Easter Term
[2016] UKSC 17
On appeal from: [2014] EWCA Civ 435

JUDGMENT

Asset Land Investment Plc and another (Appellants) *v* The Financial Conduct Authority (Respondent)

before

Lord Mance
Lord Clarke
Lord Sumption
Lord Carnwath
Lord Hodge

JUDGMENT GIVEN ON

20 April 2016

Heard on 13 and 14 January 2016

Appellants
Michael Blair QC
Robert Purves

(Instructed by Morrisons Solicitors LLP)

Respondent
Nicholas Peacock QC
Tim Penny QC
Philip Hinks
(Instructed by The Financial Conduct Authority Legal Department)

LORD CARNWATH: (with whom Lord Mance, Lord Clarke, Lord Sumption and Lord Hodge agree)

Introduction

1. These proceedings were brought by the Financial Conduct Authority (FCA) against Asset Land Investment plc and associated parties, alleging the carrying on of regulated activities without authorisation, contrary to section 19 of the Financial Services and Markets Act 2000 (FSMA). The activities in question related to sales of individual plots at six possible development sites in various parts of the country. The only issue in the appeal is whether these activities amounted to "collective investment schemes" within the meaning of section 235, and thus "regulated activities" for the purpose of section 19 (as defined by section 22 and the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544)). (It is convenient to refer generally to FCA as embracing its predecessor, the Financial Services Authority or FSA.)

2. The FCA became aware in early 2007 that Asset Land was selling land to investors, and was representing itself as responsible for seeking rezoning for residential development and for arranging a sale to a developer. Following correspondence with Asset Land's solicitors, SJ Berwin, it accepted assurances that the company would cease to make such representations. In a further exchange in July 2008, SJ Berwin indicated that there were by then 64 plot owners, who had all been informed of the change in the arrangements. They had been offered the choice of exchanging their existing plots for plots that were larger in size and had access to services and roads ("enhanced plots"), thereby allegedly making it possible for plot owners to apply for planning permission themselves in respect of their individual plots; or of selling their existing plots back to the company for the price paid. It was said that of the 64 owners one had chosen to sell his plot back and the rest had opted for an enhanced plot. On the basis of this and other information provided by SJ Berwin, the FCA closed its inquiry in November 2008.

3. In June 2011 it formed the view that the agreed restrictions on the company's method of working were not being observed. It reopened its inquiry, and gave notice of the appointment of investigators. The present proceedings were begun in June 2012, following a worldwide freezing injunction against the company and Mr Banner-Eve.

4. In a judgment given on 8 February 2013 ([2013] EWHC 178 (Ch); [2013] 2 BCLC 480) Andrew Smith J decided that its activities amounted to a collective

investment scheme, in breach of the Act. After a second hearing on remedies the judge directed an inquiry into the amounts of restitutionary orders to be made under section 382. He made interim orders for payments totalling over £20m, based on FCA estimates of the amounts paid by investors for their plots, and on the assumption that their residual value, in the absence of planning permission, was nil. There is at this stage no issue before us arising out of those remedial orders (which have been suspended pending the determination of this appeal). The judge's decision on liability was upheld by the Court of Appeal, in a judgment given by Gloster LJ ([2014] EWCA 435; [2014] Bus LR 993). Two of the parties Asset Land and its principal owner and director, Mr Banner-Eve, appeal to this court.

The statutory definition

5. The issue turns on the interpretation and application to the facts of section 235, which reads as follows:

> "235: Collective investment schemes
>
> (1) In this Part 'collective investment scheme' means any arrangements with respect to property of any description, including money, the purpose or effect of which is to enable persons taking part in the arrangements (whether by becoming owners of the property or any part of it or otherwise) to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income.
>
> (2) The arrangements must be such that the persons who are to participate ('participants') do not have day-to-day control over the management of the property, whether or not they have the right to be consulted or to give directions.
>
> (3) The arrangements must also have either or both of the following characteristics -
>
> > (a) the contributions of the participants and the profits or income out of which payments are to be made to them are pooled;

> (b) the property is managed as a whole by or on behalf of the operator of the scheme …"

6. The background and general purpose of the legislation are described by Lord Sumption. In *Financial Services Authority v Fradley* [2005] EWCA 1183; [2006] 2 BCLC 616, para 32, Arden LJ gave helpful guidance as to the correct approach to construction of the relevant section:

> "First section 235 is drafted in an open-textured way in that it is drafted at a high level of generality and uses words such as 'arrangements' and 'property of any description', which have a wide meaning. Secondly, the application of section 235 depends on the specific facts of the case and in the event of a dispute those facts will have to be determined by a court of law on the evidence before it. Once those facts are found, then it is unlikely that an appellate court will set those findings aside unless the judge was plainly wrong. … Thirdly, since contravention of the general prohibition in section 19 may result in the commission of criminal offences [subject to section 23(3) of FSMA], section 235 must not be interpreted so as to include matters which are not fairly within it."

7. We have been referred to comparable legislation, and related authorities, from other Commonwealth countries. However, the wording varies, sometimes significantly. For example, the Australian Corporations Act 2001, Part 1.2, applies to a "managed investment scheme", but refers in the definition of that expression, to investors' control not over "management of the property", but over the "*operation of the scheme*". Such differences make it advisable to keep the discussion within the ambit of the United Kingdom statute and authorities decided under it.

Section 235 and land-banking

8. The possible application of section 235 to so-called land-banking arrangements was given prominence by the publication in March 2006 of draft FSA guidance, which became section 11 of its PERG Manual. We were told by Mr Peacock QC for the FCA that this was a response to the proliferation of schemes offering investors the opportunity to participate in land development projects. As illustrated by the present case, large sums of money may be involved.

9. In the earlier schemes the promoter would often be subject to a contractual obligation to negotiate a sale to a developer, and would retain a call option over

individual plots. Once it became known that such arrangements would be regarded as unlawful under section 235, and often following legal advice, adjustments were made to the schemes to keep them outside what was thought to be the ambit of the section. As already noted, the present is such a case. Another reported example of such changes in a land-banking scheme (in a director disqualification case) is described in the judgment of Hildyard J in *Secretary of State for Business Innovation and Skills v Chohan* [2013] Lloyd's Rep FC 351 (paras 73ff). He quotes (para 88) the advice of leading counsel (Mr Blair QC) summarising the changes then thought necessary to comply with the law in the light of the guidance:

> "To be safe, the 'scheme' must ensure that the owners actually control the management of their property (and that any management that is carried out on their behalf by the promoter is done 'on an individual basis'). And the scheme must ensure that the owners are not subject to rights or duties, as against the promoter, or anyone else, that could lead to the conclusion that they were locked into any kind of collective management or development of the land."

10. It is the FCA's case that in many instances the wording of brochures, marketing material and contracts ignored reality. The more unscrupulous operators simply took to making covert as opposed to overt representations, and promises to investors regarding the planning or rezoning gains that they would procure for the site. Whatever was said, the true object of the schemes, at least as understood by investors, was to enable them to benefit from an increase in the collectivised value of the individual plots, to be brought about by the operator's supposed expertise and experience in the rezoning process, without any real involvement by investors in the management of that process. Although individuals could sell their plots at any time, this was not what was expected to happen.

11. Other schemes have related to different forms of land exploitation. In *Financial Conduct Authority v Capital Alternatives Ltd* [2015] EWCA Civ 284, [2015] Bus LR 767 (*Capital Alternatives*) the Court of Appeal considered two schemes, one relating to exploitation of a rice farm in Sierra Leone, the other to tradable carbon credits in respect of forest areas in Australia, Sierra Leone and the Amazon. It will be necessary to consider some aspects of the judgment in due course.

12. This appeal raises the general question whether the FCA's understanding of the law is correct, and specifically whether the law was correctly applied to the facts of the present case. It has potentially wide-ranging significance for the application of the Act to this and similar arrangements.

In re Sky Land Consultants plc

13. Before turning to the judge's findings in detail, it is convenient to refer to the judgment of David Richards J in *In re Sky Land Consultants plc* [2010] EWHC 399 (Ch) ("*Sky Land*"), which has been influential in subsequent cases and in FCA practice. It involved a land-banking arrangement similar in many respects to the present. It was held to amount to a collective investment scheme within section 235. In that case, as in the present, the company purported to change its practices following intervention by the FCA. The changes were held by the judge insufficient to take it outside section 235.

