

INCOME TAX – PENSION FUND – Establishment of a small self-administered pension scheme including amongst its trustees a Pensioneer Trustee – Approval of the pension fund by the Inland Revenue as an exempt approved scheme – Dissatisfaction by the other trustees with the performance and requirements of the Pensioneer Trustee – Subsequent resignation of the Pensioneer Trustee – Failure of the remaining trustees to appoint a replacement Pensioneer Trustee – Subsequent withdrawal of approval of the fund as an exempt approved scheme by the Inland Revenue – Issue of an assessment to Income Tax under Schedule D in the names of the trustees of the pension fund as administrators of the fund – Appeal by the trustees – section 21 Finance Act 1970: section 591B Income and Corporation Taxes Act 1988: SI 1991 No. 1614

THE SPECIAL COMMISSIONERS SpC 00292

THE ADMINISTRATORS OF THE CID PENSION FUND (MR ROY LAMBERT, MRS GLORIA LAMBERT, MR KENNETH R

LAMBERT AND MRS ELAINE CHARLES) Appellants

- and -

MR G V GLOVER

(HM INSPECTOR OF TAXES) Respondent

Special Commissioner: MR T H K EVERETT

Sitting in London on 29 and 30 August 2001

Mr Roy Lambert appeared in person on behalf of himself and his co-trustees

Mr S Grodzinski, of Counsel, instructed by the Solicitor of Inland Revenue, for the Respondent

DECISION

Mr Roy Lambert, Mrs Gloria Lambert, Mr Kenneth R Lambert and Mrs Elaine Charles, as administrators of the CID Pension Fund ("the trustees") appeal against an assessment to income tax under Schedule D Case VI laid on them pursuant to the provisions contained in section 591C Income and Corporation Taxes Act 1988.

On 6 April 2001, one of my colleagues, Dr Nuala Brice, Special Commissioner, heard submissions from Mr Lambert as one of the trustees of the CID Pension Fund and also a representative of the solicitor of Inland Revenue at a preliminary hearing of this appeal. She gave directions for the determination of the appeal and these were issued in writing on 9 April 2001. She directed that the issues for determination in the appeal were as follows:

- (a) whether the criteria adopted by the Inland Revenue for the approval of an independent trustee of a retirement benefits scheme are lawful;
- (b) whether the Inland Revenue is legally entitled to withdraw approval from a retirement benefit scheme if there is no independent trustee but where the scheme is bona fide established and administered for the sole purpose of providing retirement benefits;
- (c) if the Inland Revenue is entitled to withdraw such approval, whether the Special Commissioners have jurisdiction to hear an appeal against a decision to withdraw approval;
- (d) whether, if approval is withdrawn, a trust administrator who has not practised tax avoidance or tax evasion, nor distributed trust funds without payment of lawful taxes, has a personal liability to pay 40% of funds by way of tax under Schedule D; and
- (e) whether the actions of the Inland Revenue constituted an infringement of Article 1 of Protocol 1 (protection of property) of the Convention set out in Schedule 1 of the Human Rights Act 1998; the Appellant to inform the clerk to the Special Commissioners and the Inland Revenue within 14 days if any other article of the Convention is to be relied upon. (No such communication was received).

The evidence before me consisted of a green bundle of documents submitted by the Inland Revenue and a blue bundle of documents submitted by Mr Lambert. The green bundle contained, amongst other documents, a statement of agreed facts dated 25 May 2001 (pages 239 to 245). A later statement of facts served by the Inland Revenue on the trustees and dated 1 August 2001 (pages 236 to 238)

was not agreed.

In addition I received oral evidence from Mr John Samuel Affleck, a technical adviser in the pension schemes technical advice section of the Inland Revenue Savings Pensions Share Schemes Business Stream. This business stream was established with effect from 1 April 2001. From that date the former pension schemes office of the Inland Revenue was abolished and became part of the Inland Revenue Savings Pensions Shares Schemes Business Stream. In 1997 and 1998 Mr Affleck was a divisional manager in the Pension Schemes Office with responsibility for monitoring occupational pension schemes and for withdrawing approval from schemes where appropriate. Mr Affleck's evidence in chief was contained in a witness statement to be found at pages 248 to 258 of the green bundle. I accept Mr Affleck's evidence.

