

THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV 2013/0209

Between:

ROBERT WILLIAM HIRST

Appellant

And

[1] THE DIRECTOR OF THE SOCIAL SECURITY BOARD

[2] THE SOCIAL SECURITY APPEAL TRIBUNAL

Respondents

Appearances: Mr. Menelik Miller, Counsel for the Appellant
Ms. Akilah Anderson, Counsel for the Respondent

2015: December 8th

JUDGMENT

[1] **ELLIS J:** By Fixed Date Claim Form filed on 17th July 2013, the Appellant appealed against the decision of the Social Security Appeals Tribunal (the Tribunal) delivered on the 27th June 2013. This Appeal, which was filed pursuant to section 12 (i) (b) of the Social Security (Decisions and Appeals) Regulations, challenges the Tribunal's finding that the Appellant is not eligible for survivor's benefit under the Social Security Benefits Regulations *as amended*.

[2] Given the issues which arise in this Appeal, the Court is satisfied that the relevant chronology is critical to the determination of the Claim. From the evidence presented, the following appears to be the case:

11 November 1998	The Appellant's wife, Sarah Hirst dies after having made contributions of the past 16 years.
1 January 2001	The 2000 Social Security (Benefits) (Amendment) Regulations come into effect allowing widowers to become eligible for survivor's benefit notwithstanding that they were not invalids and wholly maintained by their wives prior to death.
June, 2008	The Appellant makes a claim to the Social Security Board for survivor's benefit.
7 July 2008	The Benefits Officer of the Social Security Board communicates the decision of the Director that the Appellant's claim is denied.
17 August 2009	The Appellant lodges his Notice of Appeal to the Tribunal. He indicates (1) that he was not informed by the Board that the claims should be made within 3 months of the date of death; (2) that the changes made in 2000 which allowed male survivor's to get a survivor's pension was done to make it fair for men as well as women to benefit and (3) that the Board's letter did not explain the 21 day time limit for the filing of an appeal.
22 April 2010	The Tribunal renders its Interim Decision and Memorandum of Reasons in which it: i. Stays the appeal. ii. Orders the Appellant to apply to the Minister for an extension of time to lodge the appeal pursuant to section 4 of the Social Security (Decisions and Appeals) Regulations.
March 2011	The Interim Decision of the Tribunal Memorandum of Reasons are communicated to the Appellant.

9 March 2013	The Minister of Health extends the time for lodging the Appellant's appeal.
27 June 2013	The Tribunal renders its decision denying the Appellant's survivor's benefit.
17 and 18 July 2013	The Appellant filed his Fixed Date Claim Form and Notice of Appeal

- [3] The full text of the letter written on behalf of the Director on the 7th July 2008 is relevant. It provided as follows:

"The Social Security (Benefits) Regulations mandate that claims for Survivor's Benefit must be submitted within three (3) months of the death. However, you are now claiming after nine years. In addition, the Social Security (Benefits) Regulations of 2000 included an insured widower as a person who is eligible to claim for Survivor's Benefit. However, the late Sarah Hirst died in 1998 prior to when the amendment came into effect.

Based on the above, we are unable to honour your claim for Survivor's Benefit."

- [4] The Tribunal's decision upheld the Director's decision and denied the Appellant's Appeal. The Tribunal found that at the time of his wife's death on 11th November 1998, the state of the law was that a widower could not claim survivor's benefit unless the circumstances of his case fell within the confines of Section 37 (5) of the Regulations. For a widower's claim to succeed at that time he had to prove *inter alia* that he had been an invalid and wholly and mainly maintained by her just prior to the date of his wife's death. The Tribunal contends that in submitting his claim, the Appellant neither claimed nor submitted any evidence to show that his case fell within the confines of Section 37 (5) and so he failed to satisfy the relevant conditions relating to his claim for survivor's benefit.

- [5] The Regulations were amended by the Social Security (Benefits) (Amendment) Regulations SI No. 41 of 2000, which removed those restrictions in respect of widowers who were over the age of forty. However, the Tribunal found that the changes to the law did not have retroactive effect and so the Appellant was unable to take the benefit.
- [6] The Appellant's grounds of the appeal are as follows:
- i. Subsection 8 (1) of the Regulations need not have a retroactive effect for the Appellant to be eligible for survivor's benefit.
 - ii. The date from which the Appellant is eligible for survivor's benefit, if he met the other statutory conditions is January 2001 i.e. the date on which the Regulations came into force and not the date of the death of his wife.
 - iii. The Director of the Social Security Board when considering the Appellant's application failed to consider whether the passing of the Regulations and the specific facts of the Appellant's case were good cause for the delay in making the claim and the subsequent treatment of the claim as being in time; as is defined under subsection 3 of the abovementioned legislation. The Tribunal also did not address its mind to this question and therefore did not consider a relevant fact.
 - iv. The Appellant did not fail to satisfy the relevant conditions relating to his claim for the survivor's benefit as defined under sub regulation (5).
 - v. The Tribunal failed to determine when the Appellant had submitted his claim to the Social Security Board.

PROPER PARTY

- [7] During these proceedings, Counsel for the Respondent contended that the Director of the Social Security Board had been wrongly joined as a party. She argued that the Appeal is made pursuant to the Social Security (Decisions and Appeals) Regulations (the Appeal Regulations) which provide a scheme by which decisions of the Director may be reviewed.
- [8] Section 3 (3) of the Appeal Regulations provides that the decision of the Director, under sub-paragraph (1), on any of the matters referred to in the said sub-paragraph shall be final and conclusive. However, there follows a proviso which allows the Director to set aside his own decision, on representation made and production of fresh evidence which was not available at the time of such decision. Section 3 (3) also makes it clear that it is to be read subject to section 4 which provides as follows:
- “If any person is dissatisfied with the decision given by the Director, or any other authorized person, the question shall, on notice of appeal being given, within twenty one days of receipt of notification of the decision, or such longer period as the Minister may allow having regard to the circumstances of the case, be referred to an appeal tribunal.”
- [9] Section 5 (1) of the Appeal Regulations then establishes the Appeal Tribunal with the remit to hear and determine appeals from decisions of the Director. Section 12 prescribes the course which is open to a person who is dissatisfied with a decision of the Tribunal. Section 12 (1) (b) provides that:
- “... any person who is dissatisfied with the decision of the Tribunal may appeal within twenty-one days therefrom to the Supreme Court on any question of law.
- [10] It is therefore clear is that there is no statutory right of appeal from the decision of the Director to the Supreme Court. On that basis, Counsel argued that the correct respondent to this Appeal is not the Director, but the Tribunal. She submitted

further that the scope of the Court's jurisdiction is limited to a review of the Tribunal's decision and not that of the Director.

