



VGHH/BC

Commissioner's File: CSB/975/1985

C A O File: AO 2963/85

Region: Wales and South Western

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:

IDENTIFIABLE DECISION

[ORAL HEARING]

NOT TO BE SENT OUT OF

THE DEPARTMENT

Decision

1. This claimant's appeal succeeds. My decision is that the decision of the social security appeal tribunal (SSAT) dated 21 February 1985 is erroneous in point of law. I set it aside and refer the case to another social security appeal tribunal for determination in accordance with my directions.

Representation

2. I held an oral hearing of this appeal. The claimant, who was present, was represented by Mr M A Hall of the Avon and Bristol Community Law Centre. The adjudication officer was represented by Miss R Kearns of the Solicitor's Office, Department of Health and Social Security.

Nature of the appeal

3. The issue in this case is whether there has been an overpayment of supplementary benefit to the claimant which is recoverable under section 20 of the Supplementary Benefits Act 1976. It raises the question as to the circumstances in which money advanced to the claimant (or other member of the assessment unit) by way of loan on the security of his home in order to carry out improvements and repairs thereto might properly be considered to be held in trust for the lender on failure to carry them out and not to constitute a resource of the claimant. It is not in dispute, in the present case, that, if the money so lent to the present claimant and his wife is excluded from the computation of their reckonable resources during the period in issue, there has been no overpayment of benefit.

The supplementary benefit officer's decision

4. By a decision issued on 8 October 1982 a supplementary benefit officer decided that supplementary benefit of £2,554.04 had been overpaid and was recoverable from the claimant. That amount was later stated to be incorrect, the correct amount being said to be £2,780.79. The claimant appealed against the supplementary benefit officer's decision.

5. In his written submission on the appeal, the supplementary benefit officer set out the facts before him to be as follows. In July 1980, the claimant had obtained from the Paddington Building Society a mortgage to assist with the renovation of his property. This money was put into his Barclays Bank deposit account on 16 July 1980. On 28 April 1982, that account stood at £5,111.78 and his current account at £243.34. He had not yet used the money for improvements to his house. The claimant was not entitled to supplementary benefit because he had savings of over £2,000. His payments were therefore stopped. After this decision was made, the claimant withdrew a large sum from his bank accounts to reduce the amount of his capital to below £2,000. The supplementary benefit officer had asked the claimant for verification as to what the money was spent on. On 2 August 1982, the claimant provided receipts for materials bought to do improvements on the house which accounted for the money withdrawn. The supplementary benefit officer had decided that supplementary benefit should accordingly be paid from 2 August 1982.

6. In his submission as to the reasons for his decision of 8 October 1982, the supplementary benefit officer stated that the claimant had not disclosed his Barclays Bank deposit account and the amount of money in it until he was visited by an officer of the Department on 23 April 1982. This was the reason why an overpayment had occurred which was recoverable from the claimant. The loan was entirely at the claimant's disposal free of charge or security and must therefore be treated as a resource. In reaching this decision, regard had been had to Commissioner's decision R(SB) 14/81 in which the Commissioner held that for a debt to be deductible from resources it must be 'secured on' capital resources within the meaning of regulation 5 of the Resources Regulations. He held that the phrase 'secured on' means that the actual resource must be charged or mortgaged. The loan was entirely at the claimant's disposal free of charge or security, and must therefore be treated as a capital resource.

7. In the supplementary benefit officer's submission, prior to 24 November 1980 income should be taken into account according to the amount of capital possessed, such capital being treated as equivalent to a weekly income of 25 pence for each complete £50 in excess of the value of the capital resources over £1,200, under paragraph 20 of Schedule 1 to the Supplementary Benefits Act 1976 in its original form. After that date, supplementary benefit was not payable because regulation 7 of the Resources Regulations stated that where the value of the claimant's resources as calculated in accordance with those regulations exceeded £2,000 the claimant was not to be entitled to any supplementary pension or allowance. A schedule of alleged overpayments accompanied this submission. This shows the period in issue as 10 September 1980 to 21 April 1982.

8. It is the claimant's case that the supplementary benefit officer's decision of 8 October 1982 was wrong because

- (1) the existence of the capital in the Barclays Bank deposit account had been disclosed by his wife to a DHSS visiting officer
- (2) the capital in question had been loaned for the specific purpose of improving the property belonging to himself and his wife and to have used the money lent for any other purpose would have been quite wrong. The delay in commencing the works was because the claimant's application for a grant from the local authority, made a considerable time ago, had not yet been approved and until it had the works could not be begun.