Mr Roy Lambert's presentation included evidence as well as argument and at the conclusion of his opening he was cross-examined by Mr Grodzinski.

The facts

The agreed statement of facts reads as follows:

(1) On 4 November 1980 a trust deed was executed between CID Data Centre Limited and (1) Roy Lambert, (2) his wife, Gloria Lambert and (3) Christian Morgan Trustees Limited, a Pensioner Trustee, establishing a retirement benefits scheme ("RBS") known as "The CID Pension Fund" ("the scheme").

(2) On 11 February 1981 Messrs Duncan C Fraser & Co, independent advisers, acting for Roy Lambert and his wife, applied for the Board's approval of this scheme. By letter dated 28 September 1982 the Revenue confirmed that the scheme had been approved for the purposes of Chapter II, Part II of the Finance Act 1970 with effect from 4 November 1980 and that it would be treated as an exempt approved scheme for the purposes of section 21 of that Act. The Revenue stated that the approval was given on the understanding that Messrs Duncan C Fraser & Co would inform the Revenue of any alterations to the rules or other terms of the scheme and would be conditional upon the compliance of the undertakings given by the administrator (Mr Roy Lambert) with paragraphs 7 and 9 of Part II of Schedule 5 of the Finance Act 1970 and any regulations made by the Board under paragraph 10 of that Act.

(3) The trust deed included the following clause:

"9. The following provisions shall have effect unless the Commissioners of Inland Revenue have previously agreed in writing that their contravention would not affect the approval of the plan under Chapter II of Part II of the

Finance Act 1970.

(a) one of the Trustees of the Plan and the Fund thereof shall at all times (save as hereinafter appears) be such a person who satisfies the requirements of the Commissioners of Inland Revenue in relation to the approval of the Plan (hereinafter referred to as the "Pensioneer Trustee" Provided that the Pensioneer Trustee may resign from the trusts hereof not less than 28 days after giving written notice of such resignation in the manner hereinafter appearing: -

(i) such notice shall be in writing and shall be given to all the trustees (other than the Pensioneer Trustee) and the Principal Employer.

(ii) notice may be given by sending the same through the post in a letter addressed to the recipient at his last known place of abode (or in a case of a corporation to its registered office) and any notice so sent shall be deemed to be served on the day following that on which it is posted.

(iii) the Pensioneer Trustee shall furnish a copy of such notice or notices to the Commissioners of Inland Revenue.

(iv) ..."

(4) Christian Morgan Trustees Limited was originally appointed as the Pensioneer Trustee but replaced by Pensioneer Trustees Limited ("PT Limited") in March 1982.

(5) On 20 November 1992, Roy Lambert's daughters, Mrs Pauline Bush and Mrs Elaine Charles became members of the scheme.

(6) On 19 March 1993, The Pensioneer Trustees (London) Limited ("PTL Limited") replaced PT Limited. However the administrators failed to notify the Revenue within 30 days and therefore Pension Schemes Office wrote to both the scheme administrator and to William M Mercer Limited (successors to Duncan C Fraser & Co) explaining that this was a very important requirement and referred them to SI 1991 No.1614.

(7) On 7 July 1994 the trust deed was amended to comply with regulation 9 of SI 1991 No.1614. The relevant clauses state:

"7 One of the trustees shall be a Pensioneer Trustee and should that trustee cease to be a trustee or cease to be qualified to act as a Pensioneer Trustee the remaining trustee or trustees shall within 30 days notify the Inland Revenue in writing and within 60 days appoint by deed a successor who is a Pensioneer Trustee. The trustees shall within 30 days of the appointment of the successor notify

the Board of Inland Revenue in writing of the name of the successor.

8 Subject to clause 7 above:

(a) the power of appointing a new or additional trustee or administrator or trustees of the scheme and the trusts and purposes hereby declared and the power of removing one or more of the trustees or administrators shall be vested in the principal employer and shall be exercised by deed.

(b) any trustee upon giving one months notice to each of the other trustees and each of the employers may retire as a trustee of the scheme upon the expiry of the said one month and the trustee giving such notice shall be deemed to have been discharged from the trusts of the scheme whether or not the principal employer has appointed a replacement trustee"

(8) On 17 May 1996, Roy Lambert's son, Kenneth Lambert, became a member of the scheme.

