire business; and the difficulties which have been raised in the present case would not have arisen if that had really been the nature of the transaction."*

He pointed out, however, that, having regard to the exchanges between the two societies, the contract fell to be treated as one merely for the purchase and sale of the particular mortgages with the consequences set out in the judgment of Lord Sterndale MR with which, as he later explained, he agreed.

74. Mr Mabb drew my particular attention to that passage. He pointed out that the provisions in the (then) Building Societies Acts (section 33 of the Building Societies Act 1874 and section 5 of the Building Societies Act 1877) which applied to transfers of engagements resemble sections 51(1) and 54 of the 1965 Act. The remarks of Warrington LJ demonstrated, he said, that in such a closely analogous situation a transfer of engagements enables all of the rights to be transferred to the transferee society - as part of the entirety of the transferor society's business - even if some of the rights cannot be transferred as separate items of property (either because of their nature or because the consent of the third party mortgagor is needed).

75. I consider that this is to read too much into Warrington LJ's remarks. The contract between the two societies was held to amount to a contract by the plaintiff society to put the defendant society in the same position in reference to the mortgages as regards their enforcement and the benefits to be derived from them as the plaintiff society itself enjoyed. See [1921] 2 Ch at 458. Yet, as pointed out, the contract was in form no more than a contract for the purchase by the defendant society and a sale by the plaintiff society of the mortgages which had been granted to the plaintiff society by its members in the course of carrying on its business as a building society. See [1921] 2 Ch at 455. As Warrington LJ noted (at 458): *"It [a building society] can of course transfer the mortgage debts. That is not denied. It can also transfer the security for the mortgage debts, that is, freehold or leasehold hereditaments, as the case may be, which were granted or assigned by them as security. But a mortgage from a member to a building society is a great deal more than merely an obligation to pay the mortgage debt and a conveyance of certain property by way of security. It purports to give to the society, which in that case is the mortgagee, rights and advantages derived from the Act of Parliament and from its own rules and regulations, the nature of the main advantages so given, being the right of the society to enforce, as against the mortgagor, the payment of fines and penalties for non-performance of his obligations, partly under the mortgage itself and partly under the rules and regulations of the society. Those are advantages which, as between an ordinary mortgagor and mortgagee, cannot be claimed, because ... no penalty can be enforced upon a mortgagor for non-payment at a particular time of money payable under the mortgage. "*

He later explained that (at 459): *" ... although the transferee in this case is itself a building society, the mortgagors are not its members, and it would be in no better position, for the purpose of enforcing these particular obligations of the mortgagors, than it would be if it were an ordinary individual. When, therefore, the defendant society got a transfer, if it did get one under this contract, it would not get the full advantage of the mortgage security granted by the mortgagor. "*

76. In the view of Warrington LJ (in the passage on which Mr Mabb relied), if the transaction had been by way of a transfer of engagements - resolved in accordance with section 33 - the result intended by the defendant society (or at any rate its chairman) could have been achieved and the mortgagor/members of the plaintiff society could have become the mortgagor/members of the defendant society. The defendant society would thereby have acquired the right to enforce the payment of subscriptions, fines fees and so forth which the plaintiff society had hitherto enjoyed against the mortgagors as its members.

77. That a transfer of engagements should be capable of bringing about such a result without each mortgagor first consenting to become a member of the defendant society in all respects on the same terms as that person had been a member of the plaintiff society is not at all surprising. For, in becoming a member of the plaintiff society, each mortgagor must be taken to have accepted as one of the consequences of membership that a transfer of the undertaking (including his/her membership) should be capable of achievement by an appropriate resolution of the members of the plaintiff society. Such a transfer is what is laid down by the relevant legislation (in the particular case section 33 of the Building Societies Act 1874) setting out what a building society, by an appropriate resolution, may achieve. None of this, and nothing said by Warrington LJ, is concerned with liabilities owed by a building society to a complete stranger (one who has not, by becoming a member, agreed to be subject to the rules and powers of the society) or to whom the society has otherwise come under an obligation as a result of some transaction between the society and that third party. Nor is it concerned with duties or liabilities owed by a third party, the benefit of which, by the terms of the transaction under which they arise, is only transferable with the third party's consent. **Sun Permanent** was not in any sense concerned with such cases. It does not assist Mr Mabb.

