

SUPPLEMENTARY BENEFIT

Resources—Calculation of capital resources. Vaccine damage payments held on trust.

The claimant was a vaccine damaged adult and a statutory payment of £10,000 had been made to his parents as trustees for him. Under the Trust Deed, the trustees were directed to hold the payment and any income arising from investing it on trust for the claimant as sole beneficiary; they had power to apply any income or capital for the claimant's benefit. The supplementary benefit officer treated the payment as a notional resource under regulations 4(6) to (8) of the Supplementary Benefit (Resources) Regulations and disallowed benefit on the ground that the claimant's capital resources exceeded the then limit of £2,000. On appeal, the tribunal upheld the decision. The claimant appealed to a Social Security Commissioner.

Held that:

1. where the provisions as to capital in regulations 4 and 5 of the Resources Regulations fall to be considered in determining what assets a claimant possesses, regulation 5 dealing with *actual* resources should be considered first (paragraph 15);
2. a sole beneficiary under a trust has an actual resource *in the right* to call for the trust fund to be transferred to him. This interest, being a chose in

action, is an *actual* resource with a market value which should be fixed in accordance with regulation 5, any expenses of sale falling to be deducted under regulation 5(a)(i) (paragraphs 14 and 15);

3. it makes no difference if such a beneficiary is mentally disabled because a receiver appointed under the Mental Health Act 1959 could call for the trust fund on behalf of the claimant (paragraph 14);

4. where a beneficiary or his receiver can call for the trust fund, regulations 4(6), (7) and (8) of the Resources Regulations do not apply. If notional resources fall to be considered, the relevant regulation is regulation 4(2)(a) (paragraph 15);

5. without amendment of the Resources Regulations*, claimants for whom assets are held in trust under the Vaccine Damage Payments Act are excluded from supplementary benefit if the value of their capital resources exceeds the prescribed limit.

Arrangement of paragraphs in this decision

Our decision is arranged as follows:

| | <u>Paragraph(s)</u> |
|---|---------------------|
| Decision | 1 |
| Representation | 2 |
| Nature of the appeal | 3, 4 |
| The law | 5 |
| The supplementary benefit officer's decision | 6 |
| The SBAT's decision | 7, 8 |
| The arguments on appeal | 9, 10, 11 |
| The Vaccine Damage Payments Trust Deed | 12, 13, 14 |
| Application of the capital regulations to vaccine damage trust payments | 15 |
| Was the SBAT's decision erroneous in law? | 16 |
| Is it expedient to give the decision the SBAT should have given? | 17 |
| Directions to the fresh SBAT | 18 |
| Concluding remarks | 19 |

Decision

1. Our decision is that the decision of the supplementary benefit appeal tribunal ("the SBAT") dated 25 January 1982 is erroneous in point of law. We set it aside and refer the case to another SBAT for determination in accordance with our directions: Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980 [S.I. 1980 No. 1605] as amended by the Supplementary Benefit and Family Income Supplements (Appeals) Amendment Rules 1982 [S.I. 1982 No. 40] rule 10(8).

Representation

2. Leave to appeal to the Commissioner on a point of law against the decision of the SBAT was granted by the Commissioner. The Chief Commissioner directed that this appeal should be heard by a Tribunal of Commissioners together with another appeal, which raises the same point of law, the reference to which on Commissioner's file is CSB/520/1981. An oral hearing of each appeal was held. In the present appeal the claimant appeared and was represented by his father. The supplementary benefit officer was represented by Miss L Shuker of the Solicitor's Office, Department of Health and Social Security.

*The Regulations were amended with effect from 15 August 1983 by the Supplementary Benefit (Requirements, Resources and Single Payments) Amendment Regulations 1983 [S.I. 1983 No. 1240].

Nature of the Appeal

3. This appeal is concerned with the proper method of determination of the capital resources of a claimant for supplementary benefit where that claimant has been severely disabled as a result of vaccination against a disease specified in the Vaccine Damage Payments Act 1979 and a payment has been made by the Secretary of State under that Act to trustees for the claimant.

4. The statutory payment to or for the benefit of persons so disabled is a fixed sum of £10,000. Where the value of a claimant's capital resources (including those of any dependants) exceeds the sum of £2,500 (£2,000 prior to 22 November 1982) the claimant is not entitled to any supplementary pension or allowance. The real issue in this appeal against the decision of the SBAT is as to how the value of such resources is to be calculated when the £10,000 is held in trust. The relevant regulations relating to the ascertainment of capital resources draw a distinction between actual and notional resources, which is of fundamental importance in determining entitlement to supplementary benefit: see paragraph 15 below.

