

B E T W E E N:

**(1) DAVID JOHN VENABLES
(2) CAPCO TRUST JERSEY LIMITED
(3) DAVID JOHN CAPPS
(4) STEVEN ROBERT VENABLES**

Appellants

- and -

**MICHAEL HORNBY
(HM INSPECTOR OF TAXES)**

Respondent

Hearing Date: 27 April 2001

Judgment Date: 14 June 2001

Mr Conrad McDonnell, counsel, instructed by Warner & Richardson, appeared on behalf of the Appellants

Mr Timothy Brennan, counsel, instructed by the Solicitor for Customs and Excise, appeared on behalf of the Respondent

Mr Justice Lawrence Collins:

I Introduction

1. This is an appeal from a decision of Special Commissioner Cornwell-Kelley dated 13 November 2000, which raises the question (*inter alia*) of the meaning of “retirement” for the purposes of entitlement to a pension in the light of the tax legislation. The Revenue claims that pension payments made to Mr Venables at the age of 53 when he ceased to be an executive director of the company of which he and his family trusts were the controlling shareholders are chargeable to tax under section 600 of the Income and Corporation Taxes Act 1988 (“the 1988 Act”), because he remained a director and therefore did not retire for the purposes of the company’s pension Scheme Trust Deed and Rules. His normal retirement age was 60, but the trustees had power to award an immediate

pension to a member of the Scheme “who retires in normal health at or after the age of fifty.” The Special Commissioner decided that Mr Venables had retired, notwithstanding his continued connection with the company, but that the assessment should be upheld on the ground that, although he had retired, he had not, in view of the evidence about his medical condition, retired “in normal health.” Mr Venables and the trustees appeal from the second determination, and the Revenue cross-appeals on the first determination. A further issue arises if the Revenue is right on either of those points. Mr Venables argues that if the payments were made outside the powers of the trustees and so as to attract tax under section 600 of the 1988 Act, then the payments were made in breach of trust to a trustee (Mr Venables) who therefore continued to hold the money as trustee, and therefore he could not be said to have received a “payment.” Mr Venables appeals from the decision of the Special Commissioner that there was a relevant payment chargeable to tax.

II The facts

2. Mr Venables was born on 14 December 1940. He is a substantial shareholder in Ven Holdings Limited (“the company”), having in his own right 20% of the shares and, as settlor and a trustee of his family discretionary trust, the remaining 80%. The company has a number of subsidiaries and the main business of the group is property development. At the relevant time in 1994 the group consisted of eight companies with assets of some £4 million.
3. Mr Venables worked in the business for more than 30 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’ 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 concerning the activities of the group, but from March 1993 he became responsible for its day to day running, arranging the finances, costing work and recruiting staff.
4. Mr Venables was anxious to give more of the responsibility to his children Steven and Paula, and a man called Luke Singleton. By 1994 he had decided to

cease to undertake all the responsibilities that he had had since March 1993: Mr Singleton became managing director (which post he continued to fill until 1998, when Steven Venables took over); Paula Venables became company secretary on 23 June 1994.

5. On 23 June 1994 the board minutes recorded 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.” The Special Commissioner found that “concern about his health was part of Mr Venables’ reason for wanting to pass on his newly acquired responsibilities after so short a time and when he was only 53.”
6. On 23 June, Mr Venables wrote to his pension consultant to say that although he had decided to retire from employment with the 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.
7. Thereafter, the Special Commissioner found:

“... 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 in 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.

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.

But Mr Venables no longer went to the sites as he had done before June 1994, or normally attended 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 ... 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."

8. Mr Venables remained as a director of the company at all relevant times during 1994/95 and continued as a director after 5 April 1995. But after 30 June 1994 he became an unpaid non-executive director, and ceased to be an employee.
9. The Scheme paid Mr Venables £580,591 in three tranches between July and August 1994. On 5 March 1997 Mr Venables was assessed to tax under Schedule E for the year 1994/95. On 21 March 1997 Mr Venables appealed against this assessment. On 1 March 1999, pursuant to regulation 49 of the Income Tax (Employments) Regulations 1993, a determination was raised upon Mr Venables and Denton & Co. Trustees Limited, as trustees of the Scheme.