[11] Counsel for the Appellant however insisted that the Director was properly joined. Counsel argued that under section 4 of the Appeal Regulations there is a right of appeal against the Director's decision to an Appeal tribunal. He argued that this Tribunal is appointed by the Minister and it is not certain whether it has the legal personality to sue or be sued or to pay or receive costs. He suggested that the Tribunal can only be viewed as a department within the Social Security Board and not separate and apart from it. Nevertheless, he took the precaution of adding the Tribunal as a party.

[12] With regard to section 12 (1) (b), Counsel also submitted that in the ordinary course of an appeal and in the absence of statutory provisions, it is normal for the parties in an appeal to be the same parties as in the tribunal below. He reiterated that the current matter is an appeal and as such the parties before the Tribunal were the Director and the Appellant. On appeal to the Supreme Court the same parties should maintain unless provided for explicitly in statute. He concluded that Section 12 (3) is an additional power and not a substitute for the Director to be a party.

Court's Analysis and Conclusion

[13] Although this issue was not argued substantively in oral submissions before the Court it is clear that it is a relevant issue for determination.

[14] It is now settled law that a right of appeal is a statutory right. It is not an inherent right and only inures when statute specifically provides for it. Its nature, character and extent are determined and controlled by the relevant provisions creating the right.¹

¹ AG v Sillem (1864) 10 HLC 704; R v Special Commissioners of Income Tax (1888) 21 QBD 313 at 319

- [15] Turning to the relevant legislation; it is readily apparent that there is no right of appeal to the High Court from a decision of the Director of the Social Security Board. Such an appeal lies only to the Tribunal which is an independent tribunal appointed by the Minister responsible for Social Security and apparently administered by the Ministry responsible for Social Security².
- [16] It follows that the only right of appeal to the Supreme Court (High Court) is from a decision of the Appeal Tribunal.³ The case at bar involves such an appeal in which the Appeal Tribunal upheld the decision of the Director of the Social Security Board. Typically however, the proper parties in an appeal are those which were notionally engaged before the decision maker or tribunal on its review. This is because an appeal is normally seen as a continuation of proceedings with the effect that the entire proceedings are before the appellate authority that has the power to review the evidence subject to prescribed statutory limitations. Applying this norm would prescribe that the appropriate parties in this Appeal would be the Claimant and the Director.
- [17] The Court notes that while section 12 (1) (b) identifies who may appeal a decision of the Appeal Tribunal, no guidance is provided as to the identity of the appropriate Respondent. Moreover, section 12 (1) (b) however prescribes that the nature of the right to appeal to this Court is on a point of law. This limitation is designed to ensure that the Supreme Court does not become the decision maker for matters which have been brought before the Tribunal. In this Court's judgment, the Supreme Court's role is to ensure that the Tribunal correctly interprets the legislation and acts within its powers. If a decision of the Tribunal is appealed to the Supreme Court and the Court finds that it has acted incorrectly, the matter will usually be referred back to the Tribunal for determination and guidance provided on the issue of law under dispute. The Supreme Court's role is not to look at the merits of any case and determine whether a different decision should or could be

² Section 4 and 5 (1) of the Appeal Regulations

³ Section 12 (1) (b) of the Appeal Regulations

made. Rather the Supreme Court's role is to ensure that legislation has been correctly interpreted and due legal process followed.

[18] Within this context, this Court is satisfied that although there may be nothing precluding the joinder of the Director, in an appeal to the High Court on a point of law, the Tribunal may properly be joined as a party.⁴ The Court is fortified in this view by the terms of CPR Part 60.4 which prescribes the persons upon whom a claim form ought to be served. It provides that:

“The claimant must serve the claim form and grounds of appeal on –

(a) every party to the proceedings in which the decision was made; and

(b) the clerk to the tribunal, minister or other person by whom the decision appealed against was made.”

[19] The Court is not persuaded that the fact that the Tribunal is unincorporated would militate against its joinder as a party in an appeal. It certainly would not have militated against its joinder in the event that a claimant sought to judicially review its decision. And in regard to the question of costs, the Court is satisfied that regardless of which party is named as respondent, any costs order would have to be defrayed by the Social Security Board pursuant to Section 32 (3) of the Social Security Ordinance which provides as follows:

s.32 (3) “Notwithstanding anything in any enactment, the decision of the High Court in a reference or appeal shall be final, and the Court may order the Board to pay costs of any person whether or not the decision is in favour of the Board and whether or not the Board appears on the reference or appeal.”

[20] Turning now to the substantive appeal, the Appellant in the case at bar essentially contends that he is eligible for a survivor's benefit under the Regulations. Counsel submitted that the date from which the Appellant became eligible for a survivor's

⁴ A respondent would include any person who is directly affected by the relief sought in the notice of appeal or who is interested in maintaining the decision under appeal.

benefit is the date on which the Regulations came into force and not the date of the death of his wife. It is therefore readily apparent to the Court that the statutory evolution of the current legislation is critical to a determination of the issues which arise in this Appeal.

[21] The journey commences with the promulgation of the **Social Security Benefits Regulations No. 17 of 1979** which came into force on 2nd July 1980. This was the law in force as at the date of the death of the Appellant's wife i.e. 11th November 1998.

