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① *Solicitor* *Underpin* *ls*
Insurance *Underpin* *Rec. 49* *15 Recs*

OSSE

JMH/TEMP/3

Commissioner's File: CIS/368/1993

SOCIAL SECURITY ACT 1986

SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the social security appeal tribunal was erroneous in point of law. I set it aside and remit the case for re-hearing in front of a differently constituted tribunal who are to follow the directions I have given in para 7 of this decision below.

2. This is an appeal with the leave of the Commissioner from the decision of an appeal tribunal dated 2.10.93 that the claimant was not entitled to income support because "he has capital [above] the prescribed level". There are three main points which arise. However, there are a number of subsidiary points with which I will deal first.

- (i) The original award of income support was made in June 1990 (T17 para 5.2). In the absence of evidence to the contrary it is permissible to assume that it was for an indefinite period in accordance with regulation 17(1) of the Claims & Payments Regulations 1987.
- (ii) It seems to me clear that the period at issue was until 31.5.92 and I accept the adjudication officer's submissions in para 7 of his submissions to the Commissioner (52).
- (iii) It also seems to me that the date of review was 6.3.92. The claimant's capital exceeded, if at all, £8,000 as from 20.12.91 when the sale of the house, Plas Isaf Manor, was completed. The award, being for an

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indefinite period, would continue until review and it was not reviewed until 6.3.92.

- (iv) There is no dispute that it was the award of June 1990 which was being reviewed on 6.3.92. In his letter at T1 (undated) the claimant speaks of "a change in his circumstances". I am quite content to accept that, and that circumstances enabling a review under Section 32(b) of the Administration Act 1992 existed. I therefore adopt the approach of the Commissioner in para 13 of CSSB/540/89 (starred 49/91) but since the point was not challenged I do not think a correction is necessary. But if and in so far as one is, I make it under my powers under section 23(7) of the Administration Act.

3. So much for the peripheral points. I now turn to the three main questions:

- (i) For the purposes of regulation 49 of the Income Support (General) Regulation 1987 did the claimant "possess" the proceeds of sale of Plas Isaf Manor due to him, but which were held by the solicitors on their undertaking to the Bank?
- (ii) Alternatively, in the circumstances, was the solicitors' undertaking to the Bank that they would hold the capital monies due to the claimant "an incumbrance secured" upon those capital monies for the purposes of regulation 49 (a)(ii) of the General Regulations?
- (iii) Was the capital received by the claimant's wife ("Mrs H") as her share in the proceeds of Plas Isaf Manor to be disregarded, that depends on whether Mrs H can bring those monies within any of the provisions of Schedule 10 to the General Regulations.

4. I now turn to the facts of the case. The claimant and his wife were the joint beneficial owners of Plas Isaf Manor. The claimant's business failed and the house had to be sold. It was sold for £195,000. The sale was completed on 20.12.91 and the proceeds were separately accounted for to each of them, the claimant and Mrs H (T13 and T11). The net amount due to the Plaintiff was £40,819.19 but the solicitors had retained in addition a "reserve for further costing" of £1,000. However, in connection with his business the claimant had given a guarantee or guarantees to his Bank and according to his solicitors (T25) "The Bank also had a charge over the property Plas Isaf Manor to

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support the guarantees and when the property was sold, in order to have the Bank's Charge vacated to enable us to give clear title to the purchaser, it was necessary for us to give an undertaking to the Bank that we would hold the monies on deposit in our Client's Account to the order of the Bank pending the outcome of the litigation." The litigation referred to was the litigation between the Bank and the Claimant. It does not appear whether that litigation has been resolved and, if so, how. That is a matter into which the new tribunal will have to enquire. In any event the amount outstanding on the charge was in excess of £65,000 (T34). I do not know the circumstances of the charge but it does not seem to have been a charge over the property itself as the claimant's solicitors stated in that letter but only a charge over the claimant's share of the net proceeds of sale since his wife's share seems to have been unaffected by the charge. In those circumstances I do not see why it was necessary to seek the Bank's co-operation in the sale as the Bank's charge would have been over-reached. Possibly however the Bank had registered some form of land charge or caution (as the case may be) and co-operation was the practical solution. It does not, however, I think matter for present purposes. The result was that the proceeds of sale due to the claimant became the subject matter of the solicitors' Undertaking. What effect did the solicitor's undertaking have.

First of all, what is a solicitor's undertaking? Such undertakings are common place and do not depend on any technical form. In Danodaran -v- Kuan Him (PC) 1980 AC 497, it was stated at P502:

" The main purpose and value of a solicitor's undertaking in transactions for the sale of the land is that it is enforceable against the solicitor independently of any claim against one another by the parties to a contract of sale"

" is not therefore unlike a guarantee and may be enforceable in a number of different ways, and, in appropriate circumstances, summarily by the Court in exercise of its inherent supervisory jurisdiction over solicitors. But whatever else may be so, the claimant in this case cannot claim the monies back from the solicitors during the currency of the undertaking.

