Pension Schemes – meaning of `retirement' – whether non-executive director can be `retired' – s.600 and s.612 ICTA 1988 – schedule E liability for payments `not expressly authorised by the rules of the scheme' – whether payments in breach of pension scheme trusts still within charge to tax – construction of scheme trusts where trust deed and rules in conflict – Revenue practice – whether relevant to construction of pension scheme – unequal treatment of taxpayers – whether breach of Article 14 of European Human Rights Convention

THE SPECIAL COMMISSIONERS

DAVID JOHN VENABLES

- and -

THE TRUSTEES OF THE FUSSELL

PENSION SCHEME Appellants

- and -

MICHAEL JOHN HORNBY

(HMIT) Respondent

Special Commissioner: Malachy Cornwell-Kelly

Sitting in public in London on 18th September 2000

Mr Conrad McDonnell, instructed by C W Fellowes Limited for the taxpayers

Mr Timothy Brennan, instructed by the Solicitor of Inland Revenue for the Crown

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DECISION

1. These are two distinct but related appeals. The first is by David John Venables against a schedule E assessment made on 6 April 1994 in respect of three payments to him by the trustees of the Fussell Pension Scheme totalling £580.591, which the Crown say were not authorised by the terms of the Scheme and are chargeable under section 600 of the Income and Corporation Taxes Act 1988. The second appeal is by the trustees of the Scheme against a determination under regulation 49 of the Income Tax (Employments) Regulations 1993 in respect of the basic rate tax deductible from same payments. Both stand or fall together.
2. The basic issue, put shortly, is whether Mr Venables retired on 30 June 1994 within the meaning of section 600. Other issues arising are a mixed one as to jurisdiction and the practice of the Pension Schemes Office (the PSO), one on trust law and one on the Human Rights Act 1998. To a substantial extent there were agreed facts but, in addition, there was oral evidence from Mr Venables and from Mr J C Hayward, a former member of the PSO, and now a pensions practitioner.

   Mr Venables's evidence

3. I take the facts with regard to Mr Venables first. Though obviously a man of much experience in business, and one who would probably be described as 'tough', Mr Venables struck me as defensive, not pleased at having to give evidence, and ill at ease in doing so. It is uncontested that Mr Venables, who is now 59 - he will be 60 on 13th December 2000 - is and was a substantial shareholder in Ven Holdings Limited (Ven Holdings), having in his own right 20% of the shares and, as settlor and a trustee of his family discretionary trust, the remaining 80%. Ven Holdings has a number of subsidiaries and the main business of the group is described as 'property development and selected aspects of the construction industry'. From 1991, the group comprised ten companies and had gross assets of some £7M, though by 1994 it had contracted to eight companies with assets of some £4M.
4. Mr Venables was a carpenter by trade and in the early days had worked on the sites, though he has not done so for many years. Overall, Mr Venables worked in Ven Holdings for upwards of thirty years, and had for some time been an executive director and the chairman of the company, in which capacity he worked about 30 hours a week. On 31 March 1993, the group's managing director retired and Mr Venables's workload increased so that he then worked nearly 50 hours a week. Before that, he had been occupied for the most part in making strategic decisions for the activities of the group, but now he became responsible for its day to day running, arranging the finances, costing work and recruiting staff.
5. A year passed, and Mr Venables was anxious to give more of the responsibility to his children Steven and Paula, and a man called Luke Singleton. By 1994, a little over twelve months since the last managing director had retired and Mr Venables had increased his workload, he had already decided that the time was ripe for him to do this, and he ceased to undertake all the responsibilities that he had had since 31 March 1993: Mr Singleton became managing director (which post he continued to fill until 1998, when Steven Venables took over); it is not clear what Steven did in the meantime, but Paula Venables became company secretary on 23 June 1994. The board minutes of 23 June 1994 record that 'L G Singleton is to be elected to serve as Managing Director for a trial period of six months with Miss P J Venables appointed as Company Secretary'.
6. I find that Mr Venables was not formally the 'managing director': the minutes of the board on 23 June 1994 recorded only that Mr Venables was 'retiring as an executive director on 30 June 1994 to pursue other interests but will continue as an unpaid non-executive director' : there is no minute of his appointment as managing director, in contrast to that which appointed a managing director from 30 June onwards, and my conclusion is that Mr Venables stepped into the gap left on 31 March 1993 without any particular formality. That he performed the functions which would have been performed by a managing director if there had been one, I do not doubt, but there is no evidence of his appointment to that office, even though regulation 84 of Table A was applicable to the company and provided that such an office might be held. After 30 June 1994, Mr Venables was an unpaid non-executive director, and ceased to be an employee, not having even an oral contract.
7. The question of Mr Venables's health is difficult. Mr Venables stated that he is 21 stone and a sufferer from diabetes, and had had three heart attacks. I understood this to have been the case by 30 June 1994, though when the question whether he had retired in 'normal health' was seen to be material (I refer to why below) it was stated - and not challenged by Mr Brennan - that Mr Venables's heart attacks occurred after June 1994, as did his diabetes. My note of Mr Venables's oral evidence in re-examination is that he said, in connection with his decision to go in June 1994: 'I had

