SUPPLEMENTARY BENEFIT

Resources—a loan made on the express condition that the capital is not to be used does not represent a capital resource

The claimant was a single woman who had lived in a Rest Home since 1977, the fees being met from her retirement pension and capital. Her capital consisted of £785.90 in the National Savings Bank and a National Savings Bond of £3,000 which she had purchased in 1978 using, in part, a £2,000 loan from a friend. The loan was made on the following terms:

(a) the capital sum was repayable on demand;

(b) the claimant was not to use any of the capital sum;

(c) the claimant was entitled to use any interest produced by the capital sum, so long as the loan subsisted.

On 12.10.84 she claimed supplementary benefit as her friend required repayment of the loan, and she had sent the bond for encashment. The adjudication officer decided that the claimant was not entitled to supplementary benefit as she had capital in excess of the prescribed limit (at the time £3,000).

The claimant appealed and the tribunal upheld the appeal. The adjudication officer appealed to a Social Security Commissioner.

Held that:

the loan was made on the express condition that the claimant enjoyed only the use of the interest, the capital was not at her disposal and in consequence not her resource (paragraph 8).

The appeal was dismissed.

1. This is an adjudication officer's appeal, brought by my leave, against a decision of the social security appeal tribunal dated 12 April 1985 which reversed a decision issued by the adjudication officer on 26 November 1984. Regrettably the claimant died on 27 July 1985. She is represented by the firm of solicitors which is acting on behalf of her executors. My decision is that the aforesaid decision of the appeal tribunal is not erroneous in law.

2. The facts are not in dispute. At the material time the claimant was a single woman aged 82. On 12 October 1984 she made a claim for a supplementary pension. Some years previously she had purchased a house with the aid of a mortgage and of £2,000 which had been lent to her by an old friend. By reason of failing health the claimant in 1978 moved into a retirement home. The house was sold. The net proceeds were in the region of £6,000. The claimant's friend did not seek immediate repayment of the loan of £2,000. She agreed that the claimant could continue to enjoy the benefit of the loan upon the following terms:

(a) The capital sum represented by the loan should be repayable upon demand.

(b) The claimant should not make any inroads into that capital sum.

(c) For so long as the loan subsisted, the claimant should be entitled to enjoy for her own use the interest produced by the capital sum.

In the event the claimant purchased a national savings bond in the sum of £3,000. Of that sum £2,000 represented the loan from her friend. I think that all those transactions were effected upon the claimant's behalf by the solicitors who are presently acting for her executors.

3. On 12 October 1984 the claimant's friend informed the claimant that her own financial situation had deteriorated and that she required repayment of the loan. The claimant got in touch with her solicitors. The National Savings Bond was immediately transmitted for encashment. It was, however, necessary to give 3 months notice of encashment. The pro-

ceeds were received on or about 12 January 1985. From those proceeds the sum of £2,000 was promptly remitted to the claimant's friend.

4. Without the interest which had been paid in respect of the Bond, the claimant faced financial stringency. It was for that reason that on 12 October 1984 she claimed a supplementary pension. In addition to the Bond, she had at that date £785.90 standing to her credit in the National Savings Bank. The local adjudication officer took the view that—

(a) the whole of the £3,000 represented by the Bond was a capital asset of the claimant;

(b) in accordance with the principle enunciated in Decision of a Tribunal of Commissioners R(SB)2/83, no deduction could be made for indebtedness except in the circumstances contemplated by regulation 5(a)(ii) of the Supplementary Benefit (Resources) Regulations 1981 (which had no application to this case);

(c) there were no other provisions in the Resources Regulations which permitted the disregard of the value of the Bond or of any part of that value; and

(d) accordingly, the total capital resources of the claimant exceeded the limit (£3,000) then specified in regulation 7 of the Resources Regulations.

Accordingly, the local adjudication officer disallowed the claim. The claimant appealed to the appeal tribunal.

5. After what was obviously a most careful hearing, the appeal tribunal allowed the claimant's appeal. It decided that the claimant was entitled to a supplementary pension with effect from 12 October 1984. Its reasons were set out in detail. I quote them in full:

> "The Tribunal were of the view that the Adjudication Officer had directed his attention to [reg]6(1) of the Capital Resources Regulations, as to what capital could be disregarded. The Tribunal took the view that their attention should be directed as to whether the appellant stood possessed of capital in excess of the statutory amount at the date of the claim. We noted that the Adjudication Officer accepted that the appellant was holding monies from a friend in the sum of £2,000.00 and when it was repaid on the 15.1.85, immediately granted supplementary benefit. We noted that the appellant had on the, 12.10.84 or thereabouts, surrendered the Bond and that 3 months notice for encashment was required. During that period the capital was not available and for that matter, by the long term arrangement with her friend, the capital was never available, only the interest accruing therefrom. The Presenting Officer quite correctly drew our attention to the learned Commissioner's decision in R(SB)2/83 but we did not find that decision persuasive authority because it related to business debts not being offset against available capital. We did not consider that there was any indebtedness within the true meaning of the word, except gratitude to the friend. The Tribunal found no direction in [regulation] 5 of the Capital Resources Regulations which we took to mean—capital resources available to the claimant. We fully accepted the evidence of Mr. . . . , Solicitor, an officer of the Court, with regard to the agreement between the parties, that the capital loan was to remain untouched and that only the interest was available to the appellant. We concluded that at the date of the claim the total capital available was in the sum of £1,785.90."

