SUPPLEMENTARY BENEFIT

Resources—Treatment of a Capital Resource—Gifted to Relatives.

At the relevant time the claimant, prior to moving to a residential home, lived in a flat she owned. Because her health deteriorated she later entered a nursing home where she would receive continuous nursing care.

Supplementary benefit was paid from 27.10.83 when the value of the flat was disregarded because it was for sale. The claimant's son incurred expenditure on redecorating the flat. It was not until 15.3.85 that the position was reconsidered (supplementary benefit being in payment throughout the intervening period) when it was disclosed that the flat was to be gifted to the claimant's 2 sons.

The adjudication officer considered that the flat remained the property of the claimant and, because it could no longer be disregarded under Resources Regulation 6(1)(a)(iii) and the value exceeded the capital limit, the claimant was precluded from receiving supplementary benefit.

On appeal, the tribunal decided that the flat was no longer the claimant's property and overturned the adjudication officer's decision. The adjudication officer appealed to a Social Security Commissioner.

Held that:

1. in the transfer of a property from one person to another the courts will not complete an incomplete gift and if no deed of gift was executed the resultant incomplete gift could be revoked at any time (paragraph 12);

2. the tribunal erred by failing to consider the doctrine of proprietary estoppel which arises when an intended recipient of a gift (in this case the flat) expends money on its improvement in the belief that he or they already own a sufficient interest in the property (paragraph 16);

3. in the circumstances of the case, should it be decided that the flat remained the property of the claimant, the distribution of the proceeds of sale of the flat would need to be considered in the light of Resources Regulation 4(1) (paragraph 19).

The appeal was allowed.

1. This is an adjudication officer's appeal, brought by my leave, against a decision of the social security appeal tribunal dated 15 October 1985 which allowed an appeal by the claimant against a decision of the adjudication officer issued on 30 April 1985.

2. I held an oral hearing of the appeal. The claimant did not appear but she was ably represented by one of her sons to whom I shall refer as "Mr. B." The adjudication officer was represented by Mrs. G. Huka, of the Solicitor's Office of the Department of Health and Social Security. The legal issues presented by this appeal are complex. I am not without sympathy for appeal tribunals which are called upon to grapple with them.

3. The claimant is a widow now aged about 89. She had lived with her husband in London. But her husband died in 1968 at a time when—I understand—Mr. B. was working in East Africa. The claimant moved to Birmingham so as to be near her other son. She obtained a small but comfortable flat and was soon on good terms with her neighbours. Mr. B. came back to live in England in 1971. He had spent much of his life in Devon and it was to Devon that he returned. He envisaged that the claimant would come to live with him. But she had become attached to her new home in Birmingham. When Mr. B., from time to time, reminded her that she would be welcome in his home in Devon, she would acknowledge the invitation but say "Not yet."

4. In 1982, however, the claimant had to go to hospital for a hip replacement. This seems to have borne in upon her the fact that it was no longer desirable for her to live on her own. In mid-March 1983 she telephoned Mr. B. and said that the time had come when she would come down to live in Devon. She also said that it was her intention to give her flat to Mr. B. and her other son. She duly moved to a residential home in Devon—but it was, apparently, a somewhat traumatic experience for her.

5. Most of what I have set out in paragraphs 3 and 4 above does not appear from the papers. It is based upon what Mr. B. told me at the hearing. It is not, accordingly, material of which I can properly take account in any appeal which is confined to the consideration of whether the appeal tribunal's decision is erroneous in point of law. Moreover—since I do not in this jurisdiction have any fact-finding powers—nothing which I have set out in those two paragraphs will be in any way binding upon the appeal tribunal to whom this case must be remitted for rehearing. I have given that early history of this matter simply by way of illumination of what follows. I turn now to the facts which *do* appear from the papers.

6. At the time when the claimant moved south to the residential home she was in receipt of retirement pension and attendance allowance at the higher rate. She also had a modest sum in the bank. She was in a position to meet the fees of the residential home. And it seems that she had a reasonable expectation of being able to continue to do so. But in the 6 months after her move south, her medical condition substantially deteriorated. She could neither look after herself nor join in the communal residential life of the home. It was the opinion both of the matron of the home and of her own doctor that she should be moved to a place where she could receive nursing care for 24 hours a day. Accordingly, in October 1983, the claimant was moved to a nursing home.

7. That put the claimant in a very different financial position. She was faced with a virtual doubling of the fees for her care and accommodation. That was quite beyond her liquid resources. On 27 October 1983 she was seen, in the presence of Mr. B., by an interviewing officer of the Department and made a claim for supplementary pension. On form A11 she declared that she had bank balances in the sum of £2,832.41 and owned a flat in Birmingham which she was attempting to sell. She was advised to notify the Department as soon as the flat was sold.

