From David Elliot NAYAS Gateshead + Shelter

IEJ/AJH

CSB991/84

SUPPLEMENTARY BENEFITS ACT 1976

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

(now reported as Mortgage Int. R(S) 21/85

1. (1) This is a claimant's appeal from the decision dated 8 August 1984 of a social security appeal tribunal ('the tribunal') brought by leave of the tribunal chairman and upon the contention that the tribunal's decision was given in error of law. By their decision the tribunal upheld the decision of an adjudication officer issued on 9 May 1984 to the effect that the claimant was entitled to supplementary allowance of £53.77 weekly from 9 March 1984 and £52.50 weekly from 4 May 1984. The substantive issue before the tribunal was as to the correct treatment in the computation of the claimant's entitlement to supplementary allowance of certain interest on borrowed monies for which it is common ground that he was liable. The adjudication officer now concerned supports the appeal, but upon grounds which I am unable to accept as well-founded in law.

(2) The appeal achieves a technical success, but will result in no practical advantage to the claimant (indeed he might in practical terms be better placed had the appeal not been brought). I set aside the tribunal's decision as given in error of law in the respects undermentioned and, being satisfied that it is in the circumstances of the case expedient for me so to do, now give myself the decision which the tribunal should have given.

(3) My decision is that the claimant is entitled to a supplementary allowance of £35.75 weekly from 9 March 1984 and £35.89 weekly from 4 May 1984. The reductions to these amounts of those indicated in the adjudication officer's decision of 9 May 1984 reflect exclusion from the claimant's requirements of the amounts earlier allowed in respect of mortgage interest.

(4) Whilst this is not a matter in issue upon the present appeal, I should add that I have seen nothing on the case file which suggests to me that any overpayment which may have been made in implementation of the adjudication officer's decision which included amounts in respect of mortgage interest will in the light of my own decision give rise to any recoverable overpayment.

2. It is common ground that:

(1) the present appeal has its origins in a claim made by the claimant for supplementary allowance on 7 March 1984 and that at such date he was living in an owner-occupied property of which he

was the owner and which was subject to a mortgage ('the 1982 mortgage') which he had effected in or about March 1982 with a building society and under which he was liable for mortgage interest on the outstanding principal sum which it secured, such sum standing at 7 March 1984 at £31,914.40.

(2) Whilst at 7 March 1984 such mortgage interest was payable at a current gross rate of 12.75%, that rate was reduced to 11.75% as from 4 May 1984.

(3) The 1982 mortgage was a "MIRAS" mortgage (mortgage interest relief at source), so that the claimant was entitled to satisfy his interest liability by paying not the gross interest but that net of a deduction equivalent to income tax at the prevailing standard rate (which at all material times was 30%) save as to interest on principal in excess of £30,000.

3. In circumstances which I will shortly indicate, the adjudication officer's decision brought into computation as a requirement of the claimant a weekly amount in respect of interest under the 1982 mortgage, but not the full amount for which the claimant was liable - he allowed interest only upon £10,500 of the substantially greater total outstanding principal sum. It has at all material times been and remains the claimant's contention that this was wrong, and that his housing requirement should, as regards mortgage interest, have been taken at the weekly equivalent of his interest liability on the full amount of outstanding principal under the mortgage. My decision reflects the conclusion on my part that upon a correct application of the legislation in point the claimant did not qualify for the allowance of <u>any</u> element for mortgage interest in the computation of his requirements.

4. The property in which in March 1984 the claimant was living as owner-occupier had originally been acquired in the 1960's in the joint names of himself and his wife with the assistance of a mortgage advance of approximately £6,000. Subsequently the claimant and his wife became divorced, and in or about 1976 the claimant purchased his ex-wife's interest in the property for approximately £4,500. To do that he obtained a fresh mortgage (which I will for convenience refer to as 'the 1976 mortgage', although its precise date is not in evidence). The 1976 mortgage advance was of approximately £10,000, and out of that the claimant repaid the then outstanding monies secured by the original mortgage and also paid the purchase price of his ex-wife's interest in the property. This advance was secured on the home.

5. In March 1982 the outstanding principal under the 1976 mortgage was of the order of £10,895.49. At or shortly after that time the claimant undertook highly remunerative self-employment and in circumstances which he has attributed, and I have no reason to doubt, to his having been advised that he should do so for "tax reasons", he again changed his mortgage arrangements. He obtained from a different lender from the lender under the 1976 mortgage a fresh advance - of an amount in excess of £31,000 - under the 1982 mortgage, again secured on the home (of which he was owner), applying part of that advance to repaying the then outstanding principal secured by the 1976 mortgage (which was of the order of £11,000), so that the 1976 mortgage became redeemed and discharged. The 1982 mortgage remained on foot at all material times and (as I have already indicated) the outstanding principal sum which it secured was, as at 7 March 1984, £31,914.40 with interest liability as indicated in para. 2(2) above.

6. (1) It is the claimant's contention that the whole of his interest liability under the 1982 mortgage fell properly to be taken into the

computation of his housing requirement, for the purposes of his claim for supplementary allowance, which fell to be made by the adjudication officer who gave the decision of 9 March 1984.

(2) However, the adjudication officer took the view that mortgage interest should be allowed only upon a sum - which he put at £10,500 - which represented the outstanding principal under the 1976 mortgage at the time when it was redeemed by application of that part of the much larger total amount advanced under the 1982 mortgage.

7. (1) Both the adjudication officer and the tribunal have in my judgment correctly diagnosed that the two regulations materially in point, (apart from regulation 3(2) as to need for the item in question) are regulations 15 and 17 of the Supplementary Benefit (Requirements) Regulations 1983.

(2) Regulation 15(1) materially provides:-

> "15. - (1) There shall be applicable under this regulation in respect of any mortgage or other loan taken out for the purpose of acquiring an interest in the home, the amount, calculated on a weekly basis, which is payable and attributable to interest on the loan."