III The Pension Scheme

10. 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. On 26 May 1989 the terms of the Trust Deed were amended so that thereafter Ven Holdings Limited was treated as the Founder of the Scheme in place of Fussell Estates Limited. With effect from that date the participating employers under the Scheme were (1) Ven Holdings Limited and (2) Fussell Management Limited. With effect from 1 April 1993 the trustees of the Scheme were (1) Mr Venables and (2) Denton & Co Trustees Limited. It was an "approved" Scheme for the purposes of the Finance Act 1970, but it ceased to be approved on 5 August 1994, after the payments in question in this case, 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.

11. The Trust Deed recited (Recital A) that the Scheme was being established to provide relevant benefits as defined in section 26(1) of the Finance Act 1970, and clause 1 established the Scheme “under the provisions of this Deed and the Rules made hereunder”. By Schedule A, para. (2) “each Member’s Rules shall complement the Trust Deed and both shall be construed together,” and the list of defined terms included “Employee,” which was defined to mean a person in the service of the Employer and including a director, and “Service”, which meant service with an employer for the purposes of the Trust Deed and the Rules. The normal retirement date was to be in the range 60 to 70. 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 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”

12. Clause 2 of Schedule B to the Trust 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 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 that 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.”

13. By Schedule F:

“Normal retirement

1. ...on retirement at the Normal Retirement Date a Member shall be entitled to receive such benefits as are stated in the Member’s Rules

Early retirement

2. With the consent of the founder the Trustees have discretion to award an immediate pension to a Member who retires in normal health at or after age 50. The amount of pension will be calculated as for deferred pensions...and will then be reduced by such a proportion as the Actuary determines having regard to the Member’s age at retirement.... As an alternative to an immediate pension the retiring Member may elect to receive a deferred pension payable from his Normal Retirement Date...”

and by clause 5(b) provision was made for commutation of pension for a lump sum.

14. The Scheme Rules applicable to Mr Venables, and communicated to him at the same time as the Trust Deed was executed, 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 60 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 of 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) Retirement before Normal Retirement Date

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 realised to provide reduced benefits...”

IV The retirement issue

15. The Special Commissioner found that until 30 June 1994 Mr Venables had acted as managing director without having been formally appointed as such and that he performed the functions which would have been performed by a managing director if there had been one. After that date he was an unpaid non-executive director, and ceased to be an employee. The conclusion, on the basis of the facts stated above in paragraph 7, was that Mr Venables did not

retire from the office of managing director, because he had never been appointed to it, but he did retire from employment with the company and normal service on its behalf. He retired 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.

16. The Revenue's position on this appeal is as follows: (a) the Rules and the Trust Deed must be construed by reference to the prevailing tax legislation; (b) retirement, both in ordinary parlance and under section 612 of the 1988 Act, connotes vacation of an office or employment, and directorship is equated to employment; (c) Mr Venables' only relevant office or relationship was that of director, and he held that office at all material times, and there was therefore no vacation of any office, and no termination of a relationship; (d) there was no evidence of a contract of employment, and no finding that there was any resignation or termination of the contract; (e) the reduction of work-load is all that happened, and that does not amount to retirement.
17. Mr Venables' position is: (a) the provisions of a Trust Deed should wherever possible be construed to give reasonable and practical effect to the Scheme, and the relevant background facts or surrounding circumstances (in the light of which they should be construed) include the requirements of the Revenue for approval of a Scheme, and common practice in the field of pension schemes generally; (b) retirement means withdrawal from some activity or position, and in the pension context it is the cessation of active, pensionable service; (c) an executive director may retire from employment and the office of director at different times, but it is the retirement from remunerated employment which is crucial, and there is no practical or purposive reason why cessation of office as a non-executive director should be the relevant event triggering payment; (d) if the Revenue were right, there would be a risk that "final remuneration" would be reduced by the effect of including a period as an unpaid non-executive director; (e) the statutory definition in section 612 of the 1988 Act is of no assistance, and the Trust Deed and Rules make no reference to it; (f) Recital A of the Trust Deed applies to benefits in anticipation of retirement or

in anticipation of or in connection with any change in the nature or service of the employee in question, and an exempt approved Scheme may lawfully provide a pension (including a lump sum) on early retirement, notwithstanding that it does not fall within the statutory definition of “retirement.”

