[2017] AACR 15

(MW v Secretary of State for Work and Pensions (JSA)
[2016] UKUT 469 (AAC))

Judge Gamble **CSJSA/344/2015**
9 June 2016

Capital – Scots private law – real and personal rights – whether money lent for a specific purpose to be treated as capital

The claimant was in receipt of jobseeker's allowance (income-based) (JSA (IB)). His mother lent him sums of money for the specific purpose of the purchase of a house. The claimant deposited the sums in question in building society accounts and ultimately purchased a house using these sums. He appealed against a decision of the First-tier Tribunal (F-tT) that money for the sole purpose of purchasing a house still falls to be counted as capital in terms of regulation 108 of the Jobseeker's Allowance Regulations 1996. Under the private law of England and Wales the sums of money involved would be regarded as being held in trust by the claimant, and would not be treated as "capital" for the purpose of the regulations. The issue before the Upper Tribunal was how sums of money lent to a claimant on JSA (IB) fall to be treated under Scots private law for the purposes of regulations 107, 108, 111 and 116 of the Jobseeker's Allowance Regulations 1996. It was not in dispute that Scots private law was applicable on the facts of the case.

Held, allowing the appeal, that:

1. the building society acquired the right to the money which the claimant deposited into his account and the claimant acquired a personal right against the building society to seek repayment of that money. The claimant remained under personal obligations to his mother (as the lender) and she had a personal right to require the claimant to use the loan only in accordance with the purpose she had stipulated and that personal right placed a concomitant personal duty on the claimant which meant that the loan could not be the claimant's "capital" for the purposes of the 1996 Regulations (paragraphs 11 to 13);

2. sums of money lent to a claimant on JSA (IB) do not form part of a claimant's "capital" and are not to be included in the calculations required by regulation 108 and 111. Such sums do not count towards the "capital limit" of £16,000 laid down by regulation 107 nor do they fall to be included in the calculation of tariff income from capital required by regulation 116 (paragraph 1);

3. the same approach applies to cases covered by regulations 45, 46, 49 and 53 of the Income Support (General) Regulations 1987 (paragraph 1).

The judge set aside the decision of the F-tT and directed that the Secretary of State recalculate the claimant's entitlement to JSA (IB) on the dates specified.

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The appellant was neither present nor represented.

Mr C Pirie, Advocate, instructed by Ms Katy Kelman, Solicitor, of the Office of the Solicitor to the Advocate General for Scotland appeared for the respondent.

The claimant's appeal is allowed.

The decision of the Glasgow First-tier Tribunal of 1 May 2015 is set aside.

Under section 12(2)(b)(ii) and (4)(a) of the Tribunals, Courts and Enforcement Act 2007 the First-tier Tribunal's decision is re-made as follows:

The decision of the Secretary of State of 20 November 2014 is set aside.

The sums of money lent to the claimant by his mother to be used by him for the purchase of a house are not to be treated as being part of his capital for the purposes of regulations 107 and 116 of the Jobseeker's Allowance Regulations 1996.

The Secretary of State is directed to recalculate the claimant's entitlement to jobseeker's allowance (income-based) on the dates specified in the tribunal's decision notice, document 82, in accordance with this decision.

REASONS FOR DECISION

1. The issue in this appeal is how sums of money lent to a claimant on jobseeker's allowance (income-based) for a specific purpose fall to be treated under Scots private law for the purposes of regulations 107, 108, 111 and 116 of the Jobseeker's Allowance Regulations 1996 (SI 1996/207). For the reasons given in detail below, I hold that by the application of the relevant Scots private law principles and rules such sums do not form part of a claimant's "capital". Thus they are not to be included in the calculations required by regulations 108 and 111. Further, they do not count towards the "capital limit" of £16,000 laid down by regulation 107 nor do they fall to be included in the "calculation of tariff income from capital" required by regulation 116. The same approach applies to cases covered by regulations 45, 46, 49 and 53 of the Income Support (General) Regulations 1987 (SI 1987/1967).

2. The view contrary to that taken in this decision was taken in the decision-maker's decision of 20 November 2014, documents 11–19. That decision was left unaltered at a mandatory reconsideration dated 28 January 2015, documents 58–59. The claimant appealed to the First-tier Tribunal against it.

3. The above decision was confirmed by the tribunal of 1 May 2015. The text of their decision notice, document 82, is as follows:

> "The appeal is disallowed.
>
> The decision of the Secretary of State issued on 20/11/2014 is confirmed.
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> [The claimant] is not entitled to Jobseekers Allowance (Incapacity Benefit) as his capital exceeds the upper prescribed limit of £16,000 from 4/5/2011 to 10/5/2011 and 14/9/2011 to 13/12/2011.