14. The case concerned two sites, the Crewe land and the Winterton land, involving sales respectively of some 56 and 98 individual plots. The company's option agreements for both sites stipulated the terms of any future transfers of individual plots, including a restrictive covenant precluding residential development without the consent of Sky Land (paras 22, 25). In the first period investors were given the clear understanding that the company would seek to obtain planning permission for each site as a whole, and would bear the full cost of doing so (paras 29-33). Its website identified by name its planning consultants and planning solicitors. The judge noted the common expectation (though not formally agreed) that in the meantime the land would remain "in the occupation of the original owner and would continue to be farmed" (para 34).

15. Following the intervention of the FCA, the company agreed to write to investors indicating that the restrictions would be removed, that Sky Land "cannot and will not" play any further role in the development of the site, and that the individual owners would need to make their own arrangements to realise the value of the site as a whole (paras 37-39). The judge concluded that these statements had not been fulfilled, and that the company had continued as before, representing to investors that it would deal with planning and sale, and undertaking activities for that purpose (para 70).

16. The judge concluded that the arrangements fell within section 235:

> "A scheme whereby investors purchase individual plots within a site on the shared understanding that the company will seek planning permission and market the site including the plots are clearly capable of being 'arrangements'… Each of these requirements [of section 235(1)] appears to be satisfied: (i) the arrangements concern land sold off in small plots to investors, (ii) the investors become owners of the individual plots and (iii) the purpose of the arrangements is to receive profits arising

> from the sale of the individual plots as parts of the larger site." (para 73)

17. He rejected the argument that the "property" for these purposes should be looked at by reference to individual plots:

> "I consider 'the property' to be the land comprising the individual plots sold to investors. It is that land, very probably as part of a larger site which includes areas retained by the original owner and areas acquired by the company, for which planning permission and a buyer would be sought by the company. The investors participate by each becoming an owner of part of the property. While it is legally possible for an investor to sell his plot on its own, that is not what is intended or likely to happen. The purpose is to obtain planning permission, for, and to sell, the property as a whole." (para 75)

18. On the question whether the individual investors had "day-to-day" control for the purposes of section 235(2), the answer depended on "the reality of how the arrangements are operated", as to which he saw "no real issue":

> "There was no aspect of the management of the property over which the investors had day-to-day (or any other) control. Steps with a view to obtaining planning permission and with a view to developing or selling the property were in the hands of the company. The physical management of the land continued, as it had before, to be under the control of those farming the land." (para 76)

19. Under section 235(3)(b), the issue was whether the property was "managed" as a whole by the company. He said:

> "What constitutes management is dictated by the property. Some property, short-dated deposits for example, require active and constant management. The management of property of long-term nature may involve only intermittent activity.
>
> As regards the land in question, management could be said to involve (i) long-term goals, such as planning permission, development and sale, and (ii) the short-term physical stewardship of the land. The latter was of no real concern to the

> investors. This was not intended to be an investment in agricultural land … the reasonable inference from the evidence is that investors were content to leave it to the company to agree the use of the land pending development or sale.
>
> The purpose was to make a profit from an actual or prospective change from agricultural to residential or other use. The management of the property, so far as relevant to the investors, was taking steps with a view to obtaining planning permission and developing or selling the land. Such activities fall naturally within the ambit of management of land. The respondent's submission that individual participants were left to deal with their own plots as they see fit has no basis in the evidence." (paras 77-79)

20. This reasoning was in substance adopted in the present case by the judge and by the Court of Appeal.

The facts in more detail

21. The judge's findings as to the course of dealings between the company and the investors was based largely on the oral evidence of 15 of the latter. Mr Banner-Eve was the sole witness for the company, but his evidence was regarded by the judge as generally unreliable. The judge's difficulties were compounded by the limited documentary evidence available from the company itself, but also by the FSA's failure to anticipate the need to agree or prove some of the documents (para 21). It is no criticism of the judge that his findings as to how the company's business was in practice conducted, or intended to be conducted, are lacking in precision on some aspects. Happily there is no significant disagreement on matters material to the issues in the appeal.

22. Asset Land Associates Ltd (later Asset Land Investment plc) was incorporated in April 2005. It was owned (as to 95% of its shares) by Mr Banner-Eve and his wife, who were also directors. Mr Banner-Eve controlled its day-to-day activities. Some later purchases were made in the name of Asset LI Inc, a Panamanian corporation, of which Mr Cohen (another defendant) was a director. The judge found that Mr Banner-Eve was as "fully involved" with the activities of that company as with the English company. Nothing turns on the difference for the purpose of this appeal. I will refer generally to both as "Asset Land" or "the company".

23. The first site was in South Godstone. It can be taken as typical. The company acquired two sites in February 2006 followed by a third in October 2007. The judge found (on the basis of inferences from bank statements) that the company began to sell plots at South Godstone and receive payments for them shortly after 2 February 2006. It sold plots at trade exhibitions and through telephone sales. In 2007 it began to sell properties through off-shore brokers, including an agency called Services Global Destinations ("Global") in Spain. During the life of the project some 300 to 400 investors bought plots at South Godstone. The site has never been allocated for development, nor sold to a developer. A valuation report prepared in March 2013 by consultants for the FCA recorded that the site was in the green belt and had "currently little prospect of development". There is no evidence of what attempts (if any) were made by or on behalf of the company (or anyone else) to secure rezoning, or to attract the interest of developers.

24. Later sites acquired and apparently marketed in the same way were in Liphook (acquired on 30 April 2008), Lutterworth (11 August 2008), Newbury (20 March 2009), Harrogate (14 May 2010), Stansted (June 2011). They all remain unallocated, and are likewise assessed as currently having "little prospect of development".

25. The judge accepted the investors' evidence as showing how the company sold plots between July 2007 and 2012:

> "A representative telephoned the potential investor, often by way of a 'cold call' but sometimes in response to an interest in making an investment or buying land expressed over the internet or elsewhere. … There generally followed several telephone discussions between Asset Land and the investors. They were given extravagant expectations about the profit that they were likely to make from a short term investment, often within no more than a year or two. Some, but by no means all, potential investors were sent brochures in hard copy … or electronically …
>
> If the investor agreed to invest in a plot (or plots), he or she paid a 'deposit', generally of 10% of the price. … Before paying a deposit, most investors had received at least one letter from Asset Land, and the represented defendants rely upon wording in small print by way of a 'footer', and its wording was similar to that on the so-called 'check-box form' … [see below]

> Some time after paying their deposit, the investors were required to pay the rest of the price. After they had done so, Asset Land … sent them two copies of a contract for the purchase of the plot(s) that they were buying. It was not Asset Land's practice for investors to have a copy of the contract before they had fully paid for their plot(s) …" (paras 62-64)

26. This account was also confirmed by the contents of a draft letter prepared for a potential investor in November 2011, which spoke of "re-zoning" being "anticipated for two to three years", after which the land would be "entered into the LDF (Local Development Framework)", and then made available to developers to purchase. Investors were told to have their signature to the contract witnessed, in some cases by a solicitor, but none was encouraged to seek legal or other professional advice. Those who spoke of using a solicitor were told that it was unnecessary to do so (para 65-67).

27. The documents sent to a prospective investor included a so-called "check-box" form, to be completed and returned to the company. The form included confirmation that the investor had read and understood a "disclaimer" (which appeared as a "'footer' in smaller print at the bottom of the form"). This noted that the company did not give investment advice or offer regulated investment products to the public, and that having sold the land the company "does not pursue re-zoning or planning permission …", and neither it "nor any person connected with it" would have any role in pursuing re-zoning or planning permission. The contract itself contained what the judge called a "representations clause", by which it was confirmed that no representations were relied on outside the contract; and a "services clause", which provided that the seller would not apply for planning permission for the property or provide any other services amounting to "regulated activities" under the Act, although it reserved the right to apply for planning permission for land retained by itself.

28. Notwithstanding these written provisions, and notwithstanding differences in the detailed understanding of the various witnesses, the judge found that they all shared -

> "a consistent understanding of the structure of the scheme:
>
> > i) That Asset Land would seek to progress planning procedures with a view to the sites being used for housing.
> > ii) That Asset Land would then procure their sale, probably to developers.

> iii) That the investors who sold the plots at the site would be paid a share of the total consideration paid by the purchaser." (paras 71-76)

29. The judge found further support for his view of the arrangements in the evidence of a Sky News reporter, Mr Mansfield (paras 78-80). In spring 2012, in connection with a programme about "land-banking", he had contacted the company in the guise of a potential investor. In a secretly recorded discussion with a company representative (Ms McKenna) about the Harrogate and the Stansted sites, he was told "how Asset Land operated". This involved buying sites by reference to "strict criteria", usually with "gas, water and electricity all plugged" so that a developer can "build quickly to maximise his profit margins …". The "right to build" would be sold on to developers under sealed bids. The company was "nothing to do with planning permission" since it was not involved in construction; but it would, she said, "walk (him) hand in hand right up to the end of the investment", advise him of "a fair and true market offer", and then return the title deeds to the developer from whom he would "by return of post to (his) bank account … get the profit" (para 78).