[22] The relevant parts of section 37 provided that:

37 (1) "Survivor's benefit shall consist of: -

- (a) survivor's pension or grant payable to the widow or widower of a deceased insured person;
- (b) survivor's dependants pension payable in respect of the dependant children of the deceased insured person in accordance with the provisions of paragraph (2); and
- (c) orphan's pension or grant payable where there are no surviving parents or step parents in accordance with the provisions of paragraph (3)

(2) –

(3) –

(4) A widow who is –

- (a) over forty years shall be awarded a survivor's pension for life, or a survivor's grant;
- (b) under forty years of age and incapable of self-support by reason of invalidity, shall be awarded a survivor's pension for so long as invalidity continues, or a survivor's grant. If invalidity ceases and the widow is then over forty years, any survivor's pension then in payment shall subject to the provisions of these Regulations, be payable for life;
- (d) under forty years and has a child or children eligible for survivor's dependants pension under the provisions of paragraph (2) of this Regulation, shall be awarded a survivor's pension or a survivor's grant:

Provided that if she is awarded survivor's pension it shall be payable until the youngest eligible child attains the age of fifteen years, or if continuing in full-time education, eighteen years and if when the said youngest child ceases to be eligible under the provisions of these Regulations the widow is then over forty years of age, the pension shall be payable for life.

(e) –

(f) –

(5) A widower shall be awarded survivor's pension or a survivor's grant if at the date of the death of his wife:-

(a) he and his wife had been married for not less than three years;

(b) he was then an invalid; and

(c) he had been wholly or mainly maintained by his wife immediately prior to her death

and if the survivor's benefit awarded is a pension it shall be payable for so long as he continues to remain an invalid."

[23] Under this regime, there was a obvious distinction between the entitlements of a widow as opposed to a widower - a widower would be entitled to a survivor's benefit only if he was married to his wife for more than three years, was an invalid and had been wholly maintained by his wife immediately prior to her death.

[24] It is common ground between the Parties that under this statutory regime, the Appellant would not have qualified for a benefit. Indeed, the Appellant does not seek to assert such a claim. He contends however that there was a fundamental legislative change in 2000 which entitled him to submit claim.

[25] Counsel referred the Court to the amendments in Statutory Instrument No. 41 of 2000 which amalgamated the provisions regulating the entitlement of a widow and a widower. At section 7 of the Statutory Instrument, the Legislators amended 37 of the principal Regulations by deleting sub-regulation (4) and (5) and substituting the following section which now provides that:

“(4) A widow or widower, as the case may be, who is

- (a) over forty years of age, shall be awarded a survivor’s pension for life or a survivor’s grant;
- (b) under forty years of age and incapable of self-support by reason of invalidity, shall be awarded a survivor’s pension for so long as the invalidity continues, or as a survivor’s grant. If invalidity ceases and the widow is then over forty years of age, any survivor’s pension then in payment shall, subject to the provisions of these Regulations, be payable for life.
- (c) under forty years of age and has a child or children eligible for survivor’s dependants pension under the provisions of sub-regulation (2) shall be awarded a survivor’s pension or a survivor’s grant:

Provided that if he is awarded a survivor’s pension it shall be payable until the eligible child attains the age of fifteen years, or if continuing in full time education, twenty-one years, and if when the said youngest child ceases to be eligible under the provisions of these Regulations the widow or widower is then over forty years of age, the pension shall be payable for life;

- (d) pregnant and under the age of forty years, shall be awarded a survivor’s pension or survivor’s grant:

Provided that if the award is of survivor’s pension its shall be payable for one year unless as a result of the said pregnancy a live child or children is or are born, then the pension shall continue as if the provision of sub-paragraph (c) of this Regulation were satisfied; or

- (e) under the age of forty years, had no children eligible under the provisions of sub-paragraph (c) or was not incapable of self support by reason of invalidity, shall, subject to the provisions of these Regulations, be awarded a survivor’s pension for one year, or a survivor’s grant.”

[26] In advancing this argument Counsel for the Appellant argued that when the amending Regulations came into force, for the first time in the BVI, widowed husbands became eligible for a survivor’s benefit. The Appellant submits that he

now qualifies for a survivor's benefit under this amending Regulation which came into operation on 1st January 2001.⁵

[27] Counsel referred the Court to Section 16 of the Interpretation Act which provides that when an act comes into force on a particular day, it shall be construed as coming into force immediately on the expiration of the day before. He submitted that the Appellant would have been entitled to this benefit from 1st January 2001. As a result, the Director could not refuse his application which was submitted in early 2008.

[28] He further submitted that the Appeal Tribunal incorrectly concluded that Section 8 (1) (c) of the Regulations had to have retroactive effect in order for the Appellant to become eligible for a survivor's benefit. He described this as a complete "red herring" and he posited that that section need not have retroactive affect because the Regulations are very clear in their language.

[29] Section 8 (1) (c) of the Regulations provides as follows:

(1) The time for claiming benefit shall be –

(c) in the case of invalidity, age or survivor's benefit, within three months from the date on which, apart from satisfying the condition of making a claim, the claimant becomes entitled thereto; and

[30] Counsel argued that the date on which the Appellant became entitled to the benefit was on 1st January 2001 when the amending regulations came into force. Counsel submitted that this wording denotes a clear legislative intention to afford previously ineligible claimants the ability to now claim under the new regime from 1st January 2001.

[31] He submitted that it is an established principle statutory construction that the words of a statute are to be given their ordinary and natural meaning.⁶ Counsel argued that there need be no further speculation as to the Legislature's intention in

⁵ Section 1 of SI 41 of 2000, gazetted on 4th January 2001

⁶ Halsbury's laws of England Re-issue – Statutes Vol. 44 paragraph 1486 "if there is nothing to modify, alter or qualify the language which a statute contains, the words and sentences must be construed in their ordinary natural meaning."

the case at bar. He further argued that there is no provision within the Regulations (whether the 1980 Regulations or the amending Regulations of 2000) which mandates that the Appellant need apply within three months of the death of his spouse in order to qualify for a survivor's benefit. Instead the requirement within the Regulations is that a claim should be made 3 months from when the Appellant became eligible. In this instance the Appellant became eligible only after the amending Regulations came into force in January, 2001.

[32] In support of his contention that the relevant date is not the date of the death of the Appellant's spouse, Counsel compared and contrasted the provisions found at section 8 (1) (d) of the Regulations. This provides as follows:

(1) The time for claiming benefit shall be -

(d) in the case of funeral grant, within six months from the date of death.