The SSAT's decision

9. On 21 February 1985, the SSAT dismissed the claimant's appeal. Their decision was that supplementary benefit of £2,554.04 had been overpaid and was recoverable from the claimant.

10. Their recorded reasons for decision, shortly stated, were:

- (1) The claimant had a capital resource (namely £6,892.27 in Barclays Bank) which he had failed to disclose.
- (2) Reference had been made to Commissioner's decision R(SB) 53/83 and it had been argued that repayment should not be required as the money in Barclays Bank was not available to the claimant.
- (3) This argument was rejected because in a letter from the Building Society dated 1984 it was stated that once the moneys had been advanced the Society really had no control as to how the mortgage finance was subsequently used by the borrowers and that no action would be taken by the Society to enforce the undertaking to complete the essential improvements and repairs to the property in view of the equity.
- (4) The fact of the capital resting with Barclays Bank was a material fact and in consequence of the failure to disclose it the Secretary of State had incurred expenditure under the Supplementary Benefits Act 1976 and the resulting overpayment was the sum of £2,554.04.
- (5) They had considered regulation 6(1)(g)(ii) of the Resources Regulations in respect of the period subsequent to November 1980 but decided that it would not be reasonable to disregard the claimant's capital.

The arguments on appeal

11. On behalf of the claimant, it was argued that

- (1) since the money had been advanced for a special purpose it was not the resource of the claimant (and his wife) at all and the SSAT erred in law in holding that it was
- (2) the SSAT also erred in law in making no findings of fact as to the evidence given by the claimant and his wife as to verbal disclosures of the money loaned, first to a visiting officer carrying out spot checks some time between 28 July 1980 and 24 November 1980 and then to the Unemployment Review Officer on 24 November 1980. The SSAT had relied solely on the written evidence of the A11 forms.

12. Miss Kearns, on behalf of the adjudication officer, supported the appeal. She argued that the principle of Barclays Bank v Quistclose Investments [1970] A.C. 567 might apply in the circumstances of the present case but that further evidence was necessary before this could be determined. If Quistclose did apply, the money loaned by the Building Society to the claimant and his wife was not a resource of theirs, and it was not in dispute that there would have been no overpayment. In any event, whether or not it applied, the SSAT's decision was erroneous in point of law on other grounds and in her submission the case would have to go back to a fresh SSAT to find further facts.

Was the SSAT's decision erroneous in law?

13. It clearly was. This is not in dispute. The SSAT, notwithstanding the evident care with which they went into the case, did not address their minds to the right questions and, as a result, failed to make the necessary findings of fact and apply the correct legal principles.

14. The SSAT should have asked themselves, and made findings in respect of, the following questions:

- (1) Were the claimant and his wife trustees of the money advanced to them by the Building Society? If so, what were the terms of their trust? If the loan was made specifically in order to enable the borrowers to carry out the improvements and repairs specified in the Building Society's letter agreeing to make the loan and if the loan was made only to enable the borrowers to carry them out and for no other purpose, the intention being that the sum advanced should be used exclusively for payment of the improvements and repairs and that it should not become part of the general assets of the borrower, it is a necessary consequence, by process simply of interpretation, that if, for any reason, those improvements and repairs could not be carried out, the money was to be returned to the Building Society. If these were the circumstances of the loan, the borrowers held the money lent on a primary trust to carry out the improvements and repairs and a secondary trust for the benefit of the Building Society if they could not be carried out: see the opinion of Lord Wilberforce in Quistclose's case at page 582 letter A. His reasoning is set out at pages 579 letter G to 581 letter A. If the money lent was held on these trusts, it never became part of the assets or resources of the claimant and his wife at all: see page 580 at letter B.
- (2) If the money lent was not held on trust, and at all material times either the whole or a substantial part of it was held by them in a deposit account, it is clear that it was a resource of the claimant and his wife. Nor is it in dispute that there then was an overpayment. Such overpayment would not be recoverable, however, if disclosure of the loan was made in due time. The SSAT should have considered, and made findings on, the question whether the misrepresentations made on the forms A11, referred to in detail in the verbatim record of an interview with the claimant and his wife on 22 June 1982, were qualified by verbal disclosures made to the officers who completed those forms and obtained their signature? See decision R(SB) 18/1985 in this connection. The effect of any such verbal qualification, if made, and depending on its terms, and when it was made, could be to reduce (if made after some overpayments had "already occurred) or extinguish (if made before any overpayments) the amount recoverable, on the ground that the overpayments did not occur in consequence of non-disclosure or misrepresentation: see section 20 of the Supplementary Benefits Act 1976.
- (3) Did the discretion conferred by paragraph 27 of Schedule 1 to the Supplementary Benefits Act 1976 as in force during so much of the period in issue (10 September 1980 to 21 April 1982: see paragraph 6 above) as fell before 24 November 1980 apply on the facts and, if so, should it be exercised in favour or against the claimant and for what reasons? See decision R(SB) 6/85 and that of the Court of Appeal in the Appendix to that decision, which is reported under the name of Chief Supplementary Benefit Officer v A J Leary.