30. After agreeing to invest in a plot on the Harrogate site, Mr Mansfield met Mr Cohen (director of ALI-Panama) who emphasised that he would have title to his plot and be "in control of it":

> "All we do is re-zone [the land], get a percentage of the value lifted and then, that's it, we're out of it … people who buy it, normally construction companies come in and buy it and they put in for the planning and everything."

When an offer was made, all the investors would be made aware of it, and they would have to agree the price because otherwise an investor might be "left out in the cold anyway because [the developers would] just leave [his plot] as gardens". To avoid the risk of "two or three people saying 'Oh no, we're not going to sell'" and holding the process up for everybody else, they would "normally … say it's 50% who say yes, and then 'in the contract you have to agree'" (para 79).

31. The judge summarised the effect of Mr Mansfield's evidence:

> "… consistently with the FSA's case, the scheme explained to Mr Mansfield was that (i) Asset Land would seek to have the sites re-zoned, and (ii) Asset Land would arrange for a third party, in all likelihood a developer, to make an offer for the site as a whole. Mr Cohen recognised that a minority were legally

> entitled to refuse the offer, but the scheme operated on the basis that it would make no financial sense to do so and in reality they would have to sell." (para 80)

32. Ms McKenna's reference to sale by "sealed bids" also reflects email exchanges in 2010 between Mr Banner-Eve and Ms Smeed-Hughes (who worked for the company and became a friend: para 25). The judge noted these emails in support of his conclusion that, to Mr Banner-Eve's knowledge, brokers were telling investors that "sites would be sold as a whole" with the "obvious inference" that the company would arrange the sales (para 150). One in January 2010 spoke of the land at South Godstone being sold by sealed bids; another in July spoke of land having been sold at "auction"; and the third in August commented that Global seemed to adopting "different pitches" as to how the land would be sold, a "favourite" being "the sealed bids routine, or developers already lined up to purchase".

"Management" activity

33. As already noted, a significant feature of section 235 is the reference to "management of the property", either by the operator or by (or under the control of) the participants. The judge did not find it necessary to make detailed findings on the nature and extent of management activity under the arrangements. In agreement with David Richards J in *Sky Land* he held that steps with a view to enhancing the development value of the land and selling to a developer constituted such management. That approach has since been endorsed by the Court of Appeal in *Financial Conduct Authority v Capital Alternatives Ltd* [2015] EWCA Civ 284; [2015] Bus LR 767, where management of a development site was contrasted with that of the agricultural property in issue in that case:

> "The [*Sky Land*] judgment rightly concentrated on the management with which the investors were concerned, namely that which would lead to the intended profit. In the present case that is the management of the farm with its buildings, roads, fields, irrigation areas, machinery and equipment, appurtenances and labourers." (para 85, per Christopher Clarke LJ)

34. Similarly Vos LJ highlighted the need to read the word "managed" in the context of the particular type of scheme in issue (para 120):

> "The arrangements that need to have the characteristic of being 'managed as a whole' are those relating to one or more of the acquisition, holding, management or disposal of the property.

> The question of whether the property is managed as a whole may be answered differently depending on which of these types of arrangements have been made in order to produce the intended profits or income. For example, in the land bank cases, the arrangements relate to the obtaining of planning permission which is the core management activity from which profit is expected to arise on disposal. That is plainly a management of the property as a whole …"

The reasoning of the courts below

The High Court

35. The judge first addressed the question whether the company had changed its operations after the FSA's intervention in 2007. He held that it continued to lead investors to believe that it would work with the planning authorities to enhance the prospects of housing development, and arrange for planning applications. It also led investors to think that "the whole site would be sold together and the proceeds distributed". That was "the obvious way for the plots to be sold", and the company's representatives confirmed that this was what would happen (paras 109-110). Under the heading "the disclaimer defence: the representations clause and the services clause", he considered arguments relating to the interpretation of the clauses and the application of the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) (paras 114-141). He concluded that the representations clause did not assist the defendants because properly interpreted it did not cover what the brokers told investors, it was not binding under the 1999 Regulations, and it was of no effect under the Misrepresentation Act 1967; likewise the services clause did not assist because, even assuming that it could be read as submitted by the company, it was not binding under the 1999 Regulations (para 141).

36. He identified three issues under section 235:

i) Were there arrangements within section 235(1)?

ii) Were the arrangements such the investors did not have day-to-day control?

iii) Were the arrangements such that the property was managed as a whole by or on behalf of the "operator"?

He answered all three in favour of the FCA.

37. On the first, adopting the reasoning of David Richards J, he held that there were arrangements within section 235:

> "I conclude that, as the FSA submitted, the brokers (or other sales representatives) of Asset Land and investors with Asset Land made arrangements when plots were marketed and investors paid a deposit that they should acquire land at a site, and that the object of the arrangements (as evinced in the exchanges) was that Asset Land should achieve a sale of the site (or a substantial part of it) after it had sought to enhance its value and so the price that it would attract by improving the prospects for housing development (through the site being re-zoned, if not granted planning permission), the price paid for it being shared between the owners of the land." (para 157)

38. He rejected the arguments of Mr Coppel QC (for the company) based on the varying understandings of different investors, and the lack of "mutual expectation of adherence to [what was planned]". The investors all had a "shared understanding of the essential features of the schemes". It was enough that the understanding was reasonably based on what they were told by the company's representatives, whether or not the company had any intention of acting in accordance with them (paras 159-160). He also rejected arguments based on "non-contractual disclaimers" in the letters, including the footers in the check-box forms. The footers were "verbose and not prominently presented" and did not in terms exclude the possibility of a planning application by an agent acting for the company. The investors "reasonably continued to rely on what they had been told". The whole structure of the scheme "called for plots to be sold together and this could be coordinated only by Asset Land" (paras 161-163).

39. Finally he rejected the argument that the company and the investors could not be found to have entered into arrangements inconsistent with the contracts signed by them:

> "People do not live their lives only by reference to their legal rights, and often manage their affairs, and make arrangements, on the basis that the legal framework in which they operate will not be invoked, or is unlikely to be invoked. … Non-legal arrangements are commonly made in parallel with legal contracts: they do not operate only outside territory occupied by contractual arrangements. Nor are non-contractual arrangements

> and contracts 'inconsistent' if they express differences about what the parties are to do: they operate on different levels …" (para 164)

40. On the second issue (section 235(2)), again following the reasoning in *Sky Land*, he held that the relevant property was each site acquired by Asset Land (para 157), and that on that basis none of the investors had any control over "the site as whole" (para 168). He reached the same view even treating the relevant property as the individual plots, given that the key feature of management was to do with enhancing the development status of the land and arranging a sale, which was in the hands of Asset Land. It was true that investors had the right as owners to deal with their land, and to apply for planning permission:

> "But section 235(2) is not about what legal rights investors had over their plots. First, … the subsection is directed to having *actual* control, and requires that the investors 'must actually exercise that control sufficiently to be regarded as being in effective control'. Secondly, [citing *Sky Land*] section 235(2) is about what the arrangements were and 'the reality of how [they] are operated'. In reality the arrangements described by Asset Land's representatives and therefore contemplated by the investors could not work if investors in fact exercised the rights to which Mr Coppel referred." (para 169)

41. On the third point (section 235(3)(b)) he said:

> "…, the essential nature of the schemes was that plots were investments, and the plan was that they were to be sold as part of the sites after their value had been enhanced through planning permission or the prospect of development after re-zoning. The 'management of the property' relevant for identifying the 'characteristics' of the arrangements is therefore, as I see it, management directed to what David Richards J called in [*Sky Land*] at para 78, the 'long term goals'. The arrangements were that Asset Land would deal with those management matters and the whole structure of the schemes made it obvious that only Asset Land would do so and realistically investors could not do so." (para 172)

The Court of Appeal

42. The Court of Appeal in substance adopted the reasoning of the judge on the main issues. Without disrespect it is unnecessary to repeat its reasoning for the purposes of this judgment. It will be sufficient to refer below to those aspects which are subject to specific challenge by the appellants.