Between 21/07/2011 to 04/07/2012 Jobseekers Allowance should be reduced to following entitlement:

21/07/2011	to	27/07/2011	due amount	£50.50
28/07/2011	to	10/08/2011		£51.50
11/08/2011	to	17/08/2011		£49.50
18/08/2011	to	27/08/2011		£47.50
25/08/2011	to	31/08/2011		£43.50
01/09/2011	to	07/09/2011		£39.50
08/09/2011	to	14/09/2011		£27.50
08/12/2011	to	25/01/2012		£53.50
26/01/2012	to	11/04/2012		£55.50

12/04/2012 to 27/06/2012 £59.00

[The claimant] received a loan from his mother to be used for purchasing his house. Although the money was used for that purpose it still falls to be counted as capital in terms of Regulation 108 of the Jobseekers Allowance Regulations 1996."

4. The claimant appeals against the tribunal's decision with the permission of District Tribunal Judge Kidd.

5. The claimant requested a hearing. The Registrar granted that request on 18 December 2015. On 13 January 2016 the Secretary of State stated in an email, document 116, that he was "in principle sympathetic with the grounds of appeal". He went on to state that "unless directed otherwise" he did not "intend to be represented at the oral hearing". In the light of the above email and the terms of the Secretary of State's written submissions on documents 103–105, especially paragraphs 9 and 14 of those submissions, which deal exclusively with the private law of England and Wales and do not address the private law of Scotland, which is the applicable law, I made the following direction on 14 January 2016, document 108:

"I have considered the terms of the Secretary of State's email of 13 January 2016.

I hereby direct that:

i) The oral hearing granted by the Registrar should be convened at a date to be arranged.

ii) That the Secretary of State should be represented at that hearing by Scottish Counsel, instructed by a Scottish solicitor

iii) That those acting for the Secretary of State in these proceedings should prepare and lodge whether before or at the above hearing a brief Note of Argument on the issues of Scottish Private Law arising in these appeals. In particular, that Note of argument should include comments on the applicability to these appeals of *JK v Secretary of State for Work and Pensions* [2011] AACR 26, the effect of a loan of money in transferring title to the value of the sum involved from the lender to the borrower and what the Secretary of State's position is in regard to the issue raised in paragraph 9 of his submission in these appeals dated 19 November 2015."

6. The hearing took place before me on 22 March 2016. The claimant was neither present nor represented. In all the circumstances, I considered it appropriate to proceed, being satisfied that the claimant had been sent sufficient notification of the hearing. The Secretary of State fulfilled the terms of my direction of 14 January 2016, cited in [5] above. A detailed Note of argument relating to the relevant issues of Scots domestic law, documents 119–125, was prepared and lodged on his behalf. In that Note of Argument he supported the claimant's appeal. He was ably represented at the hearing by Mr Pirie, Advocate, instructed by Ms Kelman, Solicitor. In his oral submissions, Mr Pirie developed the contents of the Secretary of State's Note of Argument. I am indebted to him for his helpful contribution to the hearing.

7. The tribunal's findings of fact were not challenged by either party. They are clearly laid out by the tribunal judge in paragraphs 4–9 of documents 85–86, as follows:

"4. **Facts found by the Tribunal** The following is a statement of the relevant facts, based on [the claimant's] evidence to the Tribunal, and the written evidence of [the claimant's] bank accounts with Yorkshire Building Society (YBS) and Nationwide.

5. At the relevant time [the claimant] was the tenant of premises at 8 Stronvar Drive. In around 2011 changes to the law (imposition of the 'bedroom tax'), and discussion of possible future changes (removal of the 'right to buy'), [the claimant] explored the possibility of purchasing his property from Glasgow Housing Association (GHA), his landlord.

6. In around February 2011 [the claimant] was made an offer by GHA to sell the property at £25,000. [The claimant] did not have capital and discussed the proposed purchase with his mother (Mrs D). She was initially not keen, as she was worried that any major costs might be hers. She loaned (the claimant] £20,000. This was paid into his YBS account on 4th May 2011. [The claimant] could not find the additional funds and the offer lapsed. As this money had been lent for the specific purpose of funding the purchase, and also because it took him over the JSA threshold, [the claimant] returned the £20,000 to his mother. The sum was withdrawn from his YBS account on 11th May 2011 and repaid to [Mrs D]. [Mrs D] suggested the purchase of premium bonds in [the claimant's] name at her address meanwhile with the money. However, NSI advised [the claimant] that they required proof of identity and address.