5. Now, in my decision, I think that the claimant "possessed" that capital in the sense that the legal title remained in him though it was subject to the undertaking. Thomas -v- Chief Adjudication Officer (R(SB)17/87) is a far clearer case than this, but it is clear that, subject to the undertaking, the solicitors have to account to the claimant for these monies.

I prefer however to put the case on the basis that, by authorising the undertaking, the claimant had, in effect, pledged the proceeds due to him to honour the indebtedness to the Bank. Had he not done so, the Bank doubtless would have been able to obtain some injunctive relief based on Mareva principles. In

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Jones -v- Barnett 1899 1 Ch 620 Romer J. said:

" In Wharton's Law Lexicon, I find "incumbrance" defined as being "a claim, lien, or liability attached to property".

The learned judge adopted that definition with approval. It seems to me that the undertaking is within that definition.

The next question is whether the undertaking was "secured" on the proceeds of sale. For this purpose, the most satisfactory definition of "secure" is to be found in the OED: "To make (a creditor) certain of receiving payment by means of a mortgage, bond, pledge or the like". It seems to me that the undertaking was the equivalent of a pledge or lien and that it was secured on the share of the proceeds of sale. "Incumbrance" is wider than mere mortgage or charge. Equally, under the old regulations it seems to me that the undertaking was "a security".

6. That disposes of the first two substantive points. The third substantive point concerns the resources of the claimant's wife. She purchased a dilapidated cottage for their home and earmarked the sum of £35,000 or so that she had received from the sale of Plas Isaf Manor for renovating it. Under what was then Section 22(5) SSAT 1986 (now section 136 of the Claims and Benefits Act 1992) it is provided that where a person claims an income related benefit as a member of a family, the income and capital of any member of that family is to be treated as the income and capital of that person. Mrs H is clearly such a member of the family. Now this question became a live question in consequence of a direction which I made on 3 May. The claimant in reply (69) states:

" Our client would submit that the balance of the proceeds of sale of Plas Isaf Manor was accepted at the hearing by both the tribunal and on behalf of the adjudication officer as being disregarded for the purpose of calculating our client's capital resources.

Evidence had been adduced to both the tribunal and the Adjudicator confirming the commitment of that capital for essential renovation work which was again accepted for the purposes of ascertaining our Client's capital. The balance of that capital was disregarded by the adjudicating officer who confirmed that fact to the tribunal"

Be that as it may, what the claimant has to satisfy me - and he has been given a chance to do so - is that the sum of £35,000, until it is spent on the renovations, qualifies under Schedule 10 of the General Regulations 1987. Paragraph 3 of that schedule clearly makes the capital used for the purchase of the cottage capital to be disregarded. The only other applicable paragraphs are (8) and (28).

" (8) any sum -

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(a)

(b) acquired by the claimants (whether as a loan or otherwise) on the express condition that it is to be used for effecting essential repairs or improvements to the home.

and which is to be used for the intended purpose, for a period of 26 weeks from the date on which it was so paid or acquired or such longer period as is reasonable in the circumstances to enable the claimant to effect the repairs, replacement or improvement."

But this paragraph cannot apply in this case for the monies were received by Mrs H as being her share in the proceeds of sale of Plas Isaf Manor. While I accept that the £35,000 was earmarked for the renovation works to the cottage, I cannot see how it can be said that those monies were acquired on the express condition that they were to be used for effecting essential repairs or improvements to the house. As I have said, it was acquired by virtue of the sale of Plas Isaf Manor in right of Mrs H's beneficial interest therein. The paragraph is intended for such a case where money is borrowed for essential repairs or improvements usually by means of a further charge on the property.

I have referred to paragraph 28 above but again I do not see how, when one examines that paragraph, the claimant can bring Mr H's share in the proceeds of sale earmarked for renovations within that paragraph.

7. My decision is therefore as set out in paragraph 1 above. I give the following directions:

(i) The solicitor's undertaking has the effect of an incumbrance secured on the claimant's share in the proceeds of sale of Plas Isaf Manor for the purposes of regulation 49(1) of the General Regulations 1987.

(ii) The amount of the incumbrance is the balance for the time being due to Midland Bank Plc under the guarantees given to them by the claimant. The tribunal is therefore to enquire as to those sums. If and in so far as those sums (including unpaid interest) exceed £40,819.19, the sum of £40,819.19 is to be excluded from the claimant's capital and, if less, only the balance is to be included.

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(iii) A finding of fact as to what happened to the £1,000 retained by the solicitors (T13) in respect of possible further costs should be made. If and in so far as any of that sum was paid to the claimant, the amount paid forms part of his capital but only from the date of payment.

(iv) The sum of £35,047.20 (Mr H's share in the net proceeds of Plas Isaf Manor after the purchase of the cottage, is not to be disregarded as capital, except in so far as from time to time it was spent on essential repairs and improvements to the cottage. The tribunal will need to make a finding of fact as to this.

8. While I have remitted the case for re-hearing, it seems to me that all which will be required is to make further findings of fact and I hope the parties can agree the figures involved so that the tribunal is not burdened with the necessity of rehearing the entire case in detail.

9. My decision is therefore as stated above.

Name: J M Henty
Commissioner

Date: 4 July 1994