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SOCIAL SECURITY ACT 1986

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal:

Case No:

[ORAL HEARING]

1. This is a claimant's appeal, brought by leave of the chairman of the social security appeal tribunal, against a decision of that tribunal date 8 March 1991 which confirmed a decision issued by the adjudication officer on 12 December 1990. Sadly, the claimant, then aged about 87, died on 7 September 1992. On 7 October 1992 the Secretary of State appointed her step-son ("Mr R") to act in this matter on behalf of the claimant's estate - and Mr R has had the carriage of these proceedings ever since. My own decision is that the aforesaid decision of the appeal tribunal was not erroneous in point of law.

2. I held an oral hearing of the appeal. Mr. R attended; but the case on behalf of the claimant's estate was argued by Mr R Poynter, solicitor, of Messrs Sinclair Taylor & Martin, of 9 Thorpe close, Portobello Road, London W10. I am indebted to Mr Poynter for a most carefully prepared argument - and I ungrudgingly concede that he put the claimant's case in a light which had never, prior to the hearing, occurred to me. The adjudication officer's side of the matter was presented by Mr G Roe. I am also indebted to Mr Roe - but his was the more prosaic task of putting the case in its straightforward, everyday light; and it is in that light that, at the end of the day, I have concluded that the case falls to be viewed. Before the appeal tribunal the claimant's case had been presented by Mr R himself. The tribunal was not confronted by the sophisticated arguments which were deployed before me by Mr Poynter. This decision,

accordingly, ranges over ground upon which the appeal tribunal made little attempt to tread. The tribunal, however, came to the correct conclusion; and it recorded reasons which were adequate in the context of the manner in which the case was presented to it.

3. The facts are straightforward and not in dispute. The claimant was born in or about 1905. In 1955 her husband was afflicted by chronic arthritis. By 1960 he had become virtually helpless. The doctors advised hospitalisation; but the claimant - to her credit - insisted upon looking after him in the family home. He died in 1965. Mr R told the appeal tribunal that the claimant's own health suffered in consequence of the care which she had bestowed upon her husband.

4. After her husband's death the claimant was befriended by a man to whom I shall refer as "Mr J". On 17 January 1966 Mr J executed a will. The claimant was not referred to therein. But on 15 December 1967 Mr J executed a codicil. I set out clauses 2 and 3 of that codicil:

"2. In addition to the legacies and other bequests in my WILL I BEQUEATH (free of duty) a legacy of Two hundred and fifty pounds to [the claimant].

3. I BEQUEATH (free of duty) to my Executor the sum of One thousand pounds and I DIRECT him to purchase therewith an annuity through the Co-operative Insurance Society Limited for the [the claimant] for her lifetime".

So clause 3 was unambiguous and specific.

5. Mr J died on 24 December 1969. The annuity was duly purchased. There is a copy of the relevant policy in the papers. It was dated 9 December 1970. The claimant was identified as both the proposer and the annuitant. The operative words provided as follows:

"NOW THIS POLICY WITNESSETH that, in consideration of the payment by the said Proposer to the Society of the purchase money mentioned in the said Schedule (the receipt whereof the Society hereby acknowledges), the Society will pay at its Chief Office for the time being the annuity specified in the said Schedule on the dates and to the person or persons therein specified provided satisfactory proof is given to the Society that the person specified in the said Schedule as the Annuitant is then alive".

The schedule specified £124 13s 4d (ie £124.66) as the annual sum, payable by equal half-yearly instalments (ie instalments of £62.33). Against "To whom payable" was inserted "The Proposer or her Assigns".

6. The annuity policy was not executed under seal; and, of course, the claimant herself had furnished no part of the

relevant consideration. But I am in not the slightest doubt that the policy conferred upon the claimant an enforceable right to payment of the half-yearly instalments. Quite apart from the fact that no reputable insurance company (and the Co-operative is such a company) would dream of taking the "no consideration" point, every court in this land would hold the company to be

estopped by the wording of its own policy.