Nokes v Doncaster Amalgamated Collieries Ltd rI9401 AC 1014 ("Nokes")

78. I have not so far referred to the decision of the House of Lords in **Nokes** upon which Mr Ross placed considerable reliance.

79. The question in that case was whether an order under section 154 of the Companies Act 1929 transferring without further act or deed all the property, rights, liabilities and duties of one company (the transferor company) to another (the transferee company) has the effect that a contract of service previously existing between an individual and the transferor company automatically becomes a contract between that individual and the transferee company. In that case an order had been made under section 154 transferring to the respondent company all the property, rights, powers, liabilities and duties of Hickleton Main Company Ltd and a question had arisen whether the appellant miner, Nokes, had absented himself from work in circumstances which made him liable under section 4 of the Employers and Workmen Act 1875. Such a liability would only arise if he could be regarded as under a contract of service with the respondent company. He had been in the employment of Hickleton but denied that he had become employed by the respondent company. It was contended that the effect of the order automatically made the appellant an employee of the respondent. The House of Lords, by a majority of four to one (Lord Romer dissenting), decided (reversing the decision of the Court of Appeal [1939] 2KB 578) that an order under section 154 did not have that effect.

80. Section 154, so far as relevant, provided:

"(1) Where an application is made to the court ... for the sanctioning of a compromise or arrangement ... and it is shown to the court that the compromise or arrangement has been proposed for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies, and that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme (in this section referred to as "a transferor company") is to be transferred to another company (in this section referred to as "the transferee company"), the court may ... " by order " ... make provision for all or any of the following matters:-

(a) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;

(2) Where an order under this section provides for the transfer of property or liabilities, that property shall, by virtue of the order, be transferred to and vest in, and those liabilities shall, by virtue of the order, be transferred to and become the liabilities of, the transferee company ...

(4) In this section the expression "property" includes property, rights and powers of every description, and the expression "liability" includes duties."

81. Viscount Simon LC said (at 1020) that the result contended for by the respondent company (that the contract of service of the appellant had been automatically transferred to it by the order made under section 154): *" ... would be at complete variance with a fundamental principle of our common law - the principle, namely, that a free citizen in the exercise of his freedom is entitled to choose the employer whom he promises to serve, so that the right to his services cannot be transferred from one employer to another without his assent. The whole question, however, is whether s154 of the Companies Act 1929 provides a statutory exception to that principle. "*

One of the arguments urged by the respondent company, as noted by Lord Simon (at 1021), was that section 154 constituted a new and simpler machinery for the transfer of the undertaking of an old company to a new company which acquired the undertaking without the necessity of the transferor company going into liquidation. Lord Simon noted (at 1021) that, as had been pointed out in the court below, the word "transfer" was not a word of art and that the language of section 154 was in very wide terms. He observed (at 1022) *that "where, in construing general words [of a statute] the meaning of which is not entirely plain there are adequate reasons for doubting whether the Legislature could have been intending so wide an interpretation as would disregard fundamental principle, then we may be justified in adopting a narrower construction"* adding that if, given a choice between two interpretations, "the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction ... ". After considering how in practice the wider interpretation of section 154 would operate, he expressed the view (at 1 024) that, when providing for "transfer", section 154 was providing for the transfer of those rights which were "not incapable of transfer" and was not contemplating the transfer of rights which were "in their nature incapable of being transferred". He therefore considered that the benefit of a contract of personal services was incapable of transfer. He made clear that his judgment was limited to such contracts.