[33] He submitted that there is no similar link drawn to the date of a spouse's death in the case of a survivor's benefit. This stark contrast further reinforces the Appellant's contention that the clear intention of the Legislature was to make previously ineligible person now eligible for a survivor's benefit and Counsel for the Appellant submitted that this intention must be respected by the Court. He commended to the Court the following excerpt from Halsbury's Laws of England:

"If the result of the interpretation of a statute according to its primary meaning is not what the legislature intended, it is for the legislature to amend the statute construed rather than for the courts to attempt the necessary amendment by investing plain language with some other than its natural meaning to produce a result which it is thought the legislature must have intended."

[34] In addressing the absence of any useful transitional provisions to the amending regulations, Counsel submitted to the Court that this simply reinforces his contention that it was always the intention of the Legislature to confer eligibility as from 1st January 2001. He further submitted that there are no explicit provisions anywhere in the statute or regulations which exclude the Appellant's eligibility.

- [35] Counsel then submitted that there is a clear distinction between “*the right to be paid*” and “*the right to an entitlement*”. He argued that the Appellant’s entitlement stems from the requisite payment which would have been made by his spouse prior to her death; the death of his spouse and the change in the law. It is the combination of these elements which make the Appellant entitled under the Regulations. On the other hand, any issue in relation to whether the Appellant should be paid is a separate matter.
- [36] In support of this submission, Counsel relied on the House of Lords decision in **Insurance Officer v McCaffery**⁷. The facts of that case reveal that on 10th February 1981, the respondent made a claim for a non-contributory invalidity pension. She had attained pensionable age of 60 on 15 April 1980. The appellant insurance officer, denied her claim on the basis that she had failed to show that she was entitled to the pension immediately or indeed at any time, before she attained pensionable age. He accepted that she had shown that she had met the statutory condition of entitlement in that she had been incapable of work for the required minimum period before 15 April 1980. But she had made no claim before that date, and in his view the making of a claim before reaching pensionable age was a condition precedent to her entitlement.
- [37] The House of Lords held that on the true construction of Section 79(1) of the Social Security (Northern Ireland) Act 1975, the requirement that ‘*it shall be a condition of a person's right to any benefit that he makes a claim for it in the prescribed manner and within the prescribed time*’ is a reference merely to a person's right to be paid the benefit, and not a reference to a person's entitlement to that benefit. Accordingly, entitlement to a non-contributory invalidity pension under Section 36(1) of the 1975 Act is governed solely by the terms of s 36, and the making of a claim in accordance with Section 79(1) is not one of the necessary preconditions to entitlement to such a pension. In delivering the decision of the

⁷ [1985] 1 ALL ER 5

Court, Lord Scarman reasoned that entitlement to a pension is governed by s 36 of the Act. At page 7 of the judgment he noted that:

“First....The section does not define entitlement by reference to the making of a claim or require a claim as a condition precedent to entitlement. Second, Section 79(1) has to be construed so as to be consistent with the entitlement which is created by Section 36, and not vice versa. Any other approach makes nonsense of Section 36. A government department, faced with the complexities of administering social security, may perhaps be forgiven for putting the cart before the horse. But a judge can have no excuse. The logic of entitlement and claim is clear: claim is based on the existence of entitlement. Third, Section 79(1) does not speak of 'entitlement'. It merely declares it to be 'a condition of a person's right to any benefit that he makes a claim'. These words do not have to be construed as a reference to entitlement. They can equally well, as a matter of ordinary English, be a reference to the right to be paid. And this is the meaning appropriate to a section dealing with the administration of benefit. Accordingly, I read the subsection as having this effect: a claimant not only has to show the existence of an entitlement but has also to make a claim in the prescribed manner and within the prescribed time in order that he may be paid. This construction avoids introducing a restriction on entitlement not to be found in Section 36 and makes sense of Section 79(1) as a provision dealing with the administration of benefit.”

[38] Counsel submitted that the House of Lords drew a clear distinction between entitlement to a benefit and a right to it in the sense of obtaining payment. He submitted that entitlement in the case at bar is governed by section 37 (4) of the Regulations and he submitted that the Appellant has met all of the requirements set out there.

[39] In light of the clear legislative intent, Counsel argued that the Director and the Tribunal's decision to refuse the Appellant's claim is illegal and should be quashed. He maintained this submission notwithstanding that the Appellant would have delayed in making his claim. He submitted that the Appellant had good cause for the delay which was not considered by the Tribunal because they erroneously concluded that he was not eligible for a survivor's benefit in any event. He submitted that the Director has the power to treat the claim as being made in time but she failed to consider whether the passing of the Amending Regulations and

the specific facts of the Appellant's case were good cause for the delay in making a claim. This error was later compounded by the Tribunal.

[40] The Appellant's claim was of course vigorously opposed by the Respondents. Counsel for the Tribunal contends that it was quite correct in its finding that retroactive effect would have to be given to the 2000 Benefits Amendments Regulations in order to allow the Appellant to be eligible for consideration under the Regulations. Counsel cited the general rule of statutory interpretation that no statute is to be given retroactive effect unless its language clearly requires it to be treated in that way.⁸ She noted that neither the Social Security Ordinance nor any of its amending or amended regulations contain any express provisions for retrospectivity.

[41] Counsel for the Respondent disputed that this issue is a "red herring." Instead, she submitted that it is *the* critical issue because "*statutes are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended.*"⁹ According to her, laws recognise future transactions so that anyone whose spouse died prior to the January 2001 would not be affected by that amendment. Counsel argued that since it is the death of his wife that vests any possible entitlement to a survivor's benefit and since her death took place before the passage of the 2000 Regulations, it follows that the Regulations must have a retrospective effect if the Appellant is to benefit under them.

[42] It is readily apparent that section 8 (1) (c) of the Regulations does not expressly tie the time for claiming a benefit to the date of death of the spouse. However, Counsel argued that it a matter of common sense that one can only become entitled when one becomes a **survivor**; so that the date of death of the

⁸ Gardner v Cone (1927) Ch. 955 at 967

⁹ Maxwell on Interpretation of Statutes 12th edition

contributing spouse must be the vesting event which would give rise to an entitlement.

- [43] The Respondents also dispute the Appellant's contention that widowers were not entitled to a survivor's benefit prior to 2001. The Court is satisfied that this submission is well made out on an accurate reading of Section 37 (5) of the 1979 Regulations. This provided that:

37 (5) "A widower shall be awarded survivor's pension or a survivor's grant if at the date of the death of his wife:-
(a) he and his wife had been married for not less than three years;
(b) he was then an invalid; and
(c) he had been wholly or mainly maintained by his wife immediately prior to her death
and if the survivor's benefit awarded is a pension it shall be payable for so long as he continues to remain an invalid."