7. It seems clear that after the death of her husband the claimant was in straitened circumstances. The papers indicate that from 1965 until her death she was continuously in receipt of national assistance/supplementary benefit/income support. Apart from the annuity, her only source of income was her retirement pension - £47.15 a week at the time when the local adjudication officer gave his decision. That decision was short and clear:

"The amount of £2.39 weekly, income received from an annuity, is to be taken into account as income other than earnings, in the calculation of income support from 9.4.90."

Did the annuity income fall to be so taken into account? That is the sole issue in this appeal. I turn to the legislation.

8. Regulation 29(1) of the Income Support (General) Regulations 1987 [SI - 1987 - No 1967] provides as follows:

"29.-(1) Earnings derived from employment as an employed earner and income which does not consist of earnings shall be taken into account over a period determined in accordance with the following paragraphs and at a weekly amount determined in accordance with regulation 32 (calculation of weekly amount of income)."

Regulation 32 of the General Regulations provides for the conversion of income into weekly sums. I need not dwell upon that regulation, for no challenge is made to the manner in which the local adjudication officer performed that exercise. I go to regulation 40, which opens thus:

"40.-(1) For the purpose of regulation 29 (calculation of income other than earnings) the income of a claimant which does not consist of earnings to be taken into account shall, subject to paragraphs (2) to (3A), be his gross income and any capital treated as income under regulations 41 and 44 (capital treated as income and modifications in respect of children and young persons).

(2) There shall be disregarded from the calculation of a claimant's gross income under paragraph (1),

any sum, where applicable, specified in Schedule 9."

(Paragraphs (3) and (3A) have no bearing on this appeal.)

9. Regulation 41 is headed "Capital treated as income". I need refer only to paragraph (2):

"(2) Any payment received under an annuity shall be treated as income."

At first glance, of course, that paragraph might be thought to furnish a ready answer to the question which I posed at the end of my paragraph 7 above. That is not, in fact, so. As Mr Poynter submitted - and Mr Roe unhesitatingly accepted - the purpose of regulation 41(2) is simply to establish beyond a peradventure that payments received under annuities fall to be regarded as being of the genus income as opposed to the genus capital. Their effect upon the income support entitlement of any given claimant still falls to be ascertained in the light of regulation 40.

10. So we go to Schedule 9 to the General Regulations. It was common ground that of that Schedule only paragraphs 15 and 17 could have any possible bearing upon this case; and it was rapidly agreed that, since paragraph 17 opens -

"17. Where a person receives income under an annuity purchased with a loan....",

that paragraph drops out of the picture. It was also agreed that sub-paragraphs (2) to (5) of paragraph 15 do not bear upon this case. Accordingly, I set out only sub-paragraph (1) of paragraph 15:

"15.-(1) Except where sub-paragraph (2) applies and subject to sub-paragraph (3) and paragraphs 36, 37 and 39 [none of which paragraphs bear upon this case], £10 of any charitable payment or of any voluntary payment made or due to be made at regular intervals."

(It will be borne in mind that Schedule 9 is headed: "Sums to be disregarded in the calculation of income other than earnings".) So can the sums which the claimant received under the annuity be treated as charitable or voluntary payments made or due to be made at regular intervals? Mr Poynter eschewed "charitable"; but he contended strongly that the payments were "voluntary". (It was never in dispute that they "were made at regular intervals".)

11. Mr Poynter posed two questions at the outset of his submissions on the "voluntary" issue:

- (a) Is a payment under an annuity capable of being a voluntary payment?
- (b) Voluntary on whose part?

In respect of the first of those questions he made two observations - and both are incontrovertible:

- (i) There is nothing in the relevant legislation to suggest that a payment under an annuity cannot be voluntary.
- (ii) There is no definition of "voluntary" in the General Regulations.

And, submitted Mr Poynter, the answer to question (a) above is "Yes". It is, of course, a question couched as a generality. As such, it may well merit an affirmative answer. I do not, however, regard this decision as the appropriate place for an examination of the generality. I confine myself to the particular facts which are actually before me.