82. Lord Atkin, in agreeing that the employee's appeal succeeded, noted (at 1027) that the contention of the respondent company was that the effect of section 154 was "to transfer all rights which a transferor company had against anyone at the date of the order whether on personal contracts or on contracts expressed to be non-assignable, or on property the rights in which ceased on assignment". He observed (at 1028) that if that was a correct view of the section it would cover, inter alia, "property held without the right of assignment" and that in the case of leases (in England) would forfeit the right reasonably to withhold consent. He then asked himself "what the reasons might be supposed to be that brought about this revolution in the law, and that led to one class of person, companies under the Companies Act, being able to shake off the restrictions which bind ordinary persons, though only when they are minded to transfer their business to another and probably a larger company". Then, after observing (at 1029) that prior to 1928, when section 154 was first introduced, "nothing was transferable by a company that was not transferable by an individual" and that sales of undertakings had to respect the rights of third parties, and after pointing out that the changes which section 154 had made (simplification of the process of transfer by means of a vesting order without the need to wind up the transferor company and making the new company take over and be responsible for the liabilities of the old) he said this (at 1030): *"But why this beneficent procedure should be tainted with the oppression and complication which in some cases would certainly be caused, or why in the interests of companies big or small for the mere purposes of an amalgamation it should violate all the rules as to transferability depending on some occasions on principles of our law and on other occasions on contract I cannot imagine."*

He later drew attention to the emphasis placed by the respondent company on the wide definition given by the 1929 Act to the expression "property". He referred to how it had been the duty of the court on countless occasions "to construe general words cutting down the generality to the obvious intention of the

Legislature" and (at 1 031) to the presumption of statutory construction that "the Legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms of by clear implication, or, in other words, beyond the immediate scope and object of the statute" with the law remaining undisturbed in all general matters outside those limits. He expressed the view (at 1033) that the court's power in an amalgamation to transfer "non-assignable property" constituted a "departure from observing the ordinary rights of property in the third parties" which was not "even suggested [by section 154] much less expressed in clear and unambiguous language". He concluded that section 154, which he described as an "in the main procedural section", should not be construed so as to transfer rights which in their nature were by law not transferable.

83. Lord Thankerton agreed with the opinion of the majority. Observing (at 1035) that the construction which had prevailed in the courts below involved that the right which a third party would otherwise have to prohibit a transfer by the transferor company was at the mercy of the court under section 154 and that the difficulty was over the use of expression "transferred" in that section, he stated that "if it had been intended to effect a substitution of the transferee company in room and stead of the transferor company it would have been easy so to express it, but Parliament has not done so". He added, a little later, that "if it had been intended to extinguish the rights of third parties, that should have been done by a clear, definite and positive enactment, not by an ambiguous one such as [section 154]". He referred, by way of example, to mineral leases noting (at 1036) that in the case of such leases it had long been settled in Scotland that a lease excluding assignees "unless approved of by the landlord has the same force with an unqualified exclusion" with the tenant having, no right either to require the landlord to justify his refusal or to subject the landlord's reasons (if given) to judicial review. He concluded that, in the absence of explicit provision to that effect, he was unable to find in the terms of section 154 anything to deprive the mineral landlord of such a right.

84. Lord Porter said that the question was whether section 154 did more than give power to the court to take a short cut and avoid the delay and expense, previously necessary when a reconstruction or amalgamation of companies was desired, of a winding-up of one or both companies. "Does it" he asked (at 1048) *"by an executive act transfer to the new body all the contractual rights of the original companies in spite of any safeguards against transfer whether express or implied contained in their contracts with third parties? Does it transfer contracts by their terms non-transferable and those, such as contracts of service, which at common law could not have been transferred without the consent of both parties?"* He summarised the respondent company's contention as involving that section 154 effected a substitution of that amalgamated company for the original constituent companies. He observed (at 1050) that he did not find himself assisted by the fact that section 154(1) referred to "liabilities" or that section 154(4) included "duties" within that expression since *"a company to which the undertaking of another company is transferred at the instance of the latter and by its own consent, must necessarily, if justice is to be done, undertake the liabilities towards third parties under any contracts entered into by the original company"*. He observed (at 1050) that shareholders and creditors of the companies to be amalgamated are the initiators of the steps taken whereas contractors, unless creditors, and employees have no say in the matter. He could not see therefore why the amalgamated companies "*as a recompense for undertaking the liabilities of the original company should obtain under section 154(1)(a) the benefit of the contracts which by their nature are not transferab*le". Then, after reviewing the meaning to be given to "property" as used in section 154 and, in particular, whether it should include "*non-transferable contracts*", he concluded (at 1053): *"I may sum up my view by saying that the word "property" in section 154, whether considered alone or in conjunction with the words "**rights and powers of every description**" means property with which the original company has the right to deal without having to obtain the consent of some third party ... "*

