

# 539 R. v Kensington & Chelsea Royal Borough Council

Queen's Bench Division

15 December 1995

**(1996) 28 H.L.R. 538**

Dyson J.

December 15, 1995

## Introduction

1 The payment of housing benefit is governed by the Housing Benefit (General) Regulations 1987 (S.I. 1987 No.1971, Encyclopedia, para. 3– 1210 *et seq.*). The regulations make provision for rent allowances to be paid to claimants whose landlord is not the local housing authority. The amount of housing benefit is based on the “ periodical payments which a person is liable to make in respect of a dwelling he occupies as his home” : reg. 10.

2 Rent allowances are usually paid to the claimant (see regulation 92(1)) but must be made to the landlord directly in any of the circumstances prescribed by regulation 93. By regulation 93(b), the authority must pay the landlord directly where the claimant is at least in eight weeks arrears of rent, except where it is in the overriding interest of the claimant not to make direct payments to the landlord.

3 Under regulation 95:

“ (1) An authority shall withhold payment of a rent allowance where, but for the fact that it is in the overriding interest of the claimant not to make direct payment to his landlord, the authority would have made direct payments under regulation 93(b) (circumstances in which payment is to be made to a landlord).”

A payment withheld by the local authority under regulation 95(1) is to be retained by the authority until it is no longer in the overriding interest of the claimant not to make payment to his landlord: regulation 95(3)(c).

4 The Local Government Act 1972, section 111 provides:

“ Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.”

## **Facts**

The applicant lived in a property let to him by a private landlord. He was dependent on welfare benefits and received housing benefit from the respondents. In 1993, a dispute arose between the applicant and his landlord concerning his security of tenure. The landlord's agents refused to accept payment of rent. Arrears accrued, but the respondents withheld payment of housing benefit on the basis of regulation 95(1) of the Housing Benefit (General) Regulations 1987 (S.I. 1987 No. 1971) until the dispute between the parties was resolved. In February 1994, the landlord commenced proceedings claiming possession and mesne profits. The applicant served a defence and counterclaimed for damages for breach of repairing covenant. The landlord amended his claim to add a claim for interest on the mesne profits.

In October 1994, the applicant's solicitors wrote to the respondents asking them to place the withheld housing benefit into an interest bearing account so as to enable the applicant to meet the claim for interest should it be awarded by the court in the possession action. Subsequently, the applicant's solicitors suggested to the respondents that the housing benefit might be paid to their firm to be held by them as stakeholders in an interest bearing account. The respondents refused to accede to their requests, contending that they had no

power to do so. The applicant sought judicial review of the respondents' decision.

Held (dismissing the application)

- (1) Interest on payments withheld from the landlord by a local authority is not to be taken into account in determining the payments which the claimant is liable to make in respect of a dwelling and is therefore to be disregarded in fixing the maximum housing benefit payable by the authority;
- (2) The detailed legislation governing the administration of housing benefit contains an implied prohibition against the payment of interest; the authority impliedly have power to maintain and operate banking arrangements for the payment out of benefit and to do other administrative acts in connection with it, but the payment of sums of money to or on behalf of claimants stands on an altogether different footing to the performance of such administrative acts; the regulations deal specifically and in detail with payments to claimants and it is clear from the legislation that it is only payment of benefit that can be made; even if the exercise of the power did otherwise fall within section 111(1) of the Local Government Act 1972, it would be *ultra vires* the respondent to exercise it because that subsection is subject to the housing benefit legislation;
- (3) Section 111(1) does not convey power on an authority unless the power facilitates or is conducive or incidental to the discharge of the authority's function; payment of interest did not assist the authority's function, namely the payment of benefit;
- (4) The words "shall be retained by the authority" in regulation 95(3) of the Housing Benefit (General) Regulations 1987 (S.I. 1987 No. 1971) mean no more than the money shall be withheld and not paid; they do not contemplate that the money will necessarily be in the hands of the authority at the time of the withholding, still less that it will be in some identifiable and designated account;
- (5) It does not follow from the fact that the authority are expressly required to have regard to the claimant's overriding interest when the question of direct payment to his landlord arises, that they are impliedly required to have regard to the interest of the claimant when deciding whether, and if so where and on what terms, to set aside a sum equivalent to the payment withheld;
- (6) The award of statutory interest is in the discretion of the court; in a case where rent is tendered to the landlord by a tenant who is in receipt of housing benefit and \*540 where as a result housing benefit is withheld and the tenant does not have the means to pay the interest on the arrears of rent, it would be surprising if a court granted statutory interest to the landlord in the resulting proceedings.

