

Applicable Amount - Housing Costs - meaning of
"service charges"



48/90

TOC/1/LM

Commissioner's File: CIS/182/1989

SOCIAL SECURITY ACT 1986

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A
QUESTION OF LAW

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

Name: Janette Gluckstein

Social Security Appeal Tribunal: Finchley

Case No: Not Known

[ORAL HEARING]

1. Our decision is that -

- (a) the unanimous decision of the Finchley social security appeal tribunal given on 6 April 1989 is erroneous in point of law and is accordingly set aside;
- (b) the decision which the tribunal should have given is that the claimant is entitled to have included in her income support a sum in respect of the service charge relating, inter alia, to the cost of roof repairs; such sum to be assessed by the adjudication officer and, in the event of any disagreement, to be referred to us for determination.

2. The claimant appeals with leave of the Commissioner against the decision of the tribunal disallowing her appeal against the decision of the adjudication officer, issued on 16 December 1988, that the claimant's income support did "not include anything towards the cost of roof repairs for which she is liable".

3. We held an oral hearing of this and an associated appeal on 2 April 1990, when the claimant was represented by Mr P.C. Black. The adjudication officer was represented by Mr James Latter, of Counsel, instructed by the Solicitor to the Departments of Health and Social Security. We are obliged to both Mr Black and Mr Latter.

4. The facts are not in dispute. The claimant, who is divorced, lives by herself in a second floor flat which she holds by virtue of a lease for a term of 99 years (less three days) from 13 June 1967. At a date of which we are unaware the lease was assigned to the claimant and it is common ground that she then became subject to the benefits and burdens thereof which, in so far as they are relevant to the instant case, are contained in clause 1, whereby the claimant undertook to pay -

" ... by way of further or additional rents (a) (b) one fifteenth part of the amount which the Lessors and/or their Agents may from time to time expend in or about or in relation to the repairing maintenance decoration cleansing and lighting of the common parts of the Building in accordance with the covenants on the part of the Lessors contained in clause 5(d) hereof ... "

By clause 5(d) the Lessors covenanted -

"(d) That (subject to contribution and payment as hereinbefore provided) the Lessors will maintain repair redecorate and renew

(i) the main structure and in particular the roof gutter and rainwater pipes of the Building ... "

5. On 12 August 1988 the Lessors' agents rendered an account for £1,326.56 to the claimant in respect of roof repairs, which she then sought as an addition to her income support. On 16 December 1988 the adjudication officer decided that that sum could not be treated as a "service charge", and whether or not it is to be so treated is the sole issue in this appeal.

6. On 6 April 1989 the tribunal disallowed the claimant's appeal. They found that -

1. The facts as they appear in the papers are correct.
2. The claim is for the appellant's contribution towards major structural repair and not within the ambit of a service charge."

And they gave as their reasons for their decision that -

- "1. The amount claimed does not fall within the ambit of the service charge.
2. The Presenting Officer confirmed that any amount to meet the half yearly bill which was not received weekly by the appellant would be adjusted when the bill was submitted provided the amount was for periodical service charge."

7. In a submission dated 6 December 1989 the adjudication officer now concerned with the case submits that in failing to make sufficient findings of fact or to give the claimant "a clear and full explanation of why the roof repairs were not considered to be 'service charges', or how her weekly amount for 'service charges' should be calculated" the tribunal were in breach of regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986 [SI 1986/2218]. We agree that is plainly the case and that the decision must accordingly be set aside as erroneous in point of law.

8. We have decided that this is a case in which we can and should exercise our discretion under section 101(5)(a)(i) of the Social Security Act 1975 to give the decision which the tribunal should have given. The reasons for our decision, including the relevant law, are set out in the appendix annexed hereto and, in those circumstances, we need only add that the claimant's appeal is allowed.

(Signed) R F M Heggs
Commissioner

(Signed) M H Johnson
Commissioner

(Signed) W M Walker
Commissioner

Date: 30 May 1990

APPENDIX

INTRODUCTION

1. Each of the two cases to which this appendix relates raises an apparently simple question, namely what is comprehended by the expression "service charges" in paragraph 1(f) of Schedule 3 to the Income Support (General) Regulations 1987 [SI 1987/1967] - ("the Income Support Regulations").