The law

5. (1) The Vaccine Damage Payments Act 1979 provides:

“1.—(1) If, on consideration of a claim, the Secretary of State is satisfied—

- (a) that a person is, or was immediately before his death, severely disabled as a result of vaccination against any of the diseases to which this Act applies; and
- (b) that the conditions of entitlement . . . are fulfilled,

he shall in accordance with this Act make a payment of £10,000 to or for the benefit of that person or to his personal representatives.

.....

6.—(1) Where a payment under section 1(1) above falls to be made in respect of a disabled person who is over eighteen and capable of managing his own affairs, the payment shall be made to him.

(2) Where such a payment falls to be made in respect of a disabled person who has died, the payment shall be made to his personal representatives.

(3) Where such a payment falls to be made in respect of any other disabled person, the payment shall be made for his benefit by paying it to such trustees as the Secretary of State may appoint to be held by them upon such trusts or, in Scotland, for such purposes and upon such conditions as may be declared by the Secretary of State.

(4) The making of a claim for, or the receipt of, a payment under section 1(1) above does not prejudice the right of any person to institute or carry on proceedings in respect of disablement suffered as a result of vaccination against any disease to which this Act applies; but in any civil proceedings brought in respect of disablement resulting from vaccination against such a disease, the court shall treat a payment made to or in respect of the disabled person concerned under section 1(1) above as paid on account of any damages which the court awards in respect of such disablement.”

(2) Schedule 1 to the Supplementary Benefits Act 1976, as amended by the Social Security Act 1980 provides:

“1.—(1) The amount of any supplementary benefit to which a person is entitled shall, subject to the following provisions of this Schedule, be the amount by which his resources fall short of his requirements.

(2) For the purpose of ascertaining that amount—

(a) . . .

(b) a person’s resources shall be calculated in the prescribed manner;

and, without prejudice to the generality of paragraph (b) of this subparagraph, regulations in pursuance of that paragraph may provide for a person to be treated as possessing resources which he does not possess and for disregarding resources which a person does possess.

(3) Regulations may provide that a person whose resources as ascertained in pursuance of paragraph (b) of the preceding subparagraph or a prescribed part of them exceed or exceeds a prescribed amount shall not be entitled to a supplementary pension or allowance.”

(3) The Supplementary Benefit (Resources) Regulations 1981 (which we shall call “the 1981 Resources Regulations”) provide:

“*Calculation of resources*

3.—(1) For the purposes of Schedule 1 resources for any period shall be calculated in the manner set out in these regulations.

.....

Notional resources

4.—(1) Any resource of which a member of the assessment unit has deprived himself for the purpose of securing supplementary benefit, or increasing the amount of any such benefit, may be treated as if it were still possessed by him.

(2) Any resource which either—

(a) would become available to a member of the assessment unit upon application duly being made, but which has not been acquired by him; or

(b) is due to be paid to a member of the assessment unit but—

(i) has not been paid to him, and

(ii)

may if, in the opinion of the benefit officer it is reasonable in the circumstances to do so, be treated as if it were possessed by him.

(3)

(4)

(5)

(6) A member of the assessment unit shall be treated as possessing the whole or any appropriate share calculated in accordance with paragraph (8) of any resources held under a trust, whether created by virtue of a statutory provision or otherwise, under which the trustees have any express or implied discretion to pay him, or apply for his benefit, any income or capital.

(7) A member of the assessment unit shall not be treated as possessing a resource pursuant to paragraph (6) if the trust funds are derived from a payment, whether in pursuance of a court order or otherwise, in consequence of a personal or criminal injury to him, except that if he is the claimant or the partner of the claimant this

paragraph shall apply only for the period, not normally exceeding 12 months from the date on which the payment would, but for this paragraph, fall to be taken into account for the purposes of a claim for pension or allowance or a review of a determination pursuant to regulation 4 of the Determination of Questions Regulations, for which, having regard to the intentions of the trustees, it is reasonable that he shall not be treated as so possessing a resource.

