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SUPPLEMENTARY BENEFITS ACT 1976

SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the Central London social security appeal tribunal dated 20 November 1989 is erroneous in point of law. Accordingly I set it aside. I give my own decision namely that the claimant is not entitled to supplementary benefit from 17 March 1986 because her income exceeded the requirements for entitlement and her capital resources do not exceed £3,000.(the then capital limit)

2. This is an appeal to the Commissioner with the leave of the tribunal chairman against the decision of the appeal tribunal in respect of the decision of the adjudication officer first involved in these appeals.

3. I directed an oral hearing. I held an oral hearing on 17 March 1993. The claimant was present and was represented by Mr Paul Rogers of Counsel of the Free Representation Unit. The adjudication officer was represented by Mr G Rowe. To both of them I am indebted.

4. The relevant statutory provisions are regulations 4, 5 and 7 of the Supplementary Benefit (Resources) Regulations 1981 and regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986.

5. Argument at the oral hearing was wide ranging in the light of the complex provisions in respect of the Trust Fund set up by the Will of J L Preston proved in the Principal Probate Registry of the High Court of Justice on 19 December 1967 following the death of the Testatrix on 1 November 1967. Probate was granted to Barclays Bank Ltd (now I understand Barclays Bank Trust Company Limited) - a Trust Corporation - as sole trustee of the Will trust. It is no disrespect to the two advocates who

appeared before me at the oral hearing that I do not set out in full their helpful submissions made to me then.

6. In my judgment the decision of the appeal tribunal is erroneous in point of law in that they have breached regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986 by failing to make findings of fact as to the amount of actual capital held by the claimant and whether, and if so to what extent, she is to be treated as having notional capital in the form of an appropriate share of the Trust Fund within the terms of regulations 4(6) and (8) of the Resources Regulations 1981 and further that they have failed to give any reasons for the conclusions reached that the claimant's capital resources exceeded £3,000 as the then capital limit. Guidance is to be found in the decision of a Tribunal of Commissioners being decision R(SB) 25/83, the decision of a Tribunal of Commissioners in R(SB) 43/84 and the decision of the Commissioner in decision R(SB) 2/84. The decisions are those of Commissioners exceptionally learned in the law of trusts and it is noteworthy that counsel appearing in the role of amicus curiae (then Mr John Mummery) is now Mr Justice Mummery of the Chancery Division.

The claimant has on the facts before me in the case papers inadequate actual capital to warrant consideration. I turn accordingly to the issue of notional capital. The mode of determining the "appropriate" share under regulation 4(6) and (8) is dealt with in paragraph 20 of the decision of the Tribunal of Commissioners in R(SB) 25/83 and in particular at paragraph 20(5) thereof which I set out in full below:-

> " (5) The fixing of the appropriate share is not, in our judgment, intended to be made on the basis of the actuarial or market value of the "interests" this would be impossible in the case of a discretionary interest (whether under a discretionary settlement or as the object of a power of appointment in a fixed interest trust). The method by which the appropriate share is fixed must be much looser than this and should, in our view, after consideration of the number of beneficiaries, the terms expressed and implied of the trust and the other circumstances, having had regard to the real probabilities under the trust. A similar conclusion was reached in Leedale's case .."

Accordingly I have to consider the realities of the position with a view to ascertaining the claimant's notional capital. Before so doing I refer to the facts of the case which were dealt with by the adjudication officer first involved in these appeals at box 5 of his written submission to the appeal tribunal and are as follows:-

> "Miss Preston is a pensioner aged 65. She lives alone in privately rented accommodation.
>
> On 25 March 1986 a claim was received for supplementary

benefit. Miss Preston stated that she had been living at 2 separate addresses, and was in receipt of a trust fund administered by Barclays Bank. Miss Preston is also in receipt of a retirement pension of £41.39 per week."

In order to clarify the details of the claim, an officer of the Department visited Miss Preston on 14 April 1986. Subsequently, the adjudication officer determined that benefit was payable at £39.46, from 12 January 1986. However, the determination made was erroneous in law because the Adjudication Officer failed to take the trust fund into account.

The adjudication officer revised the determination on 16 April 1986, which showed that the claimant was not entitled to supplementary benefit from 17 March 1986. In reaching the decision the trust fund was taken into account as an income resource. Notification of the decision was issued to Miss Preston on 1 May 1986. Miss Preston lodged an appeal against the decision on 6 March 1989.

Subsequent to the letter of appeal and in response to enquiries from Miss Preston, further details of the trust fund were requested from Barclays Bank on 20 October 1986.....

With reference to the letter of 20 October 1986 and the information contained therein, the adjudication officer revised the decision and treated the trust fund as a capital resource. On 26 February 1987, Miss Preston was notified of the decision that she was not entitled to supplementary benefit because her capital exceeds the prescribed level.