85. Mr Ross submitted that the reasoning of the majority in **Nokes** strongly supports his submission that section 51(1) does not have the overriding effect for which CWS contends. He drew attention to the wide definition of "property" in section 154(4) (set out at paragraph 80 above) and the equally wide definition of "property" to be found in section 74 of the 1965 Act (that "except where the context otherwise requires" it "includes all real, personal or heritable and moveable estate, including books and papers"). He pointed to the approach of the majority (at any rate that of Lord Atkin, Lord Thankerton and, especially, Lord Porter) to "property" as used in section 154 to mean (in the words of Lord Porter) "property with which the original company has the right to deal *without having to obtain the consent of some third party*". (emphasis added) He

submitted that there are obvious parallels between transfers effected under section 51(1) of the 1965 Act and transfers under section 154 (now section 427 of the Companies Act 1985) effected under a scheme for the reconstruction or amalgamation of companies with which sections 153 and 154 of the Companies Act 1929 were concerned. He pointed to the need in **Nokes**, which the majority found to be absent, for clear statutory wording if the statutory transfer was to override the pre-existing contractual or other rights of a third party to object to a transfer of some particular item of property. He submitted that there is no more discernible policy reason why an industrial and provident society should be entitled by a transfer of engagements to override third party rights than there was found to be under section 154. The reasons which led to that conclusion in **Nokes**, he submitted, apply with at least as much force as they do to a transfer of engagements under section 51 (1).

86. By contrast, he pointed to other legislation dealing with transfers of property where Parliament has seen fit to make express provision to override the need to obtain a third party consent to a transfer of some item of property. In such cases, Parliament has required that the transfer obtain the prior confirmation of either the court or of a regulatory body and, what is more, affords to the third party a chance to make representations before such confirmation is given. Thus, under the Insurance Companies Act 1982 (since repealed), an instrument giving effect to a transfer of business approved by the Secretary of State under section 51 of that Act was (by section 52(1)): *" ... effectual in law - (a) to transfer to the transferee all the transferor's rights, and obligations under the policies included in the instrument ... notwithstanding the absence of any agreements or consents which would otherwise be necessary for it to be effectual in law for those purposes."*

No such transfer could occur unless it was first approved by the Secretary of State. By section 51 (2) of that Act, the Secretary of State could not determine an application for his approval of the transfer unless it had been advertised and, except as he might otherwise direct, notice (containing prescribed information) given to every affected policyholder and every other person who claimed an interest in a policy included in the transfer and the Secretary of State had considered any representations made to him by the date specified in the notice. There were, moreover, restrictions on the exercise by the Secretary of State of his powers to approve such a transfer.

87. By section 94(1) of the Building Societies Act 1986, a building society is given power to *"transfer its engagements to any extent to another building society ... "*. By section 94(8) it is provided that by a transfer of engagements: *" ... the property, rights and liabilities of the society transferring its engagements (**whether or not capable of being transferred or assigned**) shall, by virtue of this subsection, be transferred to and vested in the society taking the transfer to the extent provided in the instrument of transfer of engagements."* (emphasis added)

By section 94(7), it is provided that such a transfer shall be of no effect unless, inter alia, it is confirmed by the Authority (ie the Financial Services Authority) under section 95. By section 95(3) and Part III of schedule 16 to the 1986 Act notice of, inter alia, a transfer of engagements must be published (as there laid down). Moreover Part III of schedule 16 lays down a procedure to enable interested persons to make representations before the Authority gives its confirmation.

88. The Friendly Societies Act 1992 contains provisions similar to those in the Building Societies Act 1986 with regard to the need for confirmation by the Authority of a transfer of engagements, and with the same protection for interested parties to be notified of the proposed transfer and to be given the opportunity of making representation with respect to the transfer.

89. Mr Ross also drew my attention to section 112(2) of the Financial Services and Markets Act 2000 ("FSMA 2000") which provides that where an order is made under section 111(1) of that Act (sanctioning an insurance business transfer scheme or a banking business transfer scheme) and an order is made under section 112(1)(a) for the transfer of the whole or any part of the undertaking concerned and of any property or liabilities of the authorised person concerned, the order may: *"(a) transfer property or liabilities whether or not the authorised person concerned otherwise has the capacity to effect the transfer in question ... "*

But before sanctioning the scheme the court must be satisfied (by section 111(3)) that "in all of the circumstances of the case, it is appropriate to sanction the scheme". Section 110 requires that on an application to the court for such an order "(b) any person (including an employee of the authorised person

concerned or the transferee) who alleges that he would be adversely affected by the carrying out of the scheme" is entitled to be heard.