(3) The 1983 Requirement Regulations, are, however, regulations made by way of consolidation of earlier and now repealed legislation, and whilst the same conclusion might well be reached by a direct approach to the current wording, when construing the phrase 'in respect of any mortgage or other loan taken out' in regulation 15(1) it is relevant to note that the present text reflects an original text (then regulation 16(1):-

> "There shall be applicable under this regulation in respect of any mortgage charged on and taken out for the purpose of acquiring an interest in the home, the amount, calculated on a weekly basis, which is payable and attributable to mortgage interest."

(4) The present text was adopted by amendment with effect from 9 August 1982, but it is in my judgment clear that the concluding words in that - 'interest on the loan' - bear more widely than to embrace only an 'other loan' in the same formulation, and that interest under a mortgage must be included. That leads to the conclusion that the word 'mortgage' is used (though in the present context adjectivally and not substantively) to refer to the documentary security so described - ie. the phrase 'in respect of any mortgage or other loan' falls to be construed as if it was phrased 'in respect of any mortgage loan or other loan'. I make this point in view of a contention raised by the claimant to which I will refer later below.

(5) I should also mention that at all material times there has been a provision - it is now in regulation 15(5) - that in its application to Scotland the regulation has effect with the substitution of references to a "heritable security" to references to a "mortgage". But that does not in my judgment materially affect the point made in (4) above.

8. (1) Regulation 17 can be loosely summarised as providing that there is to be an allowance made in respect of interest payable on sums

borrowed for the purpose of repairs and improvements to the home, but falls to be applied with due regard to its internal provision that the term 'repairs and improvements' is to be taken to mean only:-

(A) Major repairs necessary to maintain the fabric of the home; and

(B) Certain specified measures undertaken with a view to improving the fitness of the home for occupation, and listed serially from (a) to (k).

(2) All the so listed items under (B) are thus subject to the antecedently expressed restriction as to their having been undertaken with a view to improving the fitness of the home for occupation.

9. I am satisfied that both regulation 15 and regulation 17 fall to be construed in accordance with the ordinary meanings of the words they contain, save in so far as express definitions are specified. Thus in regulation 15 "mortgage" (or in Scottish contexts "heritable security") is not to be read in any acutely technical sense (such as, for example, "mortgage" bears in the special usage of that branch of the legal profession styled 'conveyancing' where a distinction is drawn between a 'mortgage' and a 'charge by way of legal mortgage' as involving different legal concepts). Nevertheless one cannot introduce provisions of social security law which bear upon formal transactions in the field of real property and heritable property - land and bricks and mortar - without taking due account both of the essential character of the transaction in point and the practical legal machinery by which such transactions are effected - not, I stress, to the extent of making fine technical distinctions; but in accordance with what an ordinary layman with a reasonable awareness of what is involved in buying and selling a house and raising monies on loan in connection with its acquisition may be presumed to know; and that degree of knowledge in my judgment is to be attributed to the legislature when construing what it has enacted.

10. (1) Since the coming into force of the Law of Property Act 1925 a "charge by way of legal mortgage" has become the almost universal procedure under which a purchaser of a home in England and Wales obtains borrowed monies with which to assist in the purchase of a home which, with the interest payable thereon, then becomes charged upon the home by way of security for repayment.

(2) So also, since the coming into force of the Conveyancing and Feudal Reforms (Scotland) Act 1970 the procedure as to "heritable securities" for which that Act provides - in closely similar fashion to the English change by way of legal mortgage - covers the same needs of a home purchaser in Scotland.

(3) In both cases there is established practical machinery by which the purchaser/borrower contemporaneously acquires for himself by disposition from the seller the title of the seller to the property (subject or not to perfection by a process of formal registration) and contemporaneously creates a security over it in favour of the lender for the sums he is borrowing for, or for part assistance with, the purchase price which is to be paid to the seller. The layman may be puzzled as to how the seller is induced to make the disposition of the property to the buyer (which must precede in time the creation by the latter of any effective security over it) without first receiving the purchase money which the lender will not be prepared to part with until he gets the security over the property for his protection. But suffice it to say that under the umbrella of well-established

procedures which in England are referred to as 'completion' this hurdle is in practical terms readily overcome.

(4) It is against the foregoing background that in my judgment the provisions of regulation 15 as to a 'mortgage or other loan taken out for the purpose of acquiring an interest in the home' fall to be interpreted and applied.

11. The "normal course" so described is to be contrasted, in my judgment, with the different situation and course of events when a person who is already the owner of his home seeks to borrow monies upon the security of it for some purpose he has in mind - be that the raising of funds for his business, the purchase of some other property, the repayment of some other borrowing already incurred, or any one or more of any of the purposes for which people may be prepared to borrow funds they do not have otherwise available; for which they are prepared to pay a prescribed rate of interest; and which they cannot conveniently raise without putting up their home as a security to the lender. One such case is that of borrower under an existing mortgage on his home who finds he can obtain a new secured advance, upon more favourable terms as to interest or repayment period, from a different lender; and who on that account negotiates a new mortgage for the purpose of paying off his antecedent mortgage, thereby procuring the release of his home from the antecedent security, but imposing the new security upon it instead. And here also there are established 'completion' procedures for getting over the apparent problem of obtaining the new advance concurrently with obtaining the release of the property from the antecedent mortgage.