(8) A member of the assessment unit to whom paragraph (6) applies shall be treated as possessing a resource either in whole or in part having regard to—

- (a) the number of beneficiaries under the trust; and
- (b) the terms of the trust, either express or implied,

but no resource shall be treated as possessed by virtue of these paragraphs for such period, not exceeding three months from the date on which it would otherwise have been so treated, as is necessary to enable the trustees to make arrangements for payments to be made to that person.

.....
Calculation of capital resources

5. Except in so far as regulation 6 provides that certain resources shall be disregarded, the amount of a claimant's capital resources to be taken into account shall be the whole of his capital resources assessed where applicable—

- (a) at their current market or surrender value less—
 - (i) in the case of land, 10 per cent., and in any other case, any sum which would be attributable to expenses of sale, and
 - (ii) any outstanding debt or mortgage secured on them;
- (b) in the case of a National Savings Certificate—

.....
Capital resources to be disregarded

6.—(1) In calculating a claimant's capital resources the following shall be disregarded:—

- (a) the value of—
 - (i) the home,
 -
 - (vi) any reversionary interest, except.....

(2) Where the value of a claimant's capital resources (including those of a partner or dependant) as calculated in accordance with these regulations is £2,500 or less, those resources shall, except in so far as any provision of the Act or regulations made pursuant to it provides otherwise, be disregarded.

Maximum capital resources for entitlement to pension or allowance

7. Subject to regulation 8, where the value of a claimant's capital resources (including those of a partner or dependant) as calculated in accordance with these regulations exceeds £2,500, the claimant shall not be entitled to pension or allowance."

[Regulation 8 relates to the effect of capital resources of dependants and is not relevant in the present appeal.]

Notes

(1) "assessment unit" is defined in regulation 1. It is not in dispute that the claimant is the sole member of the assessment unit in the present case.

(2) The 1981 Resources Regulations consolidated, without amendment, the Supplementary Benefit (Resources) Regulations 1980 [S.I. 1980 No. 1300] as amended by the Supplementary Benefit (Aggregation Requirements and Resources) Amendment Regulations 1980 [S.I. 1980 No. 1774] and the Supplementary Benefit (Requirements and Resources) Amendment Regulations 1981 [S.I. 1981 No. 1016] and are for convenience set out in their consolidated form as now in force. The figure of £2,500 was substituted, in regulations 6 and 7, for the figure of £2,000, by regulation 4 of the Supplementary Benefit (Up-rating) Regulations 1982 [S.I. 1982 No. 1127] which came into operation on 22 November 1982. The 1981 Resources Regulations came into operation on 23 November 1981. In determining capital resources, the law in force during the period for which supplementary benefit is in question must be applied.

The supplementary benefit officer's decision

6. The supplementary benefit officer, in his decision issued on 5 November 1981, decided that the claimant was not entitled to supplementary allowance from 2 December 1981. On appeal by the claimant against this decision, the benefit officer stated that the facts were that the claimant was aged 21 and lived as a member of his parents' household. He had received supplementary allowance from 16 April 1980 to 1 December 1981 as he was unemployed. He was a vaccine damaged adult and a vaccine damage payment of £10,000 was made on 15 April 1981 to his parents as trustees. The reasons for the benefit officer's decision were that the vaccine damage payment should be treated as a resource after a period of 4 weeks for the trustees to make arrangements for payment to the claimant. As the capital resources calculated in accordance with the regulations exceeded £2,000, a supplementary pension or allowance was not payable and the allowance was therefore withdrawn from 2 December 1981, 4 weeks after the trustees were informed that the vaccine damage payment would be treated as a resource.

The SBAT's decision

7. Before the SBAT, evidence was given by a benefit officer that the claimant was not a dependant and had made the claim in his own right; that until October 1978 he had worked as a postman and was registered for general employment; and that the payment was not taken into account for 8 months because of the lengthy considerations given to the case. The claimant's father and mother gave evidence and stated that the claimant had over 80% disability on mental grounds, that he was unable to hold down the job of a postman and that they agreed that the trust was one from which sums of income and capital could be paid on their direction for the benefit of their son. The SBAT also had before them a written statement from the parents that the trust money was in fact intact, consisting of £5,000 in National Savings Certificates with interest accruing for 5 years and £5,000 in Midland Bank Trust Corporation. It appears that the SBAT did not call for or see the Trust Deed.

8. The SBAT's decision was given on 25 January 1982. Under "Findings of Tribunal on question of fact material to decision", they recorded:

"(a) An award of £10,000 was made payable to [the claimant's father and mother] on 15.4.1981 in respect of vaccine [sic] damage to their son, [the claimant]. A trust was created with this sum and [the father and

mother] act as trustees with the discretion to pay any income or capital for [the claimant's] benefit.

