DGR/SH/10/MD

Commissioner's File: CSB/1137/1985
C A O File: AO 3111/SB/85
Region: Midlands

SUPPLEMENTARY BENEFITS ACT 1976
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. For the reasons hereinafter appearing, the decision of the social security appeal tribunal given on 25 June 1985 is erroneous in point of law, and accordingly I set it aside. I direct that the appeal be reheard by a differently constituted tribunal who will have regard to the matters mentioned below.

2. This is an appeal by the adjudication officer, brought with my leave, against the decision of the social security appeal tribunal of 25 June 1985. The claimant asked for an oral hearing, a request to which I acceded. At that hearing the claimant, who was not present, was represented by Mr Howard Jones, a solicitor of the Coventry, Legal and Income Rights Service, whilst the adjudication officer was represented by Mr E O F Stocker.

3. On 3 January 1984 the adjudication officer decided that the claimant had been overpaid supplementary benefit to the extent of £1,000.43, and that this sum was recoverable by the Secretary of State pursuant to section 20 of the Supplementary Benefits Act 1976. This alleged overpayment had arisen by reason of the claimant's being possessed, for a period prior to 13 April 1983 (at which date his benefit was stopped), of capital resources in excess of £2,500. In due course, the claimant appealed to the tribunal who reversed the decision of the adjudication officer, taking the view that two individual sums of £500 and £1,000 respectively, which had been included in the claimant's capital resources and which had been treated as bringing him over the capital limit, were not held by him beneficially. Accordingly, they should never have been included in his assets, and as a result there had been no overpayment. In view of that finding, it was unnecessary for the tribunal to determine whether any sum by way of overpayment was recoverable pursuant to section 20 of the Supplementary Benefits Act 1976.

4. The circumstances under which the claimant came to be possessed of the two sums of £500 and £1,000 respectively are set out in the letters of the two individuals who were responsible for providing them. The first letter dated 6 May 1983 and signed R[esham] Singh reads as follows:-

"As my relative [the claimant....] had to go to India in Feb, or March 1983 he borrowed £500 in Feb 1983.

He changed his mind and postponed his tour on a later date.

He was requested to return my money which he returned in cash amounting to £500 on 1 May 1983."

The next letter, this time signed by Piara Singh Sandhu, reads as follows:-

"I certify that on request from [the claimant....] I lent £1,000 (£500 in December 1982 and £500 in January 1982 [presumably an error for 1983]) as he wanted this loan to fly to India along with his family.

[The claimant] did not go to India due to certain reasons, so I requested him on 31.3.1983 to repay my loan. He eventually paid me £1,000 through cheque on 8.4.1983.

He owes me no money now."

It is not in dispute in this case that the claimant intended to go to India to find a husband for his daughter, but that in the event the project was abandoned.

5. In regarding these two sums as held by the claimant on trust, and not beneficially, the tribunal followed the decision in R(SB)53/83. In that case, the Commissioner held that, where a loan was not a general loan, but one made for a specific purpose, then unless and until it was applied for such purpose, it was held on trust for the lender, and the borrower had no proprietary interest in the sum lent. As was said in paragraph 8 of that decision:-

"But it is clear from the evidence that the loan was not a general loan, but one made for a specific purpose. Now, as it appears from such cases as Barclays Bank Ltd v. Quistclose Investments Ltd (1970) A.C.567, in those circumstances the lender will retain an equity in the sum loaned. In the words of Lord Wilberforce, (at pp. 581, 582) (who was considering whether in the case of a loan to a company to pay a dividend, which in the event was not used for that purpose, such loan belonged, on the insolvency of that company, to the general body of creditors or was reclaimable by the lender):

> 'There is surely no difficulty in recognising the co-existence in one transaction of legal and equitable rights and remedies: when the money is advanced, the lender acquires an equitable right to see that it is applied for the primary designated purpose (see In re Rodgers 8 Morr. 243 where both Lindley L.J. and Kay L.J. recognised this): when the purpose has been carried out (i.e. the debt paid) the lender has his remedy against the borrower in debt: if the primary purpose cannot be carried out, the question arises if a secondary purpose (i.e. repayment to the lender) has been agreed, expressly or by implication: if it has, the remedies of equity may be invoked to give effect to it, if it has not (and the money is intended to fall within the general fund of the debtor's assets) then there is the appropriate remedy for recovery of a loan. I can appreciate no reason why the flexible interplay of law and equity cannot let in these practical arrangements, and other variations if desired: it would be to the discredit of both systems if they could not. In the present case the intention to create a secondary trust for the benefit of the lender, to arise if the primary trust, to pay the dividend, could not be carried out, is clear and I can find no reason why the law should not give effect to it.' "

However, it must be stressed, as is apparent from the words of Lord Wilberforce, that if the "secondary purpose" is to come into play, it must be established "expressly or by

implication" that the parties did intend to impose this condition.