## **Representation**

- Jan Luba for the applicant, instructed by Wainwright & Cummins, London.
- James Findlay for the respondent, instructed by Kensington & Chelsea Royal Borough Council.

## **JUDGMENT**

DYSON J.:

### **The Issue**

This is an application for judicial review of a decision of the respondent council notified to the applicant by letter dated November 10, 1994, that his application for the transfer of his housing benefits into some form of interest bearing account be refused. The single issue that arises is whether a local authority has power to arrange for payments of housing benefit which have been withheld to be placed in an interest bearing account whilst they are retained, and pending payment out. There appears to be no authority on this point. It is one of considerable importance to local authorities responsible for the administration of housing benefit schemes. If there is no such power, then it is common ground that the application for judicial review must be dismissed; and that if there is such a power, then the application should be allowed and the respondent directed to exercise the power, or the matter should be remitted for reconsideration.

### **The Facts**

The applicant lives at 26, Thurloe Street, Kensington, London, SW7. His landlords are South Kensington Developments Limited. He is dependent on welfare benefits, and cannot afford the contractual rent or other payments for his accommodation.

Until a dispute arose between the applicant and his landlords, the respondent paid him housing benefit in respect of his tenancy. In 1993, a dispute arose between the applicant and the landlords as to his security of tenure, and in respect of other matters. Payment of rent was refused by the landlords' agents. In the exercise of its powers under Regulation 95(1) of the Housing

Benefits (General) Regulations 1987 (" the Regulations" ), upon being notified of this dispute, the respondent withheld payment of housing benefit pending the resolution of the issues between the applicant and his landlords. The sum withheld had exceeded £1700 by July 1994.

In February 1994, the landlords commenced proceedings in the West London County Court, claiming both possession and mesne profits at the rate of £180 per week. The applicant served a defence and counterclaim. By his counterclaim, he sought damages for breach of the landlords' covenant of repair. On the June 6, 1994, the landlords amended their claim to add a claim for interest at the rate of 15 per cent per annum from December 17, 1992 until March 31, 1993, and 8 per cent per annum from April 1, 1993 onwards. I am told that the county court action raises a point of law of some difficulty. It is currently under appeal to the Court of Appeal. If an award of interest is made in favour of the landlords on their money claim, the applicant does not have any funds to meet it.

On October 7, 1994, the applicant's solicitors wrote to the respondent, and asked it to place the monies withheld into an interest bearing account. In subsequent letters, \*541 the applicant's solicitors have suggested that the amount withheld might be paid to his firm to be held by them as stakeholders in an interest bearing account. The respondent has refused to accede to this request, contending that it has no power to do so.

### **The Statutory Framework**

The Social Security Contributions and Benefits Act 1992 (" the Contributions Act) provides so far as material:

(1) Prescribed schemes shall provide for the following benefits  
(in this Act referred to as " income related benefits" )-

...

(d) housing benefit

(1) A person is entitled to housing benefit if -

(a) he is liable to make payments in respect of a dwelling in Great Britain which he occupies as his home;

(b) there is an appropriate maximum housing benefit in his case;

and

(c) either -

(i) he has no income or his income does not exceed the applicable amount; or

(ii) his income exceeds that amount, but only by so much that there is an amount remaining if the deduction for which subsection (3)(b) below provides is made.

