PLH *Commissioner's File: CIS 7097/95*

DEDDFAU NAWDD CYMDEITHASOL 1992
SOCIAL SECURITY ACTS 1992

APEL YN ERBYN DYFARNIAD TRIBIWNLYS NAWDD CYMDEITHASOL YNGHYLCH CWESTION CYFREITHIOL
APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DYFARNIAD Y COMISIYNYDD NAWDD CYMDEITHASOL
DECISION OF THE SOCIAL SECURITY COMMISSIONER

Enw'r hawlydd/Claimant's name:
Cais am/Claim for
Tribiwnlys/Appeal Tribunal:
Rhif achos/Tribunal Case Ref:

[GWRANDAWIAD/ *ORAL HEARING*]

1. For the reasons given below the decision of the tribunal on 15 July 1994 that the claimant was prevented from getting income support from 4 March 1994 because she had more than £8,000 of capital was erroneous in point of law. I set it aside and exercise the power in s.23(7)(a) Social Security Administration Act 1992 to substitute my own decision on the facts as found or admitted. This is that she was entitled to income support from 4 March 1994 on the basis that on 1 March 1994 her capital included £654.14 of the balance then standing to the credit of the joint bank account in the names of her and her husband (being half the sum of £1308.28 representing their joint money), but that the remaining £4026.80 of that balance belonged beneficially to him alone.

2. I held an oral hearing of this appeal at which Mr Paul Neave of the Flint Welfare Rights Department appeared for the claimant and Miss Rachel Perez of counsel, instructed by the solicitor to the Department of Social Security, appeared for the adjudication officer. To both of them, and to those in the former Clwyd Welfare Rights Department and the Central Adjudication Service who prepared the earlier written submissions in the appeal, I record my thanks for their help on the difficult issues raised.

3. In February 1994 the claimant's husband, an elderly retired clergyman in failing health, had to move into a nursing home as a permanent resident. The claimant, herself over 80 and suffering from increasing problems with her own physical health, remained living in the church accommodation they had occupied in his retirement. Much of the responsibility for helping them both over this difficult transition fell on their daughter, who also helped them deal with their modest financial affairs. These included her father's application to the local authority for help with the nursing home fees (pages

T32-33) and her mother's claim for income support from 4 March 1994 when she was left living on her own (pages T21-22). This appeal arises out of that claim, and following the death of the claimant herself on 9 March 1995 it has been continued by the daughter as her mother's executrix.

4. The issue in the case is how the regulations require the claimant's capital to be assessed in calculating her resources for income support. There is no dispute that she had something over £6,000 of her own in National Savings that had to be taken into account at its full realisable value. There is also no dispute that in respect of £1308.28 standing to the credit of her and her husband's joint current account with Barclays Bank at the date of the claim, she must be treated as entitled to a half share by virtue of reg. 52 Income Support (General) Regulations 1987 SI No 1976, since this represented their joint money. The issue arises over a further £4206.80 also standing to the credit of the account on that date, making the total balance up to £5335.08: see page T31.

5. According to the daughter's evidence, produced to and accepted by the tribunal and rightly not disputed by the adjudication officer, this further amount was attributable to what was left of an original sum of about £7,000 derived from National Savings belonging to her father. She had earlier arranged (with his approval) for these to be cashed in when money began to be needed for his nursing home bills, and for the proceeds to be put in the bank to be used for that purpose. The point of using the existing current account was to enable the nursing home bills to be paid by direct debit. There had been no contemplation on her or his part that this money should thereby become part of the joint money in the account, which was derived from her parents' pensions and continued to be used for general domestic and other expenses. She had kept a careful tally of the running balance of her father's National Savings money, and this had been declared and taken into account as his own separate money for the purposes of his application to the local authority which was also subject to a means test: pages T33-34.

6. The mother's claim for income support was nevertheless rejected by an adjudication officer on 29 March 1994 on the ground that she had to be treated as if she owned half of the entire balance of £5335.08, and this decision was upheld by the tribunal on 15 July 1994. It is common ground that if this treatment was wrong and the father's National Savings money could be excluded from the reckoning, she would have qualified for income support; as the total of her share of the joint money and her own savings was less than the £8,000 capital limit, and his resources no longer had to be counted in with hers after he moved to the nursing home and they were living separately.