2. In CIS/182/89 the issue arises because at the hearing before the appeal tribunal the claimant raised a question about the inclusion, as part of his eligible housing costs for calculating his entitlement to income support, of his liability to pay £31 three times a year for the emptying of the septic tank at the house, of which he was the freehold owner and occupier. The tribunal held that the emptying of the septic tank was a service, for which there was a charge, and so was a service charge within the meaning of paragraph 1(f) of Schedule 3 to the Income Support Regulations. In CIS/203/89 the issue arises because the claimant maintained that a charge levied upon her in respect of the cost of roof repairs fell, having regard to the terms of her lease, also within the ambit of "service charges" for the purpose of the same provision.

3. The question of the interpretation of "service charges" has thus arisen both in regard to a freeholder and a leaseholder. But, because the relevant legislation falls to be applied equally in Scotland as well as England we have had regard to the somewhat different system of landholding involved. We are satisfied, however, that the various different methods by which a dwelling may be occupied as a home under either system of law are immaterial for the purpose of interpreting the relevant regulations. For these reasons we regard each claimant whose case is before us, as the "occupier" of his or her home. We intend that term to mean any person who has a legal right to occupy the property forming his or her home. And by legal right we mean right gained by any legally recognised method of transferring the interest of occupancy of lands and hereditaments, or of heritage. In any such case there will be some form of contract reflecting the rights of that occupier and in either it or in an ancillary document, will be found covenants, heritable burdens or other terms which may require examination when considering whether any particular obligation is properly to be regarded as a service charge. We refer to any and all such as "conditions".

THE STATUTORY PROVISIONS

4. Regulation 17(1)(e) of the Income Support Regulations deals with the assessment of housing costs within a claimant's applicable amount as follows -

"(e) any amounts determined in accordance with Schedule 3 (housing costs) which may be applicable to him in respect of mortgage interest payments or such other

housing costs as are prescribed in that Schedule."

And that Schedule provides, in so far as it is relevant, that -

"Eligible Housing Costs

1. Subject to the following provisions of this Schedule, the amounts which may be applicable to a person in respect of ... prescribed housing costs ... (applicable amounts) are -

- (a) mortgage interest payments;
- (aa) interest payments under a hire purchase agreement to buy the dwelling occupied as a home;
- (b) interest on loans for repairs and improvements to the dwelling occupied as the home;
- (c) payments by way of rent or ground rent relating to a long tenancy and, in Scotland, payments by way of feu duty;
- (d) payments under a co-ownership scheme;
- (e) payments under or relating to a tenancy or licence of a Crown tenant;
- (f) service charges;
- (g) where the dwelling occupied as the home is a tent, payments in respect of the tent and the site on which it stands;
- (h) payments analogous to those mentioned in this paragraph."

.....

"Interest on loans to acquire an interest in the dwelling occupied as the home.

7.(1) Subject to paragraphs (2) to (9), the following amounts shall be met under this paragraph ... [prescribed percentages in circumscribed cases of the interest involved in the stated purpose] ..."

"Interest on loans for repairs and improvements to the dwelling occupied as the home.

8.(1) Subject to sub-paragraph (2) there shall be met under this paragraph ... [interest on loans or replacement loans for the purposes stated, so far as the latter fall within sub-paragraph (3)] ..."

"Other housing costs

9.--(1) Subject to sub-paragraph (5), there shall be met under this paragraph the amounts, calculated on a weekly basis, in respect of the housing costs specified in paragraph 1(c) to (h) subject to the deductions specified in sub-paragraph (2).

(2) Subject to sub-paragraph (3), the deductions to be made from the weekly amounts to be met under this paragraph are -

(a) where the costs are inclusive of [certain fuel charges]...

(b) where the costs are inclusive of ineligible service charges within the meaning of paragraph 1 of Schedule 1 of the Housing Benefit (General) Regulations 1987 (ineligible service charges) the amounts attributable to those ineligible service charges

(3) [Provision as to calculation of housing costs in certain circumstances].

(4) Where as compensation for [certain] work carried out ... payment of the costs mentioned in paragraph 1(c) to (g) are waived, they shall be treated as payable.