(9) On 9 May 1997 Huw Davies of William M Mercer Limited wrote to Mrs Charles, as a trustee of the CID Trust Fund, stating that they would withdraw as Pensioneer Trustee.

(10) On 10 July 1997 Pension Schemes Office wrote to Roy Lambert outlining the function of the Pensioneer Trustee.

(11) On 31 July 1997 Huw Davies of William M Mercer Limited wrote to Pension Schemes Office informing them that PTL Limited had resigned as Pensioneer Trustee that day.

(12) On 1 August 1997 Huw Davies wrote two letters to Mrs Charles in connection with the resignation of the Pensioneer Trustee. One letter stated that the company was providing notice pursuant to clause 8(b) of schedule B of trust deed, which required 28 days notice to be given.

(13) On 11 August 1997 Harsant Services Limited ("HS Limited") telephoned the Pension Schemes Office and informed them that HS Limited had taken over as Pensioneer Trustee. HS Limited confirmed their appointment in writing promising to send Pension Schemes Office a deed of retirement and appointment as soon as possible.

(14) On 13 August 1997 Pension Schemes Office wrote to Roy Lambert informing him that PTL Limited had resigned and that they had heard from a new Pensioneer Trustee purportedly acting on behalf of the trustees.

(15) On 1 September 1997 HS Limited telephoned Pension Schemes Office and informed them that the deed was

unlikely to be signed until late in September 1997. On 29 September 1997 HS Limited wrote to PSO informing them that the deed still had not been signed.

(16) On 13 October 1997 and 27 October 1997 Pension Schemes wrote to Mrs Charles, in her capacity as a trustee of the scheme (copying all of the other trustees), and informed her that the failure to provide a deed of appointment would jeopardise approval and that approval may be withdrawn as a consequence. They went on to request information and to state that if such information was not received by the end of November 1997 approval was likely to be withdrawn without further warning.

(17) On 29 October 1997 Pension Schemes Office sent a letter to Roy Lambert stating that approval would be withdrawn if a new Pensioneer was not appointed and documents sent in accordance with the Revenue's letter of 27 October 1997.

(18) On 31 October 1997 Roy Lambert wrote to Pension Schemes Office stating that he would get the deed appointing the Pensioneer Trustee as soon as he found one who did not require to be a full trustee.

(19) On 6 November 1997 HS Limited confirmed in writing that a deed of appointment had not yet been executed.

(20) On 1 December 1997 HS Limited confirmed over the telephone that a deed of appointment had not been executed, therefore, Pension Schemes Office wrote to all the trustees giving them notice that approval had been withdrawn pursuant to section 591B Income and Corporation Taxes Act 1988 as from 30 October 1997. Pension Schemes Office stated that the reason was that the administration of the scheme no longer warranted the continuation of the Board's approval under section 591 and in particular that the trustees had failed to provide information showing that a new Pensioneer Trustee had been appointed by deed 60 days from 1 September 1997 when the last Pensioneer Trustee had resigned.

(21) On 10 September 1999 Mr Lambert telephoned the Revenue and confirmed that the value of the assets of the Scheme at the end of October 1997 was £1,013,000.

(22) An assessment was issued on 8 October 1999 in the names of all the trustees, as administrators of the CID Pension Fund.

From the evidence before me I find the following further facts:

(23) The CID Pension Fund is a small self-administered scheme ("SSAS"). A SSAS is a self-administered scheme which has less than twelve members. At 31 March 2000

there were 42,118 approved SSASs.

(24) Until very recently the Revenue had a paper based record of approved Pensioner Trustees and no running total was kept. However a count was made on 19 September 1996 and this showed that on that day there were a total of 388 approved Pensioner Trustees – 207 were individual Pensioners and 181 were corporate Pensioners.

(25) The Association of Pensioner Trustees ("APT") was formed in 1979 to:

"(i) to promote the use of small self-administered schemes.

(ii) ensure a high level of professionalism and protection for the public.

(iii) liaise and negotiate on legislative matters with the government."