- [44] It follows that the Appellant would have had to demonstrate that he was an invalid who was wholly supported by his wife prior to her death. Counsel submitted that assuming that he met those requirements; the Appellant would have been entitled to be considered under the 1980 Regulations. However, he failed to submit a claim under that statutory framework and he was therefore denied an award under that regime as well.

- [45] Counsel contends that the assertion that it is the death of his wife and not the actual making of a claim that is the material event is fortified by the House of Lords judgment in **McCaffery**. She submitted that on the authority of that case, submitting a claim is a mere administrative matter which is based on an individual's entitlement to the benefit which is claimed.

- [46] Counsel for the Respondents agreed that the amending Regulations contained no transitional provisions. Consequently she submitted that the Court must have regard to the Virgin Islands Interpretation Act – in particular Section 29(1) (c) which provides that:

“Where an enactment repeals or revokes an enactment, the repeal or revocation shall not, except as in this section otherwise provided – affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment so repealed or revoked.”

- [47] To illustrate this submission, she referred the Court to the judgment in **Chief Education Officer and Another v Maguire**.¹⁰ In that case the Social Security Commissioner determined that the respondent had an accrued right to claim a social security benefit known as special hardship allowance, notwithstanding the repeal of the provisions of Section 60 of the Social Security Act 1975 which provided for that benefit. On appeal by the Chief Adjudication Officer and the Secretary of State for Social Security, the issue arose as to the position of a claimant who, before the repeal of special hardship allowance, satisfied all the preconditions to entitlement to benefit save only that of making the requisite claim, such claim then being made within the prescribed period, albeit after repeal. More particularly, the Court had to consider whether such a claimant had an acquired right within the meaning of Section 16 (1) (c) of the Interpretation Act 1978.¹¹
- [48] In dismissing the appeal, the Court held that whether a claimant acquired a right under a repealed statute depended upon the true construction of the statute and the facts of the particular case. On a true construction of Section 60 of the 1975 Act, a claimant acquired a right to special hardship allowance as soon as the substantive conditions set out in it had been satisfied. That right was saved by Section 16 of the 1978 Act provided the allowance had been claimed within the prescribed time even though that claim had been made following the repeal of the statute. The Court found that it was clear from the authorities that a mere hope or expectation of acquiring a right was insufficient; however, an entitlement, even if inchoate or contingent, sufficed. The fact that further steps might still be necessary to prove that the entitlement existed before repeal, or to prove its true extent, did not preclude it being regarded as a right. It followed that whether or not there was an acquired right depended upon whether at the date of repeal the

¹⁰ [1922] 2 ALL ER 859

¹¹ The equivalent to Section 29 (1) (c) of the BVI Interpretation Act

claimant had an entitlement, at least contingent, to money or other certain benefit receivable by him provided only that he took all appropriate steps by way of notices and/or claims thereafter. On the facts of that case, the respondent's right to benefit had accrued when his disease was first prescribed and it mattered not that he had claimed only after the repeal of the 1975 Act.

[49] The obvious contrast with this case is that the Court was attempting to preserve a right that the claimant would otherwise have lost the benefit of, whereas in this case, the Appellant contends that his entitlement became activated by the 2000 amendment. Counsel for the Respondents submitted that the Appellant is not trying to preserve a right but to acquire one that he would not have otherwise received.

[50] The Respondents submitted that the grant of relief in this case would allow the reversal of the ordinary application of the exception to the law and would create an illogical and arbitrary result. According to Counsel, the Board is entitled to the benefit of a suite of legislation which was obviously designed to create certainty in respect of the Board's obligations to eligible members of the public. She submitted that the public nature of the functions of the Social Security Board militates against an imposition of a statutory interpretation which would lead to inconsistency and she urged the Court to resist this course.

[51] Finally, Counsel submitted that even if the issue of retrospectively does not arise, the Appellant is still required to explain his delay in making a claim under Section 27 of the Ordinance; it is a condition of a person's right to a benefit that he makes a claim within the prescribed time. Under Section 8 (1) (c) the time for claiming a survivor's benefit is within three months of the date on which, apart from satisfying the condition of making a claim, the claimant becomes entitled thereto. According to the Respondent, the applicable date would be the date of three months from the death of a claimant's spouse. Counsel submitted that the claim is there 9 years

out of time. Alternatively, if the Appellant's submissions are accepted then the claim would be 7 years out of time.

- [52] Counsel submitted that the Appellant has failed to provide any good reason for his delay. She submitted that the Appellant cannot rightly advance that the Board was obliged to notify him of his entitlement under the 2000 amending legislation. She further submitted that he has failed to identify or specify any facts of the Appellant's circumstances which would justify this protracted delay.

Court's Analysis and Conclusion

- [53] The issues in the case at bar centre around the legislative action which resulted in the **Social Security (Benefits) (Amendment) Regulations No. 41 of 2000**. Whenever new legislation is enacted it forms part of the wider legislative framework. It must therefore be read together with any legislation which it amends, any legislation which applies to it, as well as general principles of legislative interpretation.

- [54] Where new legislation proposes to amend existing legislation, that is, to alter its legal meaning, the general principles of statutory interpretation demands that in construing such an amendment the following approach should be adopted:

"In general terms, it is undoubtedly correct that the effect of an amendment to a statute should be ascertained by construing the amended statute. Thus, what is to be looked at is the amended statute itself as if it were a free standing piece of legislation and its meaning and effect ascertained by an examination of the language of that statute. However, in certain circumstances it may be necessary to look at the amending statute as well....**The expression of the relevant parliamentary intention is the amending Act. It is the amending Act which is the operative provision and which alters the law from that which it had been before.**"¹² **Emphasis mine**

¹² Inco Europe Ltd v First Choice Distribution (a firm) [1999] 1 ALL ER 820 at 823 per Hobhouse LJ

[55] Turning now to the text of the 2000 Regulations, it is clear that the amending provisions which would have been inserted are not to be treated as having come into operation on 1st January 2001.

