Co-Operative Group (CWS) Ltd v Stansell Ltd [2006] APP.L.R. 05/09

CA on appeal from Chancery Div (Mr Justice Blackburne) before Mummery LJ; Longmore LJ; Jacob LJ. 9th May 2006.

Lord Justice Mummery :

Industrial and provident societies

1. The Co-operative Group (CWS) Limited (CWS) is a society registered under the Industrial and Provident Societies Act 1965 (the 1965 Act). Like other societies registered under the 1965 Act it is incorporated with limited liability. It has a registered name by which it may sue and be sued, perpetual succession and a common seal, but it is not a company registered under the Companies Acts and, in significant respects, it is different from a company.

2. During the 19th century many bona fide co-operative societies and other industrial and provident societies were formed. Their purpose was to make profits from the personal participation and exertions of their members ("industrial") and to apply the profits in making provision for their members' future ("provident"). Acting together in a business-like and self-help way for the mutual benefit of members was a laudable activity encouraged and facilitated by legislators. There was a series of Industrial and Provident Societies Acts-1852, 1855, 1862, 1867, 1876 and 1893. There were parallel developments in similar legislation governing friendly societies, building societies and trade unions.

3. There are now about 8,300 industrial and provident societies. In general, they are subject to simpler procedures and less formal regulation than registered companies, which are governed by legislation of ever increasing complexity, much of it needed to protect the public.

The dispute in outline

4. A dispute about the effect of the 1965 Act has arisen in this case from the wish of CWS to sue the respondent, Stansell Limited, formerly called Stansell (Builders) Limited (Stansell), for alleged breach of its obligations under a building contract entered into on 17 April 1990. The contract, which was in a JCT Standard Form, was for the construction of a regional distribution centre/ warehouse at Chelston Business Park, Taunton Vale in Somerset. The construction of the works was completed on 13 December 1990. Since then there have been incidents of flooding at the Distribution Centre, but Stansell denies that they were the result of any breach of the terms of the contract by it.

5. Stansell disputes CWS's right to sue it on the building contract for two reasons: first, CWS was not a party to the building contract; and, secondly, CWS cannot rely on an assignment of the benefit of the building contract to it on account of an express prohibition against assignment in clause 18.1.1 of the building contract- *"Neither the Employer nor the Contractor shall, without the written consent of the other, assign this Contract."*

6. Stansell, which is the "Contractor" mentioned in the clause, has never even been asked for its consent to the assignment of the building contract to CWS.

7. The other party to the building contract with Stansell was Co-operative Retail Services Limited (CRS). CRS was also registered under the 1965 Act, but its registration was cancelled by the Registrar on 13 April 2000 and it ceased to exist as a registered society.

8. The circumstances in which cancellation of the registration of CRS took place are central to CWS's claim that it validly acquired from CRS the right to sue Stansell on the building contract.

9. In brief, the circumstances are these. At a duly convened general meeting of CRS on 4 March 2000 a special resolution was passed pursuant to section 51 of the 1965 Act to transfer the whole of its property and assets and all its engagements to CWS, at that time called the "Co-operative Wholesale Society Limited". The transfer was in consideration of CWS issuing to each member of the CRS paid up shares in the CWS equal in value to the amount standing to the credit of the member in the share account of the member in the register of members of CRS on the date on which the transfer of engagements becomes effective.

10. On 8 March 2000 CWS undertook, by resolution of its Committee of Management, to fulfil the engagements of CRS. The special resolution of CRS, which was confirmed at a general meeting on 25 March 2000, was duly registered by the Registrar on 28 March. It took effect on 2 April 2000. Cancellation of the registration of CRS, on the grounds that the society had ceased to exist following the transfer of its engagements, took place on 13 April 2000 under section 16 of the 1965 Act. Section 16 (7) provided that, as from the date of publication of the notice of cancellation of a society's registration the society ceased to be entitled to any of the privileges of the 1965 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."*

11. Stansell was not notified by CRS or CWS of the proposed resolution to transfer engagements. No attempt was made by CRS or CWS to obtain Stansell's consent to the proposed assignment to CWS of CRS's rights under the building contract. The first that Stansell knew of the transfer was when its solicitors received a letter dated 16 June 2000 notifying them, after CRS had applied to be removed from the register and after the registration of CRS had been cancelled, of the transfer of engagements and of the building contract to CWS.