(2) In subsection (1) above " payments in respect of a dwelling" means such payments as may be prescribed. ... (3) where a person is entitled to housing benefit, then

(a) if he has no income or his income does not exceed the applicable amount, the amount of the housing benefit shall be the amount which is the appropriate maximum housing benefit in his case..."

" Prescribed" means specified in or determined in a accordance with regulations.

The Social Security Administration Act 1992 (" the Administration Act" ) provides so far as material:

(1) Regulations may provide

...

(o) for withholding payments of a benefit to which this section applies in prescribed circumstances and for subsequently making withheld payments in prescribed circumstances"

(1) Housing benefit provided by virtue of a scheme under section 123 of the Contribution and Benefits Act (in this Act referred to as “ the housing benefits scheme” ) -

...

(c) is in any other case to be in the form of a rent allowance funded and administered by the appropriate local authority.

... \*542

(8) An authority may modify any part of the housing benefits scheme administered by the authority

(a) so as to provide for disregarding, in determining a person's income... the whole or part of any war disablement pension or war widow's pension payable to that person;

(b) to such extent in other respects as may be prescribed, and any such modification may be adopted by resolution of an authority.

The Regulations, so far as material, provide as follows:

(1) Subject to paragraphs (2) and (3) and regulations 90 to 97 (frequency of payment of rent allowance, and payments on account of a rent allowance, payment provisions, offsetting) the appropriate authority shall pay housing benefit to which a person is entitled under these Regulations at such time and in such manner as is appropriate, having regard to -

(a) the times at which and the frequency with which a person's liability to make the payment of rent arises, and

(b) the reasonable needs and convenience of the person entitled thereto.

93 A payment of rent allowance shall be made to a landlord (and in this regulation the " landlord" includes a person to whom rent is payable by the person entitled to that allowance) -

(a) where under Regulations made under the Act an amount of income support payable to the claimant or his partner is being paid direct to the landlord; or

(b) where sub-paragraph (a) does not apply and the person is in arrears of an amount equivalent to 8 weeks or more of the amount he is liable to pay his landlord as rent, except where it is in the overriding interest of the claimant not to make direct payments to the landlord.

(1) An authority shall withhold payment of a rent allowance where, but for the fact that it is in the overriding interest of the claimant not to make direct payment to his landlord, the authority would have made direct payments under Regulation 93(b) (circumstances in which payment is to be made to a landlord).

(2) In any other case an authority may withhold payment of a rent allowance where it is satisfied that the person entitled to that allowance is not paying regularly the rent to which the allowance relates.

(3) Except where Regulation 96 (payment on death of the person entitled) applies, a payment withheld under paragraph (1) or (2) shall be retained by the authority until such time as it is satisfied that

(a) the claimant has discharged his liability to his landlord; or

(b) the claimant will discharge his liability to his landlord if payment is made to him; or



(c) in a case to which paragraph (1) applies, it is no longer in the overriding interest of the claimant not to make payment to his landlord. \*543

## **Matters of Common Ground**

The following is agreed between the parties:

- (i) housing benefit otherwise payable by the respondent to the applicant by way of rent allowance has been withheld;
- (ii) such withholding is lawful, and follows a determination made by the respondent to apply Regulation 95(1) of the Regulations;
- (iii) if the respondent had not judged that it was in the overriding interest of the claimant not to make direct payments to the landlords, then it would have been obliged to make such payments to the landlords pursuant to Regulation 93;
- (iv) the respondent's decision to withhold payment of rent allowance is not challenged by the applicant either by way of the review mechanism contained in the Regulations (Regulation 72), or by this application;
- (v) there is no statutory duty upon the respondent (imposed by primary or secondary legislation) to accede to the applicant's request to arrange for the payments withheld to be placed into some form of interest-bearing account during their retention;
- (vi) there is no specific reference to any power to make such arrangements in the primary or secondary legislation relating to housing benefit;
- (vii) the legislation contains no express or implied prohibition against the making of the arrangement sought;
- (viii) the retention of the withheld benefit in an interest-bearing account would not be a "modification" of the housing benefit scheme requiring the consent of the Secretary of State pursuant to section 134(8)(b) and 134(13) of the Administration Act.