[56] There can be no doubt that the “legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts and ought not to change the character of past transactions carried on upon the faith of then existing law.”¹³ Indeed the Parties in this Appeal are *ad idem* on this critical issue and yet the presumption against retrospectivity became the fulcrum of the argument before the Court. No doubt this stemmed from the reasoning applied by the Appeal Tribunal. At **Section A IV** of its decision, the Tribunal makes the following observation:

“The common law upholds the principle that individuals ought to be able to conduct their lives with reasonable certainty of the legal consequences of their actions – a principle based on notions of fairness and justice. Although it is settled law that the legislature may enact a statute to have retroactive effect, consistent with the abovementioned common law principle courts will interpret statutes to apply prospectively absent clear indication of legislative intent to the contrary. In the case of the provisions of Section 7 of the abovementioned Social Security (Benefits) (Amendment) Regulations 2000, there is no indication of any legislative intent to attribute retroactive effect to the provisions; hence such provisions cannot be construed to have such effect.”

[57] The Tribunal’s reasoning follows at **Section B** of the Decision:

“An amendment to the law was effected in 2011 which could have entitled the Appellant to receive the benefit which he claimed (assuming that he were able to meet the relevant requirements); however, because the changes to the relevant law did not have retroactive effect, the Appellant was unable to benefit from the same.”

[58] Throughout this Appeal, the Appellant has argued strenuously that the issue of retrospectively simply does not arise. Having reviewed the relevant chronology and legal authorities, the Court must agree with the Appellant’s submission.

¹³ Phillips v Eyre (1870) LR 6 QB 1 per Willes J at page 23

[59] The Court is satisfied that the Tribunal did not appreciate that there is a clear difference between a retrospective statute in the proper sense and one that is only apparently so. This distinction is critical in the case at bar and it is unfortunate that the absence of clear and unequivocal transitional provisions would not have assisted this misperception.

[60] In this regard, the Court is guided by the learning of E. A. Driedger in “**Statutes: Retroactive Retrospective Reflections**”¹⁴ He describes true retrospectivity in the following way:

“A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute operates backwards. A retrospective statute operates forwards, but it looks backwards in that it attaches new consequences for the future to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event.”

[61] Also, in **Yew Bon Tew v. Kenderaan Bas Mara**¹⁵ the Privy Council held that:

“A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past.”

[62] Although none of the following authorities were cited by Counsel during the course of their submission, they provide a useful study of the contrasting positions.

[63] In the case of **West v Gwynne**¹⁶ the plaintiffs were assignees of a lease dated July 31, 1874, made between the defendant and certain lessees whereby certain premises at Battersea were demised for the term of 94¼ years from March 25, 1874, at a yearly rent of 640. The lease contained a covenant by the lessees against underletting the premises or any part thereof without the consent in writing of the landlord. Under section 3 of the Conveyance and Law of Property Act, 1892,

¹⁴ (1978) 56 Can. Bar Rev. 264, at pp. 268-69

¹⁵ [1983] 1 AC 553 at 558; This test was applied in *Pearce v Secretary of State for Defence* [1988] AC 553 at 558 and *Arnold v. Central Electricity Generating Board* [1988] A.C. 228

¹⁶ (1911) 2 Ch. 1

landlords could no longer seek any fine for consent to an assignment. The lease predated the Act.

[64] The Court held that Section 3 of the Conveyance and Law of Property Act, 1892, applied to all leases whether executed before or after the commencement of the Act, and, in the absence of express provision to the contrary, engrafts upon every covenant in any such lease against assignment or under letting without consent a proviso that no money shall be payable in respect of such consent.

[65] Buckley LJ made the following important observation:

“During the argument the words "retrospective" and "retroactive" have been repeatedly used, and the question has been stated to be whether Section 3 of the Conveyance Act, 1892, is retrospective. To my mind the word "retrospective" is inappropriate, and the question is not whether the section is retrospective. Retrospective operation is one matter. Interference with existing rights is another. If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case. The question here is whether a certain provision as to the contents of leases is addressed to the case of all leases or only of some, namely, leases executed after the passing of the Act. The question is as to the ambit and scope of the Act, and not as to the date as from which the new law, as enacted by the Act, is to be taken to have been the law.”

[66] The case of **R v The Inhabitants of St. Mary Whitechapel**¹⁷ is even more helpful if only because of the striking similarity to the case at bar. That case concerned Section 2 of the Poor Removal Act 1846 (9 & 10 Vict. c. 66) which provided that "no woman residing in any parish with her husband at the time of his death shall be removed from such parish for 12 calendar months after his death." A widow, whose husband died before the passing of the Act, was removed after the passing of the Act, but before the 12-month period had expired.

[67] An appeal was lodged on 1st October 1846. At the time, the widow remained unmarried. It was contended on behalf of the appellants that, by the operation of

¹⁷ (1848) 12 Q B 120

stat. 9 & 10 Viet. c. 66, s. 2, the pauper was rendered irremovable. On behalf of the respondents it was contended that the provisions of the said Act with reference to widows are not retrospective, and that, as the pauper had become a widow before the passing of the said Act, she was removable.

[68] The order was quashed. The Court held that by section 2 of the statute, the widow was irremovable because although that provision was prospective as to the removals contemplated, it might be construed retrospectively as to the conditions under which removal should or should not be lawful.

[69] Denman C's judgment is instructive.

"It was said that the operation of the statute was confined to persons who had become widows after the Act passed, and that the presumption against a retrospective statute being intended supported this construction: **but we have before shown that the statute is in its direct operation prospective, as it relates to future removals only, and that it is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing.** The clause is general, to prevent all removals of the widows described therein after the passing of the Act; **the description of the widow does not at all refer to the time when she became widow** : and we are therefore of opinion that the pauper was irremovable at the time she was removed." Emphasis mine

[70] In that case, the test adopted required the Court to consider whether the direct operation of the statute was prospective, even though some of the conditions for its operation had occurred before the passing of the Act.