12. In respect of question (b) above, Mr Poynter's submission was that the "volunteer" in this case was Mr J, the testator who furnished the funds with which the annuity was purchased. I trust that the following summary will adequately convey the gist of Mr Poynter's development of his argument:

- (a) In essence, there was a gift from Mr J to the claimant. It matters not that Mr J chose to effect that gift through the agency of an insurance company.
- (b) Certainly the payments under the annuity were enforceable as between the insurance company and the claimant. That, however, was merely incidental to the substance of the transaction.
- (c) Upon a true and ultimate analysis, each half-yearly instalment payable to the claimant represented a gift from (ie a voluntary payment by) Mr J to the claimant.
- (d) The matter can be put another way. A payment for which the payee has given no consideration is a "voluntary" payment.
- (e) One everyday meaning of "voluntary" is demonstrated by the familiar maxim: "Equity will not assist a volunteer".
- (f) The fact that the provider of the payments ends up in a position from which he cannot lawfully withdraw does not prevent those payments from being voluntary provided that, at the outset, the provider had a free choice whether to enter into the obligation or not.

13. Unsurprisingly, Mr Roe - for the adjudication officer -

submitted that Mr Poynter's arguments were over refined. They sought to obfuscate the reality of 1990 by invoking the events of 1969/70 - ie the events which, historically, gave rise to the position in 1990. It was to the position as it subsisted in 1990 that the adjudication officer was obliged to look; and by no stretch of imagination could the instalments paid in that year - or, indeed, in any year since the purchase of the annuity - be regarded as "voluntary". It was nihil ad rem that the claimant had not herself given any consideration in return for those instalments.

14. For my part, I can see no valid answer to Mr Roe's approach. There is nothing in the rationale which underlies income support which requires the ignoring - either in whole or in part - of a regular source of income derived from a policy of insurance effected in the form of an annuity. So far as the enacted legislation is concerned, it is only in cases where the relevant annuity was purchased with a loan that the adjudicating authorities are concerned with the means by which such a policy was originally financed (see the opening words of paragraph 17 of Schedule 9 quoted by me in paragraph 10 above). In the course of the argument before me I hypothesised two sets of circumstances:

- (a) A, by way of gift, transfers £1,000 of War Loan stock into the name of B.
- (b) A, by his will, directs his executor to purchase £1,000 of War Loan stock and then to transfer that stock to B.

Can it be seriously argued that, in either case, B could be heard to say that the consequent interest enjoyed by him fell within paragraph 15(1) of Schedule 9 as being voluntary payments made at regular intervals? I can see no material difference between my hypothetical sets of circumstances and the circumstances of the case now before me.

15. Mr Poynter referred me to certain passages from the title "Rentcharges and Annuities" in Vol 39 of the 4th Edition of "Halsbury's Laws of England". I set out two examples:

"An annuity is itself personal estate" (paragraph 1213).

"An annuity, like a rentcharge, can be an item of property separate and distinct from the beneficial interests in it and from the funds and other property producing it" (paragraph 1214).

But a glance through the relevant title in Halsbury makes it plain that (as, indeed, is indicated by the linking with rentcharges) the title is little concerned with the type of annuity which is effected by a policy of insurance. For example, paragraph 1214 contains the sentence -

"For the purpose of estate duty, an annuity was capable of passing on a death and could be separately valued for that purpose."

In the context of the normal type of annuity effected by a policy of insurance, that sentence is meaningless. The type of annuity with which this case is concerned is referred to in Halsbury's title "Insurance" in Vol 25; and see the definitions of "Insurance business" and "annuities on human life" in, respectively, sections 95 and 96 of the Insurance Companies Act 1982. Mr Poynter contends thus:

"The Tribunal erred in law in holding that payments under the annuity were contractual rather than voluntary. Rights to payment under an annuity are sui generis (the most closely analogous right being the right to receive payment under a rentcharge) and not contractual." (Letter dated 19 June 1991)

That passage demonstrates clearly the confusion in Mr Poynter's mind between -

- (a) the type of annuity the subject of the title in Vol 39 of Halsbury, and
- (b) the type of annuity in the case before me.

The annuity in this case was the subject of a straightforward policy of insurance. That type of annuity is the mirror image of a conventional policy of life insurance. (In the latter the insurance is against premature death. In the former the insurance is against longevity.) And, of course, policies of insurance are a species of the genus contract.

