

Housing costs - is a loan taken out to pay an ex-wife  
to move Class F land charge, a loan for the purpose of acquiring an interesting home  
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Commissioner's File: CIS/454/1993

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

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal given on 10 March 1993 is erroneous in point of law and accordingly I set it aside. However, as I consider it expedient to make further findings of fact and to give such decision as I consider appropriate in the light of them, I further decide that the claimant is not entitled from 13 May 1991 to housing costs for interest payments due on any of the loans which he has taken out. Those loans being for £25,000; £15,000 and 27,495.

2. This is the adjudication officer's appeal on a point of law against the decision of the social security appeal tribunal of 10 March 1993, leave having been granted by the tribunal chairman. I held an oral hearing of the appeal. The claimant attended and conducted his own case. The adjudication officer was represented by Miss J Smith from the Solicitor's Office of the Departments of Health and Social Security.

3. The claimant was a director of a building and decorating company ("the Company"). On 3 February 1976 he was granted a mortgage by Midland Bank Ltd ("the Bank") to enable him to purchase his present home known as Middle Candra. He opened a loan account with a credit limit of £19,000 being £14,000 for the purchase price and the balance for the payment of essential repairs. His initial intention was to repay the loan with the net proceeds of sale of his former home; an improvement grant for £9,000 and a mortgage from the Halifax Building Society. In the

event this did not happen. The building works cost more and took longer than anticipated. The claimant moved into the property in 1980. In August 1985 the Bank increased the credit limit to £25,000.

4. The claimant used the loan account with the Bank for private and company purposes. During a short period the overdraft on the loan account was reduced to nil but it subsequently rose again.

5. The claimant and his wife separated. By a court order dated 27 September 1990 the claimant was ordered to pay £10 per week interim maintenance pending divorce proceedings. The Company was in financial difficulties. The claimant had shares in the Company but these were unsaleable and as the Company's debts were equal to its assets the shares were valueless. Initially the claimant stated that as the Company owed him approximately £36,000 they had transferred a property known as Clarkswell to him in part payment. By a Court Order dated 12 April 1991 the divorce settlement was confirmed which provided that in full and final settlement for all claims the claimant and his wife may have had against each other for income, capital and other property adjustment, the claimant undertook to transfer Clarkswell into the sole name of his wife free from incumbrances and to allow her into occupation from 29 March 1991. In addition he was to pay her £15,000 by 31 December 1991. The claimant's wife undertook to remove "Land Charge entry she may have entered against the former matrimonial home at Middle Candra". As a result the claimant increased his overdraft by a further £15,000.

6. On 2 October 1991 the Company transferred Clarkswell to the claimant in consideration of £30,000. It is not in dispute that shortly after the claimant transferred the property to his wife although the deed of transfer is not included in the documentary evidence before me. In a letter dated 28 October 1991 the claimant stated that he owed the Company £30,000 for the transfer of Clarkswell. A letter from the Company dated 21 February 1992 showed that as at 31 December 1991 the capital owing was £27,495 with interest amounting to £4,175.10.

7. The claimant claimed income support on 30 May 1991. By that date the loan account at the Bank had been divided into two separate loan accounts, one for £25,000 and the other for £15,000, both secured on additional property known as Five Lanes, which was a builder's yard the claimant had purchased in 1986. On 19 May 1992 the adjudication officer decided that the claimant was not entitled to housing costs for the interest payments due on any of the loans. Thereupon the claimant appealed to the tribunal.

8. The claimant and his representative attended the hearing of the appeal before the tribunal on 12 August 1992. The tribunal very properly adjourned the hearing for further written submissions as to whether a Class F land charge was an interest in the dwelling occupied as the home in terms of paragraph 7(3) of Schedule 3 to the Income Support (General) Regulations 1987; whether part of the £15,000 paid by the claimant to his wife

included arrears of interim maintenance payments and documentary evidence to clarify the financial position between the claimant and the Company in view of the claimant's conflicting statements as to the financial position with regard to the transfer of Clarkswell. In the event the adjudication officer submitted the written submission but the claimant only submitted a copy of the transfer dated 2 October 1991 by the Company to him of Clarkswell in consideration of £30,000.

9. The claimant and his representative attended the hearing of the appeal before the tribunal on 10 March 1993. The record of the proceedings show that the tribunal took considerable care with this case. They decided that as from 30 May 1991 the claimant was entitled to housing costs for interest payments due on a total of £31,000, being made up as to £15,000 paid by the claimant to his wife for the removal of the Class F land charge and £25,000 for the purchase of Middle Candra, less £9,000 awarded as an improvement grant.