8. Prior to 21 November 1983 the disqualifying limit in respect of capital resources was £2,500. But by 31 October 1983 the claimant's bank balances had been reduced to £2,368.86—and from that date she was awarded supplementary pension. In a letter dated 4 November 1983 Mr. B. wrote:

> "I take the opportunity to confirm that the flat is now on sale for £18,600 which is a reduced price. The enclosed cutting from the Solihull Times refers.
>
> We were advised by the bank that there are over 500 flats for sale in the area which is why we lowered the price."

9. Regulation 6(1)(a)(iii) of the Supplementary Benefit (Resources) Regulations 1981 provides for the disregard of the value of—

> "(iii) Any premises which are for sale and the value of which it would be reasonable in all the circumstances to disregard for such period as the benefit officer may estimate as that during which the sale will be completed...."

In October 1983 the benefit officer (now the adjudication officer) took the view that it would be reasonable to disregard the value of the flat for a period of 6 months. For one reason or another—into which I need not here go—it was not until 15 March 1985 that the position was reconsidered. (Supplementary pension was paid throughout the intervening period.)

10. It was at this point that the case assumed an entirely new dimension. The claimant was visited on 15 March 1985. Mr. B was present at the ensuing interview. He produced copies of two letters, each dated 1 April 1983. For a reason which has not been explained to me, neither those letters nor any copies thereof are in the papers. They appear to have been signed by the claimant. One was addressed to Mr. B. and his brother and expressed the claimant's intention of giving to them the flat in Birmingham. The other was addressed to the claimant's solicitor and asked him to take such action as was necessary to implement the claimant's said intention. In respect of the second letter the papers disclose a little more. On 1 April 1985 the claimant's solicitors wrote to the Department a letter from which I quote:

> "On the 1st April 1983 [the claimant] wrote to us confirming her wish to give the flat to [Mr. B.] and his brother [....]. She instructed us to deal with the necessary formalities on her behalf.
>
> From that date she regarded the flat as belonging to her two sons jointly but as it was to be sold there seemed little point in formally transferring the property by way of a Deed of Gift. The property was placed on the market for sale and on 20th June 1983 [the claimant] gave [Mr. B.] Power of Attorney to enable him to vest the property in the joint names of himself and his brother in accordance with his mother's instructions or alternatively to sell the property.
>
> Since that time the property has been on the market and has proved extremely difficult to sell although a purchaser has been found and an exchange of contracts in the near future is anticipated."

(The flat was in fact sold in June 1985 for a price of £17,250.) A copy of the power of attorney is in the papers. It is in general terms. The operative words are:

> "I appoint [Mr. B.] of.....to be my Attorney in accordance with section 10 of the Powers of Attorney Act 1971."

It is common ground that no deed of gift was ever executed—or even prepared.

11. All this, of course, put the matter in a rather different light. Mr. B. (who has throughout had the effective conduct of the claimant's case) contended that at no time since the claimant had claimed supplementary pension had the flat been the claimant's property. Accordingly, the qualified disregard provided for in regulation 6(1)(iii) of the Resources Regulations did not come into the picture at all. The flat fell to be disregarded altogether since it belonged, not to the claimant, but to Mr. B. and his brother. But the local adjudication officer took a different view. He considered that—

(a) the flat was the property of the claimant; and

(b) it had been on the market so long that it was no longer "reasonable in all the circumstances" to disregard its value as a capital resource.

The upshot was a decision that, from the prescribed payday in the week commencing 18 March 1985, the claimant was not entitled to a supplementary pension. The claimant appealed to the appeal tribunal.

12. The appeal tribunal went into the matter with some care. But it seems to have paid no heed whatever to certain well-established principles of English law in respect of gifts *inter vivos*. I quote from paragraph 62 of Volume 20 of Halsbury's Laws of England, 4th Edition:

> "62. *Court will not complete incomplete gift.* Where a gift rests merely in promise, whether written or verbal, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it. A promise made by deed is, however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which, according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do. If a gift is intended to be effectuated by one mode, for example by actual transfer to the donee, the court will not give effect to it by applying one of the other modes.
>
> An incomplete gift can be revoked at any time; there is a power to draw back so long as the gift is incomplete. No question of conscience enters into the matter for there is no consideration and there is nothing dishonest on the part of an intending donor who chooses to change his mind at any time before the gift is complete."