(5) Where an amount calculated on a weekly basis in respect of housing costs specified in paragraph 1(e) (Crown tenants) includes amounts in respect of water charges ...

5. From the foregoing it is clear that paragraph 1 of Schedule 3 lists the amounts which may be applicable to a person in respect of housing costs and then certain subsequent paragraphs deal with particular heads thereof - thus paragraph 7 deals with paragraph 1(a) and (aa), and paragraph 8 with paragraph 1(b). Paragraph 9 deals with paragraph 1, (c) and (h), which includes, at (f), service charges and, at (h), payments analogous thereto. But by paragraph 9(2) it is required that a deduction be made from the weekly amount of housing costs if they include ineligible service charges "within the meaning of paragraph 1 to Schedule 1 to the Housing Benefit (General) Regulations 1987".

6. Paragraph 1 of Schedule 1 to the Housing Benefit (General) Regulations 1987 [SI 1987/1971] (the "Housing Benefit Regulations") lists a number of "ineligible service charges". The only provision therein with a direct bearing upon our consideration is paragraph 1(g) which disallows all charges, meaning of course service charges, not otherwise specified in the paragraph "...which are not connected with the provision of adequate accommodation". But the whole paragraph is of some assistance and may, we think fairly, be summarised as disallowing

charges for meals, laundry, certain defined leisure items, cleaning of non-communal rooms and windows, transport, the acquisition of furniture and household equipment, and for the use thereof where it is to become the property of the claimant, and general counselling and support services - broadly so far as unrelated to the provision of adequate accommodation. Next, regulation 10(1)(e) provides for an element of benefit in respect of service charges, "payment of which is a condition on which the right to occupy the dwelling depends". Regulation 10(7) then defines "service charges" for the purposes of that regulation and those of Schedule 1 as -

".. periodical payments for services, whether or not under the same agreement as that under which the dwelling is occupied, or whether or not such a charge is specified as separate from or separately identified within other payments made by the occupier in respect of the dwelling; and 'services' means services performed or facilities (including the use of furniture) provided for, or rights made available to, the occupier of the dwelling."

7. Reference was made in the submissions before us to regulation 18 of the Supplementary Benefit (Requirements) Regulations 1983, as amended, [SI 1983/1399] ("the Requirements Regulations") which are now no longer in force, to show that in the system that preceded income support certain housing requirements had been provided for. That regulation contained a clear provision for recurring charges for the emptying of septic tanks and a clear provision for service charges of which examples were given as the "...maintenance, insurance, management and the cleaning of, common areas." And it ended with a provision, regulation 18(1)(g), in these terms -

"(g) outgoings analogous to those mentioned in this Part."

THE AUTHORITIES

8. In considering the questions arising on these appeals we had the benefit of two Commissioners' decisions. The first decision, that on file CIS/4/88, held that water charges were not service charges because they were not connected with the provision of adequate accommodation. They were ineligible service charges for housing benefit being outside the scope of regulation 10(e) of the Housing Benefit Regulations and thus also of Schedule 1 thereto. The second decision, on file CIS/157/89, held that charges for emptying a cess-pit at a dwelling occupied by the claimant as his home, and of which he was the freehold owner, was not a service charge. After a wide ranging and helpful review of the statutory provisions in their historical context the Commissioner concluded, at paragraphs 15 and 16, that, at least in the context of a landlord/tenant relationship, a service charge required to be one made in respect of a service rendered to the tenant by the landlord and that the question of analogy requires careful consideration of the particular facts in each case. In the case of a freehold occupier the obligation to pay must be found in the terms and conditions subject to or upon

which the occupier holds the property and in which the payee must be identified. The Commissioner concluded that a service charge payable by an occupier pursuant to an agreement with, or under a statutory obligation to, a third party who has no connection with the terms and conditions subject to which the householder holds the property could only be described as "analogous" by an abuse of language. We agree, but for the reasons given in paragraph 11 below, we think that there is a shorter answer.