10. Regulation 17(e) of the General Regulations so far as relevant in the present case, provides that a claimant's weekly applicable amount shall include any amounts determined in accordance with Schedule 3 to those Regulations which may be applicable to him in respect of mortgage interest payments or such other housing costs as are prescribed in that Schedule.

11. Paragraph 1 of Schedule 3 to the General Regulations so far as relevant provides that the amounts which may be applicable to a person in respect of housing costs under regulation 17(e) are:-

- "(a) mortgage interest payments;
- (aa) ...
- (b) interest on loans for repairs and improvements to the dwelling occupied as the home, ...
- (c)-(h) ..."

Regulation 2(1) of the General Regulations defines "dwelling occupied as the home" so far as relevant to mean "the dwelling together with any garage, garden and outbuildings, normally occupied by the claimant as his home ..".

12. Paragraph 7(3) of Schedule 3 provides, so far as relevant, that subject to sub-paragraph (3A) to (6), "eligible interest" means the amount of interest on a loan taken out to defray money applied for the purpose of:-

- "(a) acquiring an interest in the dwelling occupied as the home; or
- (b) paying off another loan but only to the extent that interest of that other loan would have been eligible interest had the loan not been paid off."

13. Paragraph 8(1) of Schedule 3 provides, so far as relevant, that there shall be met an amount in respect of interest payable on a loan which is taken out, with or without security, for the purpose of -

- "(a) carrying out repairs or improvements to the dwelling occupied as the home; or
- (b) paying off another loan but only to the extent that interest on that other loan would have been eligible interest had the loan not been paid off.

Paragraph 8(3) of Schedule 3 provides a list of the measures that would be treated as "repairs and improvements" in paragraph 8.

14. The question for determination by the tribunal was whether the claimant was entitled to housing costs for interest payments due on three loans. With regard to the loan account for £25,000 with the Bank the tribunal found as fact that at the date of claim the overdraft on the loan account was "some £24,000", and that originally the claimant had borrowed £25,000 for the purposes of purchasing "Middle Candra". Their reasons for decision read:-

"In relation to the £25,000: it is quite clear that no further evidence was forthcoming one way or the other, either from the DSS or the claimant. The DSS had no evidence apart from what the claimant had said that at one stage the account had been marginally in credit, but the tribunal accepted that the reason for that was because of the £34,000 cheque paid into the account which was the property of [the Company]. Accordingly, the Tribunal in all the circumstances accepted that the full amount of £25,000 was originally used for the purchase of the property and was outstanding at the date of the application for income support, and that from that sum £9,000 should be deducted as being money received by way of a grant payment for the improvement on the property. Thus, it was accepted that a minimum of £16,000 was still outstanding on the original mortgage account ..."

15. In my view the tribunal's decision was erroneous in law because having found that at the date of claim the overdraft amounted to "some £24,000" they nevertheless concluded that the claimant was entitled to housing costs for interest payments due on £25,000 which they found was the amount borrowed for the purchase of Middle Candra. This was inconsistent with the evidence before them. When giving details of his mortgage on the relevant form M1 12 the claimant stated that the original amount of loan for home purchase was £25,000 taken out on 2 August 1985, and that this sum covered approximately £5,000 for the payment of arrears of interest. He explained that he was unable to obtain a mortgage from the Halifax Building Society as planned because by August 1985 his wife had registered a Class F land charge against the property. The summary of facts recorded on form AT2 state that the claimant said on 15 January 1992 that

at the date of purchase he had arranged a bank overdraft for £19,000 being £14,000 to purchase the property and £5,000 for repairs. The amount for the repairs proved inadequate and the overdraft eventually reached £25,000. The claimant reiterated this evidence before me and also produced a copy of the mortgage with the Bank dated 3 February 1976 showing the date of the conveyance to the claimant as 1 December 1975. The claimant confirmed that at the date of the purchase his credit limit was £19,000. The tribunal failed to explain why they considered the claimant was entitled to housing costs for interest payments due on the whole of the £25,000. The decision is silent in respect of the repairs carried out on the property and whether these were "repairs and improvements" in terms of paragraph 8(3) of Schedule 3. I appreciate that the claimant was unable to produce any receipts in support of his statements but there is nothing to indicate that the tribunal had regard to the relevant regulations in reaching their conclusion. The decision failed to comply with the requirements of regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986 and was erroneous in law in consequence.