The appellants' arguments in the Supreme Court

General approach

43. In this court, Mr Michael Blair QC for the appellants submitted that, given the serious consequences of a finding that the arrangements fall within section 235, a "conservative approach" to construction is appropriate, and one which promotes certainty. He accepted (appellants' case, para 58) the judge's finding as to the "consistent understanding" of the arrangements shared by the investors (para 28 above): that the company would progress the necessary planning procedures, and procure sale of the sites, and the investors would share in the proceeds. But he criticised the legal conclusions drawn from those findings by the courts below.

44. His submissions were grouped under four principal grounds (case, para 59ff):

i) *Ground 1* The Court of Appeal erred in its identification of the component parts of the arrangements, and in particular gave inadequate weight to an essential feature of the arrangements, that each investor was intended to (and in fact did) own his plot(s) outright.

ii) *Ground 2* Under sections 235(2) and (3) the court erred in treating "the property" as each of the sites acquired by the company, rather than -

> "… the aggregate, from time to time, of the all plots sold to and owned outright by individual investors, together with all the investor's appurtenant rights."

Applying that approach to section 235(2), it should have held that the arrangements left investors with the necessary control: they owned their individual plots outright, had full control over their inclusion in the scheme or eventual sale, and so between them had day-to-day control of the management of all the relevant property.

iii) *Ground 3* Under section 235(3)(b) the critical question was whether the arrangements reserved to the investor the final decision as to the exploitation of the property pursuant to the arrangements. The answer must be yes. Because each investor was the outright owner of his plot, only he could make the final decision to sell (or not sell) his individual plot.

iv) *Ground 4* The interpretation adopted by the courts below would if uncorrected potentially interfere with a wide range of legitimate business arrangements that should not be characterised as Collective Investment Schemes.

These grounds were developed in impressive detail in the written and oral submissions. The following is no more than a summary of what I understood to be the main points.

Ground 1 - "arrangements"

45. Under the first ground (para 87ff), the appellants accepted that the company made "arrangements" for the purpose of section 235. However the courts had extended that concept beyond the legislative intention, for reasons discussed under four sub-issues: "whose arrangements?", "representations", "pick and choose", and "timing". The overall thrust was that it was wrong to look for a form of "compact" between the promoter and potential participants. In the interests of certainty in the application of the law, the relevant arrangements had to be those made by the operator himself. They were to be judged objectively, as by an independent observer, taking account of their "physical structures and operating machinery", the property to be subject to the arrangements, and representations made by or on behalf of the promoter as to their content; but not of investors' understandings, save so far as they were evidence of what representations were actually made. Furthermore it was wrong for the court to "pick and choose" between the different elements, oral and written, of the arrangements (such as the contractual documents, which were an intrinsic part of what was proposed by the operator). The Court of Appeal had also been wrong also to focus on the early stage of evolution of the arrangements, rather than looking at their whole period.

Ground 2 - "property" and "day-to-day control"

46. The second ground (paras 119ff) was similarly divided into four sub-issues: "property", "purpose", "exercise" and "legal rights and realities". In substance they addressed two linked issues of interpretation under the section: identification of the

"property" (relevant to both sections 235(2) and (3)(b)), and the meaning of "day-to-day control over management" (relevant to section 235(2)).

47. First he criticised the Court of Appeal for wrongly treating the judgment of David Richards J in *Sky Land* as equating the "property" with the site acquired by the promoter, rather than the aggregate of the interests owned by the investors. He illustrated the distinction by reference to the example of a property development consisting of individual units and common parts, such as a block of flats, where the flat-owners' individual rights consist of their ownership of their own flats, and also rights relating to the common parts, to be exercised jointly with other flat owners. On the Court of Appeal's interpretation, the flat owners could never have "day to day control" of the property.

48. By contrast, he submitted, under the "manifestly better" approach in *Sky Land*, the arrangement would not be within section 235 because the individual flat owners would have "day to day control" of their flats and of their rights over the common parts, which together constituted the relevant property (case para 128).

49. He also criticised the courts below, following *Sky Land*, for directing attention to the *purpose* of the arrangements, which is a word used in subsection (1) but not subsection (2). The steps taken to achieve the purpose of enhancing the planning status of the site and attracting a developer did not require the company to have any control over management of the property. They could have been undertaken in relation to land owned by strangers. The only essential acts of "management" relating to individual plots were the decisions first whether or not to withdraw from the arrangements and secondly whether or not to sell to a particular buyer and on what terms. These were under the control of the individual owners.

50. The judge and the Court of Appeal had been wrong also to direct attention to the question not of control as such, but of how it was *exercised* in practice (following Hamblen J in *Brown v InnovatorOne plc* [2012] EWHC 1321 (Comm), para 1170). Mr Blair submits that this is a misreading of the section, under which the question is whether the investors "have" day-to-day control, not whether or how they exercise it. Further, the concept of control is concerned with the physical and legal aspects of the arrangements, not with their purpose or effect (nor how it may have been represented to investors). It is the legal rights and duties which reflect the "realities" of the scheme.

Ground 3 "management by the operator as a whole"

51. Mr Blair's submissions under this ground (paras 175ff) were the counterpart of those under Ground 2. The relevant property is the aggregate, from time to time, of the all plots owned by the individual investors, and it is they who have ultimate control over its management. He drew an analogy with FCA guidance as to the role of a managing agent in respect of a block of flats (PERG 11.2). The effect of this guidance, as he submitted, was that an arrangement with respect to multiple units of property would not entail management of the property as a whole by or on behalf of the operator if the arrangement has the following characteristics: (i) individual investors each own a unit of property outright; (ii) the final decision as to whether or not to deal with or exploit the unit in question (to let out the flat, or sell the plot) rests with the owner of that unit; and (iii) the investor receives any net proceeds of dealings with his individual unit. The critical question was whether the arrangements reserved to the investor the final decision as to the application of his own unit. It was immaterial that they would in practice follow the recommendation of the promoter, so long as they retained the right to exercise their own choice as to how to proceed, whether on their own or in collaboration with other unit-holders.

Ground 4 - conservative interpretation

52. Finally (paras 189-191) he submitted that section 235 should not be stretched to cover issues for which other remedies were available, for example misrepresentation, breach of contract, or unenforceability of unfair terms in contracts. There were well-established remedies for such practices, in private law or under the comprehensive regulatory regime for consumer protection. The expansion of "collective investment schemes" in order to bring such "ordinary commercial transactions" within the regulatory ambit of the FCA was neither necessary nor sensible.

Discussion

Arrangements

53. I can deal shortly with the first ground. It was not in dispute, as David Richards J held, that section 235 can in principle cover a scheme of the present kind, involving sale of a property in small units to investors with a view to participation in the development profits of the whole site. The word "arrangements" has its ordinary meaning, and there is no dispute that Asset Land entered into arrangements within the meaning of the section.

54. The content of the arrangements was a matter of fact for the judge. Mr Blair accepts his finding as to the "consistent understanding" of the investors of what was involved. He argues that the focus of attention should have been on the arrangements as made by the operator, including the documents prepared for that purpose, rather than as they were perceived by others. In my view this is an artificial and unrealistic distinction. The judge was entitled to take the view that the understandings of the investors conformed to what was intended by the operator. Similarly he was not required to give special weight to contractual or other documents, without regard to their context. The four sub-issues raised under this head by Mr Blair are in truth no more than factors which may be relevant in the overall assessment, none of them definitive.

55. The judge concluded that arrangements within the section were made when plots were marketed and investors paid their deposits, the object of the arrangements being that the company should achieve a sale of the site after seeking to enhance its value by improving the prospects for housing development, the price to be shared between the owners. That conclusion was amply supported by the evidence, and discloses no error of law.

The "property" and its management

56. Grounds 2 and 3 overlap and it is convenient to deal with them together. It is clear in my view that the relevant "property" for the purposes of section 235(1) was each of the company's sites taken as a whole, not the individual plots. That was the property whose sale was to lead to the profits which were the object of the exercise, and which brought the scheme within the scope of the section.

57. The appellants, as I understand Mr Blair's submissions, do not dispute that the "property" means more than the individual plots. However, it is, he submits, not so much the site as acquired by the company, but the aggregate of all the plots owned by the individual investors. It is by virtue of those individual ownerships, viewed collectively, that they have ultimate control over its management. Under his suggested analogy with a block of flats, section 235 would not apply, because the individual flat owners have day-to-day control of their flats and of their rights relating to the common parts, which together would constitute the relevant property.

58. In my view the distinction drawn by Mr Blair is not one of substance. The property for the purposes of subsection (1) is the whole site. That definition remains the same in principle throughout the section. But management control of the property under subsections (2) and (3) may be achieved in different ways. It is necessary to consider the mechanisms by which the participants on the one hand or the operator on the other manage or have management control of the property. The

mechanisms may not be the same in each case, and they need not be legal mechanisms. That follows from the acceptance that the term "arrangements" is not limited to agreements binding in law. By the same token, the "control" envisaged by those arrangements is not confined to legal control.