(b) [The claimant] is a claimant for supplementary benefit, not a dependant of an assessment unit, and he was receiving supplementary benefit from 16.4.1980 to 1.12.1981.

(c) He is the sole beneficiary of the trust. The capital has been invested in National Savings Certificates and in the Midland Bank Trust Corporation."

The SBAT's decision was recorded as follows:

"The Tribunal upholds the decision of the supplementary benefit officer—the [claimant] is not entitled to supplementary allowance from 2.12.81."

Their reasons for decision were stated to be:

"The Tribunal gave due regard to the [claimant's] circumstances and the particulars of the trust under which he is the sole beneficiary, and find that he shall be deemed to possess the whole of the resources held under the said trust [Regulation 4(6)(7)(8) of the Supplementary Benefit (Resources) Regulations 1981].

Therefore, the [claimant] has a capital resource in excess of £2,000 and shall not be entitled to an allowance [Regulation 7 of the said Regulation]."

The arguments on appeal

9. The claimant's father submitted that if the regulations so operate as to preclude payment of supplementary allowance until, by application of the trust moneys for the claimant's maintenance, the trust fund is reduced to £2,000, the reality of the case is that the £10,000 compensation awarded in respect of his vaccine damage and paid to trustees for his benefit is arbitrarily cut down from £10,000 to £2,000. It can be said, therefore, that £8,000 is in lieu of social security payments. The father produced the trust deed at the hearing before us, together with the instructions for execution of the Deed. The Deed is in a printed form supplied by, or on behalf of, the Secretary of State and the directions require it to be executed unaltered. Shortly after the parents executed the Deed, the Minister for Health was reported in the Press as having said, in reference to claimants suffering vaccine damage who are in receipt of supplementary benefit that:

"The problem [of withdrawal of supplementary benefit on receipt of the compensation] affects those youngsters now aged 16 and over. Parents should realise that if they had invested the £10,000 in a trust fund then any benefits to which they are entitled would not be affected."

Assuming the press report is an accurate statement of what the Minister said, we are, for the reasons set out in this decision, of the view that the then Minister's view of the law was and is erroneous. It was in reliance on such statement that the claimant's parents executed the trust deed, invested the £10,000, and have retained it intact so that it should be available to provide for the claimant after their own lifetimes. Now they find that his supplementary benefit has been withdrawn and the Department expect them to use up the nest egg prematurely by expending it upon his immediate maintenance in lieu of the supplementary allowance previously available for that purpose.

They are very naturally concerned for their son's long term future, in circumstances which understandably appear rather bleak.

10. On behalf of the benefit officer, Miss Shuker submitted as follows:

- (1) that the SBAT had found that the vaccine damage award was held on trust for the claimant as the sole beneficiary and that the trustees had discretion to pay any income or capital for the claimant's benefit and that the claimant was a claimant of supplementary benefit;
- (2) that having made these findings, the SBAT did not err by concluding that the whole of the resources held on trust fell to be considered under regulation 4(6) of the Supplementary Benefit (Resources) Regulations. They had recorded that eight months had elapsed by 2 December 1981 since the award was made, which implied that they considered that the resources held on trust had already been disregarded for a reasonable period;
- (3) since, however, the SBAT had failed to make the necessary findings required by regulation 4(7) and 4(8), their decision was erroneous in point of law for failure to comply with rule 7(2)(b) of the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980.

11. Miss Shuker did not dispute that the Tribunal of Commissioners were not in a position to give the decision that the SBAT should have given, or that their decision was erroneous in point of law for failure to find the necessary facts and give adequate reasons for their decision. But she submitted that their decision was in fact correct. Regulation 5 of the 1981 Resources Regulations did not apply because the claimant was not the sole beneficiary under the trust deed. There was power to apply capital or income of the trust fund in recouping to the parents of the claimant moneys expended by them in the period beginning on the 9 May 1978 and ending on the date of the deed. Accordingly, the claimant was not the sole beneficiary and regulation 5, which relates to actual resources, could not apply. It was necessary to look at regulation 4(6), (7) and (8), which relates to trusts, and under those provisions it was reasonable to decide that the claimant was not entitled to supplementary benefit from 2 December 1981.

