

**THE SOCIAL SECURITY COMMISSIONERS**

*Commissioner's Case Nos: CIS/2668/1998 and CJS/2379/1998*

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY ACT 1998

APPEALS FROM DECISIONS OF AN APPEAL TRIBUNAL ON A QUESTION OF LAW

**DECISIONS OF THE SOCIAL SECURITY COMMISSIONER**

**MR COMMISSIONER JACOBS**

*Claimant:*

*Tribunal:*

*Tribunal's Case Nos:*

## **Decisions:**

1. My decisions are as follows. They are given under section 14(8)(b) of the Social Security Act 1998.
  - 1.1 The decisions of the York Social Security Appeal Tribunal held on 25th February 1998 are erroneous in point of law: see paragraphs 8 and 10.
  - 1.2 Accordingly, I set them aside and, as it is not expedient for me to give decisions on the claimant's appeals to the tribunal, I refer the cases to a differently constituted tribunal for determination.
  - 1.3 I direct the tribunal that rehears these cases to conduct a complete rehearing.

Unless asked to consider other issues by one of the parties, the tribunal need only consider whether the value of the claimant's interest in the Edinburgh flat must be disregarded under paragraph 26 of Schedule 10 to the Income Support (General) Regulations 1987 and paragraph 6 of Schedule 8 to the Jobseeker's Allowance Regulations 1996.

If the tribunal decides that the value of the claimant's interest in the Edinburgh flat had to be disregarded, it must give decisions on this issue alone, leaving other aspects of the claims to be decided by the Secretary of State. The tribunal's decisions show that there are other matters to be investigated before entitlement can be decided, quite apart from the overlapping periods of the two claims.

## **The appeals to the Commissioner**

2. These are two related appeals to a Commissioner against the decisions of the Social Security Appeal Tribunal brought by the claimant with the leave of the tribunal's chairman. The adjudication officer supported the appeal. When the Social Security Act 1998 came into force in respect of Income Support and Jobseeker's Allowance, the Secretary of State replaced the adjudication officer as a party to the proceedings on this appeal. The Secretary of State has also made a submission in reply to a Direction by a Legal Officer to the Commissioners.

## **The issue for decision**

3. The claimant claimed a Jobseeker's Allowance on 23rd June 1997 and Income Support on 11th July 1997. The cases concern the treatment of the value of a flat in Edinburgh which was in the joint names of the claimant and his sister. A number of issues were raised before the tribunal. Before me, the issue has been narrowed down to this: is the claimant entitled to the benefit of paragraph 26 of Schedule 10 to the Income Support (General) Regulations 1987 and paragraph 6 of Schedule 8 to the Jobseeker's Allowance Regulations 1996? The paragraphs are identical. They provide for a disregard of capital represented by

“Any premises where the claimant is taking reasonable steps to dispose of those premises, for a period of 26 weeks from the date on which he first took such steps, or

such longer period as is reasonable in the circumstances to enable him to dispose of those premises.”

### **The tribunal’s reasoning**

4. The tribunal described this aspect of the case as “in many ways the most contentious”. This was reflected in the thoroughness of its reasoning - it devoted a page of closely typed reasons to the issue.

5. I deal first with the evidence. The claimant did not attend, but his parents attended. The evidence is recorded as given by his mother. The relevant parts of the chairman’s note reads:

“Parents moved to Thirsk from Edinburgh - moved in July. He put the flat up for sale in July 1995. Didn’t sell. He couldn’t bear to be in Edinburgh alone - moved to Thirsk with parents. Tried to rent ppty. out to offset his taking out a rental in Thirsk.”

“New circumstances: Had it been on market - not counted. Took sale board down because agent for renting ‘wouldn’t touch it’, till that happened. One partner - Sales: [??] lettings. Told that they wanted to sell, each tenant - safeguarded by undertaking not to sell. Approached an agent to sell - wouldn’t allow board to go up whilst tenants in. Tenancy ended on 20th Sep. Another client - July. Agreed a price for a sale. Completed 22nd Sep. - two days after they left.”

6. The tribunal only considered the position from the dates of claim. It found that the agent acting for the claimant (i) required an undertaking not to sell while a tenant was in possession and (ii) would not allow the flat to be openly marketed while a tenant was in possession. It also found that the agent did agree a sale with a client who was looking for an additional property and the sale was agreed some time in July 1997. (I am surprised by the evidence of the agent’s attitude. In English law, there is no impediment to selling a property while it is rented. The tenant would be protected by the sale being subject to the rights under the tenancy. On such research as I have been able to conduct, the position appears to be the same in Scotland.)

7. The tribunal’s reasoning was this.

“So far as the properties [sic] having been for sale, throughout the material period, is concerned, we took the view that it was not on the market at any time during the period of the tenancies. ... It is further clear that the agents were punctilious in refusing to put for sale notices on the property, or widely to advertise the property as being for sale, during the material period. We accept that there was a private negotiation, so to speak behind the scenes, and we fully accept that this led to the sale of the property, within 2 days of the ending of a tenancy. We accept that the issue before us, having regard to the regulations, is not simply of that of whether the property was ‘up for sale’. We have to consider whether the Claimant can be regarded as having first taken steps to dispose of the premises, and we accept that that can be before the property is put on the open market.

