

HOUSE OF LORDS

SESSION 2003-04

[2003] UKHL 65

on appeal from: [2002] EWCA Civ 1277

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Venables and others (Appellants)

v.

Hornby (Her Majesty's Inspector of Taxes) (Respondent)

ON

THURSDAY 4 DECEMBER 2003

The Appellate Committee comprised:

Lord Nicholls of Birkenhead

Lord Slynn of Hadley

Lord Millett

Lord Scott of Foscote

Lord Walker of Gestingthorpe

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OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

**Venables and others (Appellants) v. Hornby (Her Majesty's Inspector
of Taxes (Respondent))**

[2003] UKHL 65

LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Millett. For the reasons he gives, with which I agree, I would allow this appeal.

LORD SLYNN OF HADLEY

My Lords,

2. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Millett. I agree that the appeal should be allowed for the reasons he gives.

LORD MILLETT

My Lords,

3. In March 1997 the appellant taxpayer was assessed to income tax in respect of three payments totalling £580,591 made to him in July and August 1994 from the funds of his pension scheme. The assessment was made under section 600(2) of the Income and Corporation Taxes Act 1988 as amended by the Finance Act 1989. Section 600 provides:

"(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 for the purposes of ... (b) Chapter II of Part II of the Finance Act 1970....

(2). If the payment is not expressly authorised by the rules of the scheme ... the employee ... 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. It is common ground that the payments were made from funds which were held for the purposes of an approved pension scheme. The revenue claim that the payments were not "expressly authorised by the rules of the scheme" because, at the time they were made, the taxpayer remained a director of one of the participating

employers in the scheme and so (it is said) had not "retired" within the meaning of the rules. It is not disputed that when the payments were made the taxpayer was still a non-executive director of a participating employer. The principal issue in this appeal is whether it follows that the taxpayer had not "retired" within the meaning of the rules of the scheme so that the payments were unauthorised (for nothing seems to turn, at least in this case, on the word "expressly").

5. A secondary issue is whether, if the payments were unauthorised, they should be treated for tax purposes as if they had not been made. The taxpayer contends that if the payments were not authorised then, as one of the trustees of the scheme, he received and held them throughout as a constructive trustee on the trusts of the scheme. It is common ground that if the payments were not authorised then, unless they can be treated as not having been made (or at least not made "out of" the funds of the scheme), the assessment was properly made.

The proceedings

6. The taxpayer's appeal against the assessment was dismissed by the single special commissioner on the ground that, although the taxpayer had "retired", he had not retired "in normal health" as required by the rules of the scheme. On the taxpayer's appeal and the revenue's cross-appeal the judge (Lawrence Collins J) [2002] ICR 81 upheld the commissioner's finding that the taxpayer had retired but reversed his finding that he was not then in normal health and discharged the assessment. On appeal to the Court of Appeal the revenue did not challenge the judge's conclusion that he had been in normal health at the relevant time but continued to maintain that the taxpayer had not retired. The Court of Appeal [2003] ICR 186 allowed the revenue's appeal and held that at the time the payments were made the taxpayer had not retired because he continued in office as a non-executive director. It also held that although the payments, being unauthorised, were made in breach of trust, they were not to be treated as if they had not been made.

The facts

7. The Fussell Pension Scheme ("the scheme") was established by a Trust Deed ("the trust deed") dated 25 September 1980 as an occupational pensions scheme for the benefit of directors and employees of Fussell Estates Ltd and other participating employers. The scheme was approved by the Commissioners of Inland Revenue with effect from the same date. At all material times it was an exempt approved scheme. On 26 May 1989 the terms of the trust deed were amended so that thereafter Ven Holdings Ltd ("the company") was treated as the founder of the scheme in place of Fussell Estates Ltd. With effect from that date the participating employers under the scheme were the company and Fussell Estates Ltd. The taxpayer and a trust corporation were the trustees of the scheme. At all material times the taxpayer held approximately 20% of the shares in the company and the remaining 80% of the shares were held by a family discretionary trust of which the taxpayer was the settlor and one of the trustees.

8. The company, which had a number of subsidiaries, was engaged in the construction industry. The taxpayer, who was a carpenter by trade, was aged 53 in June 1994. In the early days he had worked on building sites, though he had not done

so for many years. He had worked for the company for upwards of 30 years, and had for some time been an executive director and chairman of the company, in which capacity he worked about 30 hours a week and was paid some £25,000 per annum.