[71] **Master Ladies Tailors Organisation v. Minister of Labour and National Service**¹⁸ concerned a wages council order which came into force on 15 August 1949 whereby a worker who ceased to be employed after it became effective became entitled to accrued holiday remuneration assessed by reference to successive periods of 12 months commencing on 1 May 1948. It was contended

¹⁸ [1950] 2 ALL E.R. 525

that the order was ultra vires the enabling Act because it conferred on workers, rights to holiday remuneration in respect of employment before the date on which the order became effective and was therefore of retrospective operation. Somervell L.J. after quoting the same passage from the judgment of Lord Denman C.J. said, at p. 528:

"The statement I have quoted from Lord Denman C.J., shows that not every matter which is retrospective 'in a sense' is retrospective in the sense in which I have to apply the words in the present case. I have come to the conclusion that the effect of these provisions as to remuneration accruing, being, as I hold, to determine and limit the quantum of prospective payments, do not make this order retrospective in the sense which has to be given to the word in this issue. The claim, therefore, fails. Most of the cases dealing with retrospective legislation, some of which were cited to me by counsel for the plaintiff are concerned with a different issue. It has, of course, been laid down in the clearest possible terms that no statute or order is to be construed as having a retrospective operation unless such a construction appears very clearly or by necessary and distinct implication in the Act. That most salutary principle does not assist in solving the problem which I have so far been considering."

- [72] Thus in that case, the liability to pay which arose after the order came into effect was prospective, notwithstanding that the amount was determined by reference to events before that time.
- [73] Denman CJ's judgment in **The Inhabitants of St. Mary Whitechapel** has also since been applied in **Board of Management of the Bank of New Zealand Officers' Provident Fund Association v McDonald and others**¹⁹ and in **R v Secretary of State for the Home Department, ex parte Mundowa and related applications and appeals**.²⁰ In the former case the English Court of Appeal held that an amendment would not be retroactive if it altered the qualifications and benefits of current and future members even if those altered qualifications recognised service, remuneration or other factors in the past.

¹⁹ [2001] 4 ITEL 412; see also *Securities and Investments Board v Financial Intermediaries, Managers and Brokers Regulatory Association Ltd.* [1992] Ch. 268

²⁰ [1992] 3 ALL ER 606

[74] In the latter case, the court was again concerned with the retrospectivity of legislation. The question arose whether the applicants had a right of appeal on the merits against the Home Secretary's decision, under Section 19 (1) of the 1971 Immigration Act, which made provision for an appeal to an immigration adjudicator on the grounds that the Home Secretary's discretion should have been exercised differently, e.g. for compassionate reasons, or whether they were restricted to the right of appeal under Section 5 (1) of the Immigration Act 1988, which prohibited an appeal on the merits from a decision to deport. The applicants contended *inter alia* that since the facts giving rise to the making of the deportation orders, which in turn gave rise to the right of appeal, occurred before Section 5 came into force, Section 5 had not limited their right of appeal unless Section 5 was to be given retrospective effect contrary to the presumption against retrospectivity.

[75] The English Court of Appeal held that the presumption against retrospectivity of a statute did not necessarily apply merely because some of the facts to which the statute applied occurred before it was passed. Accordingly, the restricted rights of appeal against a decision of the Home Secretary to make a deportation order against a person who was liable to deportation under Section 3 (5) (a) of the 1971 Act laid down in Section 5 (1) of the 1988 Act applied to cases where the decision to deport was made after section 5 came into force on 1 August 1988 even though the person had entered the United Kingdom and became liable to deportation prior to that date.

[76] At page 616 of that judgment, Bingham LJ had this to say:

"I do not think that it is very fruitful to discuss whether the section is retrospective in its operation or not, because the presumption against retrospectively can only apply where the statutory intention is not plain, and here I think it is. Plainly, on my construction, some of the events to which the section has regard may have occurred before the section comes into force, for example the granting of leave to enter, or the overstaying or breach of condition. But a person cannot have an accrued right of appeal until he has a decision to appeal against, which he cannot do until he is notified of a decision. For better or worse - and the court is not an arbiter of what the United Kingdom's immigration policies should be

- the draftsman has distinguished between those who have and those who have not received notice of the decision to deport, between those who have and those who have not an accrued right of appeal. This distinction seems to me intelligible and readily workable and, most importantly, to be that which the draftsman plainly intended."

[77] Those words reflect an approach which is extremely relevant to the case at bar. In this Court's judgment the ratio of Bingham LJ provides an appropriate prescription, highlighting the distinction which is essentially the fulcrum of this Appeal. That distinction has been clearly described by the learned author Bilika Simamba in his text, **The Legislative Process - A Handbook for Public Officials**²¹ in the following way:

"If a statute refers to a status (as in the case of a widow) or a state of things (as being in possession of something or the existence of a lease) the statute will apply regardless of when the status was acquired or the thing came into possession or into existence. Such application of the statute does not make it retrospective. If, however, the statute was framed in terms of the occurrence of an event, the results are likely to be different. If there had been reference to becoming a widow or the event of coming into possession or entering into a lease, the statutes would have applied only to women who became widows, persons who came into possession or entering into a lease, the statutes would have applied only to women who became widows, persons who came into possession or leases which were entered into after the passing of the relevant enactments."

[78] The learned authors in **Bennion on Statutory Interpretation**²² have also weighed in. They state that:

"It is important to grasp the true nature of objectionable retrospectivity, which is that the legal effect of an act or omission is retroactively altered by a later change in the law. However the mere fact that a change is operative with regard to past events does not mean that it is objectionably retrospective. Changes relating to the past are objectionable only if they alter the legal nature of a past act or omission in itself. A change in the law is not objectionable merely because it takes note that a past event has happened and bases new legal consequences upon it."

²¹ 2009 Edition at page 132

²² 5th Edition at Section 97-Presumption against retrospective operation at page 317

[79] What is clearly established by these authorities is that an enactment does not, operate retrospectively merely because a part of the requisites for its operation is drawn from a time antecedent to its coming into force, nor because it takes into account past events. An analysis of these authorities also reveals that where the relevant fact situation is a status, the enactment is not given retrospective effect when it is applied to persons or things that acquired that status or characteristic before the enactment, if they have it when the enactment comes into force; but where the fact situation is an event, then the enactment would be given retrospective effect if it is applied so as to attach a new duty, penalty or disability to an event that took place before the enactment.²³

[80] Having regard to the way in which the amending legislation has been drafted and in the absence of any transitional provisions, the statutory framework leads the Court to conclude that the Legislature intended precisely the legal consequences which would result. It therefore follows, that assuming that the conditions (under Section 38 of the Regulations) would have been satisfied and the Appellant would have been entitled under the amended Section 37 of the Regulations, it matters not that he became a widower prior to amending regulations coming into force. The Appellant's entitlement to a survivor's benefit does not depend on a retroactive construction of the Regulations.

