20 April 2016

PRESS SUMMARY

Asset Land Investment Plc and another (Appellants) v The Financial Conduct Authority (Respondent) [2016] UKSC 17
On appeal from [2014] EWCA Civ 435

JUSTICES: Lord Mance, Lord Clarke, Lord Sumption, Lord Carnwath, Lord Hodge

BACKGROUND TO THE APPEAL

These were proceedings brought by the Financial Conduct Authority ("FCA") against Asset Land Investment plc and associated parties ("Asset Land") and its principal owner and director Mr Banner-Eve, alleging they had carried on a of regulated activities without authorisation, namely the operation of collective investment schemes, contrary to section 19 of the Financial Services and Markets Act 2000 ("FSMA"). The activities related to sales of individual plots at six possible development sites in various parts of the United Kingdom. Asset Land divided the sites into plots which they sold to investors, representing that it would be responsible for seeking rezoning for residential development and for arranging a sale to a developer. The High Court held that in the circumstances this amounted to operating a collective investment scheme. The Court of Appeal upheld the decision. Asset Land and Mr Banner-Eve appealed to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses the appeal by Asset Land and Mr Banner-Eve, finding that Asset Land's activities amounted to operating "collective investment schemes" under section 235 FSMA, and were thus "regulated activities" for the purpose of section 19. Lord Carnwath gives the lead judgment. Lord Sumption gives a concurring judgment.

REASONS FOR THE JUDGMENT

Section 235 FSMA concerns collective investment schemes constituting by arrangements respecting property which enable participants to receive profits or income arising from the acquisition, holding, management or disposal of the property. To fall within section 235 the participants in the scheme must not have day to day control over the management of the property, and the property must be managed as a whole by or on behalf of the operator of the scheme.

Lord Carnwath addresses the four principle grounds of appeal raised by the Appellants. Ground 1 was that the Court of Appeal erred in its identification of the component parts of the arrangements, and gave inadequate weight to an essential feature, namely that each investor intended to, and did own his plot(s) outright. Lord Carnwath rejects the Appellant's distinction between the arrangements made by the operator and how they were perceived by others as "artificial and unrealistic". He finds that the judge was entitled to take the view that the investors' understandings conformed to what was intended by the operator, and was not required to give special weight to contractual or other documents, without regard to their context **[54]**.

Ground 2 was that the court erred in treating "the property" under section 235(2) and (3) as each of the sites acquired by the company, rather than the aggregate of all the plots sold to individual investors,

and should have held that the arrangements left investors with the necessary control. Ground 3 argued that that the critical question under section 235(3)(b) was whether the arrangements reserved to the investor the final decision as to the exploitation of the property pursuant to the arrangements, the correct answer to which was yes. Lord Carnwath deals with Grounds 2 and 3 together, finding that the relevant "property" for the purposes of section 235(1) is the whole site, but that management control of the property under section 235(2) and (3) may be achieved in different ways, and may not be by legal mechanisms or legal control. "Have control" in subsection 2 refers to "the reality" of how the arrangements are to be operated **[57-59]**. Lord Carnwath holds that the judge was entitled to find 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, and it was no part of the arrangement that the investors should have any part in or control over those management activities **[60]**.

Ground 4 was that the court's interpretation would potentially interfere with a wide range of legitimate business arrangements which should not be characterised as collective investment schemes. Lord Carnwath finds that no issue arises, as the judge's application of section 235 on the facts as found by him involved no distortion of its natural meaning or intended purpose **[63]**.

Lord Sumption reviews the policy underlying the regulation of collective investment schemes. He finds that whether a scheme is a collective investment scheme depends on what was objectively intended at the time the arrangements are made, and not on what later happens **[91]**. The essence of such a scheme is a lack of legal or practical control by the investor of the profit-generating investment which is the subject of the scheme. The investor exchanges property over which he has entire dominion for units in a larger property over which he has more limited rights. A distinction must therefore be made 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.

He holds that the judge was right to say that the mutual understanding based on the core representations made by Asset Land to the investors constituted "arrangements" under section 235, and that so far as the contract, disclaimer and publicity material were inconsistent with those representations, they were not part of the "arrangements" **[92]**. The core representations were consistent only with the "property" the subject of the arrangements being the whole of a site. It was the whole site which was to be rezoned and sold to a developer, and the profit which each investor would derive would be derived from an aliquot share of the entire sale price for the site **[93]**.

As to "day-to-day control", the question must be "in whom would control be vested were control to be required", section 235(2) must refer to the control exercisable by the investors collectively. The investors collectively did not have the relevant control of the management of the whole sites because common parts were retained by Asset Land **[94-95]**. That left as the critical question whether the property was "managed as a whole". That depended on whether, objectively, the functions which the arrangements assigned to Asset Land after the investor's acquisition of his plot constituted management of the site **[97]**. The transaction cannot be viewed only in legal terms, and the judge found that the dominion of the investors over their plots was in reality an illusion. This was a factual assessment by the judge and it is not right for this court to substitute a different view. On this narrower ground, Lord Sumption agrees that the schemes are collective investment schemes **[102]**.

References in square brackets are to paragraphs in the judgment