9. In March 1993 the group's managing director retired and the taxpayer's workload increased so that he worked nearly 50 hours a week. He became responsible for the day to day running of the group and, although never formally appointed as such, he undertook the functions previously performed by the group's managing director. The commissioner described him as having "stepped into the gap" left by the retirement of the former managing director without any formality.

10. On 23 June 1994 a board meeting of the company took place at which it was resolved that the taxpayer:

"will be retiring as an executive director on 30 June 1994 to pursue other interests but will continue as an unpaid non-executive director."

In a letter of the same date the taxpayer notified the other trustee of the scheme that he would be retiring from employment with the group from 30 June 1994 and that he wanted to take most of his lump sum pension entitlement from the scheme in the form of property.

11. The commissioner found that after 30 June 1994 the taxpayer was an unpaid non-executive director of the company and ceased to be an employee, not having even an oral contract. He now spent a large part of his time in the USA, buying a house in Florida in May 1996, though he returned to the United Kingdom from time to time. He was still a major shareholder and the remaining shares were held by a family trust which he had established. He naturally maintained an interest in the company's affairs and continued to give advice - usually by telephone - to those now running the company, but he received no remuneration for doing so. He no longer visited building sites or normally attended the office. He was for the most part physically absent being, as the commissioner put it, "not an hour's drive from the business, but on the other side of the Atlantic."

12. The commissioner found that the taxpayer, who suffered from a heart condition, (i) was not in normal health on 30 June 1994 (as I have explained, this finding was reversed on appeal); (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 service on its behalf. When discussing the relevant statutory provisions the commissioner later recorded that it was "common ground" that the taxpayer was a director both before and after the 30 June 1994 and an employee before that date. This was not entirely correct. In the absence of any written contract of employment the revenue has not accepted that he was ever an employee of the company.

The Fussell Pension Scheme

13. The scheme was a contributory final salary pension scheme of a familiar kind. The trust deed recited that it had been decided to establish a scheme for providing

"relevant benefits as defined in section 26(1) of the Finance Act 1970" for eligible "directors and employees" of participating companies.

14. Consistently with the recitals clause 3 of the trust deed provided that the funds of the scheme were to be held on trust for the provision of "relevant benefits as defined in section 26(1) of the Finance Act 1970" for eligible "employees"; and "employee" was defined as meaning:

"a person in the service of [the company] and includes a director".

15. "Normal retirement date" was defined as the date stated in the rules applicable to the particular member. In the taxpayer's case this was stated to be 13 December 2000, when he would be aged 60 and would have been a member of the company for 20 years. On retirement at normal retirement date a member became entitled to a pension in accordance with the rules applicable to him. In the taxpayer's case he was entitled to elect to take part of his benefit in the form of a tax-free capital sum not exceeding 150% of his final remuneration.

16. Clause 2 of schedule F to the trust deed made provision for early retirement. This gave the trustees a discretion exercisable with the consent of the company:

"to award an immediate pension to a member who retires in normal health at or after age 50".

The rules applicable to the taxpayer provided that with the company's consent he might retire with reduced benefits at any time after age 50. It was, however, expressly stated that the trust deed governed the matter and that it would always take precedence over the rules.

The statutory provisions

17. It will be recalled that under the terms of the trust deed the fund was to be held in trust for the provision of retirement benefits as defined by section 26(1) of the Finance Act 1970 for the benefit of employees (which term included directors). So far as material section 26(1) of the 1970 Act defines "relevant benefits" as meaning:

"any pension, lump sum, gratuity or other like benefit given or to be given on retirement or on death, or in anticipation of retirement, or, in connection with past service, after retirement or death, or to be given on or in anticipation of or in connection with any change in the nature of the service of the employee in question ..."

The section also defines "employee" in relation to a company for the purpose of the relevant part of the 1970 Act as including:

"any officer of the company, any director of the company and any other person taking part in the management of the company".

Was the taxpayer entitled to retirement benefits on early retirement in ill health?

18. This is no longer a live issue because the judge reversed the commissioner's finding that, at the date of his retirement, the taxpayer was not in normal health. It would be remarkable if on its true construction the trust deed provided for a pension to be paid on early retirement to a member who was in normal health but not to a member who was in ill health. The trust deed continues in operation and will apply to members who take early retirement in future, so that the construction which the courts have placed upon it will affect others besides the taxpayer. In these circumstances I think that I should briefly explain why I consider that the trust deed does not have this effect.