18. The Scheme in the present case was approved by the Revenue under the Finance Act 1970. Like the 1988 Act, the 1970 Act required the Revenue to approve a Scheme which complied with the statutory conditions, including the condition that it provided benefits on retirement at an age not earlier than 60 or later than 70 (1970 Act, s.19 and Sched. 5, para. 1 and 1988 Act, s.590(3)(a)), but gave the Revenue the discretion to approve Schemes which did not satisfy the prescribed conditions, including those making provision for early retirement: see now 1988 Act, s.591(2)(d).
19. The legislation (1988 Act, s.612(1), re-enacting 1970 Act, s.26(1)) defines (a) “employee” in relation to a company to include any director, and (b) “service” to mean “service as an employee of the employer in question and other expressions, including ‘retirement,’ shall be construed accordingly.”
20. Section 600 of the 1988 Act, as amended, applies to “any payment to or for the benefit of an employee, otherwise than in the 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 [the 1970 Act and the 1988 Act],” (s.600(1)), and s.600(2) provides:

“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.”
21. Consequently the question for the purposes of section 600(2) is whether the payment is expressly authorised by the Rules of the Scheme.
22. As is clear from the provisions of the Trust Deed and the Rules set out above, there is an inconsistency between the Trust Deed and the Rules. The Rules provide that with the company’s consent, Mr Venables may retire at any time after age 50, whereupon his capital sum in the Scheme would be realised to

provide reduced benefits. But the Rules are expressly subject to the Trust Deed, which provides that with the consent of the company the trustees have discretion to award an immediate pension to a member who retires in normal health at or after 50. This discrepancy raises the issue which is dealt with in the next section of this judgment.

23. It is clear from section 600(2) that the question is whether the payment is authorised by the Rules, and not whether it is authorised by the legislation or, still less, by the revenue. Accordingly the question is one of construction of the Rules of the Scheme. In *Re Courage Group's Pension Schemes* [1987] 1 W.L.R. 495, 505 Millett J. said:

“...there are no special rules of construction applicable to a pension scheme; nevertheless, its provisions should wherever possible be construed to give reasonable and practical effect to the scheme, bearing in mind that it has to be operated against a constantly changing commercial background.”

24. That statement was approved by Warner J. in *Mettoy Pension Trustees Ltd. v. Evans* [1990] 1 W.L.R. 1587, 1610-1611, who added that, although there were no special rules governing the construction of pension Scheme documents

“... the background facts or surrounding circumstances in the light of which those documents have to be construed—their ‘matrix of fact’ to use the modern phrase coined by Lord Wilberforce—include special factors. The first factor is that ... the beneficiaries under a pension scheme such as this are not volunteers. Their rights have contractual and commercial origins. They are derived from the contracts of employment of the members. The benefits provided under the scheme have been earned by the service of the members under those contracts and, where the scheme is contributory, pro tanto by their contributions. Secondly, as was common ground, pension scheme documents have to be construed in the light of the requirements of the Inland Revenue Commissioners from time to time for their approval of a scheme ... Thirdly it was also common ground that the relevant background facts or surrounding circumstances 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.”

25. In the present case there was some evidence before the Special Commissioner from a former official at the Superannuation Funds Office of the Revenue, the