90. Mr Ross pointed out that no such protection is granted to third parties under the 1965 Act. A transfer of engagements may therefore occur without interested third parties (such as Stansell in the present case) having the least idea that a transfer is to occur or that it has occurred. He submitted that, as those other legislative examples indicate, where Parliament intends to override third party rights, the legislation clearly so provides and, what is more, the third parties thereby affected enjoy a measure of protection in that the sanction of the court or of an appropriate regulatory body is first required and the affected third parties are given an opportunity to make representations to the court or that body. Not only, he said, does the 1965 Act not so provide but, despite making amendments to that Act by the Industrial and Provident Societies Act 2002, (or, he might have added, in the other amending legislation referred to in paragraph 29 above), Parliament has not seen fit to make any amendments to section 51(1). He submitted that it was significant that when amendments to what is now section 51 (1) were introduced by the Industrial and Provident Societies (Amendment) Act 1954 to reduce the size of the majority needed to effect a special resolution and to insert what I have described as the property vesting provision Parliament did not see fit, notwithstanding the decision in **Nokes** 14 years earlier, to include any provision, equivalent to what is now found in, for example, section 94(8) of the Building Societies Act 1986, to enable property to be transferred under a transfer of engagements whether or not that property is otherwise capable of being transferred or assigned. The inference, he submitted, is irresistible, namely, that Parliament did not intend that section 51(1) should have the overriding effect for which CWS contended.

91. In response to Mr Ross's various submissions, Mr Mabb pointed out that practitioners books on company law (Palmer's Company Law, 25th edition, paragraph 12.033 and Gore-Browne on Companies, 44th edition, paragraph 30.11.1) state that "property" as defined in section 427(6) of the Companies Act 1985 (originally section 154(4)) of the Companies Act 1929) does not include a contract of service. To similar effect, he said, is Buckley on the Companies Act, 14th edition, in the notes to section 208 of the Companies Act 1948 (the current loose-leaf edition being, however, silent on the matter) and Halsbury's Statutes, volume 8, on Companies. **Nokes,** he pointed out, is treated as if it is confined to contracts of service as an example of things which are incapable of transfer. He submitted that the English courts are likely anyway to be wary of extending the approach in **Nokes** to other contexts.

92. In any event, he submitted, even if the meaning of "property" appearing in section 427(6) and in its statutory predecessors would not extend to the benefit of a contract containing a prohibition against assignment without prior consent, such as clause 18.1.1, that limitation on the scope of "property" in the provision does not apply to the meaning of "property" in sections 50(1) and 51(1) of the 1965 Act. He submitted that those sections are materially different from section 427 in that they operate in a materially different context and are formulated in materially different terms. That is so, he said, for several reasons. First, sections 50 and 51 operate in a narrow context in relation to arrangements between industrial and provident societies which, in turn, are subject to a simpler and less formal regime than companies. Second, the procedure under those two sections is relatively informal and involves no application to the court (there being no equivalent to the procedure laid down by Part XIII of the Companies Act 1985 in which section 427 is to be found). Third, section 427 is a procedural measure operating as an ancillary provision where a scheme is to be or has been sanctioned by the court in exercise of its discretion under section 425 of the Companies Act 1985 (formerly section 153 of the Companies Act 1929 and subsequently section 206 of the Companies Act 1948) whereas sections 50 and 51 are substantive, free-standing, provisions, not ancillary to any others and not subject to the same discretion and with rights/property and liabilities/obligations inextricably interlinked. Fourth, there are material linguistic distinctions in the respective provisions. Fifth, section 51(1), unlike section 427(4)(a) of the Companies Act 1985, adds "without any conveyance or assignment" thereby, so submitted Mr Mabb, dispensing also with any consent which would have been required for any such conveyance or assignment.