7. The provision applied by the adjudication officer and the tribunal in rejecting the claim was reg. 52 of the income support regulations. This regulation, which has been considered in several appeals now, read as follows at the time material for this appeal:

> **"Capital jointly held**
>
> **52.** Except where a claimant possesses capital which is disregarded under regulation 51(4) (notional capital), where a claimant and one or more persons are beneficially entitled in possession to any capital asset they shall be treated as if

each of them were entitled in possession to the whole beneficial interest therein in an equal share and the foregoing provisions of this Chapter shall apply for the purposes of calculating the amount of capital which the claimant is treated as possessing as if it were actual capital which the claimant does possess."

The exception for capital that is disregarded under reg. 51(4) does not apply in this case, and the final clause about treating the deemed share as actual capital is of relevance only in that it illustrates the importance of a distinction the regulations make between "actual capital", which a claimant really does own, and "notional capital", which he is artificially treated as owning, the two having different consequences for example in the way income is calculated: cf. Regs 51, 51A, 53. This case concerns the wording in the middle of the regulation about deeming a claimant to have an equal share of an asset which in fact it is an asset owned beneficially by him *and* one or more other people.

8. The adjudication officer understands this to mean in the context of a joint bank account that so long as more than one person has any beneficial interest in possession in money represented in the account (as is undeniably the case here), the whole bank balance for the time being has to be treated as divided up into equal beneficial shares, regardless of whether this corresponds with the true underlying rights of beneficial ownership. By the same token, the regulation is said to require not only that property held in joint beneficial ownership be treated as severed into separate beneficial shares, but that undivided shares of property of any kind, real or personal, are all to be treated as equal; even where this is wildly at variance with the actual facts and rights of ownership. This argument succeeded before the tribunal, and was maintained before me.

9. The principle as thus understood has been described as extraordinary, and draconian: (see Mesher, Income Related Benefits, 1996 Edn. 191, and the Commissioners' decisions in cases CIS 408/90 para 5, CIS 807/91 para 6; though the second epithet may be thought a little unfair to Draco, whose harsh code of 621 BC was at least coherent). It is said to be for administrative convenience, to save the authorities the trouble of inquiring into the actual beneficial interests in jointly held or pooled assets, which may be difficult to discern. Reliance is placed on the very wide empowering legislation, which does indeed allow regulations to prescribe that for the purposes of assessing income or capital resources black must be treated as white and vice versa, and people as possessing what they do not, or not possessing what they do.

10. It is worth dwelling for a moment on some of the implications of the meaning suggested. It is common ground (and rightly so) that what basically has to be assessed for income support is the value of the capital resources belonging to the individidual claimant, corresponding broadly with what he is expected to use towards his own maintenance before turning to public assistance; and that what has to be looked at is the true beneficial ownership, not the legal title to or control over the assets in which a person may have a beneficial interest: cf. R(IS) 5/93. If all beneficial ownership in undivided or pooled assets has perforce to be treated as in equal shares, even where the true ownership is unequal, then the system becomes a lottery; with reg. 52 producing arbitrary answers (on some facts unjustly in favour of claimants, on others against)

wherever people own unequal shares in a house, or are beneficially interested in any kind of pooled account or investment such as money in a solicitor's client account or assets held in a unit trust. The argument on administrative convenience is lessened by imagining the adjudication officer having to ascertain on a day by day basis the aggregate amount in a solicitor's account or the aggregate assets of a unit trust and the numbers of other people interested; and if a claimant with £10,000 in the bank can halve its value by getting a relative to deposit £10 of his own in the same account temporarily, the injustice and absurdity of the meaning contended for become obvious.

11. The question of whether reg.52 really does have this effect has been expressly reserved by superior judicial authorities on two occasions. In case CIS 417/92, one of three considered together by a tribunal of Commissioners raising questions of the correct method of valuing a beneficial share (and known generally by the name of the claimant in the main case CIS 391/92 *Palfrey*), they said at para 24:

> "24. It is unnecessary for the purpose of the appeals in *Palfrey* and the present case to decide whether regulation 52 has any wider application and accordingly we express no opinion on whether that regulation applies so as to deem actual unequal shares to be treated as equal shares. That is a question that can be decided when it is raised."

Similarly in the Court of Appeal in the same cases, the "apparent effect of the regulation in this respect" was noted in passing, but the question did not arise for decision and the leading judgment records expressly that no argument had been heard on the point: *per* Nourse LJ, transcript p.6H, unrep. CA 8 February 1995.