The Vaccine Damage Payments Trust Deed

12. This is in a printed form containing spaces for completion by the insertion of the date, the names and addresses of the first trustees, the name of the Beneficiary and his or her date of birth. Apart from these insertions, the original deeds produced at the hearing before us of the present appeal and the appeal in CSB/520/1981 referred to in paragraph 2 above are in identical form.

13. (1) The Deed of Trust is expressed to be made between "The Secretary of State" (i.e. the Secretary of State for Social Services) of the one part and named "First Trustees" of the other part. It recites that the Secretary of State is satisfied that the named Beneficiary (his date of birth is given) is severely disabled as a result of vaccination against one of the diseases specified in section 1(1) of or by the Secretary of State for the purposes of the Vaccine Damage Payments Act 1979 and is about to make a payment of £10,000 under the said Act to the First Trustees to hold on the trust and with and subject to the powers and provisions set out below.

(2) The operative part of the Deed contains four clauses. Clauses 2 and 4 respectively contain definitions (of the Trustees—so as to include persons subsequently appointed to be trustees—and of the Trust Fund) and a clause protecting the trustees against non-fraudulent liability for loss and damage. Clauses 1 and 3 provide as follows:

"1. The Trustees shall hold the said sum of £10,000 and any income

arising from any investment of it on trust [sic] for the Beneficiary absolutely

.....
3. So long as the Beneficiary is unable by reason of any defect or illness of the mind to manage the Beneficiary's affairs the following provisions shall apply

- (A) The Trustees may at any time or times apply the whole or any part or parts of the Trust Fund for the maintenance or benefit of the Beneficiary as they think fit
- (B) The Trustees shall pay or apply the income of the Trust Fund (if any) to or for the maintenance or benefit of the Beneficiary as they think fit
- (C) Without limiting in any way the generality of the provisions of sub-clause 3(A) and 3(B) the Trustees shall have the additional powers specified in the Schedule hereto
- (D) The powers of maintenance and advancement given to trustees by Sections 31 and 32 of the Trustee Act, 1925 shall not apply".

(3) The Schedule to the Deed contains in paragraphs (A) to (L) a number of additional powers. Paragraphs (A) to (I), so far as material to our decision, provide that:

- (i) the trustees have unrestricted powers of investment, including investment in property not producing any income, and
- (ii) the trustees may pay or apply income for the benefit of the Beneficiary notwithstanding that it benefits others with whom the Beneficiary is residing.

Paragraphs (K) and (L) provide as follows:

- "(K) Power to act on a certificate purporting to be signed by a medical practitioner who has been in regular attendance on the Beneficiary for a period of not less than one year to the effect that in the opinion of such medical practitioner the Beneficiary is or is not by reason of any defect or illness of the mind able to manage the Beneficiary's affairs at the date of the certificate
- (L) Power to apply capital or income of the Trust Fund in recouping to the parents or parent of the Beneficiary moneys which the Trustees are satisfied were in the period beginning on the 9 th day of May 1978 and ending on the date of this Deed expended by such parents or parent for the benefit of the Beneficiary in any manner authorised under this Deed."

14. (1) Under the Vaccine Damage Payments Act 1975 section 6(1), it is a pre-requisite of the valid execution of the Deed by the Secretary of State that at the date when the vaccine damage payment falls to be made the claimant (in the Deed called "the Beneficiary") is either under the age of 18 or is incapable of managing his own affairs; if he is over that age and capable of managing his own affairs the payment must be made to him. Thus in the case of a claimant for supplementary benefit over the age of 18 years, a Deed can only be executed if the claimant is incapable of managing his own affairs.

(2) The claimant is the sole beneficiary under the Trust Deed: see clause 1.

(3) So long as the Beneficiary is unable, by reason of any defect or illness of the mind, to manage his own affairs, the trustees are expressed to have certain powers, the most important of which are referred to in paragraph 13(2) and (3) above. None of these detracts in any way from the clear trust