6. I can find no substantial error of law in those reasons. The adjudication officer now concerned submits that there has been an over-emphasis

on "availability"—and, at first sight, that criticism might appear justified. But I do not think that it is justified when one reads the reasons as a whole. The appeal tribunal was quite clearly not concerned with the problem of whether there were or were not practical difficulties in the realisation of the capital sum represented by the loan from the friend. It was concerned with the legal propriety of the claimant's using that capital sum for her own purposes. In my view it was correctly so concerned.

7. The facts of *Quistclose Investments Ltd v Rolls Razor Ltd* [1968] CL 552 were somewhat complex and far removed from the facts of the case now before me. But the Court of Appeal enunciated certain principles of general application. At page 484 Harman L. J. said this:

> "That a loan of money on a specific condition does create a trust attaching to the money in the hands of the borrower, and that that trust subsists in favour of the lender if the condition fails, seems to me to be settled by authority binding on this court, contained in a series of bankruptcy cases. This is a branch of the law of trusts created by the common lawyers, but it is, after all, none the worse for that."

On page 554 he said this:

> "*In re Rogers*, [8 Morr 243], was a decision of the Court of Appeal which approved *Toovey v Milne*, [2 B & Ald 683], and *Edwards v Glyn*, [2 E & E 29] and Lindley L. J. said this (I must explain that a man named Mozley had lent the money for the special purpose of paying pressing creditors):
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> > 'The trustee is endeavouring to affirm the transaction in part and to repudiate it in part. He wants to claim the money as the bankrupt's because it came to his hands and at the same time to reject the terms and conditions on which alone the bankrupt procured it. This is manifestly unjust and contrary to principle. If authority be wanted in support of this view, it will be found in *Milne v Toovey* and *Edwards v Glyn*, and other cases of the same class. I entertain no doubt that Mozley [that is, the lender] could have obtained an injunction to restrain the bankrupt from using that money for any purpose except that of paying his pressing creditors. If this be so, the money never was the bankrupt's in any proper sense so as to vest in his trustee as part of his general assets.'
>
> I do not see why this needs to be called a resulting trust; the bankruptcy cases never so suggest. It is a trust always attaching to the money involved in the conditions of the loan.
>
> I reject the notion that such a trust can only be implied on a gift. If it is true that, if the money had been used to pay the dividend, the obligation to repay would have survived and it did exist throughout whether the dividend were paid or no, I do not see why loan and trust cannot co-exist."

(The Court of Appeal's judgments in *Quistclose* were affirmed as "correct on all points" by the House of Lords—see [1970] AC 567, at p 582.)

8. In the case before me the £2,000 were lent upon the express condition that the claimant should enjoy for her own use only the interest thereon—and that she would not in any way deplete the capital. It is not difficult to see why such a condition was imposed. The claimant was an elderly lady who was unlikely ever to be able to replace the capital of the loan if she had once spent it. The capital was not to be—and never was—at her disposal beyond the power which she had to invest it. And I am satisfied that that is what the appeal tribunal meant when it said that the capital was not "available" to her.

9. The issue can be tested thus. Let us suppose that the claimant had fallen into debt to a third party and that the third party had instituted bankruptcy proceedings against the claimant. What would have been the attitude of the Chancery Division of the High Court had the trustee in bankruptcy claimed that the £2,000 formed part of the assets of the claimant? I myself am in no doubt as to the answer. The Court would have rebuffed him. He would have been faced with the passage which I have quoted in paragraph 7 above:

> "He wants to claim the money as the bankrupt's because it came to his hands and at the same time to reject the terms and conditions on which alone the bankrupt procured it. This is manifestly unjust and contrary to principle."

This is not, of course, a bankruptcy case. But I regard the principles established for the law of bankruptcy as furnishing—in this case, at least—a sound guide as to whether the relevant asset was ever a "capital resource" of the claimant for the purposes of the Resources Regulations. Such guidance indicates clearly that it was not.

10. It follows that the adjudication officer's appeal is disallowed.

(Signed) J. Mitchell
Commissioner