The APT is recognised as the official body representing the interests and aspirations of pensioner trustees and their clients. The APT's members are drawn from all sides of the business and financial community. They include banks, insurance companies, actuaries, solicitors, insurance brokers, accountants and benefit consultancies. In March 1998 the APT had 200 members. Pensioner Trustees are not required to be members of APT. Expulsion of a member from APT would have little practical effect.

(26) At the relevant time the Pension Schemes Office did not provide a list of Pensioner Trustees to administrators of Pension Funds. That practice has now changed and the Inland Revenue now provides such a list on request. A copy of such a list is to be found at pages 221 to 228 of the green bundle.

(27) After the resignation of PTL Limited Mr Lambert approached HS Limited but was not satisfied that HS Limited would become a Pensioner Trustee of the CID Pension Fund on the very limited terms required by Mr Lambert. He required a Pensioner Trustee who would do nothing except report to the Pension Schemes Office in the event of an illegal winding up of the fund and take no other action in relation to the trust. Having failed to appoint HS Limited as a Pensioner Trustee the trustees took no action to approach another Pensioner Trustee or trustees.

(28) The Trustees would have appointed a new Pensioner Trustee if they could have found one willing to operate on

the limited terms mentioned above and in those circumstances would have had no reason to complain or criticise the legislation governing SSAS's or the actions of the Pensions Schemes Office.

(29) Mr Roy Lambert believed that the Pension Schemes Office was operating an illegal cartel by appointing a limited number of Pensioner Trustees. He also believed that William M Mercer Limited was subject to a conflict of interest as actuaries and consultants in that they either sold or acted as brokers for the sale of annuities whilst at the same time continuing as parent company of PTL Limited.

(30) William M Mercer Limited at all relevant times was regulated by IMRO and the Personal Investment Authority.

(31) No Pensioner Trustee ever attended a meeting of the trustees of CID Pension Fund.

The contentions of the parties

The principal contention of Mr Lambert was that the Inland Revenue were entitled to withdraw approval from an pension fund only where it was being operated otherwise than for the purposes intended; e.g. in the event of the fund being used for tax avoidance or evasion or for criminal activities such as money laundering.

Mr Grodzinski, for the Inland Revenue, maintains that whilst the Inland Revenue had a discretion whether or not to withdraw approval in the instant case, where in no exceptional circumstances existed, it was both right and inevitable that the Board should exercise its discretion to withdraw approval.

Both Mr Lambert and Mr Grodzinski provided written skeleton arguments which will be available to the court should this appeal proceed further.

Conclusions

Mr Roy Lambert is a man with a grievance. He honestly believes that small self-administered pension schemes offer no tax advantages but merely tax deferment. He also believes that the Pension Schemes Office operated an illegal cartel by limiting the number of Pensioner Trustees appointed. In my judgement neither of those beliefs has any basis in fact.

The flavour of Mr Lambert's beliefs can be deduced from an extract from a letter dated the 10 October 1997 which he wrote to the Controller of the Pension Schemes Office as follows:

"It is now clear that there is no such thing as a Small Self Administered Scheme (SSAS). It is a devious piece of miss-selling by the actuarial/financial services industry with whom your office actively collaborates.

The title "Pensioner Trustee" is a euphemism for representative of the Inland Revenue Pension Schemes Office. And once a new SSAS is established your office tacitly changes the title from Pensioner Trustee to "Practitioner". When these schemes are marketed prospective clients are told that a Pensioner Trustee is a legal requirement, but would not interfere in the management of the scheme. To quote from your letter 10 July, 1997, A Pensioner Trustee is there only to ensure that the trustees of a scheme do not liquidate the assets and make an illegal distribution of the funds to the members. He is not a watchdog.

What you wrote is a blatant misrepresentation of the truth."

Mr Lambert was unhappy with many of the aspects of the operation of the Pensioner Trustee system. He claimed that William M Mercer Limited had a conflict of interest as it was engaged in either selling or broking annuities and that accordingly its subsidiary PTL Limited could not be an independent Pensioner Trustee.

He also objected to the fact that PTL Limited required to see bank statements of the trust fund and to sign cheques. He maintains that a Pensioner Trustee should confine itself to its one important task of reporting to the Pensions Scheme Office any unlawful winding up of the trust fund. He offered no explanation as to how a Pensioner Trustee could carry out such a task without being closely involved in the administration of the trust fund.