12. (1) What is, however, in my judgment quite clear is that regulation 15 has in contemplation and applies only to the interest upon loans 'taken out for the purpose of acquiring an interest in the home', and not to the interest on loans taken out for any other purpose. And although one can readily formulate terms in which regulation 15 could be expressed to bear also upon the interest payable under a loan taken out for the purpose of repaying an earlier loan where the earlier loan had been taken out for the purpose of acquiring any interest in the home, the language at present employed in the regulation is not in my judgment apt to include interest payable in respect of the second loan. An instance of a statutory provision which does cater for the latter case may be found in section 24(1)(b) of the Housing Subsidies Act 1967 whereby the provisions of the 'option mortgage scheme' (now obsolete) were made applicable to a loan if:-

> "(b) The loan is for or in connection with, or is made with a view to the repayment by means thereof of the amount outstanding on a previous loan for or in connection with, one or more of the following purposes, that is to say:-
>
> (i) acquiring ...
>
> (ii) ...
>
> (iii) ..., a dwelling on that land."

(2) I cite that provision as illustrating that whilst the drafting of an appropriate provision to bear upon interest under a "replacement loan" is perfectly practicable, it requires some elaboration of wording to achieve the desired result. And I do not believe that it is within any legitimate bound of "necessary implication" to construe the wording in fact to be found in regulation 15 as so extending. Whether the

result in fact achieved represents the effect the legislature intended and anticipated is not a matter upon which I can speculate; but whilst the result may be unfortunate in the case of a borrower who 'changes horses in mid-stream', the legislature plainly did not intend that the mortgage interest expenses of a claimant should be met under the supplementary benefits scheme in the case of a mortgage upon his home regardless of the circumstances in which it had been created and the purposes to which the borrowed funds were applicable.

13. The claimant explained to the tribunal, and the tribunal have found as facts, that over and above the amount needed to repay the outstanding loan under the 1976 mortgage he received a sum of approximately £21,000 in cash from the mortgage advance under the 1982 mortgage; that of the £21,000 about £1,500 had been spent on his home, mainly on decoration and slab laying outside; that most of the rest had gone in repayment of accrued debts to his bankers and certain friends, and the balance on living expenses of the claimant and his family.

14. (1) Having regard to those findings it is quite clear, to my mind, both that none of the £21,000 approx. could conceivably have been regarded as expended upon major repairs necessary to maintain the fabric of the home, and that some £1,500 at most merited any other consideration in the context of regulation 17.

(2) I have been a little concerned at the treatment of the regulation 17 aspect of the case accorded by the tribunal's stated reasons. They were:-

> "The tribunal looked at the way in which the £21,000 approx. was spent - on the evidence given none of the money (in particular redecoration and slabs) was in their opinion for 'major repairs necessary to maintain the fabric of the home' and so no amount could be taken into account."

That formulation might well be thought to demonstrate an error of law on the part of the tribunal, consisting in oversight as to the scope of regulation 17 extending more widely than as to major repairs necessary to maintain the fabric of the home. However, after consideration of the chairman's lengthy note of evidence I have had no hesitation in concluding that the claimant was so vague about the expenditures by which the £21,000 approx. had been expended that no reasonable tribunal properly instructed in the law could upon the evidence before the tribunal properly have attributed any of it as expended in any manner capable of being brought within any of the several heads apprised within the definition of 'repairs and improvements', still less have concluded that any monies raised by the 1982 mortgage had been borrowed for the purpose of effecting such.

(3) I need in this context add only that the claimant's present grounds of appeal advance no case referable to regulation 17, and that it accordingly passes out of the case, leaving me to deal further with contentions which have been advanced in the context of regulation 15.

15. It is convenient before treating of those in detail to refer to the now reported Commissioner's Decision R(SB)27/84, which figures in the case papers under its earlier reference as the "decision on Commissioner's File CSB/928/1983". In that case the learned Commissioner was concerened to indicate the proper treatment in the computation of a claimant's capital resources for supplementary benefit purposes of certain property owned by the claimant, in the circumstances that it comprised two separate constituent

elements, a bungalow which was 'the home' (and as such fell to be disregarded as a reckonable capital resource, pursuant to regulation 6 of the Resources Regulations) and also a parcel of 'development land', the value of which was reckonable (and the separate valuation of which itself presented no problem). The problem was that at the material time the entirety of the property, comprising both the two constituent elements, was subject to a single mortgage upon which there was a substantial principal sum secured, and that (as would in my own experience be by no means unusual) the whole of the mortgage money stood secured upon the whole of the property (and upon each and every part of it), with the result that in the event of the lender seeking to recover the loan the lender was, if entitled to realise his security at all, entitled to recover it all (or so much of it as the proceeds of sale would provide) by sale of either of the two constituent parts. The tribunal whose decision was under appeal before the Commissioner in that case had accepted submissions that there could for the purposes of the resources be an apportionment of the amount of the mortgage debt attributable respectively to the home and to the development land. The learned Commissioner indicated that in arriving at the capital value of the development land in accordance with the provisions of regulation 5 of the Resources Regulations, their provision for deducting any outstanding debt or mortgage secured on property falling to be reckoned as a capital resource admitted of no apportionment of the mortgage debt, and that it was necessary to deduct the whole of the outstanding mortgage debt from the development land. And, in so deciding the learned Commissioner indicated (paragraph 11):-

> "There is no provision in the Supplementary Benefits Act 1976, as amended, nor anywhere in the regulations, for any apportionment of the mortgage debt between any property which is 'the home' and that which is not, when arriving at the value of the property that does not form part of 'the home'. ... the entire mortgage debt is to be deducted when valuing the claimant's capital resources."

16. Whilst, respectfully, I wholly concur in that decision, it is, in the context of the present case, material to indicate that to hold that because an entire principal sum is charged upon the security of 2 properties and is enforceable to the hilt against either one, or both, the entire sum must be deducted from the value of one, if one only is reckonable, that is dealing with quite a different legal point from the point arising in the present case, which is the entirely separate question as to whether, if there is charged upon 'the home' (and upon nothing else) by a single mortgage an entire capital sum part of which is identifiable as representing money borrowed for the purpose of acquiring an interest in the home and part of which is not so identifiable (whether or not identifiable as having been borrowed for some separate purpose), regulation 15 will bear on the interest attributable to the whole, to the relevant part, or to none of the principal monies outstanding.