19. The commissioner reasoned as follows:

- (i) the rules make provision for discretionary benefits to be payable to a member on retirement at or after the age of 50 without any reference to the state of his health;
- (ii) where there is a conflict between the trust deed and the rules the trust deed prevails;
- (iii) the trust deed permits payment of benefits on early retirement only if two conditions are satisfied: (a) the member must have retired and (b) he must have done so in normal health;
- (iv) early retirement on grounds of ill health is therefore a *casus omissus*.

20. Thus the commissioner treated the words "in normal health" as a qualifying condition which must be satisfied before a member can become eligible for benefit on early retirement. It is most unlikely that it was not intended to cover early retirement in ill health, since this is an *a fortiori* case; and the commissioner accordingly took it to be an inadvertent *casus omissus*. A more plausible construction of the words "in normal health", however, is to treat them, not as words of limitation, but as words of exposition. Read in this way they refer to a member "who retires (even in normal health) at or after the age of 50." Such a construction has the advantage, not only of producing what must have been the intended result, but also of eliminating any conflict between the rules and the trust deed. It would, moreover, accord with the principle (once known as "the rule in *Jones v Westcomb* (1711) Prec Ch 316") that a gift on a contingency which does not occur nevertheless takes effect on the happening of an event which is *a fortiori*. Thus a legacy to a single woman if she survives her husband takes effect if she never marries: see *Brock v Bradley* (1864) 33 B 670; and a gift over in the event of a prior legatee having only one child takes effect if the prior legatee has no child: *Murray v Jones* (1813) 3 Ves & B 313. The further contingency arises by necessary implication to give effect to the evident intention of the grantor.

Was the taxpayer an employee?

21. The taxpayer was certainly an employee within the meaning of both the trust deed and the Finance Act 1970, since they both define the expression as including a director. The revenue accept that he was a director before 30 June 1994 and remained a director after that date. But they deny that he was ever an employee.

22. Whether the taxpayer was an employee of the company is a question of fact. The commissioner found that he was. He found in terms that the taxpayer "did retire from employment with the company" and that after 30 June 1994 he "was an unpaid

non-executive director, and ceased to be an employee". There was abundant evidence to support his conclusion, for the taxpayer had worked for the company for many years and latterly carried out the functions performed by a managing director, and was paid for doing so. Having regard to the nature of the company as a small family company, it is not surprising to find that he never had a written contract. There is no evidence to suggest that he was paid director's fees; and the fact that he ceased to be paid anything when he became a non-executive director is strong evidence that he had been paid for the work he did as an employee and not for the responsibilities he undertook as a director. Given the hours he worked before June 1994 and the extent of his duties as a director of a small family company, it is far-fetched to attribute his remuneration to his office rather than his employment.

23. It should be borne in mind that the absence of a written contract and the character of the company as a small family company, while not irrelevant, are far from conclusive on the question. There is no rule of law which precludes even a sole or controlling shareholder from being an employee of a company, and the taxpayer was neither. While the degree of control is always significant and might on occasion be decisive, it is only one of the relevant factors to be taken into account in considering whether there is a genuine contract of employment. The fact that the person claiming to be an employee is the controlling shareholder and ultimately has the power to prevent his own dismissal does not prevent the existence of a genuine contract of employment: see *Secretary of State for Trade and Industry v Bottrill* [2000] 1 All ER 915 CA.

Did the taxpayer "retire"?

24. The Court of Appeal accepted the revenue's argument that the taxpayer did not "retire" within the meaning of the 1970 Act. On a careful analysis of the provisions of the 1970 Act, it reasoned that "retirement" means "retirement from service as an employee" and did not extend to a change in the nature of the service as an employee. It then asked what is meant by "service as an employee" and answered it by reference to the provisions of section 26(1) of the 1970 Act, which defines "employee" in relation to a company as including any director of the company. Accordingly, it reasoned, service as an employee of the company must include service as a director of the company, and it followed that there is no retirement from service as an employee for so long as the person in question continues to hold office as a director.

25. Strictly speaking the question turns on the meaning of the word "retire" in the trust deed and not in the Finance Act 1970, but there is no material difference between them for present purposes and nothing turns on this. Both contain the critical definition of "employee", which lies at the heart of the revenue's case and the reasoning of the Court of Appeal.

26. I would for my part accept the reasoning of the Court of Appeal with the exception of the last step. In my opinion it does not follow from the fact that the word "employee" is defined to include a director that an employee who is also a director must retire from both his employment and his office as director before he can be said to "retire" within the meaning of the trust deed.