Section 590(1) Income and Corporation Taxes Act 1988 provides that the Board shall not approve any retirement benefits scheme unless it satisfies all of the conditions in subsection 590(2). It is not in dispute in this appeal that each of those conditions were in the present case met, in particular section 590(2)(a), but the scheme was bona fide established for the sole purpose of providing relevant benefits in respect of service as an employee.

(In this Decision, words in italics are my emphasis.)

Section 590(3) provides that the Board shall approve a retirement benefit scheme if it satisfies all the conditions in that subsection. It is not in dispute in this appeal that the scheme in this case did not satisfy each of these conditions.

Section 590(1) gives the Board a discretion to approve retirement benefit schemes notwithstanding that they do not satisfy one or more of the conditions prescribed in

sections 590(2) and (3), but this discretion is subject to subsection 591(5).

Subsection 591(5) provides that the Board shall not approve a scheme if to do so would be inconsistent with the regulations made by the Board for the purposes of that section.

The relevant regulations (made under section 591(6) of the Act) are the Retirement Benefits Schemes (Restriction on Discretion to Approve) (Small Self-Administered Schemes) Regulations 1991 (1991 No 1614), which came into effect on 5 August 1991.

Regulation 3 provides that the Board shall not exercise their discretion to approve a scheme under section 591 Income and Corporation Taxes Act 1988 in circumstances where the scheme is a SSAS and where the governing instrument of the scheme does not contain certain provisions set out in regulations 4 to 10.

Regulation 9(a) of the 1991 Regulations requires that the governing instrument of the scheme include a provision that one of the trustees be a "Pensioner Trustee". Regulation 2(1) and section 591D(5) of Income and Corporation Taxes Act 1988 both define a "Pensioner Trustee" as a trustee of a scheme who:

- (i) Is approved by the Board to act as such; and
- (ii) Is not connected with a scheme member, or any other trustee, or an employer (i.e. is independent).

The clear and unambiguous effect of these provisions is that if the deed of a SSAS does not require one of the trustees to be a "Pensioner Trustee", the Board cannot approve the scheme.

However in the instant case the scheme was approved originally. The original interim deed dated 4 November 1980 provided for one of the scheme trustees being a Pensioner Trustee. That deed was later amended on 7 July 1994 specifically to comply with regulation 9 of the 1991 Regulations.

Since 1 September 1997, when PTL ceased to act, the position has been that the trustees have failed to comply with the requirements of the trust deed – requiring them (if the Pensioner Trustee resigns) to appoint a successor within 60 days. It appears that the Appellants have declined to appoint a successor Pensioner Trustee in any event.

The key question therefore is whether in these circumstances, approval by the Board should continue or be

withdrawn.

The power to withdraw approval is set out in section 591B(1) Income and Corporation Taxes Act 1988. This states as follows:

"If in the opinion of the Board the facts concerning any approved scheme or its administration cease to warrant the continuance of their approval of the scheme, they may at any time by notice to the administrator, withdraw their approval on such grounds, and from such date (which shall not be earlier than the date when those facts first ceased to warrant the continuance of their approval or 17 March 1987, whichever is the later), as maybe specified in the notice."

Bearing these points in mind I proceed to deal with each of the issues for determination which were the subject of a Direction dated 9 April 2001 by my colleague Special Commissioner Dr Nuala Brice:

(a) Whether the criteria adopted by the Inland Revenue for the approval of an independent trustee of a retirement benefit scheme are lawful.

The criteria used by the Revenue for approval of Pensioner Trustees were:

(i) that they had current wide personal experience in dealing with occupational pension schemes; and

(ii) that they had a history of dealings with the Pensions Scheme Office; and

(iii) that they agree to give an undertaking not to consent to the termination of a Scheme otherwise than in accordance with the approved terms of its winding-up rule.

A challenge to the lawfulness of these criteria would have to show that they were ultra vires the 1988 Act or that they were in some way *Wednesbury* irrational (i.e. criteria such that no reasonable decision making body could require to be met). As to vires, regulation 2(1) of the 1991 regulations and section 591D(5) of the Act both give the Board the power to decide who shall and who shall not be granted approval as a Pensioner Trustee. This power is not qualified in any way: the statute in effect confers on the Board a discretion as to whom to approve.