9. In paragraph 8 of CIS/4/88 the Commissioner pointed out that the primary question as to what is comprehended by the expression "service charges" requires some consideration of the intention of the legislature, which is to be derived from the language used in the relevant provisions. And, as he further pointed out at paragraph 6, consideration of the history of the provision and its predecessor in the Requirements Regulations leads to the conclusion that whilst many of the provisions in those regulations are reflected in the Income Support Regulations there is a conspicuous omission from Schedule 3 of those Regulations in respect of the provision in what was regulation 18(1)(d) of the Requirements Regulations for recurring charges for the emptying of cess-pits and septic tanks. The normal canon of construction is that a material change from one version of legislation to another evinces an intention of the legislature to make a change in effect. Whilst it would not be right to say that Income Support Regulations are but another version of the Requirements Regulations, in an updated form, nonetheless there is a sufficient practical relationship between the two for us to feel bound to conclude that the omission was deliberate and that it was therefore intended that such charges should be covered by the Income Support Regulations only if they fell squarely within some express provision thereof. Under the Requirements Regulations a claimant would have been able to include his septic tank emptying charges, whether they were charges that fell due under a private contract which he had made or because of some other liability and whether or not within the terms upon which he had acquired his home. However, we must now start from the position that the intention of the Income Support Regulations is that any such automatic entitlement was deliberately excluded.

"SERVICE CHARGES"

10. Against that background we turn to consider "service charges", bearing in mind that they must be such as to form part of an individual's "housing costs". We note that neither that phrase nor "service charges" is defined for the purpose of the Income Support Regulations. Housing costs must therefore be taken in the normal sense of English as meaning those costs associated with the provision of housing for an individual and, where appropriate, his or her family. So it is in relation to that provision that service charges must be interpreted. However, paragraph 1 of Schedule 3 of the Income Support Regulations has a side heading "Eligible Housing Costs". Further, paragraph 1 of Schedule 1 to the Housing Benefit Regulations speaks in terms of "...service

charges ... not ... eligible", and paragraph 1(g) provides that service charges are ineligible insofar as they are not connected with the provision of adequate accommodation. The words in paragraph 9(2)(b) of Schedule 3 to the Income Support Regulations - "...within the meaning of paragraph 1 of Schedule 1 to the Housing Benefit Regulations..." are, we are satisfied, limited to that purpose; there is no linkage to regulation 10 of the Housing Benefit Regulations other than for the purpose of the definition of "service charges" and "services". (Those definitions are included solely for the purpose of ascertaining whether a particular service charge is excluded from the scope of eligible housing costs. It provides no guide as to those which are within the scope of eligibility.) Accordingly in our view service charges related to the provision of a claimant's home are only restricted or cut down if and in so far as they are not connected with the provision of adequate accommodation.

11. It then follows, in our view, that the attempt made in the submission and in CIS/4/89 to use regulation 10(1)(e) of the Housing Benefit Regulations as a positive definition of service charges, namely that their payment must be a condition on which the right to occupy the dwelling depends, does not apply to the expression when used for the Income Support Regulations. We further conclude that the expression is to be interpreted liberally, particularly as its scope is not trammelled by reference to examples, as in the Requirements Regulations. It means no more and no less, in our view, than that the charges must be made for services provided in connection with a claimant's housing. But that is only the positive side. The negative side as we have already noted, is that charges in respect of any services not connected with the adequacy of the accommodation are disallowed. The emphasis is on the word "adequate"; that is to say that service charges related to something other than the adequacy or sufficiency of the accommodation are excluded.

THE SUBMISSIONS

12. We turn now to the principal submissions which were put before us. We start with those dealing with the general question of interpretation. The first was a submission by Mr Rowland that there should be no distinction as between those who occupied by virtue of a lease - leaseholders - and those who were owner-occupiers - freeholders. We are aware that in paragraphs 14 and 15 of CIS/157/89 the Commissioner appeared to regard service charges as primarily relating to the former relationship. It may well be the case that the majority of such charges made binding upon occupiers is most usually found, in England at any rate, in leasehold provisions. But we are aware that precisely the sort of arrangement which the Commissioner found difficulty in focusing as an example in the case of freeholders is becoming quite normal in the case of privately developed housing estates in Scotland where facilities are provided for all owners in common, either by the superior or by an arrangement involving a third party as a factor, to do the administrative work and levy, as and when required, the