worked for myself since I was fifteen; I worked for thirty six years; I was having heart problems and wanted to slow down and leave it all to the children; I had three heart attacks; I am twenty one stone and diabetic.' I note that 15 plus 36 is 51, and that Mr Venables was in fact 53 by June 1994, so he must have been referring to his condition at least in early 1994 if not before.

8. With some hesitation, therefore, I accept the clarification - even though it was made only through counsel - that the three heart attacks occurred after 30 June 1994, but I find that concern about his health was part of Mr Venables's reason for wanting to pass on his newly acquired responsibilities after so short a time, and when he was only 53, and that he was not then in 'normal health'.
9. On 23 June, Mr Venables wrote to his pension consultant that although he had decided to retire from employment with the Fussell Group from 30 June he hoped to be involved in one or two new business ventures outside the property companies, and that he wanted to take most of his lump sum from the Scheme in the form of property. He explained in evidence that that was because there was little cash in the scheme and it was pointless to sell properties when he could have the same value without doing so. (I note that Mr Venables did not say in his letter that he was 'retiring from service as managing director' as incorrectly asserted in the Agreed Statement of Facts.)
10. As to his activities following 30 June 1994, Mr Venables spent a large proportion of his time in North America, buying a house in Florida in May 1996, though from time to time returning to the UK. In spite of the distance of time and place, Mr Venables nonetheless continued to be interested in the running of the company, since he remained - either on his own account or as a trustee - the major shareholder. He tried to guide the family in what they were doing: they could telephone him to seek advice on a wide range of matters - how they should deal with the bank manager? what rates should they pay? how best to twist his arm? would this or that building be likely to be a good acquisition? Mr Venables had a store of experience and business sense on which his family were glad to draw.
11. It was all usually done by telephone, and Mr Venables received no remuneration from the company to recompense him for his interest in its fortunes. As a trustee of the family trust, and as the originator and hitherto the mainstay of the business, it was natural for him to take that interest, and as trustee he was actively involved in the trust's investment deals. He might tip the company off about a good deal, or even on occasion cut a bargain on his own account, because he owned a small property company of his own. It was in his blood, and he did not lose interest in his lifetime's work in a single moment.
12. But Mr Venables no longer went to the sites as he had done before June 1994, or normally attend at the office. As a non-executive director, and still ultimately in control through shareholdings, Mr Venables was useful, conscientious and available, even addressing himself to particular matters such as the adequacy of credit control; he did not, however, run the company and could in his personal circumstances scarcely have done so. As I have noted already, his health was not good, and during the period we are concerned with he had three heart attacks, and he was for the most part physically absent - not an hour's drive from the business, but on the other side of the Atlantic. It was shown that on one occasion after June 1994 he had signed off the company's accounts, but he didn't normally do so.
13. I find therefore that Mr Venables (i) was not in normal health on 30 June 1994, (ii) did not retire from the office of managing director, because he

had never been appointed to it, but (iii) did retire from employment with the company and from normal active service on its behalf.