12. The only outstanding issue under the building contract is whether or not Stansell has fulfilled its design obligations. CWS wishes to pursue the claim. It served an arbitration notice on Stansell very shortly before the expiration of the 12 year limitation period.

Issues on appeal

13. The two issues decided by Blackburne J in his judgment of 22 July 2005 are brought to this court on an appeal by CWS. The judge granted permission to appeal under section 69(8) of the Arbitration Act 1996, his decision having itself been given on an appeal from an arbitrator under that Act.

14. It is sufficient for CWS's purposes to succeed on either issue in order to establish its right to sue Stansell for breach of the building contract. The judge decided the case against CWS on both issues.

    1) **Statutory construction**: does a transfer of engagements effected pursuant to section 51(1) of the 1965 Act override a prohibition against assignment such as clause 18.1.1? Blackburne J observed that overriding the contractual clause must mean that section 51(1) operated as if either the clause prohibiting assignment were not a term of the building contract or as if Stansell's consent under the clause was given to the transfer of the contract.

    2) **Contractual construction**: did section 51(1) operate 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 did not amount to an assignment within the intendment of clause 18.1.1? This issue turns on the meaning of "assign" in clause 18.1.1 and proceeds on the assumption that section 51 does not operate to override the contractual prohibition against assignment.

The 1965 Act

15. Section 51 confers on a society registered under the 1965 Act the power to make a transfer of its engagements to another registered society-

    "51(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."

16. Section 51 is in a group of sections headed "Amalgamations, transfers of engagements and conversions." The sections enable or authorise societies by special resolution to amalgamate (section 50), to transfer engagements between societies (section 51) and to convert into, amalgamate with or transfer engagements to a company (section 52). They differ from the provisions in the Companies Acts governing the amalgamation and reconstruction of companies. (They are unaffected by the Industrial and Provident Societies Act 2002, which confers powers on the Treasury to modify certain provisions of the legislation for the purpose of assimilating the law relating to companies and the law relating to industrial and provident societies.)

17. As Mr David Mabb QC, who appeared for CWS, carefully explained in a wealth of detail on the legislative history, the provisions affecting merger of and transfer of engagements between industrial and provident societies are reflected in similar provisions concerning building societies, friendly societies and trade unions. In general, the procedures are simple, formalities are kept to a minimum and regulation is light: no notification to third parties is required; no confirmation is needed from any court or regulatory body; and there are no solvency requirements

18. The provisions are subject to savings for the rights of creditors of a society in section 54 to the effect that amalgamations or transfers of engagements "shall not prejudice any right of a creditor of any registered society which is a party thereto."

19. It has been suggested (Halsbury's Laws Vol 24 4th edition re-issue paragraph 160) that the effect of section 54 is "that the creditor retains his rights against the amalgamating or transferor society, and it may be that he can exercise those rights against their assets, after the transaction, in priority to creditors of the amalgamated or transferee society, as the case may be."

20. CWS's case on the construction of the 1965 Act is quite simply that the statutory force of section 51 overcomes the express restriction on assignment in clause 18.1.1. This is so, even though the section does not contain any express provision of the kind found, for example, in the building societies legislation relating to transfer of engagements (section 94(8) of the Building Societies Act 1986) overriding the contractual rights of third parties by stating that the transfer affects rights "(whether or not capable of being transferred or assigned)."

21. There are important areas of common ground on the construction of section 51(1). It is agreed that "engagements" in section 51(1) means "business undertaking." The section covers the transfer of the obligations or liabilities of a society, even though, as a matter of general legal principle, obligations and liabilities cannot be assigned, but have to be novated with the agreement or consent of the other party.

22. CWS contends that section 51(1) effects novation in this case, in dispensing with the consent of Stansell, either by novation in law (ie novating the obligations of CRS, so that Stansell may look only to CWS); or by novation in fact (ie by allowing Stansell to retain the right to look to CRS, as well as to CWS, though, as a result of the parting with assets and the cancellation of CRS, Stansell is in practice left with no option but to look to CWS.)

23. In these circumstances CWS contends that it is consistent that the legislation should also dispense with any consent required for the assignment of contractual rights and property by CRS, especially as the property might be inextricably bound up with liabilities.

24. There is no dispute that the section enables engagements to be transferred so far as concerns the members of the society, who must be taken to have accepted that. It is also agreed that the section enables property which is freely transferable to be vested in the transferee society without any conveyance or assignment.