[81] The Court therefore finds that the issues raised in this Appeal do not involve either a retroactive or a retrospective application of the Regulations.

FLOODGATES

[82] During the course of the hearing, Counsel for the Respondents argued that an adverse ruling by this court would have significant implications for the viability of the Social Security Fund because of the potential deluge of stale claims which may inundate the Board as a result. Counsel for the Appellant placed little store in that argument. He pointed out that Section 8 (4) (a) of the Regulations clearly

²³ Benner v Canada (Secretary of State) [1997] 1 SCR 358

limits that amount which would be paid on a delayed claim to six months before a claim was duly made.

“(4) Notwithstanding the provisions of paragraph (3) no sum shall be paid-
(a) by way of sickness, maternity, invalidity, age, or survivor’s benefit in respect of any period more than six months before the date on which the claim therefore is duly made;”

[83] He submitted that the Appellant’s entitlement would be obviously limited. So that if the claim made in 2008 were accepted, the Appellant would only be able to claim benefits from December 2007.

[84] Counsel for the Appellant again referred the Court to the **McCaffrey** judgment. At page 7 of the judgment Lord Scarman stated:

“Finally, the department responsible for administering social security need fear no opening of the floodgates to a rush of stale claims. Section 82 (2) (c) provides that in respect of most non-contributory benefits including the invalidity pension no sum shall be paid to any person for any period more than 12 months before the date of the claim. The respondent therefore is limited, so far as payment is concerned, to the 12 months immediately preceding the date of her claim.”

[85] Counsel for the Respondents argued in response that the way in which the Appellant has framed his argument does not assist him. She argued that while the application of Section 8 (4) may limit the payment in arrears, it would not affect the volume of the potential claimants who may materialise as a result of this ruling. She submitted that the relevant floodgates would be the number of claims which could affect the funds administration due to the lack of certainty which may follow an adverse ruling.

[86] Counsel for the Appellant responded that the Respondents have provided the Court with no cogent evidence to support the demographics of a floodgate argument. The Court agrees. The Court is satisfied that even if the evidence were provided, it would not warrant a usurpation of the Legislature’s role by the Court. The language of the Regulations as amended is clear and unambiguous. It speaks prospectively to confer a benefit, notwithstanding that the status [of a

widower] pre-dated its coming into force. In the event that the interpretation is not what was intended, then it is for the Legislature to clarify the position through appropriate legislative amendments with appropriate and unambiguous transitional provisions.

DELAY

[87] Although Counsel for the Appellant has submitted that there is good cause for the delay, the purported grounds were not explored to any real degree during the course of his submissions.

[88] First, in the Claim dated 28th June 2008, the Appellant explanation as to why the claim had not been submitted within 6 months after the death of his spouse stated that he was not aware that there was a survivor's benefit at the time of his wife's death. Then, in his Notice of Appeal dated 17th August 2009, he stated that he was not informed by the Board that claims should be made within three months of the death. He then referenced the 2000 amendment which in his words "*allowed male survivors to get survivors pension was done to make it fair for men and well as women to benefit.*" ²⁴

[89] There can be no doubt that the Director did not address his/her mind as to whether the Appellant had provided good cause for the delay in making his claim. Although this was the subject of the Appeal before the Tribunal, their finding on the point is equally inconclusive. At **Section B** they state:

"Moreover, it is not necessary, in the circumstances for the Tribunal to consider whether or not the Appellant's claim was made within the period prescribed by the statute for making a claim."

[90] In light of the conclusions drawn herein, the Court is satisfied that the Tribunal was obliged to consider whether this would be an appropriate case for the Director to

²⁴ The Court was not apprised of any further arguments which may have been advanced by the Appellant in order to explain his delay.

have exercised his or her discretion under Section 8 (3) of the Regulations. That section provides that:

“If the claimant proves, to the satisfaction of the Director, that there was good cause for the delay in making the claim to benefit, the Director may treat the claim as having been made in time, subject to paragraph (4).”

- [91] In the Court’s judgment, the Tribunal ought to have considered whether the factors identified by the Appellant amounted to good cause for his delay in submitting a claim. By all accounts the claim would have been received in June 2008, several years after the 2000 Regulations would have come into force. And while this Court is not satisfied the Appellant’s awareness (or lack thereof) of the amending statute would provide sufficient good cause for the delay, the Court is satisfied that Appellant ought to have been heard on this critical issue, before his claim was denied.
- [92] In the premises, the Court is satisfied that the Appeal should be allowed and the Tribunal’s decision set aside.
- [93] In order to qualify for the survivor’s benefit, the Appellant would have to first satisfy the Tribunal that he had good cause of delay in submitting a claim. He must then satisfy the Tribunal that he met the conditions for making a claim prescribed at Section 38 (1) (a) and (b) of the Regulations. Section 4 of the Regulations also prescribes that the Appellant must furnish such certificates, documents, information and evidence for the purpose of determining the claim as prescribed by the Regulations.
- [94] Notwithstanding that the Court’s powers under CPR Part 60.8 (4), given the scope of this Appeal, and the nature of the subject matter, the Court is satisfied that the appropriate course would be to remit the matter for rehearing and determination by the Tribunal. The Tribunal is directed to reconsider the matter and reach a decision in accordance with the judgment of this Court.

[95] In light of the findings herein, the Court's order is therefore as follows:

1. **The Appeal Tribunal's decision is set aside.**
2. **The matter is remitted to the Tribunal for reconsideration in accordance with the judgment of this Court.**
3. **The Appellant will have his costs to be assessed in accordance with Part 65.12 unless otherwise agreed. Payment of such costs will be in accordance with Section 32 (3) of the Social Security Ordinance.**

[96] Finally, the Court conveys its sincere regrets for the delay in rendering the judgment in this matter and must thank Counsel and the Parties for their patience.

.....
Vicki Ann Ellis
High Court Judge