The Fussell Pension Scheme

14. Before considering Mr Hayward's evidence, I must turn to the details of the Fussell Pension Scheme and to the statutory provisions bearing on it.
15. The Scheme was established on 25 September 1980 by a trust deed made between Fussell Estates Limited, Mr Venables and Neill Alexander Denton, to provide relevant benefits for directors and employees of Fussell Estates Limited. It was an 'approved' scheme for the purposes of Chapter II of part II of the Finance Act 1970, but it ceased to be approved on 5 August 1994 because it did not amend its rules to comply with the Retirement Benefits Schemes (Restriction on Discretion to Approve) (Small Self Administered Schemes) Regulations 1991. The payments assessed in this case were all made before that date - in the last case, one day before.
16. Clause 1 of the trust deed established the Scheme on the basis of the provisions of the deed, which are contained in schedules to it, and 'the Rules made hereunder'. The Rules are defined in Schedule A by reference to clause 2 of Schedule D, which provides:-

'2 . Upon an employee being offered membership of the Scheme a letter with an appendix attached setting out the terms conditions contributions (sic) to be made by the Employer and the Employee respectively and benefits to be provided will be drawn up in a form acceptable to the Commissioners of Inland Revenue and signed so as to indicate acceptance by the Employee and by an authorised signatory of the Employer Upon acceptance the said letter with the appendix attached will be the Rules applicable to such member and may be superseded in whole or in part by subsequent letters duly signed and accepted in the manner stated above The Rules with this Deed will be binding (although the Rules be not under seal) on the Member the Employers and the Trustees.' [there is no punctuation in this text]

17 The Scheme Rules applicable to Mr Venables include the following:-

'2 You will normally retire from the Company's service on 13 December 2000, your normal retirement date when you will be aged sixty years and you will have been a member of the Company for more than 20 years. ... You may elect to take part of your capital sum in the form of a tax free cash sum up to a maximum of 150% of your final remuneration as defined in the trust deed. ...'

'5 The following paragraphs describe the general conditions relating to the payment of your benefits. However, it is the Trust Deed which governs these conditions and it will always take precedence over this Rule.

(a) With the Company's consent you may retire at any time after age 50. At the date of actual retirement, your capital sum in the Scheme would be released to

provide reduced benefits. An immediate pension is an optional alternative to the benefits described in Rule 4 above.'

18 Particularly in view of the opening words of Rule 5, one then refers to the trust deed in connection with early retirement. Under clause 2 of Schedule F to the deed, the trustees had discretion to award an immediate pension to a member of the Scheme 'who retires in normal health at or after the age of fifty', and under clause 5(b) of that Schedule 'before payment of a pension commences ... the Trustees may ... commute part of such Member's ... pension for a lump sum'. The power to commute is therefore dependant on the prior award of the pension, and that - to be in accordance with clause 2 - is dependant on the member (a) having 'retired' and (b) having done so 'in normal health'.

19 Neither of these expressions used in Schedule F is defined, but clause 2 of Schedule B to the deed provides that:-

'Subject to the powers to be exercised by the Employers as herein expressed the Trustees shall have full power to determine in consultation with the Founder [originally Fussell Estates Limited but Ven Holdings Limited at the relevant time] whether or not any person is entitled from time to time to any benefit or payment in accordance with the Scheme and in deciding any question of fact they shall be at liberty to act upon such evidence or presumption as they shall in their discretion think sufficient although the same be not legal evidence or legal presumption Subject as aforesaid the trustees shall also have power to determine all questions and matters of doubt arising on or in connection with the Scheme and whether relating to the construction thereof or the benefits thereunder or otherwise.' [there is no punctuation in this text]

20. Clause 2 of Schedule B must be construed strictly since it is capable of affecting adversely the interests of the beneficiaries of the Scheme and, to an extent, seeks even to oust the jurisdiction of the court. Whether it is successful in doing so it is not for me to decide and, in any event, it is not necessary in this case to do so.

21. The first part of the clause refers to entitlements, whereas the immediate pension on early retirement provided for under Schedule F clause 2, and the lump sum paid under Schedule F clause 5(b), are discretionary and are therefore not entitlements as such. But even if that is wrong, the first part of the clause correctly construed does no more than provide the trustees with the power to make ordinary decisions in the conduct of the pension fund, but it does not purport to make those decisions unassailable.

22. Nor does the second part of the clause. There is no evidence that the trustees have sought to exercise the power to determine any 'questions and matters of doubt arising', and it was not suggested that they had done so. Nor can the exercise of this power be inferred merely from the fact of the award being made to Mr Venables, because there is no evidence that the trustees thought that their action was controversial or that it would not meet with Revenue approval. It will be seen below that the appellants' case includes the claim that the pensions industry would have seen nothing exceptional or exceptionable about the early retirement lump sum award to Mr Venables: whether that is true or not, that could not be asserted as a matter of fact consistently with a claim that the trustees had made a determination about a matter in dispute.