59. "Have … control" in subsection (2) is not a technical term. In context, as David Richards J held in *Sky Land*, it must be taken to refer to "the reality" of how the arrangements are to be operated, which may or may not involve rights or powers enforceable in law. Nor is there any absolute rule for what Mr Blair calls multiple units of property, including blocks of flats. The FCA's guidance (PERG 11.2) draws the correct contrast:

> "If the substance is that each investor is investing in a property whose management will be under his control, the arrangements should not be regarded as a collective investment scheme. On the other hand, if the substance is that each investor is getting rights under a scheme that provides for someone else to manage the property, the arrangements would be regarded as a collective investment scheme."

60. The judge found that the facts of the present case brought it within the FCA's second category. He was clearly entitled to do so. Mr Blair does not, as I understand him, challenge the judge's view (following *Sky Land*) that the relevant management of the property as a whole comprised the steps necessary to obtain planning permission and secure a sale to a developer. It was no part of the arrangements that the investors should have any part in, or control over, those management activities. Their ability as individual owners to determine ultimately whether or not to participate in a sale cannot be equated with control of its management in the meantime. In any event as the judge found, it would make no sense for them in practice to opt out of the realisation of the profit which was the only purpose of the arrangements.

61. Even if one directs attention to the rights attached to individual units, there is no parallel with the position of individual lessees in a block of flats. They have day-to-day control over the management both of their own flats and (collectively) of the common parts, which together make up the relevant property. That remains the position even if in practice they delegate part of that control to a managing agent. It represents the substance of the arrangements from the outset. Under the present arrangements, by contrast, the investors' ownership of the individual units was not linked to any exercise of management control, individually or collectively. It was not even envisaged that the plots should be separately identifiable on the ground. The move to marketing of so-called "enhanced plots" did not alter the position. That may have been designed in theory to enable investors to promote individual

developments, although the practicalities of that were not put to the test, nor explored in evidence. In any event, the possibility of some individual management activity of that kind added nothing to their management control of the remainder of the property.

62. Conversely, turning to subsection (3)(b), under the arrangements as found by the judge control of the management activities for the property as a whole lay with the company. It was acting as the operator of the scheme, not as mere managing agent for the individual owners. It is true that its control was not underpinned by any legal rights over the units making up the property. That did not affect the substance of the arrangements, even if it might have been an obstacle to their effective implementation. Indeed it might have been thought that lack of legal control would lead to a need for increased management activity to ensure that individual plot owners continued to be committed to the project as it progressed. Unsurprisingly, it was no part of Mr Blair's case that the company's management activity should be disregarded because it lacked reality. That would have been tantamount to an admission that the whole scheme was a fraudulent sham. For the purpose of applying the definition under section 235, the judge was entitled to take the arrangements as found by him at their face value. The issue was not whether those arrangements were good or bad, or even dishonest, but whether they fell within the statutory words.

63. For these reasons I would reject the appeal under Grounds 2 and 3. On this view, no separate issue arises under Ground 4. I accept of course that section 235 should not be stretched to cover matters covered by other legal remedies, under common law or statute. However, the judge's application of the section to the facts as found by him involved no distortion of its natural meaning or its intended purpose.

Conclusion

64. In conclusion, I would uphold the decisions of the courts below, and dismiss the appeal.

LORD SUMPTION: (with whom Lord Mance, Lord Clarke and Lord Hodge agree)

65. I agree with Lord Carnwath that this appeal should be dismissed. My reasons are similar to his, but I propose to express them in a judgment of my own because this is the first case to reach this court or the Appellate Committee of the House of Lords about one of the more problematic features of the United Kingdom's system of statutory investor protection, namely the regulation of collective investment schemes. The appeal is about a scheme for investing in land with development

potential. Such schemes are commonly referred to as "land banks", although the variety of arrangements that carry that label is so wide that the term is probably better avoided. The question at issue is whether the arrangements made by companies controlled by Mr David Banner-Eve to enable members of the public to invest in land constituted a collective investment scheme regulated by the Financial Services and Markets Act 2000. Asset Land was not authorised under the Act to establish or operate collective investment schemes.

The facts

66. Shorn of peripheral detail, the facts are straightforward. Between February 2006 and October 2007, Asset Land Investment plc bought three adjoining parcels of greenfield land at South Godstone in Surrey with a view to consolidating them into a single site. The object was to increase the value of the site by persuading the local authority to re-zone it for housing development. The site would then be sold as a whole at a profit to a developer. Shortly after acquiring the first parcel the company began to subdivide it into plots and to offer the plots for sale to investors. Ultimately, the consolidated site was divided into 319 plots. Subsequently, another site was acquired at Liphook in Hampshire. A Panamanian company called Asset LI Inc, in which the judge found that Mr Banner-Eve was also involved, acquired further sites at Newbury, Lutterworth, Harrogate and Stansted. The additional sites were acquired with the same object and were treated in the same way. Like the judge, I shall refer to the English and the Panamanian company indiscriminately as "Asset Land".

67. At the trial, there was much dispute and a good deal of evidence about the manner in which the plots had been marketed to investors. The judge found that it was done orally, mainly by telephone, and usually began with a cold call. Potential investors were given "extravagant expectations" about the profits to be made, often within a year or two. If the investor decided to proceed, he was required to pay a deposit, generally 10% of the price. Sometime after the payment of the deposit the investor was required to pay the balance of the price. After the investor had paid the full price, he received two copies of the contract for the purchase of his plot(s) from the relevant Asset Land company. He also received a "check box form". Once these documents had been signed and returned, the investor's plot was conveyed to him and in due course he received a Land Registry certificate of title. Asset Land retained title to the roadways between the plots, the access points to the site and certain other common spaces.

68. During the marketing process, different investors were given different understandings of how the development potential would be realised. However, the judge found that the salesmen gave them all to understand that the scheme had three basic features, which he summarised as follows (para 71):

> "(i) that Asset Land would seek to progress planning procedures with a view to the sites being used for housing;
>
> (ii) that Asset Land would then procure their sale, probably to developers;
>
> (iii) that the investors who sold the plots at the site would be paid a share of the total consideration paid by the purchaser."

I shall refer to these as the "core representations".

69. On the judge's findings, there was no general understanding about how the shares of the total price would be calculated, although one investor seems to have been told that it would be pro rata to the size of each plot. It is, however, clear that it was not proposed to price each plot separately so that if, say, part of the site was approved for affordable housing the owners of plots in that part would get less while others whose plots lay across an access point designated in the planning permission would be able to hold out for more. Each investor would derive his profit from a share of the price realised for the site as a whole.

70. The core representations by which Asset Land explained how the scheme would work did not extend to requiring investors to sell on terms proposed by Asset Land. But the judge went on to find that in practice "the whole structure of the scheme called for plots to be sold together and this could be coordinated only by Asset Land" (para 162); and that, although each investor could sell, lease, mortgage or occupy his plot as he pleased once he had acquired it, and could apply for the re-zoning of the site or planning permission for his own plot, "in reality the arrangements described by Asset Land's representatives and therefore contemplated by the investors could not work if investors in fact exercised [these] rights" (para 169).

71. The contracts of purchase and the check box form contradicted the representations in a number of respects. In particular, the contracts included a "representations clause" (clause 14) and a "services clause" (clause 16). The representations clause provided:

> "The Buyer confirms that there are and have been no representations made by or on behalf of the Seller on the faith of which the Buyer is entering into this Agreement except and to the extent to which such representations are herein expressly set out or form part of written replies by the Solicitors for the

> Seller to the written Inquiries before Contract raised by the solicitors for the Buyer or the Seller's replies to Property Information Forms."

The services clause provided:

> "For the avoidance of doubt, the Seller is not obliged to and will not apply for planning permission in relation to the Property or in relation to the land as a whole of which the Property forms part, nor will the Seller provide any other services to the Buyer following the purchase of the Property by the Buyer to the extent that the provision of such services would constitute the carrying on by the Seller of regulated activities for the purposes of the Financial Services and Markets Act 2000 unless the Seller is authorised under that Act and permitted by the Financial Services Authority to carry on the relevant regulated activities. Notwithstanding the foregoing, the Seller reserves the right to (but is not obliged to) apply for planning permission in relation to any land owned by the Seller which forms part of the land of which the Property forms part."