17. Founding upon what is, in my judgment, plainly a misunderstanding of that for which Decision R(SB)27/84 stands as authority, the adjudication officer now concerned has, in support of the claimant's appeal - and upon the additional premise that some £10,500 of the principal sum outstanding at the material date upon the security of the home under the 1982 mortgage represents the proportion of the total advance under it used to repay the 1976 mortgage - contended that because of what R(SB)27/84 decided there can be no apportionment of the entire mortgage debt under the 1982 mortgage as between money borrowed for the purpose of acquiring an interest in the home and monies borrowed for other purposes, and that in consequence the claimant is entitled to have regulation 15 applied in his favour in respect of the interest on the entire mortgage under the 1982 mortgage debt.

18. (1) For the reasons I have already indicated I have found the premise as to the £10,500 being monies borrowed to acquire an interest in the home to be itself unsustainable. It is therefore unnecessary to my present decision to pursue further what would be the result had the outstanding principal amount been identifiable as consisting, in identifiable part only, of monies borrowed for that purpose. I have nevertheless thought it right to sound a precautionary note as to the relevance of the matter decided in Decision R(SB)27/84 to the determination of such an issue if and when it falls to be determined, since one may readily envisage cases in which there could be part or parts of a single advance upon the security of a single property consisting exclusively of 'the home' which could and could not be isolated as falling within the interest of regulation 15(1) as to the "purpose" of their having been borrowed - though I accept the submission of the adjudication officer now concerned that it would not be legitimate to separate the whole into parts in reliance upon a mere 'guesstimate'.

(2) I should for completeness here mention that I also accept the adjudication officer's submission that Decision R(SB)11/83, to which the tribunal were referred, must have been cited in error, as its subject matter has nothing to do with any issue arising in the present case.

19. The claimant has set out his grounds of appeal as follows:-

"(1) The tribunal failed to recognise, appreciate or give consideration to the general context of regulation 15 within the operation of the Supplementary Benefits Act. They knowing that regulation 15 stood alone to provide home security for claimants with any mortgage, by allowing the interest to be payable.

(2) The tribunal failed to recognise the essential difference between:-

(a) a mortgage on a home, and

(b) a loan taken out for the purpose of acquiring an interest in a home.

By definition a mortgage is 'a pledge as security for a debt' with the interest in the home having been acquired before the pledge is made. Now (b) is self-explanatory in that the loan precedes the acquisition of the home.

(3) The tribunal failed to show how and why the Commissioner's decision ref R(SB)18/83 (paragraph 11) took any part in their decision, it having been noted at 4.

(4) The tribunal failed to consider my submission that there is no other legislation to allow the specific alteration of my mortgage outstanding balance.

(5) The tribunal failed to afford the claimant a determination that interest on mortgages or parts thereof in excess of £30,000 are paid gross, ie. without the MIRAS deduction."

20. There is, in my judgment, no substance in the claimant's first ground of appeal. There is nothing in the tribunal's decision to indicate, nor

any other reason for supposing, that the tribunal did not understand the general framework of the Requirements Regulations within which regulation 15 is to be found or the general framework of the Acts he mentions and under which those regulations are made. If the stress in the second sentence is, as I understand it to be, laid upon the word 'any' in the phrase "home security for claimants with any mortgage", then it is the claimant who has misunderstood the position, because regulation 15(1) provides for the allowance of interest only where arising under a restricted class of mortgages, namely those secured on the home; and even more restrictively as to the purpose of the borrowing.

21. The claimant's second ground also I find to have no substance in it. The derivation of the word "mortgage" is from the Old French word so spelt and to be translated literally as 'dead pledge' - so that one may go along with the claimant in his reference to it as 'a pledge as security for a debt'; but there I part company from him in the argument he seeks to advance upon that foundation. One who seeks to obtain a borrowing of monies by pawning his watch will find it difficult to obtain the monies without allowing the pawnbroker first to get his hands on the watch. And so also the timing and manner under which the "completion" of a mortgage advance in fact takes place in my view destroys the foundation for the argument. Moreover in regulation 15(1) the qualifying words 'taken out for the purpose of acquiring an interest in the home' are in my judgment as well applicable to a mortgage loan as to any other loan.

22. (1) As regards to the claimant's third ground of appeal I infer that his reference to 'noted as 4' is to 'Box 4' in the record of the tribunal's decision - containing the tribunal's reasons for decision. The relevant reference in box 4 is back to the reference in the form LT205 to Decision R(SB)11/83 and that is erroneous.

(2) Their omission indicate more than they have noted it - and in particular their omission to indicate how, if at all, it has influenced their decision and - in the light of their reference to it - if not, why not - is, however, a legitimate ground of complaint. And were there not other reasons for so doing it might well constitute proper grounds for setting the tribunal's decision aside; but that does not assist the claimant in his substantive contentions as to the decision which should take its place.

(3) The same applies to the claimant's fourth ground of appeal, though it may well be said to have been incumbent upon the tribunal to deal specifically in their stated reasons for decision with their acceptance or rejection of the claimant's contention that (as I am quite prepared myself to accept to be so) there is no other provision of the supplementary benefits legislation dealing specifically with the allowance of mortgage interest as a requirement.

23. As to ground (5), it became material for the tribunal to consider the proper treatment of interest on outstanding mortgage monies in excess of £30,000 only if, as in fact they did not, they accepted principal monies in excess of that amount as falling within the ambit of regulation 15 at all. Had they done so, then I accept the claimant's contention that an omission to distinguish between the first £30,000 and the excess over £30,000 in the context of the MIRAS scheme would have been an error on their part. But the point does not arise in relation to my own decision in para. 1(3) above.

