

*Life Annuity to Remain in Operation see rest
of file - ... (L.S.)*



83/95

JMH/SH/5

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Commissioner's File: CIS/461/1994

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. I allow the appeal. I hold that the interest of the claimant is, for the purposes of para 5 of Schedule 10 of the Income Support General Regulations "a reversionary interest", and, accordingly, is to be disregarded for the purposes of calculating the capital of the claimant.

2. This is an appeal with the leave of the Commissioner from the decision of a SSAT dated 2.10.90. The claimant had made a claim for income support on 21.2.90. It was refused on the grounds that his capital exceeded the prescribed amount. At that time, the claimant had savings of £5,600. He lived in his own house but he also owned another house in which his wife lived. The claimant only first learned of what a reversionary interest might be in 1993 and, if his interest in this other house (which I will call "the House") was a reversionary interest, it would be disregarded under para 5 of Schedule 10 to the Income Support (General) Regulations. Accordingly, in those circumstances, his capital would fall below the prescribed amount and he would be entitled to income support. On 25.7.94, the Commissioner gave leave to appeal out of time.

3. Following their normal practice, the Department destroyed the file after two years. There is nothing to be read into their action in so doing either one way or another. A file has been reconstituted sufficient to enable me to determine this appeal.

4. This case raised difficult questions of law and I gave directions for there to be an oral hearing. I heard the case on 12.9.95. The claimant appeared in person, and the Department was represented by Ms Rabas, who made an admirably lucid and fair

analysis of the case and the questions involved.

5. The claimant is now 78 or 79. In June 1941, he married his wife, who is now about 78. He bought the House which they made their matrimonial home. They became estranged in, I think, 1968 or thereabouts. The claimant moved into another house, which he owned, leaving his wife in occupation of the House. There was no written agreement. In the chairman's note of evidence (T1) it is noted inter alia:-

"The claimant agreed with the facts. There was no mortgage. He had entered into no written agreement with his wife, it was merely understood that when he left the matrimonial home on the Isle of Wight she would be allowed to live on in there for the rest of her life. The claimant indicated there was no divorce and he said he was "totally estranged from her"."

This evidence was expanded by the claimant in his observations dated 7.11.94 (p16):-

"My estranged wife is now 77 years and 8 months and my property on the Isle of Wight has been her home since the marriage in June 1941 and she has no desire to give it up. When we became estranged in March 1968 I left matters by mutual agreement that she would continue to live there until her decease and the property will be returned to me should I survive her and I have never returned to occupy since. Our marriage was Roman Catholic and divorce has never been considered. Any question of division of the property has never been considered because my estranged wife had no money and as far as I know was living on limited means and I could not place any pressure on her to consider such a division. By her occupation she is an encumbrance. This meant I have had no income from, or enjoyment from the property since my departure in 1968."

6. In the written submissions, the AO supported the appeal but only to a limited extent and invited me to set the decision aside and remit the case for re-hearing. However, he did not accept that the claimant's interest in the House was a reversionary interest for the purposes of para 5 of Schedule 10 of the Regulations. But he did submit that the wife's occupation of the House enjoyed the protection of sections 1 and 2 of the Matrimonial Homes Act 1983 which might have the effect of bringing the value of his interest below the value of £10,000 put on it by the tribunal. The tribunal had considered that the wife might have a claim on the House which could amount to at least 50% of the capital value. On what basis, they came to that conclusion - whether under section 37 of the Matrimonial Proceedings and Property Act 1970 or otherwise - it is not clear, but I agree with the AO that until such a claim has been established, it is perilous to adopt such an approach.

7. When I gave the directions for the oral hearing I also gave the following directions in addition:-

"I would like in particular submissions on:

- (1) What the interest of the wife is in the House occupied by her and owned by the claimant; and
- (2) If that interest is as a licensee under an irrevocable and non-assignable licence, whether that interest can be "a reversionary interest" for the purpose of paragraph 5, Schedule 10 to the General Regulations.

CAO Palfrey (C.A. 8.2.95) may be relevant."

8. Since the original written submissions, there has been a significant shift in the attitude of the adjudication officer. Ms Rabas cited to me firstly a passage in Megarry and Wade 5th Edition pages 806/8 and the decisions in Bannister v. Bannister 1948 2 AER 1/33 (C.A.), Binions v. Evans 1972 2 AER 70, re Sharpe 1981 1WLR 219, Ungurian v. Lesnoff 1989, 1 WLR, 840, and Costello v. Costello (C.A.) 3.3.94, (as yet unreported) of which Ms Rabas kindly furnished me with a transcript. Those authorities support the proposition that where an irrevocable licence is granted or is to be inferred there can be circumstances which give rise to a constructive trust to the effect that the occupier is to remain for the remainder of his or her life undisturbed and that, in turn, may make him or her a tenant for life for the purposes of the Settled Land Act 1925. As Browne-Wilkinson J (as he then was) pointed out in re Sharpe (supra) the imposition of a constructive trust removed the difficulties attended by section 40 LPA 1925, though why the doctrine of part performance could not then be available I am not sure. Since the doctrine has been abolished by the 1989 Act that question is now of academic interest only. Once one attains that position, the natural consequences flow and the occupier assumes the relationship of a tenant for life - see in particular Bannister v. Bannister (supra), which the Court of Appeal in Costello v. Costello was invited to but refused to say was wrong, Binions v. Evans and Ungurian v. Lesnoff. In that latter case, Vinelott J. said at p855:-