23. As to the Rules, I find it difficult to see why they make provision in a particular matter which is at odds with that in the trust deed - the relevant

difference in this case being that they appear to envisage early retirement generally, and make no reference to good or ill health, but the trust deed refers only to early retirement in normal health. There is nothing in either place to provide for early retirement in poor health, except in so far as it is implicit in Rule 5. Since the only two provisions about early retirement are those I have cited, and since Rule 5 which deals with early retirement is - alone among the rules - clearly expressed to be subject to the deed 'which will always take precedence over this Rule', I have to conclude that the restrictive wording of clause 2 of Schedule F cuts down the apparent width of Rule 5. Early retirement on the grounds of ill health is apparently a casus omissus.

Legislation

24 Section 600 of the 1988 Act provided, so far as material:-

(1) This section applies to any payment to or for the benefit of an employee, otherwise than in course of payment of a pension, being a payment made out of funds which are held for the purposes of a scheme which is approved ...

(2) If the payment is not expressly authorised by the rules of the scheme or by virtue of paragraph 33 of Schedule 6 to the Finance Act 1989 the employee (whether or not he is the recipient of the payment) shall be chargeable to tax on the amount of the payment under Schedule E for the year of assessment in which the payment is made.

(4) References in this section to any payment include references to any transfer of assets or other transfer of money's worth.

25. Section 612 of the 1988 Act defined 'employee' and 'director' and it was common ground that Mr Venables was a director both before and after 30 June 1994, and an employee before that date. So far as it is in dispute, the section provides:-

'employee' - in relation to a company, includes any officer of the company, any director of the company and any other person taking part in the management of the affairs of the company,'

and

'"service" means service as an employee of the employer in question and other expressions, including "retirement", shall be construed accordingly;'

Mr Hayward's evidence

26. There was no case cited deciding the meaning of retirement in this precise context. Mr McDonnell submitted that the word should not necessarily be given the meaning it has in the legislation, but that it should however be construed in accordance with the commonly accepted understanding of the PSO's practice. That is because such practice was likely to have been in the mind of the draftsman of the trust deed, whose recitals make it clear that the intention was to establish pension provisions acceptable to the Inland Revenue; the trustees who administered it, moreover, would seek to do so on the same basis. It was said also to be material to a Human Rights argument which I will come to later.

27. Mr Brennan strongly opposed the admission of Mr Hayward's evidence about this on the ground that it could not be relevant to matters within the jurisdiction of the special commissioners, namely the correct interpretation of the statute and its application to the facts of the case. If it proved anything, Mr Hayward's evidence might show a legitimate expectation that a certain practice would be followed but, if it did show that, the issue would be one for judicial review alone. In support of that he cited the observations of Sir Richard Scott V-C in Steibelt v. Paling [1999] STC 594, at pages 602 to 603, Jonathan Parker J in Hatt v. Newman [2000] STC 113, at pages 120 to 121, and Leggatt LJ in Koenigsberger v. Mellor [1995] STC 547, at pages 553 to 554.

28. These principles are too well known for it to be useful for me to enter any discussion of them here and indeed they were not contested by Mr McDonnell. I decided, nonetheless, to hear Mr Hayward's evidence and to consider in the light of it whether it could have any bearing on the construction of the trust deed or the Human Rights argument. In the event I think it is really no help at all on those issues, but I will indicate what he said.

29. Mr Hayward worked in the Superannuation Funds Office, the predecessor of the PSO, from December 1979 to May 1988, as a senior executive officer until 1986 and then as a principal. From June 1986 until May 1988 when he left, Mr Hayward was responsible for the day to day policy on small self-administered pension schemes. He is now a pensions consultant familiar with PSO practice on small self-administered schemes and is of considerable professional standing in that field. Mr Hayward says that between 1979 and 1988 many requests were made to the PSO to agree the mode of early retirement in individual cases, because schemes were anxious not to make payments which would subsequently be disallowed.

30. The requests were usually 'although not always' accepted if ill-health was the cause of a reduced role or where a person continued as a non-executive director, but 'each director's early retirement request was treated on its merits'. As practitioner, Mr Hayward believed that the PSO's practice continued after he left that office in1988, and he exhibited two pieces of correspondence – neither of which was his own - to support that belief. For some years before 1994, he said that the practice was so well established that 'where a director fully resigned or became a non-executive director after age 50 early retirement benefits were often taken without an approach being made to the PSO beforehand'.