Furthermore there is no dispute as to what Mr Caple says in his affirmation on behalf of the respondent as to the funding of housing benefit. The material parts of his affirmation are as follows:

" 3. Firstly, I will set out how Housing Benefit is financed. Most of it is funded by the Government; in the case of rent allowance it is dealt with by the Department of Social Security and in the case of rent rebate by the Department of the Environment.

Authorities really act as payment agencies for the most part as the Government generally funds 95 per cent of any payments actually made by an authority. Although that can be reduced in certain circumstances in respect of all or part of a payment made by an authority those circumstances do not arise here and are the exception rather than the rule. (Provision is made for finance by section 135 and 137 of the Social Security Administration Act 1992 and S.I. 1994 No. 781).

4. In respect of each financial year the Respondent advises the respective Department half yearly of our estimate of the amount of benefit which it expects to pay out for that year. That estimate will be based on what it has already paid out (if anything) and what it considers that it will pay out for the remainder of that year.

5. After receipt of our claim, the relevant department makes a payment on account which roughly covers what the respondent has to pay out for the following month. It is important to note that the respondent is only paid for what it expects that it will pay that next month and that such payment is only " on account" . \*544

6. At the end of each financial year a formal subsidy claim is submitted. It is audited. It determines the final amounts due for that year and results in either a further payment to the respondent or a repayment if it has been paid more than it has paid out.

7. Each year a sample of cases is studied, about 20-30. If it is found that the respondent has over claimed in respect of any the whole subsidy claim is reduced by a proportion, which can be fairly drastic! It is clear that claims which are not properly based on payments actually made and/or at the correct rate should not be made. Any subsequent reduction in funding has to be made up by the respondent. Thus if it had claimed for the applicant but

had not paid him (or his landlord) and that was discovered, a reduction would occur in the monies paid to the respondent, but of far greater magnitude than the value of the applicant's claim.

8. Although claims for the monthly payments and final formal subsidy are large and do not specify each case, no case should be or is claimed for in respect of which payments are not made or could have been made in respect of the applicant's claim throughout 1994/5 financial year as he was not being paid any money. If a payment is made in respect of his claim at some stage the authority will be reimbursed the money when such payment is made. There is no restriction in respect of the authority claiming money of the department in respect of claims going back more than one year.

9. The foregoing applies in all withholding cases, all cases in which a payment on account is made first and then a higher payment made later and in any other circumstances when the authority pays claims late. There is no provision for the claiming of interest from the Government. In such circumstances the authority itself has to fund the "flow" of Housing Benefit.

10. It is clear that the respondent whilst in the terms of the Housing Benefit (General) Regulations 1987 is withholding benefit it does not have in fact most of the money relating to the applicant's actual claim until after it has paid it. If money were to be put aside and put in an account it would in the main have to come from the respondent's general resources. There is no justification for the respondent lending money in effect to the applicant or providing part of a fund to him out of which he can earn interest when that part of that fund would otherwise be earning interest for the authority and could not be considered to form part of his withheld payment. To do so would require the respondent to divert resources from other areas of the housing

budget, which resources are limited severely, to payments of interest in respect of money it has not received and which it could not recover.”

It is common ground that what Mr Caple says accurately reflects the position provided for by section 135 of the Administration Act.

## **The Arguments**

At the heart of this application lies section 111(1) of the Local Government Act 1972 (“ the 1972 Act” ) which provides:

“ Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of \*545 any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.”

It is common ground that the functions of a local authority are “ all the duties and powers of a local authority; the sum total of the activities Parliament has entrusted to it” : per Lord Templeman in Hazell v. Hammersmith and Fulham L.B.C. [1992] 2 A.C. 1, 29F.