93. Nor, said Mr Mabb, did the other statutory provisions to which Mr Ross referred assist Stansell in establishing that section 51 does not have the overriding effect for which he, Mr Mabb, contended. The fact, he said, that these provisions (section 52 of the Insurance Companies Act 1982, section 94(8) of the Building

Societies Act 1986 and section 112(2)(a) of FSMA 2000) specifically dispense with the need for any consent which would otherwise be necessary to enable the property, rights or obligations to be transferred (or overcome any lack of capacity in the transferor to effect the transfer in question) is of no significance for three reasons: (1) the content and context of sections 50(1) and 51 (1) of the 1965 Act, (2) the fact that there was, apparently, no suggestion in 1965 that the scope of the predecessors of section 51(1) were subject to the limitation for which Stansell contended and (3) the fact, so it was submitted, that Parliamentary draftsmen were less inclined 40 years ago to insert words to make specific provision for the avoidance of doubt, the more so where no doubt had been suggested.

94. In particular, said Mr Mabb, the enactment of section 94(8) of the Building Societies Act 1986 did not assist in establishing the limitation on the scope of section 51 for which Stansell contended. It is noteworthy, he said, that there is no suggestion in the standard reference works on building society law that section 20(5) of the Building Societies Act 1962 (or any of its statutory predecessors) was subject to any such limitation. The inclusion in section 94(8) of the Building Societies Act 1986 of the words "(whether or not capable of being transferred or assigned)" was readily explicable as being there to avoid any doubt. But, even if Parliament had proceeded in 1986 on the view that section 20(5) of the Building Societies Act 1962 was or might be subject to any such limitation, that fact would be of only limited authority on the interpretation of section 20(5) and would say even less, if anything, about the meaning of section 51 of the 1965 Act.

95. Mr Mabb submitted that the fact that section 51 was not amended, notwithstanding the enactment of the Industrial and Provident Societies Act 2002, did not assist in establishing the limitation on the scope of section 51 for which Stansell contended. This was, he said, because the content and context of sections 50(1) and 51(1) rendered such wording unnecessary. Consistently with that, there was no suggestion in 2002 that the scope of section 51 was subject to any such limitation. In any event, the 2002 Act was a modest amendment and it would have been surprising if Parliament had chosen to amend section 51 to make specific provision for the avoidance of doubt where no doubt had been suggested. Nor, he said, does the 2002 Act indicate that Parliament proceeded upon any particular view as to the meaning of section 51 and, even if it had, such view would have been of limited authority on what, properly construed, it meant.

96. It is clear to me that, although the actual decision in **Nokes** concerned the transferability by an order under section 154 of a contract of service, the reasoning which led to that conclusion was not so confined but had a wider basis. That basis is most concisely summarised in the passage from the speech of Lord Porter set out at paragraph 84 above. Moreover, in **Re "L" Hotel Co Ltd** [1946] 1 AER 319 (in which an application was made to the court for an order under section 154 in the course of which a question arose as to the form of the order to be made) Uthwatt J said that "at the root of that decision [Nokes] lies the undoubted principle that there is transferred, by virtue of a vesting order under the section, only such property as could be transferred by an act *inter partes"*. He did not suggest that Nokes was confined to contracts of employment. In **Re Cater Allen Ltd** [2002] EWHC 3147 (Ch) in which an application was made for an order under sections 111 and 112 of FSMA 2000 for the transfer of the banking business of a company to Cater Allen Ltd and for ancillary orders under section 112, Laddie J considered that the House of Lords in **Nokes** had approached the scope of 154 more broadly than one concerned only with rights of employment. In **W ASA International (UK) Insurance Co Ltd v W ASA International Insurance Co Ltd** [2002] EWHC 2698 (Ch); [2003] IBCLC 668, in which an application was made to the court for orders under section 111 and 112 of FSMA 2000, this time relating to the transfer of insurance businesses, Park J observed that prior to the enactment of FSMA 2000, an order under section 427(3)(a) of the Companies Act 1985 might not have been effective to transfer the benefit of reinsurance contracts without the consent of the relevant reinsurers.

