IN THE HIGH COURT OF JUSTICE NO: CO/2935/99

QUEEN'S BENCH DIVISION
CROWN OFFICE LIST

Royal Courts of Justice
Strand
London WC2

Wednesday, 3rd November 1999

B e f o r e:

MR JUSTICE OWEN

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R e g i n a

-v-

BRISTOL CITY COUNCIL
EX PARTE MRS J JACOBS

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MR DAVID BEAN QC (instructed by Nash & Co, Plymouth Devon PL4 9BD) appeared on behalf of the Applicant
MR ROBERT S LEVY (instructed by solicitors acting on behalf of Bristol City Council, Bristol, BS1 5TR) appeared on behalf of the Respondent

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J U D G M E N T
(As approved by the Court)

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Wednesday, 3rd November 1999

MR JUSTICE OWEN: This is an application for permission to apply for judicial review of the decision of the Housing Benefit Review Board of Bristol City Council of the 23rd April of this year. That decision refused to set aside the decision of the Benefit Review Board of 30th October 1998, which confirmed the determination of the City Council that the amount of housing benefit payable to the applicant under Regulation 10 of the Housing Benefits General Regulations 1987 could not include water rates, notwithstanding her separate liability to pay water rates. Alternatively, there is an application in respect of the decision of 22nd April 1999 which may in fact be the decision, and I have taken it to be, the one which is first mentioned, which is described as being on the 23rd April. Whichever it was, those are the decisions which are in dispute.

Mrs Jacobs has been a tenant of Bristol City Council (the respondent), at 44, Sheridan Road, in Bristol since the 15th August 1993. She has paid and pays rent but no service charge to the council. Her payment of water rates is not a condition of her tenancy. She is entitled to housing benefit, which she has received for some years. Since October 1997 she has disputed the amount of that benefit. For the purposes of the present application, the first instance determination under Regulation 76(1) was made in April 1998. That determination was reviewed and confirmed by the council under Regulation 79 - that is seen in the letter dated the 6th August 1998.

A review board was convened to make a further review under Regulation 81. The result was confirmation of the authority's determination that housing benefit was not payable in respect of Mrs Jacobs' water, gas, electricity and telephone. In due course there was the decision of 23rd April 1999 which was to the same effect.

The argument which was put forward before the review board was that a tenant could not receive income benefit for water charges unless separately liable. The argument continued that if, however, separately liable for water charges a tenant could claim for those charges. Indeed, the argument was that other charges would also be properly payable, such as the standing charge for a telephone, although not the calls, and in fact any charges in any way which were incurred in respect of, or in connection with, the property. The board concluded that the definition of rent in Regulation 10(1) did not include payments made separately by the tenant for water charges, fuel, or telephone. Furthermore, payment for these services was not a consequence or in respect of her use and occupation within the meaning of Regulation 10(1).

The last of these matters to which reference has been made, the decision having been given on the 23rd April, came about in this way: the applicant applied under Regulation 86 to have the decision of the first review board set aside. This was a two-way differently constituted review board and this second review board refused the application by a letter of that date. The complaint was still that the initial decision of the council was wrong. What was argued before the second review board was that the Board should set aside the decision since the interests of justice so required. It is said that would be the case if the decision was made as result of any error of law. That is still argued, but it is alternatively argued that if errors of law do not give a right to set aside under Regulation 86(1)(c), then the applicant's decision to exhaust all her statutory remedies under the regulations should not preclude her from now seeking, out of time, judicial review of that earlier decision in October 1998.

I am told that the present dispute is by way of being a "test case", raising the more limited question whether a tenant receiving housing benefit is entitled to an allowance in respect of water charges for which she is separately liable.

It is, as is obvious, common ground that the applicant is eligible for housing benefit under the Regulations. The specific issue, as again is apparent, is whether the amount of that housing benefit is to include payments of water rates incurred separately in connection with her house. The legal framework is agreed; section 130 of the Social Security Contributions and Benefits Act 1992 provides the basic entitlement to housing benefit. Subsection 1 provides that a necessary condition is that the claimant is liable to make payments in respect of a dwelling in Great Britain which he occupies as his home. Regulation 8 of the Housing Benefit General Regulation gives the general rule that housing benefit shall be payable in respect of the payments specified in Regulation 10.