31. Reference was made then to an internal Revenue manual called PSI 6.4.27 published in the summer of 1996 for the policy of the PSO which, Mr Hayward said, had been consistently the same since his time there. That was said to confirm that where a director retired from an executive appointment before retiring as a director, an early retirement pension could be taken after age 50 and a new scheme operated for post-retirement earnings, so that the individual would have as it were parallel existences, one retired and the other one somewhat active and moving towards a separate 'normal' retirement date. Lastly, Mr Hayward commented that he believed that PSO practice had changed in late 1995, but declined to speculate as to why.

32. It is no disrespect to Mr Hayward, who I regarded as an entirely truthful witness, and doubtless a specialist in his field, to say that his evidence was necessarily sketchy and speculative and could not possibly establish as a fact everything relevant to what the PSO's practice was, or how cases were dealt with, or whether there were exceptions and if so on what grounds. Mr Hayward stopped short of saying that if he had been dealing with this case he would not

have sought the PSO's clearance before Mr Venables received his payments, and he accepted that much of his experience of what the PSO did was second hand.

33. Whether a witness summons issued to an appropriate Revenue official, with an application to treat him as hostile, would have disclosed better or more comprehensive evidence I cannot say but, in my view of it, the most that Mr Hayward's evidence could do would be to support a prima facie case of legitimate expectation (though I say nothing about that), and was not apt to assist in the construction of the trust deed. The burden of establishing that a course of practice existed, but was not followed in this case for no good reason, falls on the taxpayer and it has not been discharged: it is not for the Revenue to prove their innocence of the charge. I return below to the Human Rights argument, which this evidence was also designed to support.

The Authorities

34. Mr McDonnell relied on a number of decisions to support the claim that Mr Venables had 'retired' on 30 June 1994, in particular, Mettoy Pension Trustees v. Evans [1990] 1 WLR 1587. That case concerned a number of issues arising on the winding up of a company and did not involve the questions which arise here, but it is relied upon for the comments made about the manner in which pension scheme trusts should be interpreted.

35. Thus, at page 1610, Warner J adopted the comment of Millet J in an earlier case (in re Courage Group's Pension Schemes [1987] 1 WLR 495, at 505) that 'its provisions should wherever possible be construed to give reasonable and practical effect to the scheme', and said that 'pension scheme documents have to construed in the light of the requirements of the Inland Revenue Commissioners from time to time for their approval of the scheme'. Mr McDonnell also relied on Warner J's observation at page 1611 that 'the relevant background facts [in that case] included common practice from time to time in the field of pension schemes generally, as evinced in particular by the evidence of the actuaries and by textbooks written by practitioners in that field'.

36. As Mr McDonnell accepted, however, the word 'retire' is not a term of art, and although it is of course used with great frequency in pension schemes it is to be given its ordinary and natural meaning. It is a matter of fact whether, in any particular circumstances, someone can be said to have 'retired', and the answer will depend upon the context. Whether pensions practitioners generally thought that certain types of transition would amount to retirement, or whether the PSO did or did not think so, has very little bearing on the question actually under appeal. As Mr Hayward records of the PSO in his evidence, every case has to be considered on its merits.

37. I must however deal with an argument advanced by Mr Brennan on the meaning of 'director'. Because after 1994 Mr Venables remained a director, albeit a non-executive director, he was says Mr Brennan an employee of the company and, being such, he could not have retired. In support of this argument Mr Brennan points to the definition in section 612, to which I have referred, of an 'employee' as including a director or any person taking part in the management of the affairs of the company. Since, after 30 June 1994, Mr Venables was a director he must therefore have been an employee, and if he was an employee he could not be said to have retired.

38. Put in such stark terms, the argument can be seen to be fallacious, since it does not follow that because the term 'employee' includes someone who is a

director, any non-executive director has not retired from whatever he was doing when he was an executive director. An executive director might well retire as such on the grounds of ill health, become a non-executive director so that the board could from time to time have the benefit of his experience of the business and yet, on Mr Brennan's argument, be considered not to have retired at all because he is still formally a director. Or a person who had had an executive role as a director, let us say as finance director, might retire from that position but, to ease the transition from an active to an inactive life, he might be made responsible for the running of a small branch of the business, in which case because he would remain a person taking part in the management of the affairs of the company and he would be deemed not to have retired.