25. It is plain that section 51(1) is framed in very wide terms. Read in its ordinary and natural sense it would not appear (a) to prevent CRS from passing an effective resolution to transfer to CWS the benefit of the building contract, as one of its engagements and part of the business undertaking to be transferred to CWS and which CWS has undertaken to fulfil, or (b) to prevent the vesting of the benefit of the building contract in CWS without any further document, such as an assignment, for which the consent of Stansell was expressly required in the building contract.

26. In other words the language of section 51(1) envisages that there could be a statutory assignment of both the rights and the liabilities of the transferring society, which would be effective, notwithstanding the express prohibition against assignment in clause 18.1.1 1t would override the prohibition against assignment. It would vest in CWS the benefit of the building contract and the right to sue on it, even though, according to its express terms, the contract was non-assignable without the necessary consent. The seemingly non-transferable building contract would be transferred as part of the transfer of engagements pursuant to section 51(1).

27. It may be added that, if the building contract was not transferred to CWS, an inconvenient practical situation will result: the benefit of the building contract would remain with CRS, which, by virtue of the provisions of the 1965 Act, is automatically cancelled on its ceasing to exist with no statutory procedure for its restoration to the register, such as exists in the Companies Acts.

28. The case for saying that that is in fact the situation which flows from the proper construction of section 51(1) is largely based on the supposed impact of fundamental common law principles on the construction of the legislation. Mr Ross QC, who appeared for Stansell, forcefully put the case as follows. The 1965 Act contains no reference to any entitlement to transfer compulsorily choses in action which are consensually and contractually expressed to be non-assignable. CRS was not able to transfer to CWS a right (ie a right to assign the building contract) which it did not at common law possess. Such right was not "property" or an "an asset" or "an engagement" within the meaning of the 1965 Act. Moreover, any purported transfer or assignment of any of the contractual rights under the building contract was ineffective. It was a purely personal and unassignable right, which has not vested in CWS. CWS therefore has no right to sue Stansell for breach of contract

29. I therefore now turn to consider the common law background to a transfer of engagements pursuant to section 51(1).

Common law background

30. Stansell invokes fundamental principles of statutory construction and of contract law in support of its contention that the benefit of the building contract was neither transferable nor transferred to CWS under section 51(1), so that CWS is not entitled to pursue a claim against Stansell for breach of the building contract.

31. Stansell's point on statutory construction is that, as a general rule, Parliament is taken by the courts to have legislated against the background of the common law, which forms a necessary part of the exercise of construing a statute: see ***Wisely v. John Fulton (Plumbers) Ltd*** [2000] 1 WLR 820 at 823H-824A

32. It is agreed that the burden of a contract is unassignable at common law. The same is true of the benefit of a contract which contains an express provision prohibiting a party from assigning the benefit of it without the consent of the other contracting party. The chose in action is rendered inalienable by such a provision and the intended assignee cannot not acquire the right to hold the other party to the contract liable for breach of contract.

33. The leading case on the effect of an attempt to assign a contract in breach of a contractual prohibitions against assignment is ***Linden Gardens Trust Ltd v. Lenesta Sludge Disposals Ltd*** [1994] 1 AC 85 (**Linden**) at pages 107C, 108F and 115B . Lord Browne-Wilkinson said at page 108F- *"Therefore the existing authorities establish that an attempted assignment of contractual rights in breach of a contractual prohibition is ineffective to transfer such contractual rights. I regard the law as being satisfactorily settled in that sense. 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."*

34. Lord Browne-Wilkinson, with whose speech the other members of the appellate committee agreed, rejected the analogy with leases, where an assignment of the term in breach of covenant is effective to vest the term in the assignee, leases being a hybrid, part contract, part property: see page 108H.

35. **Linden** was not, it should be noted, a case in which there were any relevant statutory provisions relating to the power to transfer or assign a contract or providing for the automatic vesting of property, assets or rights without the need for any conveyance or assignment.

36. Stansell submits that the transfer of engagements resolved on by CRS pursuant to section 51(1) did not negate the common law position, but could only transfer what was capable of being transferred at common law. If it had been Parliament's intention to override a contractual prohibition against assignment, either plain language would be required or there would have to be a necessary implication from the terms of the legislation. Parliament has not used the express language of contractual or statutory novation and there are no grounds for a necessary implication taking away the right of the third party to refuse to consent to the transfer of the contract.