10(1) is entitled "Rent". Rent is defined in Regulation 1 as including all those payments in respect of a dwelling specified in Regulation 10(1). Regulation 10(1) provides:

"Subject to the following provisions of this regulation, the payments in respect of which housing benefit is payable in the form of a rent rebate or allowance are the following periodical payments which a person is liable to make in respect of the dwelling which he occupies as his home-"

Regulation 10(3) provides:

"Subject to ... any apportionment in accordance with paragraphs (4) and (5) ... the amount of a person's eligible rent shall be the aggregate of such payments specified in paragraph (1) as he is liable to pay less-"

The applicant was separately liable for water charges. She had to pay those to the water board - the water board which provided water in that area - and, accordingly, it is agreed that no deduction was appropriate in respect of Regulation 10(3).

The applicant's argument is in this manner: payment of her separate water charges falls within Regulation 10(1)(d); that is, and I quote:

"A payment in respect of, or in consequence of, use and occupation of the dwelling:"

It is said that as a result of that it is to be added to the payment by way of rent under 10(1)(a). 10(1) sets out various payments which are listed from 'a' through to 'j'. 10(1)(a) lists payments of or by way of rent.

The argument continues that as she is separately liable for the water charges there is no deduction which would otherwise fall to be made under Regulation 10(3). This Regulation provides:

"...the amount of a person's eligible rent shall be [subject to various conditions which it is not necessary to consider here] the aggregate of such payments specified in paragraph (1) as he is liable to pay less-"

and there are then some deductions which are set out in 'a' to 'c'. (a) is:

"except where he is separately liable for [...] charges for water, sewerage or allied environmental services, an amount determined in accordance with paragraph (6)."

The dispute is over whether the water charges fall within Regulation 10(1)(d) which specifies, and I quote:

"payments in respect of, or in consequence of, use and occupation of the dwelling."

In support of her argument the applicant further contends, firstly, that a person's eligible rent is the aggregate of the payments specified in Regulation 10(1), which clearly implies that a person can be liable to make more than one class of payment specified in 10(1). There seems to me no possibility of dispute over this.

The second part of the argument for the applicant is that Regulation 10(3) provides that in calculating the eligible payment, certain sums are to be deducted from the aggregate, which, of course, is true. From this it is argued that the following conclusions necessarily apply: firstly, that Regulation 10(3)(a) envisages that water charges can be included in 10(1); secondly, that water charges so included can be incurred either separately, that is not as part of the rent due; or not separately, that is as part of the rent due. Hence, both possibilities must be accommodated within Regulation 10(1).

Secondly, water charges incurred separately cannot by definition fall within 10(1)(a), payments by way of rent. The only possibilities are that they are either payments in respect of, or in consequence of, use and occupation of the dwelling (in other words, (d)), or payments of, or by way of, service charges, payment of which is a condition on which the right to occupy the dwelling depends (that is, payment (e)); and that is not the case here.

Thirdly, payment of water charges incurred separately can therefore only fall under (d). To be fair to the applicant, that is her last argument but, nevertheless, it is that which logically follows from the earlier statements in her arguments. The other two arguments are as follows: as water charge payments are clearly in respect of, or in consequence of, use and occupation of a dwelling (which is certainly a contentious statement) and, as 10(1)(b) contemplates, payments in respect of a licence or permission to occupy the dwelling, 10(1)(d) must contemplate payments which are not in respect of rights to occupy, but which otherwise relate to the use or occupation of the dwelling.

The second argument is that 10(1)(d) cannot apply only to payments relating to the use or occupation of a dwelling under a licence or permission but, in fact, it applies irrespective of whether the dwelling is occupied under a tenancy or simply under a licence or permission. To continue, the contention is that Regulation 10(1) for the present purposes contemplates three types of payments: firstly, payments in respect of the right to occupy, whether under (a) a tenancy or (b) a licence or permission; secondly, payments upon which the right to occupy is conditional, namely 10(1)(e); thirdly, payments which, though not a condition, are incurred in respect of, or as a consequence of, the use and occupation, in other words, 10(1)(d).

The argument finishes by saying the water charges come under the third regulation, that is 10(1)(d). However, this statement is not an analysis but rather a description based on the analysis which has been related already and, as such, that of itself adds little.

Let me come now to the respondent's case. Firstly, it is that the application was not made promptly. It is said the impugned decision was made on 23rd April 1999 and the application was not made until the 20th July 1999. That, the respondents argue, in accordance with the phraseology used in Order 53, was not prompt - especially bearing in mind, as one has to, Scott Baker J's warning about possible problems over delay in August 1999 when he said that he adjourned this application for an oral hearing.

The applicant's answer is that the explanation is to be found in the review procedure. A tenant's housing benefit is determined at least annually. If the tenant is dissatisfied, there is a right to review at officer level under Regulation 79; if he is still dissatisfied an application may be made under Regulation 81 for a Housing Benefit Review Board to hold a further review under Regulation 82. Here the decision was on the 5th November 1998.