7. [Mrs D] subsequently commenced paying money into [the claimant's] accounts with YBS and Nationwide. From time to time between 25th July 2011 and 2nd July 2012 payments of £4,900 and £5,000 respectively, and subsequent regular payments of £500, were made into each account as detailed in the copy bank statements in the papers.

8. The money in each account was returned to [Mrs D], in the case of YBS in July 2012, and in the case of Nationwide in December 2011. The purchase of the premises at 8 [S] Drive by [the claimant] was concluded on 20th September 2012 and was settled by a cheque for the full price, £24,600, from [Mrs D].

9. Accordingly the Tribunal found that the capital sums identified by the DWP had been in [the claimant's] bank accounts at the times identified by them. The issue before the Tribunal was whether this capital fell to be treated as [the claimant's] capital for the purposes of regs. 107 and 116."

8. The Secretary of State accepts that under the private law of England and Wales the sums of money involved in this appeal would be regarded as being held in trust by the claimant. That follows from *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567, as submitted in paragraph 21 of document 124. Mr Pirie adhered to that submission orally and in so doing drew my attention to R(SB) 53/83. That Commissioner's decision clearly supported the proposition advanced by the Secretary of State in paragraph 21. I entirely agree with that proposition. I also agree with the further submission made on behalf of the Secretary of State in paragraph 21 that "it would be unsatisfactory if they were different results on the same facts north and south of the border." Only if the relevant principles and rules of Scots law had compelled me to reach a different outcome from that in R(SB) 53/83 would I have decided this case against the claimant.

9. The tribunal in effect held that the claimant did not hold the sums lent to him by his mother for a possible house purchase as a trustee. They put matters thus in paragraph 12 of their Statement of Reasons on document 86:

> "(The claimant) had the beneficial ownership of the money at the relevant time."

They did not err in law in holding that a trust did not operate in this case. I accept Mr Pirie's submission that there cannot be a valid trust in Scots law where the same person is himself both the sole trustee and the sole beneficiary which would have been the case here, paragraphs 18–28 of *Wilson and Duncan on Trust, Trustees and Executors, Second Edition*. I also accept his submission that the requirements of section 1(2)(a)(iii) of the Requirements of Writing (Scotland) Act 1995 had not been fulfilled, paragraph 12 of R(IS) 10/99. In those submissions, Mr Pirie reneged from the position taken in documents 104–105 by the Secretary of State that this case should be decided on the basis of the approach summarised in [8] above.

10. However, the exclusion of trust is not the end of the matter. Is there some other legal reason why the sums in question could be said not to be part of the claimant's "capital"? I accept Mr Pirie's submission that the word "capital" in the Jobseeker's Allowance Regulations 1996 is not defined and that whether any asset is covered by it is a matter, in Scotland, for the rules Scots private law to determine.

11. It was Mr Pirie's principal submission that the claimant was not only under a personal obligation owed to his mother to repay the sums of money in question but also under another personal obligation, also owed to his mother, to use those sums of money only for the purpose for which they had been lent to him. Those personal obligations were concomitant with his personal right to the sums in question. The personal obligation relating to the use of the sums lent to him required the claimant not to use those sums otherwise than for the purchase of a house or to return it to his mother. In that connection, Mr Pirie drew my attention to the tribunal's specific statement in paragraph 12 of their Statement of Reasons on document 86 that the money paid into the claimant's building society account by his mother "was to be used only for the purchase of the premises at 8 [S] Drive and was to be returned to her if the purchase did not go ahead". Mr Pirie submitted that the personal obligation requiring the claimant to use the sums of money in question only for the purpose specified by his mother had a similar legal effect to a trust. It was, he submitted, analogous to a trust. At least the application of the approach in his submission would lead to the same result for this claimant as that reached by Mr Commissioner Rice, applying English domestic law, for the claimant in R(SB) 53/83.

12. Mr Pirie supported the above submissions with the following legal analysis resting on the classical distinction, derived from Roman law, in Scots law between personal and real rights.

> (a) The loan to the claimant was a contract of *mutuum* in Scots law. According to the institutional writers, Erskine and Bell, the claimant as the borrower acquired a real right to the sums of money involved subject to a personal obligation to repay them. The detailed citations from Erskine and Bell are found in paragraphs 3–5 of documents 119–120 which read as follows:
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> > "3. Scots law distinguishes between real rights and personal rights. A real right 'entitles the person vested with it to possess the subject as his own; or, if it be possessed by another, to demand if from the possessor'; Erskine, *An Institute of*