"He was providing a house as a home for a woman much younger than himself who would be likely to survive him. I do not think that full effect would be given to this common intention by inferring no more than an irrevocable licence to occupy the house. I think the legal consequences which flow from the intention to be imputed to the parties was that Mr Ungurian held the house on trust to permit Mrs Lesnoff to reside in it during her life unless and until Mr Ungurian with her consent sold the property and bought another residence for her in substitution for it.

If that is the right conclusion, then the House became settled land within the Settled Land Act 1925 and Mrs Lesnoff is tenant for life and entitled to call for the

execution of a vesting deed and for the appointment of trustees. ..."

9. Finally, I should note that the court will not lightly impose a constructive trust in these circumstances, as was demonstrated by the judgment of the Court of Appeal in Ashburn Anstalt v. Arnold 1989. Ch.1, where part of the headnote runs:-

"... that although a mere contractual licence to occupy land was not binding on a purchaser of the land even though he had notice of the licence, appropriate facts might give rise to a constructive trust; but the court would not impose a constructive trust unless it was satisfied that the conscience of the owner of the land had been affected so that it would be inequitable to allow him to deny the claimant an interest ..."

In that case, the court did in fact hold that the evidence was insufficient to infer a constructive trust.

10. Now the evidence in this case clearly and unequivocally shows:-

- (i) The House was purchased by the claimant in 1941 for the purposes of providing a home for him and his wife.
- (ii) The claimant left the House for good in or about 1968;
- (iii) On the separation, it was mutually agreed that the claimant's wife could remain in the house for her lifetime.
- (iv) The marriage was a Roman Catholic marriage, divorce had not been considered and no question of the division of any property ever arose. However, the estrangement was permanent.

11. It seems to me clear on this evidence that the courts would impose a constructive trust. In the Ashburn Anstalt case (supra) at p22F Fox LJ, giving the judgment of the Court, said:-

"The test, for the present purposes, is whether the owner of the property has so conducted himself that it would be inequitable to allow him to deny the claimant an interest in the property..."

and at p25H:

"The court will not impose a constructive trust unless it is satisfied that the conscience of the estate owner is affected."

I have firmly concluded that those tests have been satisfied in this case. The result is that the wife is a tenant for life of

the House for the purposes of the Settled Land Act, she can call for a Vesting Deed vesting the legal estate in her with the appointment of Settled Land Act trustees and she has all the powers of a tenant for life.

12. If I reached that conclusion - and Ms Rabas did not really make any serious attempt to dissuade me - Ms Rabas conceded that the interest of the claimant was a reversionary interest for the purposes of para 5 of the 10th Schedule. Any question of any technical difference between a reversionary interest and an interest in the remainder is one of semantics, and the term included an interest which did not afford any present enjoyment. She referred me to para 21 of R(SB) 3/86, distinguished on different grounds in CIS/085/1992 and CAO v. Palfrey, where the Commissioner said:-

" 21. The touchstone in my judgment lies in the concept of a "reversionary" interest as something which does not afford any present enjoyment but carries a vested or contingent right to enjoyment in the future."

I do not think that that purported definition has ceased to find favour and indeed, in Palfrey, Hobhouse LJ seemed to accept it when at p20 he said:-

"In the context of this legislation which places an emphasis on the possession of the capital asset, a tenant is again one of the clearest examples where possession of the asset has for the duration of the term been transferred to another." (My underlining)

Likewise, in this case, the enjoyment of the House during the wife's lifetime has been vested in her. For the purposes of that statement and for present purposes I see no difference in effect between a tenancy for the life of the wife and possession under a constructive trust with the consequences I have set out above, namely that the wife has become the tenant for life for the purposes of the Settled Land Act.

13. I therefore allow the appeal and hold that the interest of the claimant in the House is a reversionary interest for the purposes of para 5, Schedule 10 of the General Regulations. If and, in so far as is necessary, to reach this conclusion I exercise my powers contained in section 23(7) of the Administration Act 1992.

14. In conclusion, I should note that I am aware of the decision in CIS/454/1993 that an interest protected by a Class F land charge is not an interest for the purposes of para 7 of Schedule 3 to the Regulations. I am also aware of the decision in

CIS/465/1994 that the interest of a statutory tenant is such an interest. For reasons which I think must adequately appear above I do not think that these cases assist either one way or another in the determination of the issues in this case.

(Signed) J.M. Henty
Commissioner
(Date) 13 October 1995