Finally, the board may be asked under Regulation 86 to set aside the previous decision on one of three grounds - one, of which, is that the interest of justice so requires. Here the decision was that - which has already been referred to - of the 23rd April of this year.

It was argued in those last proceedings, unsuccessfully, that the interests of justice did so require; but that, as I have said, was unsuccessful. I am told there is a divergence of opinion as to whether Regulation 86 ought to be invoked before applying for judicial review. There have been conflicting decisions at this level. I am far from satisfied as to the scope of the Regulation 86 jurisdiction which was not fully argued before me.

However, I am required to bear in mind the strictures which are imposed by Order 53, r. 4(1), and also bound to take into account the warnings which are to be found in cases such as Ex parte TVNI Limited (The Times, December 1990) where, of course, the facts were wholly different. Despite these strictures I do in fact find that the delay which there was was not such as to prevent these proceedings continuing. Indeed, were it to be necessary to consider all of the decisions I would have extended time to include them all.

My reasons are that pursuing alternative statutory appeals, as cases such as R v Stratford Upon Avon District Council ex parte Jackson 1985 1 WLR at 1319, show, are in general to be commended and the discretion to extend time must be exercised sympathetically. I also bear in mind that there has been no suggestion by the respondents that any hardship or loss has been caused to the respondents as a result of any delay there may have been. Finally, I bear in mind the fact that if the question is not answered in these proceedings there will be other proceedings with a consequent considerable waste of money.

So I come to consider the substantive claim. At its simplest the respondent's counter argument is that housing benefit is calculated on eligible rent, and a claim for water separately charged is not a component part of rent. Paragraph 3 of Regulation 10 advises that eligible rent is the amount after deducting various sums including a proportion of water and sewerage charges, unless the person is billed separately for those services, in which case the respondent says those charges will not have been included in the calculation of eligible rent and, accordingly, there is no need for a deduction.

The necessary effect of this reasoning is that the money paid by Mrs Jacobs for water is not recoverable by her as housing benefit. The effect of her contrary reasoning would be that whilst a tenant paying for water as a part of the rent would have a proportion of that amount deducted from her housing benefit, a tenant who had been wise enough to make her own arrangements with the water board would recover that money as housing benefit and would have no deduction made. Although there was a change in the regulations in 1987 or 1988, nobody has suggested that this is a Pepper v Hart situation. Nobody has suggested any canon of construction which would immediately settle all doubts. I do not wish to be disrespectful, but to me it seemed that each party seemed to be saying that the answer is obvious; obvious and in their favour. This is a situation which frequently requires very careful consideration before judgment. I have done my best to give that consideration.

I assess the first task to be the definition of "use and occupation"; and that is to be followed by a consideration of the qualifying words "in respect of, or in consequence of use and occupation", which is a phrase of considerable antiquity. The respondent has traced it back to section 14 of the Distress for Rent Act 1737 a statute now repealed. The respondent has also provided me with an excerpt from Chapter 10 of Woodfall on Landlord and Tenant, presumably the latest edition. Woodfall states that:

"...an award of compensation for use and occupation is a restitutionary remedy, based upon quasi-contract. It arises where a person has been given permission to occupy the land of another without any binding terms having been agreed about payment. In such circumstances [Woodfall continues] the law will imply a promise on the part of the occupier to pay a reasonable sum for his use and occupation of the land."

It is true that it might be said that a payment in respect of, or in consequence of use and occupation of, a dwelling might be considered to be covered by the words of (b); that is, payments in respect of an implied licence or permission to occupy the dwelling, since both (b) and (d) imply permissive occupation. However, it might be possible to find and illustrate situations which are not covered by one or other. For example, the payments for a licence or permission would normally be fixed, whereas the amount due as compensation under use and occupation would not be agreed, and would generally need determination by the court if there was no agreement before court proceedings.

However, that exercise, which was not carried out before me, is not necessary, since I accept the respondent's argument that the phrase "use and occupation", has a defined meaning, and it would be odd, indeed, if the draughtsman had intended a different meaning. By including (d) under the general description of rent, the draughtsman had in mind payments to a landlord, or one whom the law says may be treated as a landlord. If the calculation of compensation for use and occupation included a sum for use of water, the draughtsman had in mind exclusion under 10(3). If not, no payment would be due as housing benefit. In my judgment, the respondent council was correct in its ruling as to "use and occupation".