In addition, the check box form included a non-contractual confirmation, signed by the investor, that he had read and understood a "disclaimer" in the following terms:

> "Asset Land Investment plc is not regulated by the Financial Services Authority (FSA) or any other regulatory body. Asset Land Investment plc is not authorized to give investment advice or offer regulated investment products to the public. Asset Land Investment plc offers parcels of land for sale. Asset Land Investment plc does not pursue planning permission or re-allocation of the land once it has been sold and as such, this is not to be viewed as a Collective Investment Scheme (as defined by the Financial Services and Markets Act 2000). Neither Asset Land Investment plc nor any person connected with it will have any role in pursuing planning permission as a way of increasing the value of the land."

72. The judge found that the arrangements governing the scheme were contained in the core representations made when the plots were marketed and before the price was paid (para 157). The contract and the check box form came later. The judge rejected the submission that these last documents superseded or supplemented the

representations. This was because the services clause dealt with planning permission but not re-zoning of the sites, and was in any event unenforceable under the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083); the representations clause was of no effect under the Misrepresentation Act 1967; and the disclaimer was verbose, not prominently presented and would not have been read or understood by many investors. The investors, he said, "reasonably continued to rely on what they had been told" (para 161).

The Financial Services and Markets Act 2000: the general prohibition

73. Section 19 of the Financial Services and Markets Act 2000 substantially re-enacts section 3 of the Financial Services Act 1986. It provides that no person may carry on a "regulated activity" unless that person is authorised or exempt. This is referred to in the Act of 2000 as the "general prohibition". In the earlier Act, regulated activities had been defined in the Act itself. But in the Act of 2000, a "regulated activity" is simply defined as an "activity of a specified kind" which "relates to an investment of a specified kind" or "is carried on in relation to property of any kind": section 22. For this purpose, "specified" means specified by the Treasury by statutory instrument.

74. The relevant statutory instrument is the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544). The order identifies specified activities as including (i) activities such as promoting, advising on, managing or dealing in "investments"; and (ii) "establishing, operating or winding up a collective investment scheme": para 51(1)(a) (now renumbered as article 51ZE). Specified investments are identified in Part III of the same order. Although the Treasury is empowered to specify any assets as investments, the order in fact identifies broadly the same kinds of asset as had previously been identified in the Financial Services Act 1986. They comprise shares, bonds and other debt instruments, government and public securities, warrants and tradeable certificates for any of the foregoing, mortgages, options and futures, contracts for differences, units in a collective investment scheme, and similar financial instruments.

75. The statutory consequences of a breach of the general prohibition are severe. The infringer commits a criminal offence: section 23. Any contract made in the course of carrying on the relevant activity is unenforceable: section 26(1). And there are provisions for compensation and restitution in favour of the other party: section 26(2).

Collective Investment Schemes

76. Specific provision is made for collective investment schemes in Part XVII of the Financial Services and Markets Act 2000. Chapter I of Part XVII comprises definitions, including the general definition in section 235, which provides:

> "235 Collective investment schemes.
>
> (1) In this Part 'collective investment scheme' means any arrangements with respect to property of any description, including money, the purpose or effect of which is to enable persons taking part in the arrangements (whether by becoming owners of the property or any part of it or otherwise) to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income.
>
> (2) The arrangements must be such that the persons who are to participate ('participants') do not have day-to-day control over the management of the property, whether or not they have the right to be consulted or to give directions.
>
> (3) The arrangements must also have either or both of the following characteristics -
>
> > (a) the contributions of the participants and the profits or income out of which payments are to be made to them are pooled;
> >
> > (b) the property is managed as a whole by or on behalf of the operator of the scheme.
>
> (4) If arrangements provide for such pooling as is mentioned in subsection (3)(a) in relation to separate parts of the property, the arrangements are not to be regarded as constituting a single collective investment scheme unless the participants are entitled to exchange rights in one part for rights in another.

> (5) The Treasury may by order provide that arrangements do not amount to a collective investment scheme -
>
> (a) in specified circumstances; or
>
> (b) if the arrangements fall within a specified category of arrangement."

The rights or interests of participants in a collective investment scheme are referred to in the Act as "units": see section 237(2).

77. The statutory definition substantially re-enacts section 75 of the Financial Services Act 1986, except that the exclusions which are left to secondary legislation in the later Act are defined in the body of the earlier one (subject to the general right of amendment reserved to the Treasury).

78. Chapter II of Part XVII comprises restrictions on the promotion of collective investment schemes. Chapters III, IV and V then provide detailed schemes of regulation for the three classes of collective investment scheme at which the Act is principally directed, respectively unit trusts, open-ended investment companies and recognised overseas schemes. More recently a fourth category has been added by amendment, namely master-feeder structures governed by EU legislation for UCITS (undertakings for collective investments in transferable securities), but nothing more needs to be said about these.

79. The definition and its statutory predecessor of 1986 have been regarded as highly unsatisfactory provisions by professional advisers ever since they were first enacted, mainly because of their generality, lack of definition and dependence on secondary legislation to take transactions out of the scope of the legislation which ought not to be there. As its opening words show, section 235 is primarily intended to operate in conjunction with the detailed provisions of Part XVII relating to units trusts, open-ended investment companies and recognised overseas schemes, all of which must satisfy the general definition in section 235 in addition to further criteria specific to each of the three categories. In that context, its application is relatively straightforward. However, section 417, which is a general interpretation section covering the entire Act, adopts the definition in section 235 for all other purposes. Most of the difficulties about the definition arise from its application to transactions not covered by Part XVII. Those difficulties were comprehensively examined in a report prepared by a committee chaired by Michael Brindle QC under the auspices of the Financial Markets Law Committee in July 2008 ("Operating" a Collective

Investment Scheme). The litigation arising from land banks has only served to emphasise them.

The legislative background

80. Before examining the statutory provisions in greater detail, it is necessary to say something about the background against which they were enacted and their place in the statutory scheme as a whole.

81. The current statutory provisions for regulating collective investment schemes have their origin in previous schemes for regulating unit trusts, ie arrangements under which a manager invests in securities which are then held in trust for participants. Unit trusts became popular during the 1950s, when they largely replaced direct investment in securities for many private investors, especially the less experienced ones. At that time, statutory investor protection was based on the Prevention of Fraud (Investments) Act 1939, which had introduced a licensing scheme for dealers in securities. The Act was replaced by the Prevention of Fraud (Investments) Act 1958. This retained the basic scheme of the 1939 Act but included a special regime for the managers and trustees of unit trusts. They were not subject to the Act's restrictions on dealing in securities, provided that the unit trust had been authorised under section 17 of the Act by what was then the Board of Trade. A substantial body of practice for authorising and de-authorising unit trusts was developed by the Board of Trade and its successor the Department of Trade and Industry, which resulted in unit trusts becoming the most heavily regulated financial products in the United Kingdom.

82. In 1981 Professor LCB Gower was commissioned to examine the existing arrangements for statutory investor protection. He reported in 1984 in his *Review of Investor Protection*, Part I, Cmnd 9215 (1984), making extensive recommendations for overhauling the existing law. One of Professor Gower's principal objections to the then current statutory arrangements was that their coverage was arbitrary and adventitious. They regulated certain modes of investment while leaving unregulated other arrangements which were functionally similar. In particular, he recommended the extension of regulation to other modes of collective investment which operated in a similar way to unit trusts, except that instead of holding a beneficial interest in the assets, the participant had purely contractual rights (as in the case of life insurance) or redeemable shares (as in the case of open-ended investment companies).

83. During the consultation process which preceded the publication of his report, the question was raised of regulating alternative investments in physical assets, such

as land, wine, bloodstock, works of art and the like. Professor Gower said about this (para 4.03):

> "Although some responses suggested that physicals as well as futures should be regarded as investments, I do not think that this is necessary. … Nor, consistently with the provisional views expressed in the discussion document, do I think it necessary to include stamps, medallions, works of art, porcelain, limited editions, and other 'collectibles', or interests in land - providing that the acquirer obtains exclusive control over them and is not in reality buying rights to share in the income or capital appreciation under an arrangement whereby someone else controls and manages them. If the latter is the situation, they should be treated as investments. This would liberalise and strengthen the present law."

Professor Gower recommended that all forms of investment should be regulated "other than those in physical objects over which the investor will have exclusive control": para 4.29(a).

84. In 1985, the Government published a White Paper, *Financial Services in the United Kingdom: A New Framework for Investor Protection* (Cmnd 9432) 1985. The White Paper announced the government's intention of introducing new legislation. It declared, at para 4.2:

> "The definition of 'investments' will set the boundary of the regulated area. It is therefore fundamental to the proposed system of regulation. In defining 'investments' the Government proposes, with minor exceptions, to adopt Professor Gower's approach. The definition - which will be in the primary legislation - will be *specific* (to provide certainty for practitioners, customers and investors) and *wide* (to achieve consistency of treatment between different financial services)."