- (4) What was the claimant's reckonable capital, ascertained in accordance with the Supplementary Benefit (Resources) Regulations 1981 as amended for each week subsequent to 24 November 1980: see decision R(SB) 15/85? In which weeks did that capital exceed the limit for the time being prescribed under regulation 7 of those Regulations?

Findings on the points referred to in paragraphs (3) and (4) were essential if the money lent did constitute a resource. Without such findings, it is impossible to calculate the amount of any recoverable overpayment.

- (5) What was the law in force during the period to which the alleged overpayment related? If the SSAT had asked themselves this question, they would have discovered that regulation 6(1)(g)(ii) of the Resources Regulations did not fall to be considered at all, since it came into force on 9 August 1982. The period in issue was 10 September 1980 to 21 April 1982: see paragraph 7 above.

15. It is not possible for me to give the decision that the SSAT should have given since the necessary facts have not been found. Accordingly, I set aside the decision of the SSAT as erroneous in law and refer the case to another SSAT which should, in accordance with the usual practice, be entirely differently constituted.

Directions to the new SSAT

16. The first question for the SSAT to decide is whether the principle of Quistclose's case applies on the facts relating to the present appeal: see paragraph 14(1) above. In order to arrive at the conclusion that the loan to the claimant and his wife was made by the Building Society only to enable the borrowers to carry out the improvements and repairs specified in the Building Society's letter and for no other purpose it is necessary to decide that

- (1) it was a condition of the loan that these improvements and repairs should be made after completion of the mortgage advance and
- (2) the loan did not exceed in amount the estimated cost of the improvements and repairs as put before the Building Society when the advance was requested and
- (3) on failure to carry out the improvements and repairs the mortgage became enforceable and the whole sum advanced, in so far as not already repaid, was recoverable under the terms of the mortgage.

If the answer to these three questions is, as to each of them, Yes, the SSAT could properly conclude that if, for any reason, those improvements and repairs could not be carried out, the money was to be recoverable by the Building Society, being held on a primary trust to carry out the improvements and repairs and a secondary trust for the benefit of the Building Society if they could not be carried out. The fact that at some later date, long after the period in issue, the Building Society indicated to the claimant that it does not intend to require repayment of the moneys owing, since the mortgage security is sufficient, can have no effect on the existence of any trust during the period in issue.

17. If held on these trusts during the period in issue, the money loaned and resting in the claimant's bank account during the period in issue will not constitute a resource of the claimant or his wife for the reasons set out in paragraph 14(1) above.

18. If, however, the money was not held on trust but could be used by the claimant and his wife as their beneficial property, the SSAT should go on to consider, and make findings on, the remaining questions set out in paragraph 14 above. The record of their decision should comply with regulation 19(2)(b) of the 1984 Adjudication Regulations as amended.

19. Before parting with this case, I should, for completeness, add that I was referred to a number of authorities, very properly, by Miss Kearns. Decision CSE/911/1985, starred as 7/86 and to be reported as R(SB) 12/86 illustrates the application of Quistclose's case to an unsecured loan. Decision R(SB) 14/81 does not refer to Quistclose's case. Decisions R(SB) 12/86 and decision CSE/1137/1985, starred as 97/86 (which appeared after the oral hearing of the appeal) contain remarks on the application of Quistclose's case and should be before the new SSAT .

20. My decision is set out in paragraph 1.

(Signed) V G H Hallett
Commissioner

Date: 12 December 1986