97. I agree with Mr Ross that the reasoning of the majority in **Nokes** gives strong support to Stansell's contentions. It is true, as Mr Mabb pointed out, that section 154 of the Companies Act 1929 (now section 427 of the Companies Act 1985) operates in different circumstances, that there are differences in wording, not least in the definition of "property", between that provision and section 51 of the 1965 Act and that each is subject to a different procedure. But I do not consider that those differences undermine to any material extent the applicability to section 51 of the reasoning which lies at the root of the majority's decision in **Nokes.** Nor do I find at all persuasive the fact that the references to **Nokes** in practitioners books on

company law are confined to pointing out that "property" as defined by what is now section 427(6) of the Companies Act 1985 does not include a contract of service. The fact that sections 50 and 51 are subject to a simpler and less formal regime than companies is, to my mind, a consideration which adds to rather than detracts from the force of Mr Ross's submissions. The fact that section 427 is a procedural measure, intended to operate as an ancillary provision where a scheme is sanctioned by the court under section 425, whereas section 51 is substantive in nature does not seem to me to carry much if any weight. The fact is that section 427 (and, before it, section 154) is a provision which exists as part of a group of sections concerned to facilitate reconstructions and amalgamations of companies. To my mind, those provisions, overall, are no less "substantive" than is the transfer of engagements provision contained in section 51. It can as easily be said that the property vesting provision in section 51(1) is procedural in that it operates as a measure ancillary to the provision for transfer contained earlier in that subsection and is designed to dispense with the need for a formal conveyance or assignment.

98. On the other hand, and here I agree with Mr Mabb, I derive little assistance from the fact that in other legislation dealing with transfers (in particular, in the case of a building society, transfers of engagements now regulated by section 94 of the Building Societies Act 1986) Parliament has made express provision dispensing with the need to obtain a third party consent to the transfer or assignment of the assets (or liabilities) of the transferring body. This is highlighted by the fact that, so far as I am aware, there is nothing equivalent in the Friendly Societies Act 1992 to the phrase "(whether or not capable of being transferred or assigned)" to be found in section 94(8) of the Building Societies Act 1986. This is notwithstanding the existence in that legislation of other safeguards for interested parties, where a transfer of engagements has been resolved upon, similar to those which are to be found in the Building Societies Act 1986.

Conclusion in relation to the "overriding effect" argument

99. I can summarise my conclusions on this limb of the appeal as follows. I adhere to my initial view of the effect of section 51 (as set out in paragraphs 50 to 52 above). I am reinforced in that view by reference to the reasoning of the majority of the House of Lords in **Nokes.** It follows that, notwithstanding Mr Mabb's powerful submissions to the contrary, the arbitrator was wrong to conclude that section 51 of the 1965 Act overrode the prohibition against assignment contained in clause 18.1.1.

Was the contractual prohibition against assignment engaged by the transfer?

100. The arbitrator accepted CWS's contention that the contractual prohibition was not in any event engaged by the transfer. The contention that it was assumes, contrary to CWS's primary case, that section 51 does not otherwise operate to override the prohibition. The question is whether section 51 operated to cause the benefit of the building contract (in particular the right to bring proceedings against Stansell) to become vested in CWS in circumstances which do not amount to an assignment within the intendment of clause 18.1.1.

101. Mr Mabb submitted that 18.1.1 is a fetter on the alienability by CRS of its rights under the building contract. He submitted that the general policy of the law is to favour alienability over inalienability (see **Bettison v Langton** [2000] Ch 54 at 71H per Robert Walker L1) and therefore that clear language is required to limit what would otherwise be CRS' s unfettered right of assignment; indeed that, by analogy with covenants against assignment contained in a lease (for example, **Marsh v Gilbert** (1980) 256 Estates Gazette 715 at 717 per Nourse J), the clause should be strictly construed. He submitted that, in the case of a lease, a covenant against assignment is confined to assignments made directly by the lessee and does not extend to an assignment by operation, or pursuant to a requirement, of law (for example, vesting in a trustee in bankruptcy even where the bankruptcy occurs on the lessee's own petition: see **Re Riggs** [1901] 2 KB 16 at 21; or a lease taken in execution to satisfy a debt: see **Crosbie v Tooke** (1833) 1 My&K 431 at 434; or a vesting order made by the court on appointment of new trustees of a trust vesting the lease in the new trustees: **Marsh v Gilbert** (op cit) at 717). He pointed in particular to the observation of Nourse J in **Marsh v Gilbert** (at 717) that: *"In normal legal usage an 'assignment' is an inter vivos disposition made by one party in favour of another as an act of their joint volition. If that is the correct approach as a matter of language, I am bound to say that, authority apart, it would seem to me an odd result if a vesting order made by the court was capable of being an assignment for the purposes of a covenant of this nature ... "*