12. In my judgment this question, which does arise directly in the present case, has to be approached *de novo*. The two Commissioners' decisions cited in para 9 above preceded *Palfrey*, and in neither of them was any decision given on the point; as in the first the claimant's interest was above the maximum capital value on any footing, and in the second it transpired that the claimant's true share was an equal one. The only case in which I am aware of a decision being given on the point is CIS 240/92, where the Commissioner at paras 10 and 15 appears reluctantly to have felt himself bound by the decision in *Palfrey* to give reg. 52 the effect contended for before me. However he gives no reason for so holding apart from a reference to a paragraph in the *Palfrey* decision that does not appear to me to deal with the point, and in view of what was expressly said by the same Commissioners in their decision of the same day in CIS 417/92 para 24 quoted above, it seems to me that he must have been mistaken.

13. All systems of property law have to deal with cases where rights of ownership are joint, shared or mixed. Ancient jurists argued about what happened when different people's gold coins were mixed in a bag, wine was all stored in the same vat, or corn was all ground up together into flour at the same mill. The particular contribution of English jurisprudence has been the very clear distinction developed in equity between the legal right of control over an asset and the true underlying ownership, which enabled the "beneficial ownership" to be recognised as divisible or transmissible in sophisticated

ways between two or any number of people concurrently, successively or both, while the asset itself remained undivided and could be managed as a whole.

14. Where ownership rights are concurrent, our law recognises a well established distinction between people having rights of *joint* ownership of a given asset, and separate rights of *ownership of shares* of an undivided asset or a fund held on a collective basis. While an asset is in the joint beneficial ownership of A and B they both own the whole jointly; if one of them dies the whole is left in the beneficial ownership of the survivor; their right of ownership is a single, joint and co-extensive one; and while the arrangement continues neither has any greater or less right than the other, or any separate right of ownership at all. By contrast, where A and B own undivided beneficial shares in property each has a separate asset, namely his own share, which by definition does not extend to the whole but may represent any proportion of it, equal or unequal. But if joint beneficial owners sever their joint ownership as English law allows them to do, the consequence is always to create *equal* separate beneficial shares: this follows from the unity of their right while it was joint. The concept of joint beneficial ownership resulting in separate rights of *un*equal value is a legal and logical impossibility: *Cowcher v Cowcher*, [1972] 1 WLR 425, 430H.

15. I must of course bear in mind that while the language used in reg. 52 is "strongly influenced by the English law of real property" (*per* Hobhouse LJ, *Palfrey* at p.17F) this legislation applies to the whole of Great Britain, and must therefore be read in a sense that is meaningful in Scotland as well. But it seems clear that Scots law too recognises the same distinction in the types of what English equity calls concurrent beneficial ownership. Gloag and Henderson, Law of Scotland, 10th Edn. 1995 p.671, describes a joint right of property with survivorship, and the decision of a very experienced Scottish Commissioner in case CIS 413/92, paras 4 and 10, makes clear that a *pro indiviso* proprietor of property in Scotland, entitled to what in England would be called a quarter undivided beneficial share, had a separate asset she could dispose of as her own property: namely the share, without the necessity for realisation of the whole.

16. In this case the tribunal recorded at page T48 that they accepted that the claimant's own beneficial entitlement in the joint bank account was limited to what remained after deducting the balance of her husband's own capital which had been deposited in it, £4026.80 as at 1 March 1994. In my judgment they were right to do so. The normal presumption between husband and wife operating a joint banking account in a conventional domestic context, with the usual mandate under which either can draw on the account and the survivor can give a good discharge to the bank, must be that either one of them paying money into the account intends it thereby to become part of their joint beneficial property; but this presumption is not irrebuttable. Where there is clear evidence of a contrary intention, such as that of using the joint account merely as a convenient way of parking or handling money to be retained and used as the sole property of one of them, there is no reason in law or equity against giving effect to that intention, in the same way as if it had been put instead into a solicitor's client account or otherwise mixed with other money belonging to other people.