16. Miss Smith accepted that the loan account had been opened initially with the Bank for the specific purpose of purchasing and repairing Middle Candra, although as is normal in such cases the mortgage dated 3 January provided that Middle Candra was secured to the Bank for the claimant's general indebtedness. The account was in credit for a short period which showed that the loan was repaid. The fact that the claimant used the account for other purposes was irrelevant. The reality of the position was that prior to the date of claim the amount borrowed from the Bank in respect of Middle Candra had been repaid for whatever reason. There was no loan outstanding at the date of claim "for the purpose of acquiring an interest in the dwelling occupied as the home" or for "repairs and improvements". It was also immaterial that the mortgage had not been redeemed. The claimant was entitled to its redemption at any time that the account was in credit. However, he continued to use the credit facilities to finance other ventures. I agree. The claimant is not entitled to housing costs on interest payments due on £25,000. The tribunal erred in law in concluding otherwise.

17. The tribunal were next required to consider whether the Class F land charge registered by the claimant's wife could amount to an interest in the dwelling occupied as the home in terms of paragraph 7(3) of Schedule 3. The tribunal concluded that it was and that the claimant was entitled to housing costs for interest payments due on £15,000.

18. Section 1(1) of the Law of Property Act 1925 provides that only two legal estates can exist in land - an estate in fee simple absolute in possession and a term of years absolute. Section 1(2) enumerates the only interest or charges in or over land which are capable of subsisting or of being conveyed or created at law. There are five and a Class F land charge is not included. Section 1(3) states that all other estates, interest and charges in or over land take effect as equitable interests.

The question at issue is whether the Class F band charge falls within the scope of section 1(3).

19. Section 1(1) of the Matrimonial Homes Act 1983 ("the Act") gives each spouse the right not to be evicted from a dwelling house vested in the other and where a spouse is not in occupation, with the leave of the court the right to enter and occupy such a dwelling house (referred to in the Act as "rights of occupation"). A Class F land charge may be registered by a spouse to protect his or her rights of occupation against a purchaser of the legal estate or mortgagee.

20. Section 2(1) and (4) of the 1983 Act provides so far as relevant:-

" 2. Effect of rights of occupation as charge on dwelling house

(1) Where, at any time during the subsistence of a marriage, one spouse is entitled to occupy a dwelling house by virtue of a beneficial estate or interest, then the other spouse's rights of occupation shall be a charge on that estate or interest, having the like priority as if it were an equitable interest [my underlining] ..."

(4) Notwithstanding that a spouse's right of occupation are a charge on an estate or interest in the dwelling house, those rights shall be brought to an end by -

(a) the death of the other spouse or

(b) the termination (otherwise than by death) of the marriage,

unless in the event of a matrimonial dispute or estrangement the court sees fit to direct otherwise by an order made under section 1 above during the subsistence of the marriage."

21. As stated prior to the hearing of the appeal before the tribunal on 10 March 1993, the adjudication officer submitted a further written submission on the nature of a Class F land charge as directed by the tribunal of 12 August 1992. He referred the tribunal to Wroth v. Tyler (1974) CH 30 where Megarry J, as he then was, explained the nature of a registered charge of a spouse's rights of occupation under sections 1(1) and 2(1) of the Matrimonial Homes Act 1967. The sections are couched in similar terms to the corresponding provisions in the 1983 Act. At page 43 he stated:-

"In the present case, the concluding words of the subsection [section 2(1)] brought the wife's "rights of occupation"

into being as a charge on January 1, 1968 when the Act came into operation. It is on that date that she acquired "a charge" on the defendant's fee simple under his absolute title. That charge is not declared to be an equitable interest, but merely to have "the like priority as if it were an equitable interest" created (in this case) on January 1, 1968. The charge seems to be neither legal nor equitable, but a pure creature of statute, with a priority (though not a nature) defined by reference to equity."

At page 45 he said:-

".. The statutory right appears in essence to be a purely personal right for the wife not to be evicted; and it seems wholly inconsistent with the Act that this right should be assignable or otherwise disposable."

At page 46 he said:-

"No doubt, too, the protected spouse may, by registering the statutory charge, and particularly by registering it at an inconvenient moment, require the earning spouse to buy off the charge ..."