Halsbury cites a number of leading cases in support of each of the principles there stated. I need not here refer to those cases. Some of them are mentioned in the submission of the adjudication officer now concerned.

13. An interest in land cannot, of course, be the subject of a physical delivery of possession as is the case which a chattel—for instance a motor car or a picture. In bygone days the common law recognised, under the principles of livery of seisin, a type of token delivery of possession—the handing over a turf or a twig or such like. But that passed out of common use and was wholly abolished by the Law of Property Act 1925. In the present case the claimant's letters of 1 April 1983 (see paragraph 10 above) did *not* constitute "everything which, according to the nature of the property comprised in the gift, was necessary to be done by [her] in order to transfer the property and which it was in [her] power to do". That required the execution of a deed of gift—and none was executed.

14. But—as I have already indicated—the appeal tribunal appears to have wholly ignored those principles of law. Its findings of fact contained the sentence:

> "The Tribunal find as fact that the claimant gave her flat to her 2 sons on the 1st April 1983."

But that is neither explained nor amplified. I think it must have been reached upon a "palm tree justice" approach—i.e. by taking the view of the man in the street who is unversed in legal science. But that, I am afraid, will not do. There was clear error of law.

15. But the matter does not end there. I quote from paragraph 65 of Halsbury, *loc cit*:

> "The subsequent acts of the donor may give the intended donee a right to enforce an incomplete gift. Thus, if a donor puts the donee into possession of a piece of land and tells him that he has given it to him so that he may build a house on it, and the donee accordingly, and with the donor's assent, expends money in building a house, the donee can call on the donor or his representatives to complete the gift."

A slightly different situation is contemplated in paragraph 1511 of Halsbury's Laws of England, Volume 16:

> "If A spends money on B's land believing that the land belongs to A or that A has or will obtain some interest in the land and B, knowing of A's mistaken belief, stands by while the money is being spent or encourages the expenditure, B will not be heard to assert his title to the land so as to defeat A's expectation at least without compensating A for his expenditure."

Again, at paragraph 1475 of Halsbury Volume 16 we read:

> "The court will also protect a person who takes possession of land or exercises an easement over it under an expectation, created or encouraged by the owner, that he is to have an interest in it, and, with the owner's knowledge and without objection by him, expends money on the land. The protection may take the form of requiring repayment of the money, or the refusal to the true owner of an order for possession, or of holding the person expending the money entitled to a charge or lien, or of finding a constructive trust. Similarly, where a person who mistakenly believes that he has an interest in land, being ignorant of his want of title, expends money on it in buildings or other improvements or otherwise dealing with it, and the true owner, knowing of the mistaken belief and the expenditure, raises no objection, equity will protect the person who makes the expenditure, as by confirming that person's supposed title, or by requiring that he be compensated for his outlay, or by giving him such a charge or lien."

16. All that is carefully dealt with in an admirable submission by the adjudication officer now concerned. Her summary of the essence of proprietary estoppel is based upon a quotation from Fry J. in *Willmott v Barber* (1880) 15 Ch D 96, which was quoted with approval by Scarman L. J. (as he then was) in *Crabb v Arun District Council* [1975] 3 AER 865, at 876–7:

> "It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the

> first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly...., the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right."

To that quotation Scarman L. J. immediately added the following comment:

> "Counsel for the defendants, in the course of an interesting and vigorous submission, drew the attention of the court to the necessity of finding something akin to fraud before the equity sought by the plaintiff could be estabished. 'Fraud' was a word often in the mouths of those robust judges who adorned the bench in the 19th century. It is less often in the mouths of the more wary judicial spirits who sit today on the Bench. But it is clear that whether one uses the word 'fraud' or not, the plaintiff has to establish as a fact that the defendant, by setting up his right, is taking advantage of him in a way which is unconscionable, unequitable or unjust."

17. The submission of the adjudication officer now concerned brought another new twist to the narrative. Mr. B., on the claimant's behalf, contended that this was, indeed, a case in which equity would remedy any imperfection in the original gift. There is in the papers a letter dated 29 May 1985 and written by the estate agents in whose hands the sale of the flat had been placed. I quote therefrom:

> "As [sic] our advice, you completely redecorated the flat and you did in fact reduce the price from £18,500 to £17,250, and we do not think that there is anything more you could have done."

At the oral hearing Mr. B. explained to me that he personally had done the redecoration—with the help of the gardener. In respect of the interview on 27 October 1983 (see paragraph 7 above) he said that the claimant was still sensitive about the move from Birmingham and he did not want "to rub in" the fact that she was no longer the owner of the flat to which she had become so attached. He also told me that from the eventual proceeds of the sale of the flat the claimant had kept "just under £3,000" and had given the balance to Mr. B. and his brother. (A cynic can hardly fail to notice that, since 21 November 1983, £3,000 has been the cut-off point in respect of capital resources.)