102. Mr Mabb submitted that the principle underlying these authorities applied equally to clause 18.1.1 and therefore that the contractual prohibition contained in that clause was limited to an assignment made directly by CRS as employer under the building contract (and would equally have applied to an assignment by Stansell as contractor since clause 18.1.1 applied to assignments by both employer and contractor). He submitted that, given that understanding of the expression "assigned", the operation of section 51 did not involve CRS or anyone else in assigning the building contract or any other property within the meaning of clause 18.1.1. He submitted that that was so for four reasons. First, insofar as the transfer of engagements resolved upon pursuant to section 51 (1) was of obligations or liabilities, there could be no question of any assignment: obligations or liabilities can only be novated, ie, assumed by the replacement obligor with the agreement or consent of the obligee. Second, the language of section 51(1), insofar as it deals with the transfer of the transferor society's property, speaks in terms of "approval" ("if that resolution *approves* the transfer of the whole or any part of the society's property ... ") rather than of transfer or assignment, much less of an assignment within the meaning of the expression "assigned" as used in clause 18.1.1. Third, it is only when the special resolution is registered by the "appropriate registrar", pursuant to section 50(4) as applied by section 51(2), that the statutory consequence prescribed by section 51(1) occurs, namely the transfer of the property to the transferee society. Accordingly it is the act of the registrar which is the proximate cause of the transaction and not any act of CRS. Fourth, section 51(1), by making clear that where, as here, the special resolution approves the transfer of the whole or any part of the transferor society's property (in the present case it was of all of CRS's property) then: *"the whole, or as the case may be, that part of the society's property shall vest in that other society without any conveyance or assignment."*

This makes clear, he said, that the property vests by force of statute rather than by act of CRS as the transferor society.

103. I do not accept these submissions. The question is one of construction of the expression "assign" as used in clause 18.1.1. Adopting the language of Nourse J in **Marsh v Gilbert**, it connotes *"an inter vivos disposition by one party in favour of another as an act of their joint volition"*. It was in my opinion precisely that result the disposition of (inter alia) the benefit of the building contract by the one society in favour of the other as an act of their joint volition - that CRS (and CWS) sought to achieve when CRS resolved "to transfer the whole of the property and assets ... of the society [ie itself] to [CWS] ... ". The fact that the transfer resolved upon extended also to liabilities and other obligations owed by CRS to others (as well as to other property and rights) or that section 51 (1) speaks of a resolution which "approves" the transfer rather than "transfers" or "assigns" the property in question seems to me to be beside the point. The fact that the resolution would not be effective without its registration by the appropriate registrar and that no conveyance or assignment would be required in order to perfect CWS' s title are likewise immaterial. These are matters which go to the mechanics whereby the transfer resolved upon is rendered effective and not to whether there is an assignment by CRS. Thus, the inter vivos transfer on sale of a registered leasehold estate by the proprietor of it to a third party is not the less an assignment of that estate because the transfer is required to be completed by registration. Moreover, if the benefit of the building contract was not transferable by any inter vivos act on the part of CRS except with Stansell's consent - and that consent was not forthcoming - it is, to my mind, nothing to the point that if that consent had been forthcoming the transfer, insofar as it was carried out as part of a transfer of engagements between societies pursuant to section 51 (1), required that the resolution be registered by the appropriate registrar before the transfer could become effective or that title to particular items of property would pass to CWS as transferee without the need for a formal conveyance or other form of assignment otherwise necessary if title is to be effectively transferred.

104. In my judgment, this way of putting its case did not assist CWS to show that the benefit of the building contract, and in particular any right to sue Stansell for breach of contract, had passed to it and the arbitrator was wrong to conclude that it did.

Result

105. The appeal succeeds.

John Ross QC (instructed by Squire & Co) for the Applicant
David Mabb QC (instructed by Tods Murray LLP) for Co-operative Group (CWS) Limited