37. In relation to the impact of statutory provisions on the assignment of contracts which are not assignable at common law Stansell relied strongly on another decision of the House of Lords ***Nokes v. Doncaster Amalgamated Collieries Ltd*** [1940] AC 1014 (**Nokes).** The decision was on the provisions in the Companies Acts for facilitating the reconstruction and amalgamation of companies and for "(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": section 154 of the Companies Act 1929 (the predecessor of section 427 of the Companies Act 1985). Section 154 was described by Lord Atkin at page 1034 as providing for the transfer of property from one company to another, followed by the dissolution of the transferor company. He characterised it as a "procedural section" affecting dealings with third parties which "should not be construed so as to transfer rights which in their nature are by law not transferable."

38. ***Nokes*** is a leading case on what is transferable in the context of statutory provisions relating to the transfer of property from one company to another. Section 154 was held not to include contracts of service. The common law doctrine was that contracts of service are not assignable, though for all practical purposes this doctrine has been overtaken by the provisions derived from EC Directives for the protection of employment on the transfer of an undertaking ie the Transfer of Undertakings (Protection of Employment) Regulations 1981 -TUPE.

39. Mr Ross sought to derive a more general proposition from the speeches in ***Nokes*** that an ordinary statutory transfer would not negate the common law position that a prohibition against assignment makes the benefit of a contract inalienable. Thus (at page 1035) Lord Thankerton said- *"…If it had been intended [by Parliament] 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 the section relied on in this case"…"*

40. He also cited Lord Porter at page 1048 for the proposition that Parliament did not intend, and could not have intended, that a company could- *"..by an executive act transfer to the new body all the contractual rights of the original[parties]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? Undoubtedly to effect such a change would be to make a momentous change in the law as it previously stood, a change which from one point of view affects companies only, but from the other, affects many individuals who have entered into contracts with them."*

41. Other authorities following **Nokes** were also cited: ***Re "L"Hotel Co Ltd and Langham Hotel Co Ltd*** [1946] 1 All ER 319 at 320A; ***Re the Estate of Skinner dec'd*** [1958] 1 WLR 1043 at 1047; ***Re Cater Allen Limited*** [2002]EWHC 3147 (Ch); ***WASA International (UK) Insurance Co Ltd v. WASA International Insurance Co Ltd*** [2003] 1 BCLC 668 at paragraph 17

42. Against the background of basic common law principles and the canons of statutory interpretation Mr Ross helpfully collated various factors in the statutory context, which he contended were relevant to ascertaining the intention of Parliament in enacting section 51(1) and supported his submission that the language and context of section 51(1) were insufficient to override the contractual prohibition against assignment agreed between the parties: a transfer of engagements pursuant to section 51(1) provided only for the passing and administrative registration of resolutions, which could be passed by as few as 2 votes; there was no requirement to consult or notify third parties or to obtain confirmation of the transfer by a court or by a regulatory body; the transfer need only be of part of a society's property; no solvency requirements are laid down; the transferee society may be wholly unconnected or unrelated to the transferor society; the material statutory provisions were brief and made the process of transfer easy; there was a procedural dispensation with the need for a conveyance or assignment; and there were no policy reasons to support a Parliamentary intention to confer on a society in unregulated circumstances the exceptional power to render alienable, at the instance of the society, a chose in action which the society and its contractual counterparty have legitimately declared by their contract to be inalienable.

43. With that setting of the statutory provisions and of the common law background I now turn to consider the judgment under appeal.

Judgment of Blackburne J

44. The statutory provisions and the case law, in particular ***Nokes***, were considered in detail by Blackburne J in a careful and comprehensive judgment, from which CWS appeals. He allowed Stansell's appeal under section 69 of the Arbitration Act 1996 from the award of the arbitrator dated 9 June 2004. The award was on the preliminary issue of CWS's right to sue on the building contract arising in the arbitration initiated by CWS against Stansell.

45. The arbitrator (Mr DR Dyer) concluded, on the basis of a statement of agreed facts, that clause 18.1.1 did not prevent CWS from pursuing the claim against Stansell, as the transfer effected by the special resolution was not an "assignment" of CRS's interest in the building contract so as to be caught by the non-assignment clause 18.1.1 and that, even if it was caught, section 51(1) of the 1965 Act overrode the restriction on assignment in the clause.