For the applicant, Mr Luba submits as follows:

- (i) the relevant function of the respondent in the instant case is the delivery of the local housing benefit scheme.
- (ii) The establishment of an interest-bearing account for the deposit of retained payments of housing benefit facilitates, alternatively is incidental or conducive to the discharge of that function. The legislature cannot have, and has not, specified every aspect of the way in which housing benefit is administered. It is for the respondent to determine how it administers the scheme. By way of example, it can decide (a) to send out payments by first class post, by second class post or in any other manner, (b) to employ administrators directly or to contract-out administration, (c) to maintain and operate banking arrangements for payment-out of benefit and payment-in of subsidy receipts (such as repaid overpayments), and (d) to provide translation or interpretation facilities for non-English speaking claimants. None of these arrangements is dealt with in the regulations. These are all examples of

things done by a local authority which facilitate or are conducive or incidental to the delivery of the local housing benefit scheme.

- (iii) It is accepted that the legal ownership of the money retained remains with the local authority until it is paid over to the landlord; but when payment is made to the landlord, it is made on behalf of the claimant who is entitled to the housing benefit. There is no legal obstacle to prevent payment of any retained money into an interest-bearing account, the ultimate destination of the interest being determined according to the outcome of the dispute between landlord and tenant. Thus, for example, if when the principal is paid over to the landlord, the accrued interest is £1000, and it is determined by a court or agreed between the parties that the landlord should receive interest in the sum of £500 on the arrears of rent, then £500 will be paid out of the fund to the landlord, and the balance of £500 will be retained by the local authority.
- (iv) The object of the housing benefit scheme is to ensure that needy persons do not fall into debt with their landlords. The reference in regulations 93 and 95(1) to the "overriding interest of the claimant" underlines the fact that the scheme is to be administered for the benefit of claimants who satisfy the criteria for entitlement to housing benefit. The establishment of an interest-bearing account for the deposit of retained payments is consistent with and calculated to further the underlying object of the housing benefit scheme.
- (v) If there is no power to establish such an account, then there will be cases (of which the present is an example) where without fault on his or her part, a claimant will fall into debt, and be at risk of eviction. By definition, those in receipt of housing benefit are on low incomes. If the landlord succeeds in obtaining judgment for rent (or mesne profits) and for interest, the tenant will be in difficulties in meeting the interest, even if the payment-out of the retained housing benefit satisfies the outstanding arrears. The amount of interest will escalate the longer the withholding \*546 continues. Such hardship, or the risk of it, is wholly disproportionate to the burden upon the authority of opening an interest-bearing account in which withheld payments can be retained.

For the respondent, Mr Findlay submits as follows:

- (i) the housing benefit scheme is self-contained and all embracing; the statutory provisions (which are very detailed) speak of payment only of housing benefit, not housing benefit plus interest. If Parliament had intended to confer on a local authority the power to pay interest on payments that have been withheld, it would have expressly provided. By implication, therefore, the power is excluded.
- (ii) Accordingly, the power contended for is excluded by the legislation, and section 111(1) of the 1972 Act cannot be invoked, since the powers conferred by that sub-section are expressed to be "subject to the provisions of this Act and any other enactment".

- (iii) Alternatively, the power contended for does not facilitate, and is neither conducive nor incidental to the discharge of the local authority's function. The relevant function is that of administering the housing benefit scheme in accordance with the regulations. Payment of interest is irrelevant to the payment of housing benefit in accordance with the regulations.
- (iv) The examples given by Mr Luba of powers that are sanctioned by section 111(1) of the 1972 Act are ones of a purely administrative nature, and are distinguishable: they concern making the scheme work, by assisting claimants to make their claims, enabling payment of housing benefit to be made and so on. None of them concerns the amounts of payments that may be made by the authority to or on behalf of claimants.
- (v) If Mr Luba's argument is correct, then local authorities will suffer hardship by reason of the funding arrangements set out at section 135 of the Administration Act, whose working in practice is described in those passages in the affirmation of Mr Caple to which I have already referred.