I now turn to the words, "in respect of, or in consequence of". The applicant's argument amounts to saying that once a tenant can show use and occupation, any payments in consequence, although not to the landlord, must be taken into account. On the tenant's full argument it would be possible to claim payments for water, heating, lighting, television, fuel and even decorating. Logically this was the original conclusion sought by the applicant. I am satisfied that no such conclusion was ever intended. In this connection, it is, I consider, permissible to consider the anomaly which the applicant's construction would produce. A tenant being separately liable for water, sewerage and allied environmental services would be far better off financially, although there is no discernable reason why this should be so.

The respondent points out that grammatically some such words as, "in respect of, or in consequence of", are necessary and appropriate for a situation where the amount will have to be determined either by agreement or by the court. The intention, it is said, is to cover use and occupation payments when determined or agreed by the court. The calculation by the court would not normally include a water component since rarely, if ever, is there a condition that a tenant shall have water - the calculation being for compensation. The words used must have some restrictively causative affect. It is not any payment which has any connection with the dwelling which is relevant, but only those payments which the court would include when calculating compensation for use and occupation.

Mrs Jacobs' payments were not in respect of, or in consequence of, her use and occupation; firstly, since she occupied under a tenancy and, accordingly, liability for use and occupation did not arise; secondly, because the water charges payable to a third party cannot be payment in respect of, or in consequence of, use and occupation or, for that matter, her tenancy.

In those circumstances I am indebted for the arguments but I reject the application.

MR LEVY: My Lord, in this case, although Mrs Jacobs is in receipt of housing benefit, your Lordship may recall that this is a "test case"; it is being sponsored by the South West Tenants' Association.

MR JUSTICE OWEN: Well, I was told it was a test case but I was not aware that it was being sponsored.

MR LEVY: Your Lordship may have gathered from the bundle that in relation to these proceedings the applicant gave power of attorney to one Richard John Culverhouse. So, my Lord, as Mrs Jacobs is not in receipt of legal aid, I would ask for an order of costs against her. Equally, and indeed it is the case, given her obvious financial position - i.e. she is in receipt of housing benefit - this is a case where, I say, it is appropriate to consider making an order under section 51 of the Supreme Court; whether against that association or Mr Culverhouse.

Now, I think I am probably at liberty to air a conversation I had with my learned friend last evening, where he said: 'This is not going to be a problem because the tenants' association considers itself to be in the same position as a trade union would, in similar proceedings, and would meet its indebtedness.' Neither the tenants' association, which I understand is a non-corporated association, nor Mr Culverhouse, is a party to the proceedings, and they need to be a party to the proceedings under section 51. So if the order could reflect that I have liberty to apply at some stage in the future for an order under section 51, either against the tenant's association or Mr Culverhouse, I think we can leave it at that and I am sure my learned friend's words will prove to be correct.

MR JUSTICE OWEN: Yes, well, I will ask. (To Mr Bean) What is the situation?

MR BEAN: My Lord, before we get on to costs, as to the form of order itself we argued the case substantively on the last occasion - indeed, I think that is the basis on which my friend makes an application for costs. So, I submit that the formal order should be that permission is granted, that the hearing is treated as the substantive hearing but the application is dismissed. If my friend is simply seeking an order that permission be refused, then he may be in greater difficulties on cost.

MR JUSTICE OWEN: Yes, he may. That is right. Throughout it has been an application for permission and it has been, as often happens of course, argued fully, and not on the basis of the lesser burden of an application for permission, but I do not think that, in these circumstances, has made any difference.

I would like to do what is most convenient for each of you. It has been argued fully and nobody can go behind that. It does seem to me that it is proper for me to say that clearly I was assisted by the fact that the respondent was here.

MR BEAN: Yes, I do not dispute that, but that is what I had to say about the form of order if we, after some enquiry on the last occasion, treated it as a substantive hearing, but I accept that the substantive application must be dismissed.

Now, as to costs, I had no notice of any special application until my learned friend notified me on the telephone at six o'clock last night. This is no different from, say, a personal injury case where an impecunious claimant loses, and, in reality, the bill is to be picked up by a trade union or an insurance company, the form of order is that the application is dismissed with costs. I do not anticipate that there will be any difficulty, I have not been able to obtain instructions from the association through my solicitors in the short time before coming to court this morning. I simply suggest that the application is dismissed with costs, in the unlikely event, if there is any difficulty, than my learned friend is obviously at liberty to----

MR JUSTICE OWEN: Take such steps--

MR BEAN: On proper notice.

JUSTICE OWEN:-- and, indeed, as would Mrs Jacobs be at liberty to make that point.

MR BEAN: Yes, indeed.