27. A definition clause is principally a drafting device employed to avoid unnecessary repetition and applies only for the purpose of construing the document or part of the document in which it is contained. Unfortunately the use of a definition as shorthand in this way sometimes causes ambiguity. It does so in the present case. The revenue's argument assumes that its effect is that "employee" means "employee and director", so that, as the Court of Appeal held, a person who is both an employee and a director does not retire unless he retires from both.

28. But this is not what the definition says. It says only that the word employee "includes a director." This does not tell us unambiguously what words should be substituted for "employee" wherever that word appears. It may mean that we should substitute the words "employee and director" (in which case the member must retire from both); the words "either as employee or director" (in which case he may retire from either and receive the same benefits as if he had retired from both); or the words "whether as employee or director" (in which case he may retire from either and receive the benefits attributable to the position from which he has retired).

29. The ambiguity is, however, easy enough to resolve. The recitals to the trust deed explain its purpose as the provision of benefits to "directors and employees" of the company, and this cannot sensibly be confined to persons who are both employees and directors. It must mean persons in the service of the company whether as employees or directors. The underlying concept, therefore, is that of pensionable occupation whether as an employee or director. It follows that the word "retire" means "retire from the service of the company whether as employee or director".

30. It is, therefore, not necessary that a member who is an employee and a director should retire from both positions. Under the terms of the trust deed benefits are related to final remuneration, so that unremunerated service is not a pensionable occupation. The fact that the taxpayer has remained in his non-pensionable occupation as a non-executive director cannot affect his right to benefit on retiring from his only pensionable occupation. But it would make no difference if he had received and continued to receive director's fees. He would still have retired from his pensionable occupation as an employee, though benefit would have to be calculated without reference to his director's fees.

31. The definition of "relevant benefits" in the 1970 Act (incorporated into the trust deed by clause 3) distinguishes between "retirement" and a "change in the nature of the service of the employee", though for the purposes of the 1970 Act relevant benefits may properly be paid in either event. The trust deed, however, provides for benefit to be paid only on "retirement". The Court of Appeal held that the effect of incorporating the statutory definition of "relevant benefits" into the trust deed was that a change in the nature of service does not constitute "retirement" for the purposes of the trust deed. By ceasing to serve as an employee and continuing to serve as a director, it held, the taxpayer had merely changed the nature of his service.

32. I am not at all convinced that the incorporation of the statutory definition into the trust deed for an entirely different purpose has this effect. But it is not necessary to decide this, for a proper appreciation of the meaning of the word "employee" disposes of the point. What is outside the scope of the word "retirement" in the 1970 Act is a

mere "change in the nature of service whether as an employee or a director". This is not what happened. The taxpayer ceased to be an employee altogether.

33. I reach this conclusion with some satisfaction. The Court of Appeal's ruling would mean that under the trust deed as drawn a member who was an employee and a director and retired from service as both but was reappointed a director on the following day would have "retired" and be entitled to benefit, but a member who like the taxpayer retired from service as an employee but continued in office as a director without remuneration would not; and on finally retiring from his unpaid office as a director the latter would be entitled to benefit calculated by reference to his final remuneration, (quite possibly nil). These absurdities, moreover, would be the consequence, not of the 1970 Act or of any statutory restriction on benefit, but of the construction of the trust deed placed upon it by the Court of Appeal and the incorporation for a quite different purpose into the trust deed of a statutory definition of relevant benefits.

Were the payments made out of the trust funds?

34. This makes it unnecessary to express a concluded view on the second question, whether the payments were "made out of" the trust funds if they were paid in breach of trust to a trustee of the scheme in circumstances in which he came under an obligation enforceable in equity to repay them. It depends on whether it is sufficient that the payments were made to the recipient for his own use and benefit and were valid to pass the legal title to the money, or whether they must also have been received free from any legal or equitable obligation on the part of the recipient to make restitution. In short, it may depend on whether the determining factor is the payment or the receipt.

Conclusion

35. In my opinion the commissioner was entitled to find that the taxpayer was both a paid employee and an unpaid director of the company on 30 June 1994. On that finding I am satisfied that on the true construction of the trust deed he retired from service as an employee on that date even though he continued to be an unpaid non-executive director thereafter. If it had been necessary I would also have held that he was eligible to be considered for benefit on early retirement even if he was in ill health as the commissioner found him to be. It follows that the payments to the taxpayer were duly authorised by the rules of the scheme.

