

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 dismiss the appeal. There may however have to be a slight adjustment to the figure on which interest is to be borne as to which I have given directions in the last paragraph of this decision.

2. This is an appeal by the AO with the leave of the chairman from the decision of a SSAT dated 19 May 1994. In circumstances which I will relate, the claimant claimed income support on the basis that her housing costs were to be assessed on the basis of a mortgage of £53,500, whereas the AO claimed that they should be assessed on the basis of their mortgage of £43,200. The tribunal allowed the claimant's appeal.

3. On 21 October 1996, I held an oral hearing. Mrs. Rabas of the Solicitor's Office of the Department appeared for the AO, and Mr. de Mello of Counsel, instructed by Messrs Tyndallwoods, Solicitors, appeared for the claimant. I am grateful to them both.

4. The claimant and her husband purchased the matrimonial home with the assistance of a loan in the sum of £43,200 secured by means of an endowment mortgage from Barclays Bank Plc. The house was in the joint names of the claimant and her husband as, I assume, beneficial joint tenants in equity and their liability under the mortgage was joint and several.

5. The marriage broke up, and the couple were divorced some time in 1992. On 31 August 1993 the claimant claimed income support which was awarded on the basis that her housing costs were assessed on the basis of a mortgage of £43,200. But the mortgage was not then a mortgage for £43,200: it was a mortgage for £53,500 - or more precisely probably £52,313.58.

6. Interest on a mortgage is allowable as housing costs for the purposes of income support as provided for in paragraph 7 of schedule 3 to the Income Support (General) Regulations 1987. Sub-paragraph (3) provides as follows:-

"(3) ... in this paragraph "eligible interest" means the amount of interest on a loan whether or not secured by way of mortgage ... taken out to defray money applied for the purpose of death.

- (a) acquiring an interest in 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."

It is clear that interest on arrears cannot qualify for in the words of the Commissioner in CIS/765/94 "as although they involve in effect taking a further loan from the Building Society equal to the amount of the unpaid interest, this further money has not been applied in the original purchase."

7. Now in this case the couple fell into arrears with their mortgage repayments. It is said that - but I make no findings as to this - that the reason was because the husband did not pay his fair share. It is common ground, and found as a fact by the tribunal, that Barclays Bank would not agree to the transfer of the house to the claimant unless the arrears were discharged. In, I think, March 1993 - the precise date does not matter - the County Court made an Order in, so far as is relevant, the following terms:

"2. The Respondent [ie the husband] do transfer to the Petitioner [ie the claimant] all his legal and beneficial interest in the former matrimonial home ... subject to a Charge in his favour in the sum of £5,000.

3. The said charge of £5,000 is to be repaid by the Petitioner to the respondent at the rate of £25 per week.

4. The whole of the outstanding balance of the said charge shall be repaid by the Petitioner to the Respondent in the event of the sale of [the matrimonial home] the remarriage of the Petitioner or in the event of the Petitioner co-habiting with another man for a period in excess of 3 months."

In April, the husband transferred his interest in the house to the claimant who took out from Barclay's Bank a fresh loan in the sum of £52,313.58 which was used in paying off the original mortgage the arrears thereon. (Those instructing Mr. de Mello confirmed these details by a telephone call made during the hearing.) I would add that the house was valued at £79,000.

8. On behalf of the AO it is submitted that the sum required to clear the arrears - the precise sum apparently being £9,113.58 - was not used in acquiring an interest in the house pursuant to paragraph 7(3) of the third schedule but in clearing the mortgage arrears for which the claimant was jointly and severally liable, although, as I pointed out, she would probably be entitled to a right of contribution from her husband. Interest on arrears is not "eligible interest". Mrs. Rabas, before me, submitted that the tribunal erred in law in finding that the purpose of the new loan was that the claimant was buying the interest of the husband: the purpose was simply to repay the original loan and the arrears. The claimant obtained her husband's share by agreeing to pay the sum of £5,000 by way of weekly instalments of £25. Mrs. Rabas points out that there is no evidence of any agreement with the Bank - but as I have said the tribunal found as a fact that the Bank would not agree to the transfer without the arrears being paid off. The proof of the pudding is in the eating and when the Bank agreed to the further mortgage there was, to that extent, an agreement with the Bank.

9. I am, however, unable to accept Mrs. Rabas's submission. The essence of the transaction was:

- (i) The house would be transferred legally and beneficially into the sole name of the claimant;
- (ii) In consideration therefor -
 - (a) the claimant would pay the husband £5,000 by instalments; and
 - (b) the husband would be released from all liability under the mortgage - both principal and arrears.

It is not, in my view, permissible to sever parts of the transaction and look at them in isolation. The transaction must be viewed as a whole. What was the position before the transaction? What was it after? That was how in my view the essence of the transaction is to be and I am therefore entitled to infer that there was an agreement between the claimant and the husband to that effect. In any event the result of the transaction was that the husband's beneficial interest in the house was, pursuant to the Order of the Court, transferred to the claimant. The consideration I have set out in (ii) above has an aggregate monetary value, which I need not calculate but which I will call "£x". It seems to me clear, for the purposes of paragraph 7(3), that the new mortgage was applied for the purposes defraying the sum of £x and in part applied for the purposes of "(a) acquiring an interest in the dwelling occupied as the home" - ie the husband's interest; and in part "(b) paying off another loan" ie the original loan of £43,200.

10. That is the end of the matter. There was an interesting argument based on sub-paragraph (7) of paragraph 7 - the

defaulting provisions - and the useful case of CIS/765/94 was cited to me. If sub-paragraph (7) were to apply to this case - and I am not sure that the circumstances of this case fall within the ambit of that sub-paragraph - the Commissioner's decision seems to me to be helpful to the claimant's case. But I need say no more on this aspect of the matter.

11. The appeal is dismissed. However it may be that the figure of £53,500 is not the correct figure. Insofar as is necessary I decide that interest is allowable on this sum secured by the remortgage of April 1993 - whether it be £53,500 or £52,313.58 or whatever the correct sum is.

(Signed) J.M. Henty
Commissioner

(Date) 19 MAR 1996