From a letter from Barclays Bank Trust Company Limited dated 17 July 1989 it appears:-

"For your information the investments now held in the Estate comprise £13,240, $6^{3}/_{4}$% Treasury loan 1995/1998 valued at approximately £10,000 725 and 3130 M&G dividend fund income units valued at £19,406 which, together, produce a gross annual income of £1,839. Miss M M Preston is therefore presently in receipt of a net annual income from the Trust Fund of approximately £1,380."

In that letter the Trust Corporation refer to the powers as contained in Clause 6(a) of the Will as follows:-

"You will see from the Will that Clause 6(a) gives power to the Trustees to exercise discretion over a half share of the capital in Miss M M Preston's favour. We believe it would be appropriate to set out the Trustee's policy when exercising such discretion and as mentioned previously under the terms of the Will, the funds are being held on a protective life interest. This in itself does place an additional burden on a trustee as there is a necessity for greater care and control of the Trust funds as far as the beneficiary is concerned. You will see that the discretion is completely unfettered and Miss Preston has no power

whatsoever on whether or not the Trustees exercise this. You will note also that the Trustees do not need to give a reason for refusing such requests as may be made for this clause to be used to provide capital.

We would advise therefore that in all the circumstances the Trustees propose to exercise extreme care with any requests before advances are made and bearing in mind that capital reductions will inevitably affect the income available for Miss Preston, we would be very reluctant to make payments for general living expenses. We think you will agree that the discretion over capital would most generally be intended to be used for capital purposes, that is, perhaps the purchase of a property or particular items of furniture."

Paragraph 20(2) of the decision of the Tribunal of Commissioners in decision R(SB) 25/83 so far as relevant is as follows:-

"A statement by the Trustee that it is not intended to exercise a discretion to pay capital (or income) in favour of a claimant if that would reduce the amount of supplementary benefit payable to the claimant is, however, not material."

To my mind however, the above statement being that of a Trust Corporation, merits consideration as also does the past history of advancements actually made. At the oral hearing I was informed by Mr Rogers that over the past 22 years £1,000 had been advanced. The Rt Hon Norman Lamont in his letter dated 26 July 1988 to the claimant's constituency Member stated that he could not give a precise statement on what the claimant's tax position would be should the trustees exercise their discretion in releasing monies from the Trust to her. However he states as follows:-

"The Inland Revenue tell me that where the beneficiary of a Trust receives payments from the Trustees in satisfaction of a life interest, the payment would be income of the beneficiary. But where the payments are made to a beneficiary who has an interest in the capital of the Trust, the tax treatment will depend on a number of factors, such as the precise nature of the payment, the source from which it is paid, the exact terms of the Trustees discretion in making the payment. Each case has to be looked at individually on the occasion of each payment, and it is not possible to say in advance what the tax treatment will be since there are so many combinations of circumstances which could affect the decision."

I would only comment that such guidance as is set out above would scarcely encourage a trustee to make advances even if such trustee were otherwise so minded. The relevant Trusts are set out in Clauses 5 and 6 of the Will of the Testatrix and I set them out in full below:-

"5. I GIVE DEVISE BEQUEATH AND APPOINT all the residue

of my estate both real and personal whatsoever and wheresoever unto the Bank upon trust to sell call in and convert the same into money with power to postpone such sale calling in and conversion at the Bank's discretion without the Bank being liable for loss and after payment of my debts (if any) funeral and testamentary expenses to divide the same into moieties and to hold one moiety upon trust for my son for his own use absolutely and to hold the other moiety upon protective trusts for my daughter during her life and from and after her death in trust for all her children living at her death and the children then living of any of her children who are then dead who (whether children or grandchildren) attain the age of Twenty-one years and if more than one in equal shares but so that children of a deceased child shall take between them equally only the share which the parent would have taken if he or she had survived my daughter and attain a vested interest. In the event of no children or grandchildren or my daughter retaining a vested interest then the Bank shall hold my daughter's moiety after her death in trust for such person or persons as my daughter shall by Will or Codicil appoint and subject to such appointment in trust for the person or persons in equal shares of more than one who would have been entitled if my daughter had died intestate and such share formed part of her estate.

6. (a) Notwithstanding anything herein contained the Bank may in its absolute and unfettered discretion at any time and from time to time raise and pay to my daughter or as she shall direct or pay or apply for her benefit any part of parts of the capital of her moiety not exceeding the total of one half of such moiety. Provided that the Bank shall be entitled to decline to make any such advancement without giving any reason if it should think fit."