for the Beneficiary. There is a power to apply income for the benefit of the Beneficiary notwithstanding that it benefits others with whom the Beneficiary is residing; but those others are not beneficiaries. The power is only exercisable for the benefit of the sole Beneficiary. Miss Shuker suggested that the power of recoupment in paragraph (L) of the Schedule to the Deed (which is set out in paragraph 13(3) verbatim) added further beneficiaries: see her submission as summarised at paragraph 11 above. That power enables the trustees to recoup to the parents or parent of the Beneficiary moneys which they are satisfied were in the period beginning on the 9 May 1978 and ending on the date of the Deed expended by such parents or parent for the benefit of the Beneficiary in any manner authorised under the Deed. This power is only exercisable while the Beneficiary is incapable of managing his own affairs: see the opening words of clause 3. It does not add any additional beneficiary as a cestui que trust under the Deed; but confers a power of recoupment which would not otherwise exist; for it is well settled that under a power of maintenance a parent cannot obtain recoupment of past sums paid by him for maintenance of a child (see Halsbury's Laws of England 4th Edition, Volume 24 at paragraph 458, text to note 10) except with the authority of the Court (ibid para 369 notes 10 ff). The power is vested in the trustees not as individuals, but by virtue of their office, since clause 2(A) defines the expression "the Trustees" as including any trustees for the time being who may hereafter be appointed. It is clearly fiduciary and does not authorise the trustees, if they happen to be parents, to recoup themselves: see *Re Edwards Will Trusts* [1947] 2 All E.R. 521 at page 524, per Jenkins J. (as he then was). That case was reversed in the Court of Appeal on a different point (see [1948] Ch 440) but nothing was said in that Court to cast any doubt on Jenkins J's decision on this point. The well recognised principle is that where a power of disposition is to be exercised in a fiduciary capacity the donee cannot, in the absence of express words authorising him to do so, exercise it for his own benefit. Accordingly, trustees who are parents cannot exercise the power contained in paragraph (L) of the Schedule to the Deed in order to recoup themselves.

(4) At any time, the Beneficiary or, while he is incapable of managing his affairs any receiver appointed by the Court of Protection, under section 105 of the Mental Health Act 1959 could, under section 103(1)(c) of that Act, call for the transfer of the entire trust fund and the income thereof; for under clause 1 of the Deed it is held in trust for the Beneficiary absolutely. Even where a settlor (in this case, the Secretary of State) has contemplated and intended that the trustees shall have control of the property, the sole party beneficially interested can put an end to the trust by calling for it to be transferred to him, without reference to the wishes of the settlor or the trustees. This is the well-known rule in *Saunders v Vautier* (1841) Cr and Ph 240. If the fund is called for while the Beneficiary is unable by reason of any defect or illness of the mind to manage his affairs, and the trustees not being themselves the parents are satisfied that his parents are entitled to be recouped under paragraph (L) of the Schedule, and they have not already done so, they can retain sufficient assets to recoup them. But they must hand over the balance. As explained in (3) above, there can be no recoupment by parent-trustees.

Application of the capital regulations to vaccine damage trust payments

15. (1) In all cases where the provisions as to capital contained in regulations 4 and 5 of the Resources Regulations fall to be applied in determining what assets a claimant possesses, regulation 5 should be applied first because this regulation is concerned with actual, not notional, capital resources, and as to actual capital resources the determining authority has

no discretion at all. If a claimant's actual capital resources exceed the amount specified in regulation 6 (£2,000 at the date of the claim in the present case and £2,500 as from 22 November 1982) supplementary benefit must be refused.

(2) Where the claimant's *actual* capital resources do not exceed the specified amount, regulation 4 (which relates to notional assets) should then be considered.

In the present case, the claimant (whether or not capable of managing his own affairs) clearly has an actual resource with a market value, consisting of an equitable interest in the entire trust fund. This interest, which is a chose in action, falls squarely within regulation 5. Its market value can be ascertained without difficulty by reference to a valuer expert in this field. Essentially it will reflect the underlying assets held in the trust less a discount representing the aggregate of:

- (i) such outlay as the purchaser would expect to incur in obtaining transfer of those assets, and
- (ii) such profit as the purchaser would expect as the inducement to purchase.

From the market value as so ascertained there will then fall to be deducted also (see regulation 5(a)(i)) any expenses of sale which a vendor of the interest would incur.

Only if the net amount so ascertained in respect of the claimant's equitable interest in the trust fund is less than the amount prescribed under regulation 6 need the determining authority go on to consider the application of regulation 4 (notional resources). The appropriate regulation then to apply will be regulation 4(2)(a), not regulation 4(6), (7) and (8). Regulation 4(2)(a) is apt to cover property in the hands of a nominee (eg land or investments purchased by one person with his own money in the name of another) or in the hands of trustees holding the trust property (as in the present case: see clause 1 of the trust deed) for the beneficiary absolutely. As was pointed out in Decision R(SB) 25/83 at paragraph 18(1), where, in the events which have happened, the only beneficiary is entitled under the rule in *Saunders v Vautier* to call for the entire trust fund, the claimant is not notionally possessed of the capital resources in question because he is the sole object of a discretion but by virtue of his absolute interest. Regulation 4(6), (7) and (8) accordingly do not fall to be considered at all.