39. A further objection to that line of argument was advanced by Mr McDonnell and I think that it has much force. It is that under an exempt approved scheme the maximum amount of the pension and the lump sum which can become payable is limited by reference to the scheme member's final remuneration. That is typically defined by reference to remuneration in the last three years of pensionable activity, or to such a period in the last ten years before retirement. To regard an activity of the kind referred to in the definition of 'employee' in section 612 as necessarily postponing retirement would clearly be apt to distort the calculation of the employee's pension benefits, in some cases very seriously. So to interpret the legislation would produce an anomaly which would discourage early retirement on any but the most absolute and legalistic basis, and would constitute an widening of the tax charge for which the wording of section 600 provides no clear warrant.

40. Section 600 does indeed not refer to retirement, but to payments not authorised by the rules of the pension scheme in question. If as a matter of fact, Mr Venables had retired when he received the payments, the circumstance of his having a continuing interest in the company's affairs as a principal shareholder, in which capacity it was entirely sensible for him to have been a non-executive member of the board, cannot alter the fact of his retirement as an employee and executive of the company. It is true that the section does charge 'any payment to or for the benefit of an employee', but only to those payments made 'otherwise than in the course of payment of a pension' – and I take the payments made under clause 5(b) of Schedule F in this case to be payments made in the course of payment of a pension. The section must therefore contemplate payments being made to persons within the definition of 'employee' which are nonetheless not chargeable to tax. It is thus not surprising to find that a taxpayer may at the same time have retired for the purpose of an approved pension scheme, have received a payment in the course of his pension under that scheme, but still be within the definition of 'employee' in section 612.

41. I conclude therefore that because Mr Venables was not in normal health on 30 June 1994, he did not so retire within the meaning of clause 2 of Schedule F to the trust deed, and that the payments made to him were therefore not 'expressly authorised by the rules of the scheme'. If that construction of the effect of Rule 5 and clause 2 is wrong, and the Scheme should be interpreted as permitting the payment of pension benefits on early retirement otherwise than in normal health, I would hold that Mr Venables did retire for the purposes of the Scheme on 30 June 1994, because he thereafter ceased to be an executive director or an employee of the company, and had no normal, usual or definite role in its management.

Breach of Trust

42. A further plank in Mr McDonnell's case was the argument that if the payments to Mr Venables had been made so as to attract tax under section 600, they must have been made in breach of the terms of the trust and, Mr Venables being one of the trustees, therefore continued to hold the money as such; in which event, he could not be said to have received anything in his personal capacity and the assessment must fail.

43. I believe that the point can be dealt with quite shortly by reference to the wording of section 600 itself. Subsection (2) refers, by way of identifying the chargeable event, to any payment 'not expressly authorised by the rules of the scheme'. If the scheme is an approved scheme, it is true that a lump sum payment made in accordance with its rules would not be expected to be such that, as a matter of the policy of the legislation, it should be within the Schedule E charge to tax.

44. This section accordingly targets payments which might be outwith the rules approved by the Revenue, but says nothing about whether they would have been made in breach of trust. That is because the evident purpose of section 600 is to provide a safety net to the Exchequer where, for one reason or another, and despite previous approval of a scheme, the terms of that approval are not respected in practice. If they are not, the relief afforded to an approved pension scheme provides no shield to the recipient of the payment. For the purpose of section 600, it is beside the point that there has, in addition to a breach of the rules of the scheme, been a breach of trust. There may commonly be, but sometimes not: either way, the tax is charged.

45. Nonetheless, there is some authority to support Mr McDonnell's thesis. It is Hillsdown Holdings Plc v. Inland Revenue Commissioners [1999] STC 561, a decision of Arden J on section 601 of the 1988 Act. The material facts of the case were that Hillsdown acquired a subsidiary company whose pension fund was in surplus, and the trustees of the fund in surplus transferred the assets and liabilities of their fund to Hillsdown's pension scheme. The rules of the subsidiary's pension scheme had prohibited the reduction of a surplus by means of a transfer of assets to the employer, but the rules of Hillsdown's scheme allowed it. After the enhancement of the benefits enjoyed under the first scheme, Hillsdown's scheme was itself in surplus and the surplus was reduced, with Revenue approval: the surplus was then paid to Hillsdown, subject to the payment to the Inland Revenue of tax due under section 601, which charges 'payments made to an employer out of funds which are or have been held for the purposes of a scheme'.