46. Blackburne J disagreed with the arbitrator on both questions. I shall deal with his judgment on each question in turn, taking first, as did the judge and counsel in their detailed submissions, the construction of the statutory provisions.

Statutory construction issue

47. After a review of the relevant industrial and provident society legislation and of section 50 to 54 of the 1965 Act in particular, the judge defined the principal question-

"47. …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 18.1.1? 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. Blackburne J stated his initial views (in paragraphs 50-52) before considering the numerous detailed points argued by counsel. In his conclusion on the point (in paragraph 99) the judge adhered to his initial views, finding that they were reinforced by the reasoning of the majority in **Nokes.** He held, disagreeing with the arbitrator, that section 51 did not override the prohibition against assignment in clause 18.1.1.

49. My first reaction to the unfamiliar provisions of section 51(1) was the same as that of Blackburne J: that it was unlikely that the section could be relied on by CWS in order to obtain a transfer of the non-transferable.

50. The judge's first impression was confirmed by an analytical approach to section 51(1). He explained-

"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 to 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 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 the 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."

51. Blackburne J discussed and rejected the following 5 particular reasons advanced by Mr David Mabb QC as to why section 51(1) did indeed have the effect of overriding the contractual right of Stansell to refuse to consent to an assignment of the benefit of the building contract to CWS:

*"53. ….(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** [1921] 2 Ch 438…."*

Conclusions on statutory construction

52. I am unable to agree with the judge on the statutory construction point. In my judgment, section 51(1) vested the benefit of the building agreement in CWS, notwithstanding the prohibition against assignment in clause 18.1.1 and the absence of consent by Stansell to an assignment to CWS. I base my conclusion on the natural and ordinary meaning of section 51(1) and on the absence of (a) a legislative context and (b) binding authorities indicating that section 51(1) should be given a more restricted meaning than it naturally bears.

A. The legislative text

53. First, I agree with Mr Mabb that the wording of section 51(1) is wide enough to achieve that result. I would put my trust in the legislative text on this point, unless there was a strong context to the contrary, which there is not (see below). The self- evident purpose of the provision was to enable or authorise one registered society to transfer to another society its engagements (its business undertaking) and its property with the minimum of formality-simply by passing a special resolution, which would have the stated statutory consequence of vesting the transferor's property without the need for a conveyance or assignment. The language of "a transfer of engagements" is broad enough to include the liabilities of a society to its members and to third parties and the rights of a society against its members and against third parties; and to cover contracts which would not ordinarily be transferable without the consent of the other party, such as contracts of service with employees of the transferring society. The force of the statutory language and purpose dispenses with the need for the consent of Stansell to the transfer to CWS of the benefit of the building contract.

B. The legislative context

54. Secondly, there is nothing in the scheme of the 1965 Act generally or in the context of section 51(1) in particular, which prevents the words of the subsection from having their natural and ordinary meaning. On the contrary, it makes more sense for all the engagements of CRS as the transferring society, including contracts containing restrictions on assignment, to pass to CWS as the transferee society. If the benefit of such contracts is left in CRS, which is then cancelled from the register on ceasing to exist as a registered society, the result would be either that the transferring society must continue to have some form of existence for as long as any of its assets are subject to a restriction on assignment, or the benefit of such contracts vests in the Crown as bona vacantia. It is very unlikely that the legislation was intended to lead to either result.

55. There was some discussion about section 54 of the 1965 Act. Whatever its précise effect, on which I have not reached a final view, I am confident that it does not prevent creditors of the transferring society from looking to the transferee society to satisfy their claims, even if they are still entitled look to the transferor society which has retained assets after the cancellation of the registration.