In relation to the question of rationality Mr Lambert's argument is that the whole industry has been irrationally approved, not merely one or two specific Pensioner Trustees.

Mr Lambert has objected to what he regards as exorbitant

fees charged by William Mercer. Such fees are however outside the control of the Board as is clear from the evidence of Mr Affleck. In any event Mr Lambert has failed to provide any proof that the fees were exorbitant. His complaint merely amounts to an assertion.

Mr Lambert has also complained that Pensioner Trustees are of little use but once again he has failed to provide any evidence.

Mr Lambert also asserts that the industry operates what would amount to an illegal cartel in collusion with the Pensions Scheme Office but once again his assertion is wholly unsupported by any cogent evidence.

Finally, Mr Lambert asserts that the approval of a corporate body rather than an individual is inconsistent with the requirement of independence. He submits that William Mercer could not be independent as they were involved either in selling or broking the sale of annuities.

However the independence demanded by the legislation is independence from other trustees, members and employers. A corporation can fulfil such a requirement as easily as an individual.

Finally Mr Lambert has complained that the recent Pension Schemes Office Update (number 69 dated 29 August 2000) which announced the enhancement of the role of Pensioner Trustees was ultra vires legislation by the back door. However there is no restriction in the legislation on the criteria that the Board may set for the approval of Pensioner Trustees and in any event the Update issued in August 2000 is irrelevant to the instant case as the decision under challenge was taken in 1997.

Accordingly, I determine that the decision to withdraw approval by the Board on 1 December 1997 was within its powers under the legislation and was not irrational or otherwise unlawful.

(b) Whether the Inland Revenue is legally entitled to withdraw approval from a retirement benefit scheme if there is no independent trustee but where the scheme is bona fide established and administered for the sole purpose of providing retirement benefits.

It has been established that the trustees of the scheme have failed to comply with the requirements of their own deed. That deed in order to be approved had to provide for a Pensioner Trustee. The trustee's failure to comply is a matter which the Board was entitled to and indeed obliged under the provisions of the Income and Corporation Taxes Act 1988 take into account when considering to continue or withdraw approval.

Mr Grodzinski has conceded that the Board was not bound to withdraw its approval under section 591B for the subsection clearly states that "... they may at any time by notice to the administrator, withdraw their approval ...".

Mr Grodzinski submits however that for the Board not to withdraw its approval in the circumstances obtaining in the instant appeal a set of wholly exceptional circumstances would have to exist. He cites the situation where for example they were in existence simply no Pensioner Trustees approved by the Board at all. And concedes that in such a case it would be irrational for the Board to withdraw approval for a failure to appoint a Pensioner Trustee.

No such exceptional circumstances existed in the instant case and accordingly I hold that the Inland Revenue was legally entitled to withdraw approval from the scheme even though it was bona fide established and administered for the sole purpose of providing retirement benefits.

(c) If the Inland Revenue entitled to withdraw such an approval whether the Special Commissioners have jurisdiction to hear an appeal against a decision to withdraw approval.

It is settled law that neither the Special Commissioners nor the General Commissioners have the power to review the exercise of an administrative discretion.

Mr Grodzinski has sought support from the judgement of Oliver J (has he then was) in *Slater v Richardson & Bottoms Limited* [1979] STC 630 at 635h where he commented on section 50(6) of the Taxes Management Act 1970 as follows:

"There is nothing in those words, I think, which can possibly enable the General Commissioners to discharge an assessment on the ground that circumstances were such that the collector of taxes ought to have exercised a discretion which is placed on him to remit tax which is clearly payable under the terms of the section".

He also referred me to *R v IRC ex p Roux Waterside Inn* [1997] STC 781 where an unsuccessful challenge was made by application for judicial review of a decision of the Board under section 591B Income and Corporation Taxes Act 1988 to withdraw approval from a SSAS. There is no indication that an application by way of judicial review was other than the only route by which the exercise of the Board's discretion to withdraw approval could be challenged.

Accordingly I hold that this Tribunal has no jurisdiction to hear an appeal against a decision by the Board to withdraw approval from an SSAS.