46. It was held that, inter alia, the payment to Hillsdown (by means of the transfer of assets) was in breach of trust and that Hillsdown, as a constructive trustee of the assets holding them for the benefit of the trustees of the scheme, had in law received nothing and that it was not liable accordingly under the section. That view of the position, as a matter of trust law, had resulted from an order by the Pensions Ombudsman to Hillsdown to repay the scheme trustees, an order moreover upheld on appeal by Knox J in Hillsdown Holdings Plc v. Pensions Ombudsman [1997] 1 All ER 862. The obligation of Hillsdown to make restitution had been established and was not in dispute. Arden J said, at page 571 a and h:

'In my judgment there is no reason in the present case why Parliament should seek in section 601 to tax a payment which was not effectively made, and indeed the policy of the sections would, as [Hillsdown] submitted, suggest otherwise. ... In my judgment, these words [in section 601(1)] indicate that the payment must result in funds effectively leaving the fund as intended by the transaction

(whether absolutely or for a period, as in the case of a loan). The words 'out of' are not apt to describe a payment which, contrary to the stated effect of the transaction, does not have the effect of changing the ownership of the moneys paid and is in fact reversed.' (my emphasis)

47. That is not the case here: I have had no evidence that Mr Venables knew or should have known that the payments to him were in breach of trust; indeed, from what I can deduce it is more than likely that he acted in good faith, on professional advice, and did not once suppose that he was involved in committing a breach of trust. Moreover, no breach of trust has yet been established; it cannot simply be assumed that if there is a charge to income tax, such a breach must inevitably have occurred.

48. The needs of this case seem to me to call more for the approach adopted by the court in R v. Inland Revenue Commissioners ex parte Roux Waterside Inn Ltd [1997] STC - which appears not to have been referred to in Hillsdown. In that case, assets of an approved scheme were transferred to a second scheme which was seeking, and on the face of it entitled to, Revenue approval. On such a transfer, no charge to tax would in principle arise, but the Revenue withdrew approval from the first scheme when it appeared that the trustees of the second scheme had become non-resident and that the object of the exercise had been to extract a payment from the first scheme without payment of tax in circumstances in which it would otherwise have been chargeable; the effect was to trigger a charge to tax under section 591C of the 1988 Act.

49. But it was argued, somewhat as here, that the transfer to the second scheme was invalid and that the trustees of the second scheme held the assets on constructive trusts for the trustees of the first scheme: the effect of that would have been to remove the basis for the Revenue's withdrawal of its approval. Of this argument, Tucker J said, at page 787:

'As I understand the law, equity imposes a constructive trust, upon trust or other property subject to a fiduciary relationship, or upon its traceable product where such property has wrongfully been transferred by a fiduciary to a stranger [and text authority is then cited]. If there is any such doctrine I cannot believe that it can have application to a situation such as that in the present case, where, in my view, no injustice has occurred and where the imposition of equitable relief is unrequired and inappropriate. The taxpayer entered into these schemes, presumably after taking professional advice, in full knowledge of what was involved and with the sole object of avoiding payment of tax. He must have known, or must be presumed to have known, of the risks of Revenue disapproval and all that that involved, but he must have considered the fiscal advantages sufficiently attractive to warrant the taking of that risk.'

50. I make it quite clear that there is no suggestion here of the payments made to Mr Venables being made as part of a tax avoidance scheme but, apart from that difference - which I do not think alters the statement of principle involved at all - the learned judge's observation can be applied well enough to what has occurred and is now the case with the Fussell Pension Scheme, the only important difference between this case and the facts in Roux being that there are I believe other beneficiaries in the Fussell Scheme whose interests might have been prejudiced by a wrongful transfer and who might be entitled to call for restitution to the fund - though even in Roux's case there was a further beneficiary involved, and that fact did not alter the conclusion. However that may be, I do not see the constructive trust argument as made out in the circumstances of this case.