In a consideration of notional capital as I have to consider the realities it is essential to analyse the relevant trusts to see whether there is any real possibility of the claimant securing capital out of the trust fund either by her own action, as a result of the exercise of the powers or by means of an application under the Variation of Trusts Act 1958 to the court. Where all the parties interested under a settlement are of full age sui juris and ascertained they can by agreement divide up the Trust Fund in any way they see fit. Here that is not the case. The claimant has a protected life interest in accordance with section 33 of the Trustee Act 1925. Should she seek to dispose of her life interest (though no forfeiture occurs when there is an advancement effected under an express or statutory power), a forfeiture of the life interest would take place and the trustees then have a discretion to pay or apply the income for the principal beneficiary (i.e. the claimant) and her spouse or

issue, or if there is no spouse and issue the persons who, if she were dead would be entitled to the Trust Fund or the income as the trustees in their absolute discretion think fit. The class of potential beneficiaries following a forfeiture is not one comprised of persons of full age who are ascertained and sui juris. In the light of the claimant's age the court would be prepared to disregard the possibility of her children and issue. There are numerous authorities in this regard and I need only refer to re White, White v. Edmond [1901] 1 Chancery 570 and re Smith, Public Trustee v. Aspinall [1928] 1 Chancery 915. Although the claimant is a spinster the law would consider the possibility of a future spouse (sometimes referred to as the spectral spouse) of the claimant and accordingly the class to benefit on the forfeiture is not fully ascertained. Further the ultimate class to benefit in default of the exercise by the claimant of her power of appointment (which is a general power) are those to take on her intestacy and this is a class which cannot be ascertained until the claimant's death. I turn therefore to the question as to whether the claimant could secure a capital sum or division of the Trust Fund by the exercise of her general power of appointment. The power is exercisable by Will (and not by deed). There is somewhat old authority see Bull v. Vardy (1791) 1 Vesey Junior 270 that a general power of appointment by Will is equivalent to that of a general power of appointment by deed by enabling the claimant during her life to become absolutely entitled to the reversion. However, this case is not normally now regarded as good law. Various devices such as the exercise by the tenant for life of a general power of appointment by Will together with a covenant not to revoke the Will have sometimes found acceptance as a mode of dividing up the Trust Fund or assigning a reversion. In the instant case as the claimant's life interest is a protected one she would still be faced with the problems referred to immediately above even if she were to become absolutely entitled in remainder. The release of the general power of appointment would be of no assistance to the claimant as that would bring in the class of those to benefit on her intestacy - a class only ascertained as at her death. I turn therefore to the Trust Corporation's overriding power of appointment - as appears from the text of the Will that has the limitations there contained.

There remains the possibility of an application under the Variation of Trusts Act 1958 to the court - this would normally involve the support of all parties that is the life tenant and the Trust Corporation in the instant case and would involve the seeking of an Order to recompense those who might otherwise have taken albeit their entitlement would only have been in events that may be extremely unlikely ever to arise. The complexities and costs of any such application particularly in the light of the amounts involved would I think not warrant any such application being made with worthwhile chances of success. For myself I cannot see that any such application in the present instance is a real possibility. Accordingly in considering the above in the light of the realities of the situation I would be quite prepared to decide that taking everything into account the notional capital is nil - however in the light of all the

circumstances and as I was informed at the oral hearing £1,000 has been advanced from the Trust Fund to the life tenant over the last 22 years, I am prepared to find that the claimant's notional capital is £1,000. I need only add as to the notional capital position that in the light of the Trusts being a protected life interest the claimant could not dispose of that interest for any capital sum for example to a reversionary interest company which would normally be prepared to buy "straight" life interests. Further it would be a fraud on the power arising to the trustees on the forfeiture to agree with the life tenant claimant to pay the whole or part of the income of the Trust Fund to her. Accordingly in my judgment the claimant's life interest could not be turned into a capital sum.

I turn therefore to the income position. In my judgment the income of the Trust Fund is a resource to the claimant and this takes her out of the possibility of receiving supplementary benefit. I was referred to the Resources Regulations 1981 namely regulation 11(4)(l) as a possible escape route for the claimant. After consideration Mr Rogers conceded that the income of the Trust Fund does disentitle the claimant from benefitting in the light of the decision of the Tribunal of Commissioners in decision R(SB) 43/84. To my mind this concession was rightly made. The income of the Trust Fund must be taken into account as a resource of the claimant.

7. In accordance with my jurisdiction my decision is as set out in paragraph 1 of this decision. This is a supplementary benefit case now outstanding for some time. I can give the decision myself and I so do in paragraph 1 of this decision. For the claimant it is but a pyrrhic victory as though she succeeds on the technical issue she fails on the issue of substance. As the claimant will of course be aware my jurisdiction is in respect of error of law and is limited to construing the effect of the relevant legislation in the light of the facts of the case. I have no overriding or dispensing powers.

8. Accordingly the claimant's appeal succeeds on the technicality but fails on the issue of substance.

(Signed) J.B. Morcom
Commissioner

(Date) **27 May 1993**