> *the Law of Scotland,* 8th edition ('Erskine'), III, I, 2. The creditor in a personal right has 'only … a right of action against the debtor … by which [the debtor] may be compelled to fulfil that obligation, but without any right in the subject which the debtor is obliged to transfer to him': *ibid.*
>
> 4. Scots law recognises two species of loan. Commodate is 'a real contract of loan, for a certain use, without hire, and on an engagement, express or implied, that the identical thing lent shall be restored to the owner": Bell, *Principles of the Law of Scotland,* 10th edition ('Bell'), §195. The lender retains the real right of ownership in the subject of the loan: Bell, §199; Erskine, III, I, 20. *Mutuum* is 'a real contract, by which one gives and transfers a fungible to another without hire, for use by consumption, on an engagement to restore as much of the same thing at the stipulated term': Bell, §200. The borrower obtains the real right of ownership in the subject of the loan and the lender obtains a personal right to require an equivalent from the borrower at the term: Bell, §201; Erskine, III, I, 18.
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> 5. A loan of money is a *mutuum*: Bell, §200; Erskine, III, I, 18."

(b) When the claimant deposited the sums in question in his building society account that was a further contract of *mutuum* between him and the building society. Accordingly the building society acquired the real right to the sums of money in question subject to the claimant's personal right to claim repayment, which placed a corresponding personal obligation on them to repay the money in question when the claimant exercised that personal right. (The claimant of course continued to be under the personal obligation of repayment to his mother, the original lender). Mr Pirie supported these propositions by reference to *Royal Bank of Scotland v Skinner* 1931 SLT 382. In that case Lord Mackay at 384 analysed the relationship between a banker and a customer as being (as is also the case in English law) one of debtor-creditor. He then went on to say:

> "The banker is not, in the general case, the custodier of money. When money is paid in, despite the popular belief, it is simply consumed by the banker, who gives an obligation of equivalent amount. When money is drawn from a fund which no longer exists it simply creates a loan by the banker, having all the incidents of a loan except, perhaps, that the form of writs instructing it is reduced to stereotyped shape – namely, drafts, passbooks, and accounts."

That statement equally applies to a building society. The claimant having acquired a personal right against the building society to seek repayment of the money lodged with them by him remained under, as noted above, a personal obligation of repayment of the money lent to him by his mother, owed to her as the lender.

(c) Additionally, given the specific purpose laid down by his mother when the loan was made he was under a further personal obligation owed to her to use the money only for that purpose. To support that proposition which was key in his argument Mr Pirie drew an analogy with the close forensic analysis of real and personal rights in the context of the Law of Trusts by Lord President Normand *in Inland Revenue v Clarks Trustees* 1939 SC 11 at 22. There His Lordship stated that a beneficiary, albeit that he has no real right to the assets of a trust, has "a personal right to sue the trustees and to compel them to administer the trust in accordance with the directions which it contains". By analogy, Mr Pirie submitted that the claimant's mother had a personal right to require the claimant

> to use the loan which she had made to him only in accordance with the purpose for that loan which she had stipulated. That personal right placed a concomitant personal duty on the claimant. The existence of that personal duty meant that the sums of money involved were not the claimant's "capital" for the purposes of the Jobseeker's Allowance Regulations 1996.

13. I am persuaded by the detailed legal argument summarised in [12] above that Mr Pirie's submission narrated in [11] above was correct. The tribunal erred in law in failing to decide the case in the way submitted by Mr Pirie.

14. For the sake of completeness, I should add that the tribunal did not err in law by failing to hold that the sums involved were not "capital" by reason of the claimant being subject to an obligation of certain and immediate repayment of those sums. See *Leeves v Chief Adjudication Officer*, reported as R(IS) 5/99, and CIS/2287/08, paragraphs 27–28. The decision of the Court of Appeal in *Leeves* did not apply in this case given the facts found by the tribunal.

15. My acceptance of Mr Pirie's submissions in this case and particularly the approach contained in them to money deposited in a bank or building society requires me to revisit my decision in *JK v Secretary of State for Work and Pensions (JSA)* [2010] UKUT 437 (AAC); [2011] AACR 26. In my direction to the Secretary of State referred to in [5] above I requested submissions on *JK*. On reflection on that decision in the light of Mr Pirie's submissions, I consider that in it I overlooked the distinction between real and personal rights in Scots law in the terminology which I used. I should have avoided the use of such terms as "ownership" and "belong" in paragraphs 8(b)–(d) of that decision. Rather I should have expressed myself in terms of personal rights to repayment of money in a bank or building society account. With that terminological qualification I am satisfied that my decision in that case remains correct.

16. As I held in [13] above, I am satisfied that the tribunal erred in law. I exercise my discretion in the claimant's favour and set their decision aside. So far as disposal is concerned, it is appropriate, given the detail of the tribunal's undisputed findings of fact, for me to substitute my own decision on the basis of those findings. I do so.

17. The claimant's appeal is allowed for the reasons given in detail above.