24. My decision is accordingly as indicated in para. 1(3) above.

(Signed) I. Edwards-Jones

Commissioner

Date: 28 January 1985

Commissioner's File: CSB/991/1984

CAO File: AO 9144/84

Region: Midlands

Reg. Mortgage interest

CSB/991/1984

IEJ/AJH

SUPPLEMENTARY BENEFITS ACT 1976

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

1. (1) This is a claimant's appeal from the decision dated 8 August 1984 of a social security appeal tribunal ('the tribunal') brought by leave of the tribunal chairman and upon the contention that the tribunal's decision was given in error of law. By their decision the tribunal upheld the decision of an adjudication officer issued on 9 May 1984 to the effect that the claimant was entitled to supplementary allowance of £53.77 weekly from 9 March 1984 and £52.50 weekly from 4 May 1984. The substantive issue before the tribunal was as to the correct treatment in the computation of the claimant's entitlement to supplementary allowance of certain interest on borrowed monies for which it is common ground that he was liable. The adjudication officer now concerned supports the appeal, but upon grounds which I am unable to accept as well-founded in law.

(2) The appeal achieves a technical success, but will result in no practical advantage to the claimant (indeed he might in practical terms be better placed had the appeal not been brought). I set aside the tribunal's decision as given in error of law in the respects undermentioned and, being satisfied that it is in the circumstances of the case expedient for me so to do, now give myself the decision which the tribunal should have given.

(3) My decision is that the claimant is entitled to a supplementary allowance of £35.75 weekly from 9 March 1984 and £35.89 weekly from 4 May 1984. The reductions to these amounts of those indicated in the adjudication officer's decision of 9 May 1984 reflect exclusion from the claimant's requirements of the amounts earlier allowed in respect of mortgage interest.

(4) Whilst this is not a matter in issue upon the present appeal, I should add that I have seen nothing on the case file which suggests to me that any overpayment which may have been made in implementation of the adjudication officer's decision which included amounts in respect of mortgage interest will in the light of my own decision give rise to any recoverable overpayment.

2. It is common ground that:

(1) the present appeal has its origins in a claim made by the claimant for supplementary allowance on 7 March 1984 and that at such date he was living in an owner-occupied property of which he

was the owner and which was subject to a mortgage ('the 1982 mortgage') which he had effected in or about March 1982 with a building society and under which he was liable for mortgage interest on the outstanding principal sum which it secured, such sum standing at 7 March 1984 at £31,914.40.

(2) Whilst at 7 March 1984 such mortgage interest was payable at a current gross rate of 12.75%, that rate was reduced to 11.75% as from 4 May 1984.

(3) The 1982 mortgage was a "MIRAS" mortgage (mortgage interest relief at source), so that the claimant was entitled to satisfy his interest liability by paying not the gross interest but that net of a deduction equivalent to income tax at the prevailing standard rate (which at all material times was 30%) save as to interest on principal in excess of £30,000.

3. In circumstances which I will shortly indicate, the adjudication officer's decision brought into computation as a requirement of the claimant a weekly amount in respect of interest under the 1982 mortgage, but not the full amount for which the claimant was liable - he allowed interest only upon £10,500 of the substantially greater total outstanding principal sum. It has at all material times been and remains the claimant's contention that this was wrong, and that his housing requirement should, as regards mortgage interest, have been taken at the weekly equivalent of his interest liability on the full amount of outstanding principal under the mortgage. My decision reflects the conclusion on my part that upon a correct application of the legislation in point the claimant did not qualify for the allowance of <u>any</u> element for mortgage interest in the computation of his requirements.

4. The property in which in March 1984 the claimant was living as owner-occupier had originally been acquired in the 1960's in the joint names of himself and his wife with the assistance of a mortgage advance of approximately £6,000. Subsequently the claimant and his wife became divorced, and in or about 1976 the claimant purchased his ex-wife's interest in the property for approximately £4,500. To do that he obtained a fresh mortgage (which I will for convenience refer to as 'the 1976 mortgage', although its precise date is not in evidence). The 1976 mortgage advance was of approximately £10,000, and out of that the claimant repaid the then outstanding monies secured by the original mortgage and also paid the purchase price of his ex-wife's interest in the property. This advance was secured on the home.

5. In March 1982 the outstanding principal under the 1976 mortgage was of the order of £10,895.49. At or shortly after that time the claimant undertook highly remunerative self-employment and in circumstances which he has attributed, and I have no reason to doubt, to his having been advised that he should do so for "tax reasons", he again changed his mortgage arrangements. He obtained from a different lender from the lender under the 1976 mortgage a fresh advance - of an amount in excess of £31,000 - under the 1982 mortgage, again secured on the home (of which he was owner), applying part of that advance to repaying the then outstanding principal secured by the 1976 mortgage (which was of the order of £11,000), so that the 1976 mortgage became redeemed and discharged. The 1982 mortgage remained on foot at all material times and (as I have already indicated) the outstanding principal sum which it secured was, as at 7 March 1984, £31,914.40 with interest liability as indicated in para. 2(2) above.

6. (1) It is the claimant's contention that the whole of his interest liability under the 1982 mortgage fell properly to be taken into the

computation of his housing requirement, for the purposes of his claim for supplementary allowance, which fell to be made by the adjudication officer who gave the decision of 9 March 1984.

(2) However, the adjudication officer took the view that mortgage interest should be allowed only upon a sum - which he put at £10,500 - which represented the outstanding principal under the 1976 mortgage at the time when it was redeemed by application of that part of the much larger total amount advanced under the 1982 mortgage.

7. (1) Both the adjudication officer and the tribunal have in my judgment correctly diagnosed that the two regulations materially in point, (apart from regulation 3(2) as to need for the item in question) are regulations 15 and 17 of the Supplementary Benefit (Requirements) Regulations 1983.