(d) Whether, if approval is withdrawn, a trust administrator who has not practised tax avoidance or tax evasion, nor distributed trust funds without payment of lawful tax, has a personal liability to pay 40% of funds by way of tax under Schedule D.

Mr Lambert, in relation to this issue, repeats his general complaints about Pensioner Trustees and maintains that as he believes that such complaints are correct there can be no justification for the imposition of the tax. He also submits that as there has been no loss to the Revenue by reason of the failure to appoint a Pensioner Trustee the Revenue should not impose the tax. Finally he complains that payment of the tax would be contrary to the provisions of the trust deed.

I have dealt above with Mr Lambert's complaints about Pensioner Trustees and their operations generally.

In relation to the submission that there has been no loss to the Revenue, unfortunately for Mr Lambert the legislation provides by section 591C(2) that the tax "shall" be charged under Case VI of schedule D at a rate of 40% on an amount equal to the value of the assets immediately before cessation of approval.

Section 591C(3) as in force that the date of the assessment provides that the person liable for the tax shall be the administrator of the scheme. And sections 611AA(1) and (2) provide that the administrator is the person who is, or the persons who are, the trustees of the scheme.

It appears, again unfortunately for Mr Lambert, that the fact that the scheme administrator has not evaded or avoided tax nor has distributed the funds improperly is simply irrelevant to the legislation. Payment of the tax is in effect the automatic sanction for withdrawal or approval.

I hold that notwithstanding that Mr Lambert and his co-trustees have not practised tax avoidance or tax evasion nor distributed trust funds without payment of lawful taxes they have a personal liability to pay 40% of the funds by way of tax under Schedule D, notwithstanding the provisions of the trust deed.

(e) Whether the actions of the Inland Revenue constituted an infringement of Article 1 of Protocol 1 (protection of property) of the Convention set out in Schedule 1 of the Human Rights Act 1998.

The Appellants did not give notice of any other article of the convention upon which they intended to rely and accordingly the issue is limited to an allegation of infringement of Article 1 of Protocol 1.

Mr Lambert's skeleton argument contains the following in

relation to this issue:

"By exercising the discretionary powers of section 591B for the reason stated – failure to appoint a Pensioner Trustee – the Board has sought ultra vires to take the property of trust members.

The trust funds underpinning pensions in payment and accrued benefits are the property of the members. They cannot be appropriated for any reason that is not supported by law."

Mr Lambert did not expand these submissions in his oral presentation.

Mr Grodzinski also limited himself to the arguments contained in his skeleton and like Mr Lambert, did not seek to expand his arguments in his oral presentation.

The article in question provides as follows:

"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."

Mr Lambert has repeated the allegation of ultra vires action by the Board which I have dealt with above.

He has also submitted that the assets of the members of the trust fund cannot be appropriated for any reason unsupported by law once again I have dealt with the legal position above.

Article 1 expressly preserves the State's right to secure the payment of taxes but such a right is not unqualified. Mr Grodzinski has referred me to the recent case of *Wallbank v Parochial Church Council of Aston Cantlow* [2001] 3 All ER 393 where the court held that it was a requirement of the convention that:

"The legitimate aim of taxation in the public interest must be pursued by means which are not completely arbitrary or out of all proportion to their purpose".

However, the court immediately went on to state that:

"We deliberately put it in these strong terms because the

second paragraph of Article 1 of the First Protocol makes it plain that the State in this area enjoys a large choice of measures to control the use of property or redistribute wealth."

In relation to the facts of this appeal I hold that the current liability of the Appellants to tax cannot be described as "completely arbitrary or out of all proportion to their purpose".

Mr Lambert has not shown that there were no purpose whatsoever to the requirement to have an independent Pensioner Trustee, so that the imposition of a tax for failure to appoint such a trustee could be said to be arbitrary or perverse.

I hold that the actions of the Inland Revenue in the instant case did not constitute an infringement of Article 1.

Having dealt with each of the issues for determination prescribed by the Notice for Directions dated 9 April 2001 I hold that the appeal fails and accordingly I confirm the assessment laid upon the Appellants.

T H K EVERETT

SPECIAL COMMISSIONER

SC 3107/2000

Authority cited but not referred to in the Decision

In Re Findlay [1985] 1AC 318