36. I would allow the appeal and discharge the assessments.

LORD SCOTT OF FOSCOTE

My Lords,

37. I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Millett and Lord Walker of Gestingthorpe. Having read the opinion of Lord Millett I had intended simply to express my agreement with his reasons for allowing the appeal. However, having later read the opinion of Lord Walker I find myself persuaded that, for the reasons he has given, Mr Venables

cannot be regarded as having had a contract of service with the company or any of its subsidiaries. Mr Venables did not, in my opinion, retire from service as an employee, strictly so-called.

38. On the other hand, Mr Venables did, in my opinion, on the findings of fact made by the special commissioner - other than the finding relating to Mr Venables' "normal health" which was reversed by Lawrence Collins J - "retire" within the meaning of the pension scheme rules and trust deed. Prior to his "retirement" he had been for 30 years or so an executive director and chairman of the company. He worked about 30 hours a week. During the 15 months prior to his "retirement" on 30 June 1994 he had been the de facto managing director. His workload over this period was about 50 hours a week. It was recorded in the board minutes of 23 June 1994 that he was "retiring as an executive director on 30 June 1994 to pursue other interests but will continue as an unpaid non-executive "director"". So, after 30 June 1994 he remained an unpaid non-executive director with no work-load or executive responsibilities at all. Why was this not "retirement"?

39. The critical issue, in my opinion, is whether the retention by Mr Venables of an unpaid non-executive directorship barred him from being treated for the purposes of the pension fund rules and trust deed as having "retired". Under clause 3 of the trust deed, the trust fund is held upon trust to provide:

".... relevant benefits for such employees of the employers who become eligible to participate in the scheme in accordance with the trust deed and the rules."

"Employee" is defined in the trust deed as "a person in the service of the employer and includes a director". Under the rules and the trust deed the trustees had power "to award an immediate pension to a member who retires in normal health at or after age 50".

40. The revenue's argument accepted by the Court of Appeal and summarised by Lord Millett at paragraph 24, was that since "employee" was defined as including a director, "retirement" could not take place so long as the individual remained a director. I, like my noble and learned friend, am unable to accept this reasoning. On the findings of fact in this case, Mr Venables retired from all the executive responsibilities that he had previously held and on account of which he had received remuneration from the company. If "retire" is given its ordinary meaning as a word in the English language, Mr Venables retired on 30 June 1994. The definition of "employee" as covering both employees strictly so-called and directors does not, in my opinion, warrant giving the word "retire" or the concept of "retirement" a narrower meaning than it would ordinarily bear. A managing director, whether formally appointed or de facto, who gives up all his or her executive responsibilities and retains merely an unpaid non-executive office with the company "retires", in my opinion, both as a matter of ordinary language and for the purposes of the rules and trust deed with which your Lordships are concerned in the present case. Save that, in my opinion, Mr Venables was not an employee under a contract of service with the company, I am in full agreement with the reasons given by Lord Millett for allowing this appeal.

LORD WALKER OF GESTINGTHORPE

My Lords,

41. Since I have the misfortune to differ from the majority of your Lordships as to the outcome of this appeal I will express my opinion as shortly as possible. It was conceded that the special commissioner was incorrect in taking it as common ground that Mr Venables was an employee of Ven Holdings Ltd ("the company") before 30 June 1994. In my opinion the special commissioner would also have been wrong in making that finding of fact, since there was no evidence on which he could find that Mr Venables had a contract of employment (or a contract for services) with the company or any of its subsidiaries.

42. It is conceded that there was no written contract. Nor has a search of the company's minutes of board meetings and other records produced any resolution (such as would have been required under para 84 of Table A) authorising the company to enter into a service contract with Mr Venables. The agreed statement of facts makes no reference whatsoever to a service contract, written or oral. If there had been an oral contract there should have been a written memorandum of it under section 318 (1)(b) of the Companies Act 1985. There was before the special commissioner no evidence as to the amount of the salary to which Mr Venables was said to be entitled under any such contract, or otherwise as to its terms. Such material as can be gleaned from the documentary evidence (Mr Venables's tax return for 1994-95 and the company's unconsolidated financial statements for the years to 30 September 1994 and 30 September 1995) do not support the suggestion that Mr Venables was until 30 June 1994, entitled to a salary. For 1994-95 Mr Venables's income from employment was returned as nil (while his dividend income was £77,500). Directors' emoluments were shown in the company's 1994 accounts as: 1993 - £25,340; 1994 - nil and in the 1995 accounts as: 1994 - nil; 1995 - £992.