(2) Regulation 15(1) materially provides:-

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(3) The 1983 Requirement Regulations, are, however, regulations made by way of consolidation of earlier and now repealed legislation, and whilst the same conclusion might well be reached by a direct approach to the current wording, when construing the phrase 'in respect of any mortgage or other loan taken out' in regulation 15(1) it is relevant to note that the present text reflects an original text (then regulation 16(1):-

> "There shall be applicable under this regulation in respect of any mortgage charged on and taken out for the purpose of acquiring an interest in the home, the amount, calculated on a weekly basis, which is payable and attributable to mortgage interest."

(4) The present text was adopted by amendment with effect from 9 August 1982, but it is in my judgment clear that the concluding words in that - 'interest on the loan' - bear more widely than to embrace only an 'other loan' in the same formulation, and that interest under a mortgage must be included. That leads to the conclusion that the word 'mortgage' is used (though in the present context adjectivally and not substantively) to refer to the documentary security so described - ie. the phrase 'in respect of any mortgage or other loan' falls to be construed as if it was phrased 'in respect of any mortgage loan or other loan'. I make this point in view of a contention raised by the claimant to which I will refer later below.

(5) I should also mention that at all material times there has been a provision - it is now in regulation 15(5) - that in its application to Scotland the regulation has effect with the substitution of references to a "heritable security" to references to a "mortgage". But that does not in my judgment materially affect the point made in (4) above.

8. (1) Regulation 17 can be loosely summarised as providing that there is to be an allowance made in respect of interest payable on sums

borrowed for the purpose of repairs and improvements to the home, but falls to be applied with due regard to its internal provision that the term 'repairs and improvements' is to be taken to mean only:-

(A) Major repairs necessary to maintain the fabric of the home; and

(B) Certain specified measures undertaken with a view to improving the fitness of the home for occupation, and listed serially from (a) to (k).

(2) All the so listed items under (B) are thus subject to the antecedently expressed restriction as to their having been undertaken with a view to improving the fitness of the home for occupation.

9. I am satisfied that both regulation 15 and regulation 17 fall to be construed in accordance with the ordinary meanings of the words they contain, save in so far as express definitions are specified. Thus in regulation 15 "mortgage" (or in Scottish contexts "heritable security") is not to be read in any acutely technical sense (such as, for example, "mortgage" bears in the special usage of that branch of the legal profession styled 'conveyancing' where a distinction is drawn between a 'mortgage' and a 'charge by way of legal mortgage' as involving different legal concepts). Nevertheless one cannot introduce provisions of social security law which bear upon formal transactions in the field of real property and heritable property - land and bricks and mortar - without taking due account both of the essential character of the transaction in point and the practical legal machinery by which such transactions are effected - not, I stress, to the extent of making fine technical distinctions; but in accordance with what an ordinary layman with a reasonable awareness of what is involved in buying and selling a house and raising monies on loan in connection with its acquisition may be presumed to know; and that degree of knowledge in my judgment is to be attributed to the legislature when construing what it has enacted.

10. (1) Since the coming into force of the Law of Property Act 1925 a "charge by way of legal mortgage" has become the almost universal procedure under which a purchaser of a home in England and Wales obtains borrowed monies with which to assist in the purchase of a home which, with the interest payable thereon, then becomes charged upon the home by way of security for repayment.

(2) So also, since the coming into force of the Conveyancing and Feudal Reforms (Scotland) Act 1970 the procedure as to "heritable securities" for which that Act provides - in closely similar fashion to the English change by way of legal mortgage - covers the same needs of a home purchaser in Scotland.

(3) In both cases there is established practical machinery by which the purchaser/borrower contemporaneously acquires for himself by disposition from the seller the title of the seller to the property (subject or not to perfection by a process of formal registration) and contemporaneously creates a security over it in favour of the lender for the sums he is borrowing for, or for part assistance with, the purchase price which is to be paid to the seller. The layman may be puzzled as to how the seller is induced to make the disposition of the property to the buyer (which must precede in time the creation by the latter of any effective security over it) without first receiving the purchase money which the lender will not be prepared to part with until he gets the security over the property for his protection. But suffice it to say that under the umbrella of well-established

procedures which in England are referred to as 'completion' this hurdle is in practical terms readily overcome.

(4) It is against the foregoing background that in my judgment the provisions of regulation 15 as to a 'mortgage or other loan taken out for the purpose of acquiring an interest in the home' fall to be interpreted and applied.

11. The "normal course" so described is to be contrasted, in my judgment, with the different situation and course of events when a person who is already the owner of his home seeks to borrow monies upon the security of it for some purpose he has in mind - be that the raising of funds for his business, the purchase of some other property, the repayment of some other borrowing already incurred, or any one or more of any of the purposes for which people may be prepared to borrow funds they do not have otherwise available; for which they are prepared to pay a prescribed rate of interest; and which they cannot conveniently raise without putting up their home as a security to the lender. One such case is that of borrower under an existing mortgage on his home who finds he can obtain a new secured advance, upon more favourable terms as to interest or repayment period, from a different lender; and who on that account negotiates a new mortgage for the purpose of paying off his antecedent mortgage, thereby procuring the release of his home from the antecedent security, but imposing the new security upon it instead. And here also there are established 'completion' procedures for getting over the apparent problem of obtaining the new advance concurrently with obtaining the release of the property from the antecedent mortgage.

12. (1) What is, however, in my judgment quite clear is that regulation 15 has in contemplation and applies only to the interest upon loans 'taken out for the purpose of acquiring an interest in the home', and not to the interest on loans taken out for any other purpose. And although one can readily formulate terms in which regulation 15 could be expressed to bear also upon the interest payable under a loan taken out for the purpose of repaying an earlier loan where the earlier loan had been taken out for the purpose of acquiring any interest in the home, the language at present employed in the regulation is not in my judgment apt to include interest payable in respect of the second loan. An instance of a statutory provision which does cater for the latter case may be found in section 24(1)(b) of the Housing Subsidies Act 1967 whereby the provisions of the 'option mortgage scheme' (now obsolete) were made applicable to a loan if:-

> "(b) The loan is for or in connection with, or is made with a view to the repayment by means thereof of the amount outstanding on a previous loan for or in connection with, one or more of the following purposes, that is to say:-
>
> (i) acquiring ...
>
> (ii) ...
>
> (iii) ..., a dwelling on that land."