18. So there it is. The appeal tribunal undoubtedly erred in law. But it is quite impossible for me to give the decision which it should have given because the proprietary estoppel point involves findings of fact which I have no jurisdiction to make. The case will have to go back for appropriate findings to be made and appropriate conclusions in law to be derived therefrom. Amongst the matters of which the fresh appeal tribunal will wish to take account, I suggest the following:

(a) Although Mr. B. makes some play of the presumption of advancement, that presumption has no bearing upon this case. Its function

in law is to afford a prima facie rebuttal of the presumption—which would otherwise arise—of a resulting trust in favour of a donor. No question of a resulting trust in favour of the claimant can possibly arise. That she *intended,* on 1 April 1983, to make a gift of the flat is clearly established. (The Commissioner made the like point in paragraph 7 of Decision R(SB)23/85.)

(b) But did it *remain* the claimant's intention to make a gift of *the flat*? Her solicitors appear to have taken the (very understandable) view that to transfer ownership of the flat in advance of what was then hoped would be a reasonably quick sale would be a pointless waste of effort and money. And they appear to have advised the claimant accordingly. At that stage the claimant may well have abandoned her intention of transferring ownership of the flat before the flat was converted into money. That would be consistent with the course of the interview on 27 October 1983 and the statements made on form A11. It would also be consistent with the fact that the power of attorney was never invoked for the purpose of transferring ownership of the flat to Mr. B. and his brother.

(c) Evidence will, of course, have to be heard in respect of the outlay of money and effort expended by Mr. B. upon the redecoration of the flat—and as to the intention with which he incurred such expenditure. Prima facie, of course, such expenditure would seem to be as consistent with a desire to get the flat sold for a reasonable price as soon as possible (so that that price might be distributed between Mr. B. and his brother) as it is consistent with Mr. B's belief that the flat was already the property of himself and his brother.

(d) In the event that the appeal tribunal should consider that Mr. B. and his brother were in a position to avail themselves of the doctrine of proprietary estoppel, consideration will have to be given to what equity would have considered the appropriate relief (see the end of the final quotation in paragraph 15 above). In *Dillwyn v Llewelyn* (1862) 4 De GF & J 517, a son had, at his own expense, built a house upon land which he believed his father had given him. In *Chalmers v Pardoe* [1963] 3 AER 552, the plaintiff had built six buildings on the relevant land. In *Crabb v Arun District Council* (see above) the defendants resiled from an assurance which left the plaintiff (who had incurred no little expense) with a plot of land to which he had no right of way. In each of those cases the "donee's" expenditure or loss went far beyond the redecoration of a flat. The appeal tribunal will wish to consider whether such redecoration would have induced a court of equity to hold that ownership in the flat passed to Mr. B. and his brother; or whether it would have held that justice could be done by requiring the claimant to compensate Mr. B. for his outlay or by giving Mr. B. an appropriate charge on the flat. Such compensation or charge would, of course, have reduced the capital resources of the claimant—but would hardly, at the relevant time, have brought them below £3,000.

19. The appeal tribunal carefully considered whether it should regard the events of 1 April 1983 as the depriving of herself by the claimant of resources for the purpose of securing supplementary benefit (see regulation 4(1) of the Resources Regulations). It decided that it should not so regard those events—and that is a conclusion with which the appeal tribunal which rehears this matter may see fit to agree. But, of course, the fresh appeal tribunal must consider the situation down to the date when it sits. Should

it find that, until the date of its sale, the flat remained the property of the claimant, it may have to consider—in the light of regulation 4(1) aforesaid—the distribution of the proceeds of sale of the flat. It must bear in mind, however, that the only decision of an adjudication officer before it is that of 30 April 1985. It will have no jurisdiction to interfere with any decisions of the adjudication officer made after that date.

20. This is a type of case which not infrequently comes before the Commissioner. It is impossible to banish the (perhaps unworthy) thought that the object of the proceedings is not so much to ensure that an elderly person lives out his or her life in tolerable comfort but to ensure that the supplementary benefit fund cushions that person's children against any erosion of their expectations.

21. My decision is as follows:

(1) The adjudication officer's appeal is allowed.

(2) The decision of the appeal tribunal dated 15 October 1985 is erroneous in law and is set aside.

(3) The case is referred to a differently constituted appeal tribunal for determination in accordance with the principles of law set out in this decision.

(Signed) J. Mitchell
Commissioner