43. The fact is that the affairs of the group seem to have been managed with the high degree of flexibility, and some degree of informality, which often characterises a company or group dominated by a single individual. But it is precisely when a single individual is in a dominant position that proper procedures are most important. Any contract between Mr Venables and any group company must have raised an obvious conflict of interest (especially as he owned four fifths of the company's shares in a fiduciary capacity) and such a contract could have been properly effected only in accordance with the procedure prescribed by article 84. In practice Mr Venables seems to have been able to achieve what he wanted without having any service contract. In my opinion the only conclusion open to the special commissioner was that his right to emoluments from the company were limited to his rights under articles 82 and 83, which did not depend on an individual contract.

44. My noble and learned friend, Lord Millett (whose opinion I have had the advantage of reading in draft) has referred to the decision of the Court of Appeal in *Secretary of State for Trade and Industry v Bottrill* [1999] ICR 592. The issue in that case was whether a controlling director could be an employee for the purposes of section 230 of the Employment Rights Act 1996. The director had a written contract of employment which specified his duties, his working hours and his entitlement to remuneration (subject to annual review by his fellow directors). Nevertheless there

was an issue as to whether the contract should be taken into account for the purposes of the Employment Rights Act. The case does not in my view assist as to the circumstances in which an oral contract should be inferred.

45. It is common ground that material relevant to the construction of the group pension scheme includes its fiscal context: the tax advantages of approved occupational pension schemes, the statutory provisions as to mandatory and discretionary approval, and (so far as notorious enough to be within the actual or presumed knowledge of the parties) the way in which the Superannuation Funds Office of the Inland Revenue exercised its statutory and managerial discretion at the material time. It was argued that Chadwick LJ went beyond that in his predisposition to give to an expression not defined in the rules—that is, "retirement" and allied expressions—the same meaning as in Chapter II of Part II of the Finance Act 1970.

46. I respectfully think that Chadwick LJ was right to start with that predisposition, and that he was also right to conclude that nothing in the trust deed (including its schedules) led to a different conclusion. Although the trust deed was (as your Lordships were told) based on a published precedent, the deed cannot be regarded as well drafted. It would be unsafe to treat any apparent nuances in its language as being significant. The safer course is to give "retirement" its normal meaning in the statutory scheme. If the issue had been posed the other way round—that is, if it had been in the Inland Revenue's interest to contend that "retirement" as used in the deed should be given some meaning different from its meaning in the statute—your Lordships would, I venture to think, have been disinclined to hear the argument sympathetically.

47. In my opinion it follows that Mr Venables was at all material times, by virtue (and exclusively by virtue) of his directorship of the company, an employee (as defined in the deed) in service (as defined in the deed) and that relationship continued until he ceased to be a director of the company. His retirement must be related to the end of his directorship, since it was the only qualification that he had for membership of the pension scheme. There was in my opinion no proper ground for treating his informal transition from executive to non-executive directorship as amounting to retirement.

48. Lord Millett has referred to anomalies resulting from the position in which (on the view taken by the Court of Appeal) Mr Venables would have found himself. I think, with great respect, that the first anomaly tends to overlook (as Mr Venables himself may possibly have overlooked) the difficulties arising from Mr Venables's conflicting interests while he was still an executive director—as the real driving force of the company, as a trustee of the pension scheme, and also as a trustee of the family settlement which held 80% of the shares in the company. It would not have been right for Mr Venables, with so many conflicting personal and fiduciary interests, and knowing that he was to be reappointed as a director the next day, to join in exercising in his own favour the discretion to permit early retirement. Moreover the figures in the tax return and accounts (although admittedly sketchy) suggest that he might in any event have had some difficulties in achieving what he wanted in the way of final remuneration.

49. If (contrary to the view of the majority) Mr Venables became subject to a large tax liability, I would feel some sympathy for his position, but that sympathy would be qualified. It was said that Mr Venables was a practical businessman who could not be expected to deal with the finer points of company law and pensions law. But he had lawyers, accountants and actuaries to give him expert advice. He hoped to obtain, through the company's approved occupational pension scheme, a large tax-free sum which it might have been difficult for him to obtain in any other way (I was unpersuaded by Mr McDonnell's submission, skilfully though it was put, as to the marginal attractions of approved pension schemes). It was incumbent on Mr Venables, in order to obtain those advantages, to ensure that matters were arranged properly. The difficulties arising from his fiduciary obligations (as pension trustee, family trustee and director of the company) were not simply a matter of formality.

50. I consider that the Court of Appeal were also correct in their view on section 600 of the Income and Corporation Taxes Act 1988. I would therefore have dismissed this appeal.