predecessor of the Pension Schemes Office, to the effect that it was between 1979 and 1988 the practice to agree the mode of early retirement in individual cases, and in particular to approve pension payments for directors who changed from an executive role to a non-executive role, and that the practice had become so established that where a director became a non-executive director after age 50 early retirement benefits were often taken without an approach being made to the Revenue beforehand. The Special Commissioner decided that the evidence was too sketchy and speculative to be of assistance, and in particular was not apt to assist in the construction of the Trust Deed. It was not argued on this appeal that the Special Commissioner was wrong in this conclusion, although Mr McDonnell drew my attention to a recent Revenue manual which suggests that there is no incompatibility between retirement and the retention of a directorship with the former employer. But if Warner J. was right (as I think he was, although it seems that Glidewell L.J. in *Harris v. Lord Shuttleworth* [1994] I.C.R. 991, 1003, had some doubts about the admissibility of Revenue practice as an aid to construction) in saying that among the relevant surrounding circumstances for the purpose of construction of the Rules (as distinct from the legislation) is the then prevailing Revenue practice, it is regrettable that evidence of the practice as known to pension practitioners at the time when Mr Venables became a member of the Scheme in 1980 was not available.

26. Since the Trust Deed and Rules were drafted against the background of the legislation and the need to obtain Revenue approval they must be construed against the background of the legislation. But I do not derive any assistance from the references in the legislation to “employee,” “service,” and “retirement.” It is true that employee includes a director, and that therefore service includes service as a director. But the provision that “other expressions, including ‘retirement,’ shall be construed accordingly” (s.612(1)) does not, in my judgment, help to determine whether, for the purposes of the Trust Deed and the Rules, a paid executive director who ceases to be such, and becomes an unpaid non-executive director, is a person who “retires” within the meaning of the Trust Deed or the Rules. More relevant in the present case is

that the Trust Deed (Recital A) states the purpose of “providing relevant benefits as defined in section 26(1) of the Finance Act 1970” for directors and employees. “Relevant benefits” in section 26(1) (and in the 1988 Act, ss.612(1)) means any pension “given or to be given on retirement or on death, or in anticipation of retirement, ... 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”. While this does not assist in the meaning of the expression “retirement” it clearly shows that a change in the nature of the service of an employee can qualify the employee to benefits, and that an exempt approved scheme may lawfully provide a pension on early retirement in such circumstances.

27. In my judgment the Trust Deed and the Rules have to be given a practical and purposive construction. In *Harris v. Lord Shuttleworth* [1994] I.C.R. 991, 1001, the Court of Appeal was concerned with the question whether an employee who had been dismissed for substantial absences for sickness had left on “retirement...by reason of incapacity.” It decided that the employee had retired as a result of incapacity. It emphasised that the right to a pension is delayed remuneration for which the employee has given consideration, and that “the rules which provide for the payment of pensions on early retirement, whether that comes about at the wish of the employee or on the direction of the employer, in each case within a few years of normal pension age, are but variants on the normal theme” (at 1005). That case is not directly relevant, but it does show that the Rules must be interpreted in a common sense and commercial manner.
28. There is no clear distinction in law between an executive and non-executive director. But I do not consider that there can be a principle that, in Rules in form similar to those in this case, a person who is a director, and who has executive responsibilities and is paid, whether or not he or she has a designated office such as managing director, and who subsequently ceases to be paid and have executive responsibilities, does not “retire.” If there were such a principle it would have odd and uncommercial consequences, particularly with regard to the calculation of final remuneration. In my

judgment it is a matter of fact and degree as to whether a person has retired, which in my view connotes withdrawing from active work. I accept the contention by Mr Brennan QC for the Revenue that a mere reduction in workload is not retirement, but I do not accept the contention that the only relationship Mr Venables had with the company was that of director, and that because he never ceased to be a director he never retired. In this case there was substantial evidence on which the Special Commissioner came to his conclusion that Mr Venables had retired. He was previously working in effect as managing director for 50 hours a week. There was evidence that he was anxious to give up work because of concerns about his health. There was some direct evidence that he had been remunerated, and substantial indirect evidence from the size of the pension payments. His activities thereafter could be regarded as those of an interested and knowledgeable shareholder who had built up the business, who (with his family trusts) was a controlling shareholder, and who was keen to preserve the value of the holding, and whose advice was respected by those who carried on the business. There was sufficient evidence for the Special Commissioner's decisions on the facts, and in these circumstances there are no grounds for interfering with it.