C. The authorities

56. Thirdly, the authorities do not require this court to construe section 51(1) in the way that Blackburne J construed it. The judge agreed with Mr Ross that the reasoning of the majority in ***Nokes*** gave *"strong support"* to Stansell's contentions that *"section 51(1) did not have the overriding effect for which* CWS *contend"* (see paragraphs 85 and 97 in particular). For that reason the court was taken in detail through all five speeches in ***Nokes.***

57. In my judgment ***Nokes*** is of limited assistance in this case. It is undoubtedly authoritative on the common law principle of the non-assignability of personal contracts, such as contracts of employment, and of contracts which contain an express prohibition against assignment. However, I agree with Mr Mabb that the context of the transfer of engagements of a registered industrial and provident society under section 51(1) is materially different from the context of the Companies Act provisions on reconstruction and amalgamation of companies construed in ***Nokes.***

58. As explained earlier the issue in **Nokes** was the effect of an order under section 154 of the Companies Act 1929 on a contract of service. The question was whether, when a court makes an order under section 154 transferring all the property and liabilities of the transferor company to the transferee company, such order has the result that a contract of service previously existing between an individual and the transferor company automatically becomes a contract between the individual and the transferee company (see Viscount Simon at page 1017). The focus of the case was on the non-assignability at common law of a contract of personal service without the consent of the employee. Such contracts are not "property" within the meaning of section 154 or what is now section 427(6) of the Companies Act 1985.

59. Sections 51 of the 1965 Act is materially different from the provisions in the Companies Acts (section 154 of the 1929 Act or section 427 of the 1985 Act) which are in the nature of procedural sections, which do not affect substantive law rights. Section 51 is a substantive provision intended to achieve objectives specific to the case of industrial and provident societies. As explained earlier in this judgment, industrial and provident societies, like building societies, friendly societies and trade unions, but unlike companies, are enabled by statute to transfer engagements and to amalgamate in a relatively informal way without the intervention of the court.

60. Further, in the case of companies one entity can join with another by the acquisition of the other's share capital. This is not realistically possible in the case of industrial and provident societies, most of which do not use transferable shares: the shareholding in a society is not in the nature of an investment, has no significant value and has a maximum limit on the holding. The focus in the 1965 Act and similar legislation is on facilitating the joinder of undertakings or businesses in a simple and straightforward way. There is no equivalent to section 51(1) in the Companies Acts enabling a company to transfer its business or undertaking, including contracts of service, by passing a resolution. The transfer of the property of a company is ancillary to an order by the court under section 425 sanctioning a scheme of arrangement and binding members or creditors by a majority vote.

61. The parties cited many other cases, items of legislation and passages from text books and practitioners works which were of interest, but of only marginal assistance and it is, in my view, unnecessary to set them out or to discuss them in this judgment. In my judgment the answer to this case is in the language and context of section 51(1). With the greatest respect the judge fell into error in not giving effect to the plain meaning of the words and in construing the section as if it had the same context as the decision in ***Nokes.***

Contractual construction issue: "assign"

62. Blackburne J accepted the submissions of Stansell on the second question. My conclusion on the construction of section 51(1) means that it is unnecessary to decide the point on the construction of clause 18.1.1. The point has, however, been fully argued on the appeal, as it was below, and I think I should express a view on it. In my judgment, the judge's decision on this point was correct.

63. Blackburne J held that, on the assumption that section 51(1) did not operate to override the prohibition on assignment, clause 18.1.1 was engaged by the transfer under section 51(1) and the section did not operate to cause the benefit of the building contract to become vested in CWS since this would have amounted to an assignment within clause 18.1.1.

64. Blackburne J said-

*"103. …The question is one of the construction of the expression "assign" as used in clause 18.1.1. Adopting the language of Nourse LJ 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."*

65. Mr Mabb argued that the judge had misconstrued "assign" in the context of clause 18.1.1. He emphasised that the clause is a simple standard form, which requires the motive or moving force to effect the assignment to come from the person who assigns (ie CRS.) In this case the motive or moving force was not supplied by CRS. It was supplied by section 51(1) itself. Clause 18.1.1 was limited to an assignment made directly by CRS to CWS. This was a statutory assignment. The statutory vesting pursuant to section 51(1) did not therefore involve CRS assigning the building contract, or any rights thereunder, within clause 18.1.1.

66. In my view, the judge was right to reject Mr Mabb's submission. It ignores the fact that section 51(1) was engaged by the voluntary act of CWS in passing the special resolution to transfer its engagements to CWS and to approve the transfer of its property to CWS. That act of CRS had the consequences spelt out in the statute, but that did not turn it into an involuntary transfer, which would fall outside the description of "assign" suggested by Nourse J.

Result

67. I agree with Blackburne J on the construction of clause 18.1.1 of the building contract, but, with respect, I disagree with his construction of section 51(1) of the 1965 Act. The decision of the House of Lords in ***Nokes*** is distinguishable as a case on the provisions of the Companies Acts. The language and context of the provisions in the 1965 Act are materially different. I would allow the appeal.