## **Decision**

In my judgment, this application fails substantially for the reasons advanced by Mr Findlay. Mr Luba does not contend that interest on payments of housing benefit that are withheld is part of the housing benefit itself. In my view, he is right not to do so. Section 130 of the Contributions Act, together with the regulations, establishes the maximum housing benefit payable in each case. Interest on payments withheld from the landlord is not mentioned: it is not a factor to be taken into account in determining the payments which the claimant is liable to make in respect of a dwelling (section 130(1)), and is therefore disregarded in fixing the maximum housing benefit payable by the authority. Mr Luba's argument is that interest on housing benefit withheld under regulation 95 may be paid to or on behalf of a claimant by reason of section 111(1) of the 1972 Act.

### **Is payment of interest prohibited by the legislation that governs the administration of housing benefit schemes?**

If it is prohibited, then section 111(1) cannot avail the applicant. It is true that there is no express prohibition. In my view, however, there is an implied prohibition. The \*547 statutory provisions which govern the administration of

housing benefit schemes are very detailed. A glance at section 5(11) of the Administration Act and the regulations made thereunder shows that Parliament intended to define the powers of the authority in relation to the administration of schemes with considerable precision. Section 5(1)(n) refers to regulations for suspending payment in certain circumstances; and section 5(1)(o) to regulations for withholding payments of a benefit and for subsequently making withheld payments in prescribed circumstances. Overpayments are expressly dealt with. Thus, section 75 of the Administration Act provides:

“ (1) Except where regulations otherwise provide, any amount of housing benefit paid in excess of entitlement may be recovered in such manner as may be prescribed either by the Secretary of State or by the authority which paid the benefit.

(2) Regulations may require such an authority to recover such an amount in such circumstances as may be prescribed.”

The relevant regulations are to be found at Regulations 98 to 102. It is significant that nowhere in these detailed provisions is there any reference to interest. Section 5(1)(o) of the Administration Act empowers regulations for the subsequent making of withheld payments of “ a benefit” in prescribed circumstances.

Section 5(1)(n) refers to suspension, and therefore impliedly to the subsequent release of what is payable, *i.e.* benefit. The provisions regarding overpayment are detailed. The fact that the authority could recover statutory interest if it decided to litigate to recover the overpayment is irrelevant.

Regulation 102 empowers an authority to recover from a person any recoverable overpayment by deduction from any housing benefit to which that person is entitled, or it may request the Secretary of State to recover the overpayment from the benefits prescribed in regulation 105. Thus, the draftsman contemplated recovery of overpayment by means other than litigation: but what may be recovered in this manner is the recoverable overpayment, and not interest thereon.

I accept, of course, that the legislature could not have intended to specify every aspect of the way in which housing benefit is administered. Thus, quite apart from section 111(1) of the 1972 Act, the authority impliedly has the power to maintain and operate banking arrangements for payment out of benefit, and do other administrative acts of the kind mentioned by Mr Luba: see *Att. — Gen. v. Smethwick Corporation* [1932] 1 Ch. 563. The fact that the statutory provisions governing the administration of housing benefit schemes are very detailed is not of itself sufficient to exclude the implied power to do everything that can fairly be regarded as incidental to or consequential upon the powers expressly conferred by statute.

But it seems to me that the payment of sums of money to or on behalf of claimants stands on an altogether different footing from the performance of administrative acts of the kind instanced by Mr Luba. The regulations deal specifically and in detail with payments to claimants. It is quite clear that it is only payment of benefit that can be made. Administrative acts such as those mentioned by Mr Luba would undoubtedly have been regarded at common law as incidental to the powers and duties conferred by the benefit legislation. In my judgment, payment of interest on retained payments would not have been so regarded. I mention this here, not in order to anticipate my conclusion on the section 111(1) point, but merely to show why I cannot accept Mr \*548 Luba's submission that payments of interest are no different in principle from administrative acts of the kind that he mentions. The special status of the authority's power to make payments is underlined by section 135 and 137 of the Administration Act and the evidence of Mr Caple. Payment of the retained monies into a specially designated interest-bearing account has potentially considerable adverse financial consequences to the respondent for the reasons explained by Mr Caple. This supports my conclusion that the power contended for by Mr Luba is not impliedly authorised by the Act. Accordingly, even if the exercise of the power did otherwise fall within section 111(1) of the 1972 Act, it would be *ultra vires* the respondent to exercise it, because that sub-section is subject to the housing benefit legislation.