“At the time of the Income Support and Job Seekers Allowance decisions, that is to say before 10 July 1997, the property was not for sale or subject to legal proceedings. We accept that in the background the firm was aware of an overall desire on the part of [the claimant] to dispose of the property, and we accept that they took in hand the negotiations with the landlord who eventually purchased the property from [the claimant]. At no time, however, was the property put up for sale in the ordinary acceptance of those words. It was not put on the open market. If it had been, it could not have been sold until 20 September at the earliest, bearing in mind all the factors which have been mentioned before. We are not clear that [the claimant] himself had actively taken steps to dispose of the property, beyond merely indicating to the agents that he was prepared to sell the property if a suitable buyer came along. He and they did not advertise the property for sale, or take any steps to draw the sale of the property to the attention of the public at large. We understand perfectly well why that was not done, because it was regarded as not being able to be done, but nevertheless there was nothing to show that the property was available for purchase.”

### **Was the reasoning erroneous in law?**

8. The adjudication officer argued that the tribunal had taken too narrow a view of “reasonable steps” by concentrating too much on sale on the open market. After some hesitation, I accept that there is an error of law. However, I would put it slightly differently from the way it is put in the officer’s submission.

9. In CIS/562/1992, the Commissioner held that the correct starting point was not the date of claim, but the date when the claimant first took steps to dispose of the property. I respectfully agree with that decision. However, it must not be misunderstood. It prevents a claimant obtaining a succession of disregards for 6 months each by the simple expedient of taking the property off the market and putting it on again the next day or a few days later. But it does not mean that time has been running against a claimant who made another distinct attempt to dispose of the property some time earlier. I do not attempt to define the circumstances in which time has continued to run or has stopped running for the purposes of this disregard. The answer is to be found by investigating the facts of case and by bringing common sense to bear in an assessment of the probabilities.

10. The tribunal began its consideration at the date of claim. However, there was evidence that the flat had been put up for sale in 1995, two years earlier. The limited details of this earlier period recorded in the oral evidence and noted in the reasons for decision suggest that the tribunal did not give a great deal of attention to that period. The tribunal should have investigated this period in detail in order to decide how to apply CIS/562/1992. This investigation would have been relevant in one of two ways.

10.1 One possibility is that the first steps were taken in 1995. In this case, the 6 months period ran out in early 1996. The paragraph allows this period to be extended and the tribunal should have considered whether an extension was reasonable in the circumstances.

10.2 The other possibility is that the earlier efforts were a genuinely separate effort to dispose of the flat. In this case, the history of the efforts to sell the property might have

shown that the steps taken by the claimant at the time of the claims and immediately afterwards were reasonable. For example, they might have shown that attempts at a sale on the open market were unlikely to be successful.

The failure to deal sufficiently with the earlier period means that the decision was erroneous in law and must be set aside.

### **Should I give my own decision?**

11. As the decision must be set aside, I have to consider whether to give my own decision or remit the case for rehearing.

12. The change in the perspective to include the earlier period will not be wholly to the claimant's benefit. The initial 6 months period ended long before the claims were made. As a result, the period will have to be extended considerably if the claimant is to take advantage of the disregard. The problems with the sale may justify the extension, but it is not automatic.

13. If the claimant were certain to fail at the rehearing, it would be pointless to direct one. I am not satisfied that his case, however weak it may be, is that hopeless. So, I have directed a rehearing.

### **How is the property to be valued?**

14. The legislation contains provision for the valuation of an interest in jointly owned property. The adjudication officer and the tribunal applied that legislation. In CIS/3238/1997, a Commissioner decided that that legislation was not authorised by statute. The decision only took effect from 21st May 1998. I agree with the Secretary of State's submission that it is likely that that date is outside the period in issue in this case. So, it is not necessary to deal with this point. However, I note the following.

14.1 The Commissioner's decision is not to be reported. In a suitable future case, it may need to be reconsidered.

14.2 The Commissioner gave his decision in the context of English land law. In this case, the property was subject to Scottish law. If the Commissioner's decision is correct, its application to property held in Scotland will have to be determined by a Commissioner based in Edinburgh.

### **Summary**

15. The Social Security Appeal Tribunal's decisions are erroneous in law and must be set aside. It is not appropriate for me to give the decisions that it should have given on its findings of fact and it is not expedient for me to make further findings of facts. There must, therefore, be a complete rehearing of these cases before a differently constituted tribunal. It will decide afresh all issues of fact and law on the basis of the evidence available at the rehearing in accordance with my directions.

16. The Social Security Act 1998 has abolished Social Security Appeal Tribunals, transferring their existing cases to the new and nameless Appeal Tribunal. The claimant's appeals will be reheard by the new Appeal Tribunal. It is differently constituted from a Social Security Appeal Tribunal. It is likely to consist of a legally qualified panel member sitting alone: see regulation 36(1) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999.

17. Although my jurisdiction in these cases has been limited to issues of law, it must be clear from my reasoning that I have directed a rehearing only in case further facts emerge that are favourable to the claimant. This is unlikely and I do not want him to entertain any false hope that the outcome of the rehearing will be to his advantage.

**Signed on original**

**Edward Jacobs  
Commissioner  
24th May 2000**