22. The tribunal rejected the adjudication officer's submission for two reasons. Firstly because "commonsense dictated that [the claimant's wife] would not have removed her Class F land charge unless she was paid a sum of money which was eventually settled at £15,000". Secondly "as a matter of law the Tribunal found that Section 1(3) of the Law of Property Act clearly stated that "all other estates, interest and charges in or over land take effect as equitable interest". Section 2(1) of the Matrimonial Homes Act 1983 states that the spouse who is not the owner of the matrimonial home has a right "of occupation which shall be a charge on that estate or interest, having the like priority as if it were an equitable interest." Thus, it appears to the tribunal that a Class F land charge was undoubtedly defined as a "charge" on the estate, and as section 1(3) of the Law of Property Act clearly states that any "charge" shall take effect as an "equitable interest", it seems clear to the tribunal that the purchase of the wife's interest protected by a Class F land charge came into the clear ambit of Para. 7(3) of Schedule 3 of the Income Support (General) Regulations. As [the claimant] had borrowed £15,000 from the bank to pay off his wife's interest and secure the removal of the Class F land charge, this was clearly a loan by him for the purchase of an interest in property."

23. In the present case the title to Middle Candra was unregistered. The evidence indicates that the Class F land charge was registered prior to August 1985. The claimant told me that his wife had not occupied Middle Candra for a long time, although he was vague as to the precise date. The adjudication officer stated that the decree absolute of the claimant's divorce was on 12 October 1990, although I presume this should be 12 October 1991 which is consistent with the documentary evidence and the claimant's evidence before me. With regard to the

tribunal's first reason for rejecting the adjudication officer's submission, Miss Smith referred me to section 5(1)(b) of the 1983 Act which provides:-

" Cancellation of registration of determination of marriage, etc.

5. - (1) Where a spouse's rights of occupation are a charge on an estate in a dwelling house and the charge is registered under section 2 of the Land Charges Act 1972 or section 2(8) above, the Chief Land Registrar shall, subject to sub-paragraph (2) below, (not applicable in the present case) cancel the registration of the charge if he is satisfied -

(a) ...

(b) by the production of an office copy of a decree of a court, that the marriage in question has been terminated otherwise than by death"

24. Miss Smith submitted that the tribunal had erred in law in concluding that the claimant's wife would not have removed her Class F land charge unless she had been paid £15,000 for doing so. She submitted that the tribunal failed to have regard to sections 2(4)(b) and 5(1)(b) of the Act which provided for the termination of rights of occupation and cancellation of registration of such rights on the production of an office copy of the decree absolute of the divorce. I agree.

25. With regard to the tribunal's second reason for concluding that the Class F land charge fell within the scope of section 1(3) of the Law of Property Act 1925 and should take effect as an equitable interest, Miss Smith submitted that the tribunal had erred in law in failing to read section 1(3) of the Law of Property Act 1925 in conjunction with section 2(1) of the Act which provided that such a charge should have priority as if it were an equitable interest. This indicated that it was not an equitable interest and as such fell outside the scope of section 1(3). Further, she submitted that the tribunal had failed to have regard to Wroth v. Tyler which decided that a spouse's rights of occupation was in essence a personal and non-assignable statutory right which "seems to me neither legal nor equitable, but a pure creature of statute, with a priority (though not a nature) defined by reference to equity". It was a mere right of occupation and not an interest in the dwelling house. The Class F land charge registered by the wife did not constitute the ownership of an interest to be acquired. It followed that the claimant had not applied £15,000 for the purpose of "acquiring an interest in the dwelling occupied as the home" for the purposes of paragraph 7(3)(a) of Schedule 3. The claimant was not entitled to housing costs for interest payable on this sum. I agree. The tribunal's decision was erroneous in

law on this ground also.

26. The tribunal decided that the claimant was not entitled to housing costs on interest payable on the loan of £27,495. They found as fact that the Company owed the claimant £30,000 and that they had transferred Clarkswell to his wife as directed by him in settlement of that debt. They concluded that no part of £27,495 had been used by the claimant "to buy any interest of his wife in the original property" and as a result the claimant had not used any part of that loan for the purpose of "acquiring an interest in the dwelling occupied as the home". I see no error of law in that conclusion.

27. In their reasons for decision the tribunal noted that the case was extremely complicated and had been "made more difficult by the absence of any documentary evidence in relation to bank accounts etc". Although I found the claimant an honest witness, his evidence was vague and confused and he was unable to recall events and dates precisely. I am satisfied that no further documentary evidence is available and in those circumstances I see no purpose in remitting the case to another tribunal for rehearing. I consider it expedient to give the decision the tribunal should have given as I am empowered by section (a)(ii) of the Social Security Administration Act 1992.

28. The adjudication officer's appeal is allowed and I give the decision set out in paragraph 1.

(Signed) R.F.M. Heggs  
Commissioner

(Date) 7 March 1994