6. Although the decision in R(SB)53/83 was subsequently set aside by the Court of Appeal by consent, there is nothing to suggest that the Court of Appeal entertained any doubts as to the principle there expounded based on Barclays Bank Ltd v Quistclose Investments Ltd. But, in any event, the principle there stated has been repeated in a more recent case on Commissioner's file CSB/911/1985 (to be reported as R(SB)12/86). In that case, the claimant was lent £2,000 subject to the express condition that she should enjoy for her own use the income and only the income in the fund, that she should not in any way deplete the capital, and that she should return the same as and when called upon so to do. The Commissioner applied the Quistclose principle and held that the claimant had no beneficial interest in the capital sum of £2,000.

7. Mr Stocker did not seek to challenge the Quistclose principle, and as regards the decision CSB/911/1985, he accepted that there had been an express condition imposed on the use of the £2,000. However, he sought to distinguish the present case on the ground that there was no express or implied term that the two sums of £500 and the £1,000 should be held on trust for the respective lenders, in the event that the sums were not applied for the purpose of enabling the claimant to fly to India.

8. Although the decisions in R(SB)53/83 and CSB/911/1985 correctly emphasised the need to apply the Quistclose principle where the circumstances justified it, it must, nevertheless, be stressed that the circumstances calling for the application of that principle will be met with but rarely. If A makes a loan to B, he normally does so without restriction on the use to which such a loan may be put. The motive for making the loan available has no bearing on the issue. It does not give rise to a trust. As was said with reference to gifts by Page Wood V. - C. In re Sanderson's Trust (1857) 3 K. & J. 497, 503 (cited with approval in In re Andrews Trust [1905] 2 Ch. 48):-

> "....there are two classes of cases between which the general distinction is sufficiently clear, although the precise line of demarcation is occasionally somewhat difficult to ascertain. If a gross sum be given, or if the whole income of the property be given, and a special purpose be assigned for that gift, this court always regards the gift as absolute, and the purpose merely as the motive of the gift, and therefore holds that the gift takes effect as to the whole sum or the whole income, as the case may be."

The passage cited above was further approved by Goff L.J. in re Osoba, dec'd (C.A) [1979] 1 WLR at p.252, subject to the qualification that it was "not a rule of law, but in the absence of context, to which of course it must yield, or perhaps very special circumstances, it is a long established and oft applied principle which I would not seek to whittle away".

9. To attach a trust to a loan is a sophisticated concept, fully understandable in a commercial arrangement such as occurred in the Quistclose case, but not normally something to be found in private transactions, particularly where there is a family background or something analogous to a family background. The two loans in the present case would appear to have arisen in the context of the latter type of background. For the chairman's note of evidence attributes the following statement to the claimant:-

> "People from same village always help each other and regarded as daughter of village. Borrowed from friends in same way as he would lend to them or may have lent to them. No letters, no agreement. Community sanctions and therefore no way he would fail to repay."

It must also be remembered that the two letters referred to above, setting out the circumstances in which the loans were made, were written after the event, when the initial arrangements had become the subject of scrutiny.

10. Mr Jones invited me to read into the two letters, particularly that of Mr Piara Singh Sandhu the imposition, by implication, of a trust on the application of the loans, so that they could not be applied for any other purpose than for air fares to India. I do not think that either letter can bear that meaning. Apart from the fact that the letter from Mr Resham Singh does not make it clear that his particular loan had to be applied specifically for an air fare, neither letter does more than express the motive for the loan. Mr Jones attached significance to the word "so" in the letter of Mr Piara Singh Sandhu, and argued that its effect was to impose a trust, with the result that the money could not be used for any other purpose than that indicated therein. I do not think that the word 'so' in that context is strong enough to bear any such interpretation. All I think that the author was saying was that, as the money lent had not been used (the claimant not having gone to India) and as it was therefore available for immediate repayment, he asked for it to be repaid. Had it actually been used on an air fare, he might well not have chosen that particular time to ask for repayment; its sheer availability caused him to use the word "so".

11. Accordingly, I am not satisfied that either of the two loans were in any way subject to a trust. The beneficial interest in the monies vested in the claimant, and the tribunal erred in point of law in deducting these amounts from the claimant's capital resources. Accordingly, I must set aside their decision and direct that the appeal be reheard by a differently constituted tribunal. They will treat the loans as constituting part of the claimant's capital resources and will have to determine whether in the circumstances there was an overpayment, and if so, whether it is recoverable by the Secretary of State pursuant to section 20 of the Supplementary Benefits Act 1976.

12. I allow this appeal.

(Signed) D.G. Rice

Commissioner

Date: 15th October 1986