16. Since I held the oral hearing in this case there has come to my notice the judgment of Laws J which was delivered in the Queen's Bench Division of the High Court on 11 December 1992 in The Queen v Doncaster Borough Council, ex parte Boulton. (At this stage, I have only a transcript.) That case did not, in fact, concern income support. It concerned housing benefit and community charge benefit. Each of those benefits, of course, is means tested. Both the Housing Benefit (General) Regulations 1987 and the Community Charge Benefit (General) Regulations 1989 contain a schedule entitled "Sums to be disregarded in the calculation of income other than earnings"; and each of those schedules contains a sub-paragraph identical, in its essence, to sub-paragraph (1) of paragraph 15 of Schedule 9 to the Income Support (General) Regulations 1987 (see my paragraph 10 above). At F on page 1 of the transcript Laws J sets out the words which fell for construction by him:

"Except where sub-paragraph (2) applies and subject to sub-paragraph (3) £10 of any charitable payment or of any voluntary payment made or due to be made at regular intervals."

The case concerned the cash payments made by British Coal, in lieu of free concessionary coal, to the widow of a miner.

17. Had I thought that there was anything in Boulton which materially affected what I have said in paragraphs 1 to 15 above, I should, of course, have called for further submissions from the parties to this appeal. I have not so thought, however. I set out in paragraph 18 below substantial quotations from the judgment of Laws J; but I have directed that a copy of the full transcript be sent, with the copy of this decision, to Mr Poynter. He will then be in a position to consider whether there is anything in Boulton which furnishes him with grounds for seeking leave to appeal to the Court of Appeal. It is my own view, of course, that there is not.

18. I quote from the judgment of Laws J:

"The question which I have to decide can be stated as shortly as this: Were the payments of cash in lieu made to the applicant by British Coal 'voluntary' payments within the meaning of the regulations to which I have referred?" (Page 7B)

"I therefore think it right to proceed on the basis that (a) the applicant was paid under the provisions of successive national agreements between British Coal and the union and (b) she had no private law claim to the money. On that footing I return to the question in the case which I have identified which requires me to construe the regulations. In argument before me all parties have agreed that the word 'voluntary' bears two different senses in the law. In Overseers of the Savoy v Art Union of London [1986] AC 296, Lord Halsbury said this at page 305:

'My Lords, there is no doubt that the word "voluntary" is constantly used in two different senses: it is constantly used as the antithesis of something done under compulsion; but it is also used commonly among lawyers - and not uncommonly among other people - as denoting the obtaining or giving of something without anything being obtained in return. A lawyer speaks of a voluntary conveyance as opposed to one which involves valuable consideration. It is common to hear of some institution supported by voluntary contributions. There is no doubt of the frequent use of the word "voluntary" in both these senses; and the problem to be solved is in what sense, or in which of those two senses, the Legislature has used the word in the section under construction.'" (Page 15C-G)

"It is to my mind abundantly clear that a decision which of the two meanings of the word 'voluntary' bears in any given statute or statutory instrument depends upon the context where it so appears and the purpose of the instrument. There is no

presumption in favour of either meaning as a matter of ordinary language, since ordinary language plainly embraces both."
Page (16B-C)

"As Mr Howell [counsel instructed by the Solicitor to the Department of Social Security] submitted, housing benefit and community charge are income related benefits; the intention, broadly at any rate, is that they should be paid to persons demonstrably in need who are to be identified as such by the level of any income they have. In construing the relevant schedules one is looking at sets of provisions which advisedly take out of the calculation of income sums in the recipient's hands which would otherwise fall within it.

The list of disregards is a long one but the presence of each is surely to be accounted for on the footing that the subordinate legislator had some rational and identifiable purpose in creating what amounts to an exception to the full impact of the application of the primary rules for entitlement to benefit which operates in the benefit holder's favour and means to an extent that all benefit holders are not treated even-handedly: some are placed in a better position than others." (Pages 18D-19A)