V The “normal health” issue

29. Although the evidence was not altogether clear, for present purposes the position can be taken to be as follows. At the time of his retirement Mr Venables was seriously overweight (21 stone), and his blood pressure was high. He was mildly diabetic. The Special Commissioner found that concern about his health was part of Mr Venables' reason for wanting to pass on his newly acquired responsibilities after so short a time, and when he was only 53. Mr Venables suffered three heart attacks, but the Special Commissioner accepted that those attacks, and the more serious diabetes which he developed and for which he took medication from 1995, all occurred after 30 June 1994.
30. There are two oddities about the Rules and the Trust Deed. First, the Rules permit retirement at any time after the age of 50 with company's consent, but the Trust Deed refers only to a member “who retires in normal health at or

after the age of fifty,” and the Rules expressly provide that the Trust Deed is to take precedence over the relevant Rule. Second, neither the Rules nor the Trust Deed contain any provision for retirement on the grounds of ill health or incapacity. The consequence, if the Special Commissioner and the Revenue were right, would be the bizarre and uncommercial one that the more ill and the more disabled an employee aged over 50 were, the less able he or she would be to retire early.

31. The Special Commissioner found that Mr Venables was not “in normal health” on 30 June, based on the facts stated above. The Revenue relies in particular on the fact that concern about his health was one of the reasons for the resignation, and an important factor leading to his decision to resign. Accordingly, the Revenue contends, the Special Commissioner was entitled to come to the conclusion that he did not retire in normal health.
32. Mr Venables has several answers to the decision of the Special Commissioner on this point, which, according to Mr McDonnell, for Mr Venables, was a point taken for the first time in the decision, and did not form part of the Revenue’s case. I see considerable force in the contention that the reference to “in normal health” is simply surplusage or a drafting error, intended to contrast retirement of a member in normal health after the age of 50 with earlier retirement of incapacity or ill health, and that because no provision for ill health was in fact made by the Rules or the Trust Deed (except in relation to commutation of pension), the reference to normal health can be ignored, on the basis that “something must have gone wrong with the language”: *Investors Compensation Scheme v. West Bromwich Building Society Ltd* [1998] 1 W.L.R. 896, 913. I would have so held if there were not a more compelling reason for finding that the Special Commissioner’s finding can be interfered with. In my judgment, the Special Commissioner could not reasonably have arrived at the conclusion that, for the relevant purpose, Mr Venables was not in normal health.
33. This is so for two reasons. First, even if the Rules and the Trust Deed contain no provision for retirement for ill-health and incapacity, I consider that the

expression “in normal health” in the context of a pension scheme Trust Deed cannot be interpreted in a vacuum. “In normal health” must mean “normal” by reference to some standard, and the only standard which can reasonably be applied is fitness to do the job. Not only was Mr Venables spending 50 hours a week as an executive director at the time of his resignation, which suggests strongly that he was fit to do the job, but there was no evidence to suggest that he was unfit to do it. Second, there was no evidence to support the finding that even in the abstract Mr Venables was not in normal health. High blood pressure and mild diabetes are common conditions in overweight middle-aged men, and there was no finding that his health was abnormal.

34. For the sake of completeness I mention that I would have rejected Mr McDonnell’s three other arguments on this issue. The first was a very strained interpretation of clause 2 of Schedule F, which depended on inserting a comma so that it would read “the Trustees have discretion to award an immediate pension to a Member who retires, in normal health at or after age 50” with the consequence (it was said) that it has the following meaning: the trustees have discretion to award an immediate pension to a member who retires, but if he is in normal health then only at or after age 50, whereas a member who retires other than in normal health can draw an immediate pension with no age restriction. This construction comes close to rewriting the Trust Deed to cure the omission of the provisions for ill-health and incapacity. The second argument was that clause 2 of Schedule B to the Trust Deed confers on the trustees a wide power to determine matters of doubt. But no such question or matter was put to the trustees and they have never purported to do more than make the payment to a person they considered was retiring. Finally, it is suggested that as a deferred pensioner (i.e. a person who had left employment with service benefits but was not yet entitled to a pension), Mr Venables could have applied for his pension to be commuted and a lump sum paid to him. But (a) the right to commute a deferred pension for a lump sum arose only when the pension was payable; (b) even if that were wrong Mr Venables had never made such an application and the trustees had not exercised their discretion under that power; and (c) there was no evidence as

to what lump sum might have been payable.