(2) I cite that provision as illustrating that whilst the drafting of an appropriate provision to bear upon interest under a "replacement loan" is perfectly practicable, it requires some elaboration of wording to achieve the desired result. And I do not believe that it is within any legitimate bound of "necessary implication" to construe the wording in fact to be found in regulation 15 as so extending. Whether the

result in fact achieved represents the effect the legislature intended and anticipated is not a matter upon which I can speculate; but whilst the result may be unfortunate in the case of a borrower who 'changes horses in mid-stream', the legislature plainly did not intend that the mortgage interest expenses of a claimant should be met under the supplementary benefits scheme in the case of a mortgage upon his home regardless of the circumstances in which it had been created and the purposes to which the borrowed funds were applicable.

13. The claimant explained to the tribunal, and the tribunal have found as facts, that over and above the amount needed to repay the outstanding loan under the 1976 mortgage he received a sum of approximately £21,000 in cash from the mortgage advance under the 1982 mortgage; that of the £21,000 about £1,500 had been spent on his home, mainly on decoration and slab laying outside; that most of the rest had gone in repayment of accrued debts to his bankers and certain friends, and the balance on living expenses of the claimant and his family.

14. (1) Having regard to those findings it is quite clear, to my mind, both that none of the £21,000 approx. could conceivably have been regarded as expended upon major repairs necessary to maintain the fabric of the home, and that some £1,500 at most merited any other consideration in the context of regulation 17.

(2) I have been a little concerned at the treatment of the regulation 17 aspect of the case accorded by the tribunal's stated reasons. They were:-

> "The tribunal looked at the way in which the £21,000 approx. was spent - on the evidence given none of the money (in particular redecoration and slabs) was in their opinion for 'major repairs necessary to maintain the fabric of the home' and so no amount could be taken into account."

That formulation might well be thought to demonstrate an error of law on the part of the tribunal, consisting in oversight as to the scope of regulation 17 extending more widely than as to major repairs necessary to maintain the fabric of the home. However, after consideration of the chairman's lengthy note of evidence I have had no hesitation in concluding that the claimant was so vague about the expenditures by which the £21,000 approx. had been expended that no reasonable tribunal properly instructed in the law could upon the evidence before the tribunal properly have attributed any of it as expended in any manner capable of being brought within any of the several heads apprised within the definition of 'repairs and improvements', still less have concluded that any monies raised by the 1982 mortgage had been borrowed for the purpose of effecting such.

(3) I need in this context add only that the claimant's present grounds of appeal advance no case referable to regulation 17, and that it accordingly passes out of the case, leaving me to deal further with contentions which have been advanced in the context of regulation 15.

15. It is convenient before treating of those in detail to refer to the now reported Commissioner's Decision R(SB)27/84, which figures in the case papers under its earlier reference as the "decision on Commissioner's File CSB/928/1983". In that case the learned Commissioner was concerened to indicate the proper treatment in the computation of a claimant's capital resources for supplementary benefit purposes of certain property owned by the claimant, in the circumstances that it comprised two separate constituent

elements, a bungalow which was 'the home' (and as such fell to be disregarded as a reckonable capital resource, pursuant to regulation 6 of the Resources Regulations) and also a parcel of 'development land', the value of which was reckonable (and the separate valuation of which itself presented no problem). The problem was that at the material time the entirety of the property, comprising both the two constituent elements, was subject to a single mortgage upon which there was a substantial principal sum secured, and that (as would in my own experience be by no means unusual) the whole of the mortgage money stood secured upon the whole of the property (and upon each and every part of it), with the result that in the event of the lender seeking to recover the loan the lender was, if entitled to realise his security at all, entitled to recover it all (or so much of it as the proceeds of sale would provide) by sale of either of the two constituent parts. The tribunal whose decision was under appeal before the Commissioner in that case had accepted submissions that there could for the purposes of the resources be an apportionment of the amount of the mortgage debt attributable respectively to the home and to the development land. The learned Commissioner indicated that in arriving at the capital value of the development land in accordance with the provisions of regulation 5 of the Resources Regulations, their provision for deducting any outstanding debt or mortgage secured on property falling to be reckoned as a capital resource admitted of no apportionment of the mortgage debt, and that it was necessary to deduct the whole of the outstanding mortgage debt from the development land. And, in so deciding the learned Commissioner indicated (paragraph 11):-

> "There is no provision in the Supplementary Benefits Act 1976, as amended, nor anywhere in the regulations, for any apportionment of the mortgage debt between any property which is 'the home' and that which is not, when arriving at the value of the property that does not form part of 'the home'. ... the entire mortgage debt is to be deducted when valuing the claimant's capital resources."

16. Whilst, respectfully, I wholly concur in that decision, it is, in the context of the present case, material to indicate that to hold that because an entire principal sum is charged upon the security of 2 properties and is enforceable to the hilt against either one, or both, the entire sum must be deducted from the value of one, if one only is reckonable, that is dealing with quite a different legal point from the point arising in the present case, which is the entirely separate question as to whether, if there is charged upon 'the home' (and upon nothing else) by a single mortgage an entire capital sum part of which is identifiable as representing money borrowed for the purpose of acquiring an interest in the home and part of which is not so identifiable (whether or not identifiable as having been borrowed for some separate purpose), regulation 15 will bear on the interest attributable to the whole, to the relevant part, or to none of the principal monies outstanding.