"One could multiply examples. What, then, is the purpose in making a special exception by way of disregard in the case of 'any charitable payment or of any voluntary payment'? I can discern no sensible purpose in according a disregard to any regular payment whatever which happens not to be legally enforceable. In the case of a charitable payment, I think the purpose clear: it is to ensure that bodies which administer funds to the disadvantaged under charitable trusts, and thus shoulder part of the burden of looking after people in our society in difficult or distressed circumstances, should be assured that their intended beneficiaries obtain the fruits of their charity in full and that the payments they make will not simply go pro tanto to relieve the State's obligations. If that is right, this policy I think gives colour to that which underlies the disregard of voluntary payments in the same regulation. In his skeleton argument, Mr Howell made this submission which I accept:

'Charitable payments are made for benevolent purposes. But not all payments made for benevolent purposes are necessarily charitable. (To be charitable, for example, a purpose has to be one that benefits the public or a sufficient section of it rather than individuals.) The effect of specifying both charitable and voluntary payments is to enable payments which are not made for the payer's own benefit to be brought within the scope of the disregard without the need to engage with fine distinctions between charitable and non-charitable payments.'" (Pages 19G-20F)

"In my view Mr Straker [counsel for Doncaster Borough Council] made an illuminating submission, which I also accept, when he said that the question whether a payment is voluntary is to be judged by looking at the volunteer not the recipient so that the issue is not

whether the payee has any legal rights: it is, rather, what is the nature of the payment from the putative volunteer's point of view? Looked at in this way the nature of the legislative policy here becomes entirely clear; it is in fact precisely the same as that relating to the charitable payments. The legislator is looking at a payment which is made, to use Lord Halsbury's words, without anything being obtained in return. There may, I suppose, even be cases where the recipient of the payment could enforce it; certainly there cases where the payer has undertaken an obligation, at least in a broad sense of the word, to make the payment. In my judgment the provision is not all concerned with the question whether or not the payer has entered upon legal obligations [my emphasis]; it is concerned with cases where a person or body, outside the state, has shouldered some part of the burden of providing relief to people living in the kind of economic circumstances which will attract housing benefit. I have no doubt but that the adjective 'voluntary', as it appears in these regulations, is used in the second sense described by Lord Halsbury." (Pages 21B-22B)

At the end of the day, Laws J, applying the aforesaid construction, held that payments made by British Coal in lieu of free concessionary coal were not "voluntary" within the meaning of the regulations.

19. I had, in fact, drafted the first 15 paragraphs of this decision before there came to my notice the judgment which Laws J delivered on 11 December 1992. Had I studied that judgment before I embarked upon setting out this decision, there might have been in those 15 paragraphs a slight difference of emphasis; just as the hearing before me might have taken - in places - a slightly different course had we all had before us the passage which I have myself emphasised in my quotation from pages 21-22 of the transcript. But the conclusions to which I came in those paragraphs remain substantially unaltered by what was said in Boulton - although I add the following paragraph by way of gloss.

20. I am prepared to accept that Mr J executed the codicil to his will with the laudable intention of assisting the claimant in the straitened circumstances to which she had been reduced. I cannot see, however, any material difference between the course adopted by Mr J and the course of the hypothetical testator in my example in sub-paragraph (b) of paragraph 14 above. (For the sake of this limb of my argument I am prepared to hypothesise that, in each of my examples in paragraph 14, B's circumstances were straitened and A's actions were motivated by charity.) To put it in somewhat stilted legal terms, in all three cases (ie the case now before me and my two hypothetical examples) the nexus breaks down between the charitable gift itself (in each case the sum of £1,000) and the periodic payments enjoyed by the beneficiary of the gift. In none of the three cases are those payments the inevitable consequence of the gift. The recipient of the War Loan stock would be at liberty to sell that stock and

do what he (or she) wished with the proceeds. In the case before me, the right to the instalments under the annuity was assignable (cf my paragraph 5 above). Assignment of that right would, of course, have brought to the claimant a one-off lump sum; and with that sum she could have done what she chose. Mr J - in other words - made his gift; but the claimant was in no way obliged to treat that gift as a gift of continuing income. It remains my firm view that the sums paid under the annuity were not "voluntary payments" within the meaning of paragraph 15(1) of Schedule 9 to the Income Support (General) Regulations 1987.

21. The claimant's appeal is disallowed.

(Signed) J Mitchell
Commissioner

Dated: 30 March 1993