Lord Justice Longmore :

68. On 17th April 1990 Co-operative Retail Services Ltd ("CRS"), a registered society within the meaning of the Industrial and Provident Societies Act ("the 1965 Act") contracted with Stansell Builders Ltd ("Stansells") for the construction of a distribution centre at Chelston Business Park in Taunton Vale, Somerset. The works were completed in December 1990 and CRS paid for the works shortly thereafter. It is now alleged that Stansell are liable for damages for defective design or workmanship. Clause 18.1.1 of the building contract provided:- *"Neither the Employer nor the Contractor shall, without the written consent of the other, assign this Contract."*

69. On 4th March 2000 CRS passed a special resolution at a duly convened general meeting resolving to transfer the whole of [the] property and assets and all the engagements of [CRS] to the Co-operative Wholesale Society Ltd ("CWS") in consideration for the issue of paid-up shares in CWS to each member of CRS. This resolution was registered under the 1965 Act on 28th March 2000 and took effect on 2nd April. The registration of CRS was then cancelled by the Registrar.

70. In early December 2002 CWS began arbitration proceedings against Stansell by serving on it a notice to refer the dispute between them to arbitration and to concur in the appointment of an arbitrator. On 9 January 2003 Mr D R Dyer was appointed to determine that dispute . He was asked to decide whether the special resolution was effective to vest in CWS the right to claim damages for breach of contract on a preliminary issue in the arbitration. He held that it was. Stansell obtained permission to appeal that decision from Cooke J and subsequently Colman J transferred the matter to the Chancery Division. Blackburne J has held that the resolution was ineffective to transfer the rights against Stansell to CWS and there is now an appeal to this court.

71. The relevant provision of the 1965 Act is section 51(1) which provides as follows:- *"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"*.

72. The first and decisive question is whether section 51(1) is intended to override (or take effect in spite of) any contractual provision against assignment. It is not irrelevant that the section has its own legislative antecedents, but Mr Ross QC for Stansell relied on the fact that section 94(8) of the Building Societies Act 1986 is an express statutory provision which states that a transfer of a building society's engagements takes effect to transfer rights *"(whether or not capable of being transferred or assigned)"*.

That is an inappropriate argument of statutory construction. The Building Societies Act of 1986 was a substantial reforming measure in which opportunity was taken to clarify as much as to change the law. Before 1986 the relevant transfer of engagements provision in relation to building societies made no reference to non-alienable rights. But the same question as has now arisen in relation to the Industrial and Provident Societies Act could easily have arisen under the equivalent provision for building societies and would have to have been decided as a matter of construction. The context of the legislation is all-important.

73. The concept of "transfer of engagements" appears to have originated in the Friendly Societies Act 1855 which, by section 48, applied its provisions to industrial and provident societies. Section 14 provided:- *". . . . a Society formed and established under this Act . . . . 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 . . . ."*

It is perhaps pertinent to observe that assignment of even the benefit of contracts was not permissible at common law at that date. This was a rule that was commercially very inconvenient and in and around 1855 Parliament took specific steps to ensure that such assignments were legally permissible in certain spheres of activity. The Bills of Lading Act 1855 is a well-known example. In relation to friendly societies and industrial and provident societies Parliament was concerned, having decided that it should be permissible to assign the benefit of a contract, to ensure that the counterparty to the original contract or engagement was not prejudiced by such permissible assignment. That is why it was provided that the transferee had to undertake to fulfil the engagements of the transferor and, later, that rights against the transferor were to be preserved (see section 11(5) of the Industrial and Provident Societies Act 1876). But I venture to think that, in these examples of statutory assignment, Parliament would be surprised to be told that although it was now to be lawful to transfer the benefits of contracts or engagements, such lawfulness only applied to such transfers as were contractually permissible. That would have defeated the purpose of the beneficial statutory intervention.

74. For these reasons, as well as those of Mummery LJ, I agree that the first question should be answered in favour of CWS. I also agree with his answer to the second question.

Lord Justice Jacob:

75. I agree with both judgments.

MR DAVID MABB QC (instructed by Tods Murray LLP) for the Appellant
MR JOHN ROSS QC (instructed by Squire & Co) for the 1st Respondent