In addition to securities and other financial products such as futures contracts or options, the legislation would cover "participatory rights in other forms of property": para 4.3(iii). But it would exclude "property which can be inspected by or for the potential purchaser and which passes under his direct physical control if he buys it": para 4.7(i). Chapter 9 of the White Paper dealt with the specific forms of regulation proposed for "unit trusts", in which category it included not only unit trusts properly so-called but open-ended investment companies and "all collective investment

arrangements other than pensions and life assurance"; para 9.2. The latter were to be regulated under separate statutory arrangements.

85. These principles informed the drafting of Part I, Chapter VIII of the Act of 1986 and Part XVII of the Act of 2000 which replaced it in 2001. In both cases, the draftsman resolved to deal with the regulation of collective investment schemes comprising physical assets as part of the broader system of statutory regulation governing unit trusts and open-ended investment companies, which they largely resembled.

86. In keeping with the policy objectives identified by Professor Gower, there is an important difference, which runs through the whole of the Act between financial instruments and physical assets. With very limited exceptions, regulated activities must relate to assets specified by the Treasury in the Regulated Activities Order. They are (as I have pointed out) financial instruments of one kind or another. Regulated activities as defined do not relate to physical or other non-specified assets. Collective investment schemes are the one exception to this. They may comprise arrangements with respect to "property of any description". The only respect in which the Act regulates non-specified assets is that regulated activities include (i) establishing, operating or winding up a collective investment scheme, which may include non-specified assets, and (ii) promoting, advising on, managing or dealing in units in a collective investment scheme, which may include non-specified assets. In other words, the Financial Services and Markets Act 2000 regulates only the indirect sale or holding through collective investment schemes of non-specified assets. It has no application to the direct acquisition, management or disposal of non-specified assets such as land. A huckster may engage in all manner of sharp practice in selling land to consumers, in which case he is likely to fall foul of the common law rules concerning misrepresentations and may well infringe consumer protection legislation such as the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) (now in Part 2 of the Consumer Rights Act 2015). But he will not be carrying on an activity regulated by the Financial Services and Markets Act 2000, and will not in general fall under the regulatory powers of the Financial Conduct Authority.

87. Under the Asset Land schemes as found by the judge, Asset Land sold the plots to the investors, but thereafter proposed to do just two things: negotiate with the planning authority to rezone the site and then find a buyer for it. It is accepted by Mr Peacock QC, who appeared for the Financial Conduct Authority, that if Asset Land had simply sold the land and left it at that, they would not have been operating a collective investment scheme. That is plainly right, because land is not a specified asset. Selling it to investors is not therefore a regulated activity. He also accepted that if a planning consultant and an estate agent had come in after the investors had acquired their plots and assumed the functions of negotiating with the planning authority and finding a developer willing to buy the site, the planning consultant and

the estate agent would not be operating a collective investment scheme. That is also plainly right. They would simply have been providing professional services to the landowners. Advising, negotiating and finding a buyer might in some circumstances be regulated activities in relation to specified assets, but not in relation to physical assets like land. The Authority's submission is that it makes all the difference that Asset Land was going to perform all of these functions. But why should that matter? Mr Peacock was inclined to submit that it was because Asset Land set up the whole thing and promoted it as a package. But, with respect, that will not do. The Act does not regulate the establishment or promotion of schemes, unless they are collective investment schemes or involve regulated activities in relation to specified assets. It must first be established that they are.

88. I would agree with the submission, which provided the abiding theme of the Authority's argument, that it is important when construing a regulatory statute of this kind not to allow technical distinctions to frustrate the purpose of the legislation. But the Financial Services and Markets Act 2000 cannot be construed on the assumption that it was intended to regulate every kind of investment in which members of the public are liable to have advantage taken of them by an unscrupulous intermediary. In the first place, as cases like *Office of Fair Trading v Abbey National plc* [2010] 1 AC 696 remind us, most regulatory legislation is a compromise between the protection of consumers and the avoidance of regulatory overkill. In a statute such as the Financial Services and Markets Act 2000, which deliberately sets out to regulate some forms of investment but not others, the omission of some transactions from the regulatory net cannot of itself be regarded as compromising the efficacy of the statutory scheme. Secondly, there is, as the White Paper preceding the 1986 Act pointed out, a tension between the need to provide certainty for practitioners, customers and investors, and the need to cast the net wide enough to ensure consistency of treatment between different financial services. The consequences of operating a collective investment scheme without authority are sufficiently grave to warrant a cautious approach to the construction of the extraordinarily vague concepts deployed in section 235. Arden LJ was surely right in *Financial Services Authority v Fradley* [2006] 2 BCLC 616, para 32, to say that the section "must not be interpreted so as to include matters which are not fairly within it". It must, moreover, be interpreted in a way that provides intelligible criteria which can be applied by professional advisers considering schemes in advance of their being marketed. The Treasury has a wide power under section 235(5) to exempt particular categories of transaction, but criminal liability and the avoidance of contracts are not results which can properly be made to depend wholly on the discretion of the Treasury or the enforcement division of the Financial Conduct Authority.

89. It follows that any conclusion that Mr Banner-Eve and his companies were operating collective investment schemes must be firmly founded on the language and purpose of section 235, without making arbitrary teleological assumptions.

Section 235: general

90. Section 235 begins in subsection (1) with a wholly general description of collective investment schemes which on its own would cover virtually all cooperative arrangements for deriving profits or income from assets. Subsections (2), (3) and (4) narrow down the breadth of that description. They are the heart of the definition. Their function is to give effect to the distinction between direct and indirect dealings, which I have described above. The paradigm cases of arrangements for indirect dealing with assets are the three classes of collective investment regulated by Part XVII to which the definition is primarily directed: unit trusts, open-ended investment companies and corresponding overseas schemes. All of these have the common feature that the investors have no control over the assets comprised in the scheme. This is because they have no legal interest in the assets, and in the case of an open-ended investment company no beneficial interest either. Of course, other forms of collective investment may exhibit the same lack of control over the assets on the part of the investors, but in different ways. Hence the wider terms of the statutory definition and its application to schemes lying outside Part XVII.

Section 235(1): "arrangements"

91. A collective investment scheme means, as section 235(1) provides, "arrangements" of the prescribed description. Subsections (1) to (4) all describe the characteristics that the relevant "arrangements" must have if the resultant scheme is to qualify as a collective investment scheme. "Arrangements" is a broad and untechnical word. It comprises not only contractual or other legally binding arrangements, but any understanding shared between the parties to the transaction about how the scheme would operate, whether legally binding or not. It also includes consequences which necessarily follow from that understanding, or from the commercial context in which it was made. In these respects, the definition is concerned with substance and not with form. It is, however, important to emphasise that it is concerned with what the arrangements were and not with what was done thereafter. Of course, what was done thereafter may throw light on what was originally understood. It may for example serve to show that some record of the understanding was a sham. It may found an argument that the arrangements originally made were later modified. But it must be possible to determine whether arrangements amount to a collective investment scheme as soon as those arrangements have been made. Whether the scheme is a collective investment scheme depends on what was objectively intended at that time, and not on what later happened, if different.

92. The judge held that the core representations represented a shared understanding about how the scheme would work. On his findings there can I think

be no real doubt but that that he was right to say that the mutual understanding based on the core representations constituted "arrangements" within the meaning of that word in section 235, and that so far as they were inconsistent with those representations, the contract, the disclaimer and publicity material were not part of the "arrangements".

Section 235(1): "with respect to property"

93. The next question is: with respect to what "property" were Asset Land's arrangements with these investors made? The core representations are consistent only with its being the whole of a site. It is not the individual plots. Nor is it, as Asset Land submitted, the totality of the individual plots plus the rights of the plot-holders over the roadways, access points and common parts. The reason is that the property referred to in subsection (1) is the property from whose acquisition, holding, management or disposal the profits or income were to be derived. On the judge's findings, that was the whole site. It was the whole site that was to be rezoned, and it was the whole site which was to be sold to a developer. The profit which each investor would derive from these transactions would be derived from an aliquot share of the entire sale price for the site.