Human Rights

51. The final argument on behalf of the taxpayer was that the PSO's alleged inconsistency of treatment of taxpayers in the same essential position amounted to unlawful discrimination contrary to Article 14 of the European Convention on Human Rights and Fundamental Freedoms, as applied to the circumstances of this case by the Human Rights Act 1998. The argument depends on the relationship between Article 14, and Article 1 of the first protocol to the Convention. They provide as follows:-

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property birth or other status.

First Protocol

Article 1

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

52. It is said in effect that the kind of lack of fairness in treating taxpayers differently when their circumstances are alike, which the courts will sanction on judicial review, is capable also of being a breach of Article 14 which section 6 of the Human Rights Acts makes unlawful, and which section 7(1)(b) requires me take account of. Indeed, it is said that the special commissioners themselves, being a 'public authority' within section 6(3), will have committed a breach of Article 14 if the appeals are not allowed because the appeal decision must respect the rights granted by the Convention in the same way as the PSO should have done. The case is decided after 2nd October 2000, when the Act came into force, so the possibility suggested by Mr McDonnell's argument is a real one.

53. But I have indicated above that the evidence which is supposed to show discrimination by the PSO does not in my view do so, or get anywhere near doing so. The best that can be said of it is that it raises a prima facie case which might, conceivably, be sufficient to get leave for judicial review. In the circumstances, that is enough in itself to dispose of the Human Rights argument, but I will nonetheless address two further points which arise in connection with it.

54. The first is that section 7(1)(b) of the 1998 Act applies to the case, notwithstanding that the events of which complaint is made took place long before then. That is because section 22(4) of the Act, about commencement, provides:-

(4) Paragraph (b) of subsection (1) of section 7 applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but otherwise that subsection does not apply to an act taking place before the coming into force of that section.

55. In view of the findings of fact I have made it is in a sense academic whether this has the effect of disapplying the Convention, as a matter of domestic law, to the present case. It is doubly academic if Mr McDonnell is right that any decision repeating or compounding an antecedent breach by a public authority is itself a breach of the Convention, whether or not - as Mr McDonnell argues - the commissioners have, by virtue of their power under section 50 of the Taxes Management Act 1970 to determine or reduce an assessment, an administrative and a judicial function, or only the latter.

56. I will not therefore go into the arguments in any detail, but I express the view that these appeals are not proceedings brought by or at the instigation of the Inland Revenue, or the Inspector on their behalf. The mechanism of assessment under section 29 of the Act and the concomitant rights of appeal are well known and it is not necessary to rehearse them here. The decision to initiate these proceedings is that of the taxpayer and of nobody else. Thousands of assessments are issued each year which are not appealed and it would be strange if proceedings had thereby been initiated or brought by the Revenue: nothing is at that point before any court or tribunal, and in most cases nothing ever will be. If there is to be some doctrine of relation back to the assessment when and if an appeal is made, then one would expect that to be clear from the statute itself.

57. The other point I should deal with relates to the citation of Human Rights decisions. In a brief report in the Times of 24 October 2000 of Barclays Bank Plc v. Ellis & Anor the Court of Appeal is reported as saying:-

'If counsel wished to rely on the provisions of the 1998 Act they had a duty to have available any material in terms of decisions of the European Court of Human Rights which they relied on or which would help the court. Mere reference to the Convention did not help the court. Argument needed to be formulated and advanced in a plausible way.'

58. Even if the factual evidence had been much more detailed and wide-ranging than it was, and the issue had been seriously arguable on the facts, I would still have needed considerable assistance in the way of citation of ECtHR decisions before being able to conclude (a) that, in spite of decisions known to suggest the contrary, the Convention is indeed capable of being prayed in aid in tax liability cases, and (b) that Article 14 can be relied upon by a taxpayer either to claim that an unpublished but withdrawn concession, or a debatable but abandoned practice, should be extended to him and (c) that the matter is not within the margin of appreciation often allowed to the state in such circumstances. No

authorities of the ECtHR were cited. It may be that the issue of discrimination can be pursued on judicial review, and that appropriate authority can be cited there, but in the present proceedings the argument on Article 14 must fail.

Conclusion

59. In view of what has gone before, the assessment and the determination must be confirmed. It is agreed that there is an arithmetical error in regard to the

payments to Mr Venables referred to in the regulation 49 determination and that they should total £580,591: the determination is increased accordingly.

SPECIAL COMMISSIONER

Malachy Cornwell-Kelly

Date of Release: 13th November 2000

SC 3112-13/99