VI The “payment” issue

35. This issue does not arise in view of my decision on the first two issues, but it was fully argued. The point arises in this way. The effect of section 600(1) and (2) of the 1988 Act is that if a “payment” is made out of funds of an approved pension scheme and “the payment is not expressly authorised by the rules of the scheme” the employee is chargeable to tax. For Mr Venables, Mr McDonnell argued that in the circumstances of this case there was no relevant “payment” to him: (a) if the payment to Mr Venables was not authorised by the Trust Deed or the Rules, then he was not beneficially entitled to it; (b) Mr Venables was a trustee of the Scheme, and if he was not beneficially entitled to the payment, he could not have taken it free from the trusts of the Scheme; (c) consequently, the money remained subject to the trusts of the Scheme, and nothing accrued to Mr Venables; (d) accordingly he received nothing and there was therefore no payment to him. The Revenue’s position, put by Mr Brennan QC, is that the whole purpose of section is to impose a charge to tax when money is paid out of pension funds otherwise than in accordance with the Scheme and the Rules, and “payment” should be construed in its ordinary sense, in which event there can, it says, be no doubt that payments were made to Mr Venables. The Special Commissioner decided Mr Venables had not shown that the payments were in breach of trust, and that he held the funds as constructive trustee, and that accordingly the point did not arise.
36. Mr Venables relied on *Hillsdown Holdings plc v. IRC* [1999] S.T.C. 561. That was a case on section 601(1) and (2) of the 1988 Act, the effect of which is that, subject to important exceptions, where a payment is made to an employer out of an exempt approved Scheme, an amount equal to 40 per cent of the payment is chargeable to tax. Such a payment was made by the trustees of the pension fund of FMC Ltd. to the trustees of the pension fund of Hillsdown plc (FMC Ltd.’s parent), and tax was paid, but the pension ombudsman decided that the payment of the surplus assets of the Scheme to the Hillsdown Scheme was in breach of trust and invalid. His decision was

upheld, and Hillsdown plc and its pension fund trustees sought to recover the tax which had been paid pursuant to section 601. Arden J. held that the tax was recoverable because (a) the payment in the events which had occurred had not been effectively made; (b) it did not have the effect of changing the ownership of the funds and was in fact reversed; (c) the employer had merely received the money as a trustee for the fund under a trust arising under operation of law. In *R. v. IRC, ex p. Roux Waterside Inn Ltd.* [1997] S.T.C. there was a transfer from one Scheme to another, and the Revenue withdrew approval from the former Scheme because it took the view that the transfer was intended as a device to avoid the restrictions imposed by the Revenue as a condition of approval. The Revenue made an assessment to tax under section 591C of the 1988 Act, which provides that income tax is payable on the assets of a Scheme where approval ceases to have effect. It was argued that approval should not have been withdrawn, because if the transfer of assets to the new Scheme had not been permissible, the transferred assets would have been held by the trustees of the new Scheme as constructive trustees of the old Scheme. Tucker J. held that this was not a case in which equity would have imposed a constructive trust, since it was not a case in which property had been wrongfully transferred to a third party.

37. In this case, if Mr Venables, who was not only a member of the Scheme, but also a trustee, had known, or should have known, that the payment was unauthorised by the terms of the trust, then he would have been accountable as a trustee. In such circumstances, the funds would have been recoverable by the trustees, and if they had been recovered, there would have been no effective payment to Mr Venables. I am of the view that if each and every one of the following conditions is fulfilled, then there is no taxable payment for the purposes of section 600: that the payment is in breach of trust, that the recipient is accountable to the trustees as an actual or constructive trustee, and that the recipient is able and prepared to account to the trustees. In those circumstances, I would accept that the rationale of the *Hillsdown* case applies, and I would follow it.
38. I will therefore allow the appeal, on the basis that the Special Commissioner

was right to decide that Mr Venables had retired, but wrong to decide that the state of his health disentitled him to early retirement benefits.