17. I emphasise that between husband and wife such a contrary intention must be clearly and affirmatively proved if the presumption of joint beneficial ownership of the entirety of such an account is to be avoided. But there was in this case the clearest possible evidence of a specific purpose that the father's savings should be used for his nursing home bills, supported by the practical point about dealing with the direct debits via the existing account without having to open another one, and the careful accounting by the daughter to keep track of how much of the balance on the account represented the proceeds of her father's savings and how much of it was joint. A court of equity in these circumstances would in my judgment have had no difficulty in reaching the same conclusion as the tribunal did on the underlying ownership of the balance in the account. In the language of equity this can be expressed by saying that on 1 March 1994 the claimant and her husband held their rights against the bank as joint accountholders (which as Miss Perez correctly pointed out consisted not of money, but the right as creditors of the bank to recover the credit balance from it on demand) upon trust as to £1308.20 for themselves as beneficial joint owners, and as to £4206.80 for him alone.

18. Nevertheless the tribunal felt themselves obliged to hold artificially that for income support half of the entire balance belonged to the claimant by virtue of reg. 52. In my judgment it was quite correct that the regulation had to be applied to the £1308.20 which represented their joint money. The special nature of joint beneficial ownership means that some special provision on the lines of reg. 52 is needed if a fair value has to be assessed for the capital assets of one of the joint owners alone. Otherwise there would be doubt about the extent of his actual capital since it could be said with equal validity that the whole asset is in his beneficial ownership, yet separately he owns none of it. Special provision is needed to produce the sensible and fair result of a deemed equal share, which is not what the joint owner actually does have, but exactly what he could have as a separately disposable asset if he effected a severance. By reg. 52 the claimant was thus to be treated, contrary to the actual fact, as if she were the sole beneficial owner of half what in fact was in the joint beneficial ownership of herself and her husband.

19. If one goes back to the wording of reg. 52 and gives the much criticised draftsman credit for knowing his property law, property held in joint beneficial ownership is the only kind of property to which the regulation purports to apply. This is the only time it is strictly correct to speak of the claimant and one or more other persons being beneficially entitled in possession to a given capital asset. Cases where property is held in undivided shares fall outside what the regulation says, since each co-owner under such an arrangement is beneficially entitled to his own share, which is actual capital he possesses in his own right. In terms of beneficial ownership, this is a different asset from the shares belonging to the others; and in contrast to the joint right of a joint owner is an asset separately disposable by him, both in English and Scottish law: CIS 413/92 *supra*. A literal reading of the actual language used, as enjoined by Hobhouse LJ in *Palfrey* at p.13E in conjunction with his observation at p.17F about the influence on it of English real property law, is therefore in my view against the meaning for which the adjudication officer contends.

20. I have not been able to find any clear enough indication in reg. 52 or the rest of the regulations to make it necessary to hold that it was meant to be read in a more loose sense, so as to stretch or chop all unequal shares into deemed equality. For my part I doubt very much whether this Procrustean approach could be be consistent with any rational intention of Parliament, when one considers the possible implications: see para 10 above. And while the saving of public administrative cost is of course a legitimate statutory purpose, the evidential difficulties of identifying the beneficial interests in mixed accounts and assets cannot in my view be held up as the main justification for distorting them, when the same or very similar difficulties must be met in identifying whether additional beneficial interests exist to make reg. 52 apply at all (e.g. on facts such as those in case R(IS)5/93, where there was an account in the sole name of one spouse but it was found that the other also had a beneficial interest in it as joint property, so that reg. 52 applied); and in some cases even worse difficulties may be caused, to no obvious practical end: see para 10 also. The argument from the width of the enabling section is an obvious non sequitur and I reject it for the reason the same argument was rejected in case CSIS 137/94, appx para 28.

21. In the end I have found myself unable to be persuaded that the meaning advanced by the adjudication officer can be correct. In my judgment reg. 52 is to be interpreted literally and applies only where two or more people are beneficially entitled in possession to the same asset in the strict sense that their beneficial ownership of it is joint. In such cases it performs the needed function described in para 18 above so that the beneficial ownership is deemed, contrary to the fact, to be divided between them in equal shares. This has no application where the claimant's capital asset *already* consists of his own undivided beneficial share, equal or unequal, in real or personal property of any kind. There his share is already actual capital that belongs to him individually. The other people involved are beneficially entitled to their own shares, not his.

22. For those reasons, I set aside the decision of the tribunal and substitute the decision set out in paragraph 1 above.

(Signed)

P L Howell
Commissioner
20 February, 1997