(3) If the value of the assets in the hands of the trustees is (as we understood at the oral hearing that it was) still £10,000, it seems to us highly unlikely that any need to consider regulation 4 will in practice arise; for it is virtually inconceivable that the claimant's equitable interest in funds of £10,000 is worth less than the prescribed amount, namely £2,000 in respect of any period prior to 22 November 1982 and £2,500 for any period thereafter.

Was the SBAT's decision erroneous in law?

16. Yes, manifestly so. Regulation 5 was clearly applicable and so was the rule in *Saunders v Vautier*. There is nothing in the SBAT's findings to indicate that they considered the regulation or the rule or, for that matter, that they read the Trust Deed at all. If they did read it, they misunderstood its effect. They applied the wrong regulation, namely regulation 4(6), (7) and (8).

Is it expedient to give the decision the SBAT should have given?

17. No. The material facts have not been found and we have no jurisdiction to conduct a complete re-hearing, finding further facts. (Indeed, we have referred to the Trust Deed, which was not in evidence before the SBAT, only to clarify the legal position for the purpose of our directions).

Directions to the fresh SBAT

18. (1) The SBAT should find and record as facts:

- (a) whether the claimant was unable to act in terms of regulation 26 of the Supplementary Benefit (Claims and Payments) Regulations 1981;
- (b) whether the Secretary of State had made an appointment, and if so in favour of whom, under that regulation;
- (c) whether a receiver had been appointed by the Court of Protection under section 105 of the Mental Health Act 1959;
- (d) what the terms of the Trust Deed affecting the claimant in fact are, and should identify the Trust Deed, which should be inspected, in an adequate way by date, names of parties, and name and age of the Beneficiary;
- (e) the market value of the claimant's interest in the Trust Fund and the estimated expenses of sale: see paragraph 15(2) above. If the parents are still the trustees of the Trust Fund, no deduction should be made for unrepaid outlay prior to the date of the Trust Deed: see paragraph 14(3) above.

(2) If there has been no appointment of a receiver by the Court of Protection and no appointment by the Secretary of State under regulation 26 of the Supplementary Benefit (Claims and Payments) Regulations 1981 (or under earlier corresponding regulations) and the claimant is found unable to act in terms of that regulation, the SBAT should ask for an appointment to be made by the Secretary of State before going on to consider (d) and (e) above so that there is a duly constituted representative of the claimant for supplementary benefit purposes, with the authority to act and to give receipts as authorised by that regulation.

(3) If the market value of the claimant's interest in the Trust Fund, less the expenses of sale, is more than £2,000 in respect of any period prior to 22 November 1982 and more than £2,500 in respect of any period after that date, the appeal from the decision of the supplementary benefit officer must be dismissed.

Concluding remarks

19. (1) Before parting with this case, we wish to express sympathy with the parents of the claimant who invested the vaccine damage payment made to him so as to form a nest egg for him after they were gone and may well find that the existence of this nest egg precludes him from obtaining supplementary benefit until its value is reduced below £2,500 (formerly £2,000). But we are bound to interpret and apply the law as set out in the Supplementary Benefits Act 1976 (as amended) and the regulations made under that Act and have no power to disregard it. If vaccine damage payments (and assets representing such payments) are to be excluded assets for the purpose of determining a claimant's capital and income resources, express provision to that effect is required in the regulations. Putting such payments in a trust under which the claimant is the sole beneficiary does not, as this appeal illustrates, operate to exempt them, and the assets

representing them, from the provisions of the regulations relating to a claimant's capital (or income) entitlement, or to confer any discretion to disregard a claimant's actual resources under regulation 5 of the Resources Regulations.

(2) The law governing the trusts referred to in paragraphs 12, 13 and 14 above is that of England and Wales. We have not considered the law of Scotland in this decision.

(Signed) I. O. Griffiths
Chief Commissioner

(Signed) V. G. H. Hallett
Commissioner

(Signed) I. Edwards-Jones
Commissioner