17. Founding upon what is, in my judgment, plainly a misunderstanding of that for which Decision R(SB)27/84 stands as authority, the adjudication officer now concerned has, in support of the claimant's appeal - and upon the additional premise that some £10,500 of the principal sum outstanding at the material date upon the security of the home under the 1982 mortgage represents the proportion of the total advance under it used to repay the 1976 mortgage - contended that because of what R(SB)27/84 decided there can be no apportionment of the entire mortgage debt under the 1982 mortgage as between money borrowed for the purpose of acquiring an interest in the home and monies borrowed for other purposes, and that in consequence the claimant is entitled to have regulation 15 applied in his favour in respect of the interest on the entire mortgage under the 1982 mortgage debt.

18. (1) For the reasons I have already indicated I have found the premise as to the £10,500 being monies borrowed to acquire an interest in the home to be itself unsustainable. It is therefore unnecessary to my present decision to pursue further what would be the result had the outstanding principal amount been identifiable as consisting, in identifiable part only, of monies borrowed for that purpose. I have nevertheless thought it right to sound a precautionary note as to the relevance of the matter decided in Decision R(SB)27/84 to the determination of such an issue if and when it falls to be determined, since one may readily envisage cases in which there could be part or parts of a single advance upon the security of a single property consisting exclusively of 'the home' which could and could not be isolated as falling within the interest of regulation 15(1) as to the "purpose" of their having been borrowed - though I accept the submission of the adjudication officer now concerned that it would not be legitimate to separate the whole into parts in reliance upon a mere 'guesstimate'.

(2) I should for completeness here mention that I also accept the adjudication officer's submission that Decision R(SB)11/83, to which the tribunal were referred, must have been cited in error, as its subject matter has nothing to do with any issue arising in the present case.

19. The claimant has set out his grounds of appeal as follows:-

"(1) The tribunal failed to recognise, appreciate or give consideration to the general context of regulation 15 within the operation of the Supplementary Benefits Act. They knowing that regulation 15 stood alone to provide home security for claimants with any mortgage, by allowing the interest to be payable.

(2) The tribunal failed to recognise the essential difference between:-

(a) a mortgage on a home, and

(b) a loan taken out for the purpose of acquiring an interest in a home.

By definition a mortgage is 'a pledge as security for a debt' with the interest in the home having been acquired before the pledge is made. Now (b) is self-explanatory in that the loan precedes the acquisition of the home.

(3) The tribunal failed to show how and why the Commissioner's decision ref R(SB)18/83 (paragraph 11) took any part in their decision, it having been noted at 4.

(4) The tribunal failed to consider my submission that there is no other legislation to allow the specific alteration of my mortgage outstanding balance.

(5) The tribunal failed to afford the claimant a determination that interest on mortgages or parts thereof in excess of £30,000 are paid gross, ie. without the MIRAS deduction."

20. There is, in my judgment, no substance in the claimant's first ground of appeal. There is nothing in the tribunal's decision to indicate, nor

any other reason for supposing, that the tribunal did not understand the general framework of the Requirements Regulations within which regulation 15 is to be found or the general framework of the Acts he mentions and under which those regulations are made. If the stress in the second sentence is, as I understand it to be, laid upon the word 'any' in the phrase "home security for claimants with any mortgage", then it is the claimant who has misunderstood the position, because regulation 15(1) provides for the allowance of interest only where arising under a restricted class of mortgages, namely those secured on the home; and even more restrictively as to the purpose of the borrowing.

21. The claimant's second ground also I find to have no substance in it. The derivation of the word "mortgage" is from the Old French word so spelt and to be translated literally as 'dead pledge' - so that one may go along with the claimant in his reference to it as 'a pledge as security for a debt'; but there I part company from him in the argument he seeks to advance upon that foundation. One who seeks to obtain a borrowing of monies by pawning his watch will find it difficult to obtain the monies without allowing the pawnbroker first to get his hands on the watch. And so also the timing and manner under which the "completion" of a mortgage advance in fact takes place in my view destroys the foundation for the argument. Moreover in regulation 15(1) the qualifying words 'taken out for the purpose of acquiring an interest in the home' are in my judgment as well applicable to a mortgage loan as to any other loan.

22. (1) As regards to the claimant's third ground of appeal I infer that his reference to 'noted as 4' is to 'Box 4' in the record of the tribunal's decision - containing the tribunal's reasons for decision. The relevant reference in box 4 is back to the reference in the form LT205 to Decision R(SB)11/83 and that is erroneous.

(2) Their omission indicate more than they have noted it - and in particular their omission to indicate how, if at all, it has influenced their decision and - in the light of their reference to it - if not, why not - is, however, a legitimate ground of complaint. And were there not other reasons for so doing it might well constitute proper grounds for setting the tribunal's decision aside; but that does not assist the claimant in his substantive contentions as to the decision which should take its place.

(3) The same applies to the claimant's fourth ground of appeal, though it may well be said to have been incumbent upon the tribunal to deal specifically in their stated reasons for decision with their acceptance or rejection of the claimant's contention that (as I am quite prepared myself to accept to be so) there is no other provision of the supplementary benefits legislation dealing specifically with the allowance of mortgage interest as a requirement.

23. As to ground (5), it became material for the tribunal to consider the proper treatment of interest on outstanding mortgage monies in excess of £30,000 only if, as in fact they did not, they accepted principal monies in excess of that amount as falling within the ambit of regulation 15 at all. Had they done so, then I accept the claimant's contention that an omission to distinguish between the first £30,000 and the excess over £30,000 in the context of the MIRAS scheme would have been an error on their part. But the point does not arise in relation to my own decision in para. 1(3) above.

24. My decision is accordingly as indicated in para. 1(3) above.

(Signed) I. Edwards-Jones

Commissioner

Date: 28 January 1985

Commissioner's File: CSB/991/1984

CAO File: AO 9144/84

Region: Midlands