### **Section 111(1) of the 1972 Act**



The relevant function for the purposes of the application of section 111(1) is the function of administering a housing benefit scheme in accordance with the relevant statutory provisions. This includes determining the entitlement of a claimant to housing benefit, and making payments of housing benefit in accordance with regulations 88 to 97. I have already quoted extracts from these regulations: they are concerned with the payment of housing benefit in the form of rent allowances, and not with the payment of anything else. The purpose underlying housing benefit schemes so administered is undoubtedly to ensure that the poorest members of the community do not fall into debt with their landlords. That, however, is quite different from saying that the relevant function for the purposes of section 111(1) is doing whatever is necessary to prevent claimants from becoming indebted to their landlords and in consequence facing the threat of eviction. The statutory powers are drawn tightly and with precision.

The question, therefore, is whether payment of interest on benefit that has been withheld facilitates or is conducive or incidental to the payment of housing benefit in the form of rent allowances. In my judgment, the answer is clearly no. Payment of interest does not assist the payment of benefit. It may assist the claimant if a certain contingency arises, namely that it is determined by a court or agreed between landlord and tenant that interest should be paid to the landlord on the arrears of rent. Section 111(1) does not come into play unless the power facilitates or is conducive or incidental to the discharge of the function. It is insufficient to show that the power might benefit the claimant for whose benefit the function is discharged.

Mr Luba sought to advance a particular argument based on regulation 95(1). He pointed out (correctly) that an authority that has decided that it is in the overriding interest of the claimant not to make direct payment to the landlord, is under a duty to withhold payment and to retain it until it is no longer in the overriding interest of the claimant not to make the payment to the landlord. Mr Luba submitted that the money must be retained somewhere, and that it must be retained in a manner and place that advances rather than harms the claimant's overriding interest, *i.e.* in an interest bearing account. I accept Mr Luba's premise, but not his conclusion. First, I cannot accept that the words

“ shall be retained by the authority” in Regulation 95(3) mean anything more than that the money shall be withheld and not paid. They do not contemplate that the money will necessarily be in the hands of the authority at the time of the withholding, still less that it will be in some identifiable and designated account. Secondly and in any event, it does not follow from the fact that the authority is expressly required to have regard to the claimant's overriding interest when the \*549 question of direct payment to his or her landlord arises, that it is (impliedly) required to have regard to the interest of the claimant when deciding whether, and if so where and on what terms, to set aside a sum equivalent to the payment withheld.

I conclude, therefore, that section 111(1) of the 1972 Act does not avail the applicant.

### **Other considerations**

I have reached a clear conclusion by analysing the statutory provisions and considering section 111(1) of the 1972 Act in the light of them. Is my conclusion likely to work serious injustice to claimants of housing benefit? If it is, then this might throw doubt on my analysis. Mr Luba submits that the implications of Mr Findlay's arguments are potentially very serious for claimants in cases such as the present. I rather doubt this. The award of statutory interest is in the discretion of the court. In a case where rent is tendered to a landlord by a tenant who is in receipt of housing benefit, and where as a result housing benefit is withheld, and the tenant does not have the means to pay interest on the arrears of rent, I would be surprised if a court would grant statutory interest to the landlord in the resultant proceedings. As between landlord and tenant, it would surely be unjust to order payment of interest.

For all these reasons, in my opinion the respondent authority did not have power to pay or to provide for the payment of interest on housing benefit. Accordingly, this application must be dismissed.