Section 235(2): "day-to-day control"

94. The arrangements must be such that the investors do not have "day-to-day control" of the management of the property. The judge adopted the opinion of Hamblen J in *Brown v InnovatorOne plc* [2012] EWHC 1321 (Comm) at para 1170, that the subsection was directed to investors having "actual control" and required that they "must actually exercise that control sufficiently to be regarded as being in effective control": para 169. The Court of Appeal (para 83) agreed with him, but I regret that I do not, essentially for the reason which I have given in para 91 above. "Control" of property means the ability to decide what is to happen to it. I would accept that that does not only mean the legal ability to decide. It extends to a case where the arrangements are such that the investor will in practice be able to do so. But the critical point is that the absence of day-to-day control in subsection (2) has to be a feature of the arrangements. This is necessarily prospective, viewed from the time when the arrangements are made. Either those arrangements confer or allow control on the part of the investors or they do not. The test cannot depend on what happens after the arrangements have been made. Nor would a test based on the actual exercise of control be realistic. Some kinds of property require little or nothing by way of management. Some situations do not require any exercise of management control. The question must necessarily be in whom would control be vested were control to be required. For the answer to turn on what exercise of control turned out to be required, would add an arbitrary element to the test which can hardly have been intended.

95. In my opinion, subsection (2) in this case is satisfied for the simpler reason which the judge gave as his main one. The "property" over whose management the investors must lack day-to-day control means the property referred to in subsection (1) with respect to which the arrangements were made. The question is therefore whether the arrangements were such that the investors had day-to-day control of the management of the whole site. This cannot refer to the powers of control exercisable by any individual investor. It is hard to conceive of a case in which an individual investor could ever have day-to-day control of any more than his own plot. The subsection must therefore refer to the control exercisable by the investors collectively. In the case of Asset Land's sites, the investors collectively did not have the relevant control for two reasons. First, they were not in a position to exercise control of the management of the whole site because the roadways, access points and other common parts were retained by Asset Land. The investors had only easements in respect of those parts. Secondly, even if the investors had been for practical purposes in a position to control the management of the whole site by organising themselves to that end, there were no arrangements to that effect. It follows that the critical part of the definition is subsection (3).

Section 235(3)(b): management of the property as a whole

96. Section 235(3) lays down two alternative criteria. The arrangements must be such that either (a) the contributions and the profits or income are pooled, or (b) the property is "managed as a whole" by or on behalf of the operator of the scheme. The Authority does not rely on (a). That is because the arrangements in this case envisaged the pooling of the proceeds of sale, but not the pooling of their contributions, ie their plots. It follows that the question whether subsection (3) was satisfied depends on paragraph (b). It should be noted that paragraph (b) operates entirely irrespective of whether there is any pooling. It would be the determinative provision in this case even if the arrangements had been that the plots would be individually priced and each investor would receive the price of his own plot.

97. Subsection (3)(b) provides that what has to be "managed as a whole" is the property the subject of the scheme, not the scheme itself so far as that is different. Acts by way of management of the scheme are relevant only so far as they involve the management of the property. In a classic collective investment scheme, say a unit trust, the property the subject of the scheme will usually comprise incorporeal property such as securities. But where the property of the scheme comprises physical assets, subsection (3)(b) requires the arrangements to be such that the operator manages the physical assets. In this case the property falling to be managed by or on behalf of the operator is, as we have seen, the site. Accordingly, the question is whether, objectively, the functions which the arrangements assigned to Asset Land after the investor's acquisition of his plot constituted management of the site. Asset Land had, as I have pointed out, two functions: negotiating with the planning authority and finding a buyer for the site. These two functions amounted to

managing the business project, in other words the scheme. But that is not the question. The question is whether, either separately or together, they also constituted managing the site.

98. "Management" is a protean word which can embrace a wide range of activities involving varying degrees of control over the property being managed. But in section 235 it has a specific purpose. Subsections (2) and (3) together perform two closely allied functions. They describe the classic features of unit trusts and open-ended investment companies, under which the investor has no control over the assets. And they give effect to Professor Gower's recommendation that investment in physical assets (which are covered only through the provisions relating to collective investment schemes) should not be regulated if the investor had exclusive control of them. In each case, the section is concerned with arrangements under which the investor exchanges property over which he has entire dominion for units in a larger property over which he has more limited rights. A collective investment scheme may exist in respect of property of which the investors become owners, as section 235(1) makes clear. But their rights in respect of that property are nevertheless limited by the collective nature of the scheme. Section 235(3) identifies two ways in which the investor may part with control over the property. The reason why the subsection treats them as alternative criteria for recognising a collective scheme is that they are functionally equivalent. Subsection (3)(a) refers to cases where the contributions and the profits or income generated by them are pooled, which necessarily imports a loss of control in favour of whoever controls the pool. Subsection (3)(b) refers to cases in which there may be no pooling, but there is an equivalent loss of control to the operator by virtue of his powers of management of the whole property.

99. The fundamental distinction which underlies the whole of section 235 is between (i) cases where the investor retains entire control of the property and simply employs the services of an investment professional (who may or may not be the person from whom he acquired it) to enhance value; and (ii) cases where he and other investors surrender control over their property to the operator of a scheme so that it can be either pooled or managed in common, in return for a share of the profits generated by the collective fund. Unit trusts and open-ended investment companies are, as I have said, the paradigm cases in the latter category, and indeed the only cases regulated in detail by Part XVII to which section 235 primarily relates. In the context of land schemes, a good example of a surrender of control by virtue of the arrangements for the management of the property is supplied by the facts of *Financial Conduct Authority v Capital Alternatives Ltd* [2015] EWCA Civ 284; [2015] Bus LR 767: a farm was divided into plots which were owned outright by investors but run by a manager with "complete autonomy over its management": see paras 74-75.

100. It is convenient to deal first with Asset Land's role in finding a buyer. In my opinion, this is an act of management if the arrangements empowered Asset Land to effect a sale on the investors' behalf, in the same way as the manager of a unit trust sells securities. The same would be true if the arrangements required the investors to sell on the terms approved by the company. Selling or procuring the sale of an asset is an act of management. The power of disposition which is involved would constitute sufficient control to satisfy the object of section 235(3)(b). This appears to have been the position in *In re Sky Land Consultants plc*, where the investors entered into a marketing agreement appointing the promoter as their sole agent to sell their plots and gave him a power of attorney for that purpose. The promoter claimed to have abandoned these rights after being challenged by the Financial Services Authority, but the judge found that the changes were notified to only a handful of investors and that the scheme continued to be marketed as before. For that reason I think that that case was rightly decided notwithstanding my reservations about aspects of the reasoning.

101. On the other hand, Asset Land's role in finding a buyer was not an act of management within the meaning of subsection (3)(b) if all that they were expected to do was put a proposal for sale before the investors for them to approve or reject as they saw fit. On that footing the alleged manager had no control at all. The distinction is necessary if there is to be a workable distinction between collective investment schemes and cases in which an intermediary such as an estate agent simply supplies professional services without assuming control over the assets. Some examples will illustrate the point. A wine merchant stores investors' wines in specialised storage along with those of other customers, thereby enhancing their value over time. Investors buy flats to let in a block managed by a single manager. Adjoining owners of plots in a commercial forest employ a professional forester to manage the whole forest and sell the timber. The owners of the four flats in a town house get together to instruct an estate agent to sell the whole house as a single property. In each of these cases the owner's property or its proceeds are not necessarily pooled, and they do not necessarily have day-to-day control over all of the property comprised in the arrangement. But, as I have pointed out, paragraph (b) of section 235(3) is an alternative to paragraph (a) and operates entirely independently of any considerations of pooling. Mr Peacock understandably did not go so far as to suggest that these arrangements would be collective investment schemes. But if they are not, then why not? In my opinion, it can only be because in each case the assets were not "managed as a whole by or on behalf of the operator of the scheme". This was because the owner retained entire dominion over his property and merely contracted for professional services in relation to its exploitation.

102. On which side of the line does the present case fall? In strictly legal terms, the three core representations did not call for any surrender of control over the plots to an investment intermediary. On the contrary, each investor remained the entire

owner and sole controller of his plot and simply counted on Asset Land to enhance its value and find him a buyer. But the transaction cannot be viewed only in legal terms, and the judge has found that the practical consequences of the arrangements went wider than the express terms of the three core representations. He discounted the significance of the investors' legal right to dispose of their plots as they pleased, because he considered that the arrangements embodied in the core representations could not work if the investors exercised the rights that they theoretically possessed: see paras 162, 169 of his judgment. The dominion of the investors over their plots, although apparently complete, was in reality an illusion. This was essentially a factual assessment for the judge and, a challenge to it having failed in the Court of Appeal, it could not be right for this court to substitute a different view of its own. On that ground, which is substantially narrower than the submissions addressed to us by the Financial Conduct Authority, but enough for the resolution of this appeal, I agree that the schemes with which we are concerned are collective investment schemes.