charges. He concluded that that route led to the conclusion that water charges were ineligible service charges for the purposes of housing benefit and income support. However the reference in paragraph 9(2) of the Income Support Regulations is only to paragraph 1 of Schedule 1 to the Housing Benefit Regulations and, as earlier indicated, it seems to us that any reference outside that provision is limited to the definition of service charges in regulation 10(7). In our view it is not legitimate to look beyond those provisions for assistance in the Housing Benefit Regulations as to the positive scope of the meaning of "service charges" for the purpose of the Income Support Regulations. Conversely it is legitimate so to look, but only to the limited extent we have indicated, for the purpose of determining the scope of the negative restrictions put upon the meaning of the expression.

OUR CONCLUSIONS

15. We now turn to consider more precisely the scope of the meaning of "service charges" in relation to housing costs. It seems to us that there is a basic distinction between, on the one hand, what might properly be called charges in respect of services rendered for housing and, on the other hand, charges which give rise to contractual duties which relate only to a particular house for the exclusive benefit of its occupier. Thus an occupier contracting with a painter for the painting of the outside of his house does not thereby acquire something which could properly be called, in our view, a service in relation to his house. Even if a group of occupiers entered into a contract with one of their number, or with an independent person acting as agent, to arrange for such decorating work, the result would be the same; there would be a contract for painting in return for payment. However, if by some means the occupiers were obliged to accept the determination of the agent or a third party as to when and how the decorating was to be arranged and were equally liable for the cost, then this would, in our view, be more of the nature of a service being provided, in the shape of the arranging for the painting rather than of the painting itself. Indeed, it seems to us that, in the context of housing, the essence of the concept of a service is the provision, that is to say the determination and the arranging, of what would otherwise be left to the occupier to do for himself. However, we feel that in order to put the commitment to such an arrangement onto the level of a service, it must not be one from which an occupier can withdraw at pleasure. We conclude that the arrangement must by some means be binding upon all those with the same interest in the property - e.g. all the tenants of a single landlord in a single property, or it must run with the land so as to be binding upon successors in occupancy.

16. But that is not the end of the matter. Even although a charge may fulfil the definition which we have just set out it may still fail to qualify as an eligible service charge being excluded by paragraph 1(g) of Schedule 1 to the Housing Benefit Regulations, because it is not connected with the adequacy of the accommodation.

THE RESULT

17. We now consider the instant cases in turn. We take first CIS/203/89 - that relating to the septic tank recurring charges. There is insufficient information to enable us to come to a final determination about this case and for the reasons given in its individual decision, it must be remitted for rehearing by another tribunal. But by way of guidance we can say this. If, as rather appears from what is contained in Mr Rowland's written submission, the arrangements giving rise to the recurring charges are contained in a private contract made by the claimant with a particular organisation limited to the purpose of emptying his septic tank then that will not qualify, according to our definition above, as a housing service charge. But if it is imposed upon him and others under, or by, the terms on which he holds his property, and that could include a statutory undertaker under a duty to empty septic tanks in the claimant's area and for which it is required to make a charge, which he is then obliged to suffer and pay, then the result would be otherwise on the positive side at least. So the new tribunal will have to concentrate on the terms of the arrangement by which this septic tank is emptied. They will, if they come to conclusions thus far favourable to the claimant, then finally have to consider whether the service - and we emphasise it is the service and not the charge - is or is not connected with the provision of adequate accommodation. At this stage any part played by an outside contractor, by the nature of the arrangement, may prove fatal to the claim as not being concerned with the provision of adequate accommodation. The provision of adequate accommodation is a question of fact for the tribunal.

18. Turning to CIS/182/89, however, we are able to give the appropriate decision ourselves. The relevant terms of the lease are before us and are quoted in its individual decision. It is clear that in relation to the premises in question this claimant and others have had imposed upon them a condition of making payment for a number of matters centrally provided and arranged by the landlords. It is an obligation that runs with the property and clearly relates to, or in other words is connected with, the provision of adequate accommodation, the landlord being the "provider". And there is, perhaps not surprisingly in the circumstances, no suggestion that the services provided do not relate to the adequacy of the accommodation. This case will therefore be remitted to the adjudication officer to arrange the appropriate financial payment.