JUSTICE OWEN: It is quite clear any order against her would be of no value to anybody.

MR BEAN: What would until the 26th April have been called a <u>Brutum Fulmen</u>. May I say something else about costs?

JUSTICE OWEN: Yes.

MR BEAN: There are two items which I ask your Lordship to disallow. The first is, your Lordship may recall that a witness statement of my learned friend's solicitor was drawn up and served on the day before the hearing before your Lordship. It was quite useless. My learned friend scarcely referred to it but, even if it had been used, to produce it three months after the grant of leave and on the day before a hearing is something which should be discouraged.

The second item under that category is the letter to the court from the council's solicitors not copied to my side, dated the 23rd July. Again, just as the very late production of a witness statement should be discouraged, the writing of secret letters not copied to the other side should be discouraged. Subject to those two points I cannot resist an order for costs.

MR JUSTICE OWEN: Now, Mr Levy, first the form of the order?

MR LEVY: Your Lordship may recollect that in the course of the hearing of this matter I sent out my clerk from the City Council to take instructions from the powers that be as to whether the matter ought to be treated as a substantive hearing, whether he would be content with that; and he came back and said yes.

MR JUSTICE OWEN: In those circumstances, would it be sensible to say then, granting permission, I reject the application, or the application is dismissed.

MR LEVY: My Lord, yes.

MR JUSTICE OWEN: Then there is costs. Quite clearly, at this stage, they can only be against Mrs Jacobs.

MR LEVY: My Lord, I merely want to flag up the possibility because there may be the applications for joinder and it would be remiss of me to----

MR JUSTICE OWEN: You have done that. If I make that order I shall also make the order that that order is not to be enforced against Mrs Jacobs without further order of the court, which I can still make in these circumstances. I can give you and Mrs Jacobs liberty to apply to the court and I think that will cover the situation, if there are difficulties in the future.

MR LEVY: My Lord, yes. Does your Lordship intend to act as a taxing judge now and determine whether the statement was useless, or whether----

MR JUSTICE OWEN: I have been asked specifically about these matters, I wonder is it not a fair point to say it only came at the very, very last moment? Even if it is only to make the point.

MR LEVY: My Lord, yes, it is fair.

MR JUSTICE OWEN: Sitting here, one does get a little fed up with receiving letters on the day, sometimes it cannot be avoided I know, but nevertheless it is on the day that the letter comes, or the affidavit comes, or the skeleton arguments come, although all the papers have been here the night before and when one has stayed until ten o'clock at night, as quite frequently happens, reading, it does become even more cross-making in the morning.

MR LEVY: My Lord, I can understand the court might be a little miffed.

MR JUSTICE OWEN: Miffed? Miffed is an understatement.

MR LEVY: Well, we will leave it at that but, in any event, insofar as suggesting that the statement was useless, I would obviously dispute that.

MR JUSTICE OWEN: What I shall say is that if there is to be taxation of the costs particular attention shall be paid to the affidavit and to the letter.

MR LEVY: My Lord, yes.

MR JUSTICE OWEN: My remarks should be taken into account. It does not imply that any necessary decision has to be made one way or the other.

MR LEVY: My Lord, insofar as the letter is concerned your Lordship may recollect there was no quick (Inaudible) letter before action in this matter; there was simply a letter applying for judicial review. In those circumstances----

MR JUSTICE OWEN: Well, that may be a matter which is to be taken into consideration and I have indicated there are occasions, as I am well aware, when last minute communications cannot be avoided and if that is what you want to argue you will have to adduce the argument.

MR LEVY: We are very grateful.

MR BEAN: One other matter: obviously careful consideration will be given to the terms of your Lordship's judgment, but as the rules stand at the present time I have to ask your Lordship for leave to appeal.

MR JUSTICE OWEN: Yes, what do you say as to that? I am minded to give leave.

MR LEVY: My Lord, I say the point is so strikingly obvious, my learned friend said, and your Lordship agreed with me, there is little point in trying the Court of Appeal on this and section 10(1) is headed "Rent"; your Lordship will be clear about that.

MR JUSTICE OWEN: But it is one of those situations one has to be very careful in giving a decision about, saying, 'I know I am right'. I am not prepared to do that. In those circumstances, really, I take the view that if it is thought that there could be could be an argument, even a fallacious argument, then----

MR LEVY: The test, as I understand it, my Lord, is: a realistic prospect of success.

MR JUSTICE OWEN: It is very hard to know, is it not?

MR LEVY: It is one of the -- again I am in your Lordships' hands.

MR JUSTICE OWEN: I am minded to give leave. I do so without any encouragement. All right; thank you both.