Bull. No. 176 [JSHort]

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal is allowed. The decision of the Chippenham appeal tribunal dated 21 January 2002 is erroneous in point of law, for the reasons given below, and I set it aside. It is expedient for me to give to substitute a decision on the claimant's appeal against the adjudication officer's decision dated 14 May 1999 having made the necessary findings of fact (Social Security Act 1998, section 14(8)(a)(ii)). My decision is that:

(a) the adjudication officer's decision dated 10 February 1999 falls to be reviewed on the ground that it was made in ignorance of material facts (the facts underlying the proper valuation of the claimant's home); and

(b) the revised decision on review with effect from 19 November 1999 is that the claimant's income-based jobseeker's allowance is to be calculated with the application of a restriction of his housing costs to limit them to the interest allowable on a qualifying loan of £79,000.

2. This is, I hope, the final chapter in a long-running saga about the proper calculation of the claimant's housing costs with effect from 19 May 1999. I do not need to set out all the history, much of which was described in my earlier decision on 15 August 2001 (CJSA/2536/2000). That decision referred the case back to a new appeal tribunal for rehearing with directions of law. The rehearing took place on 21 January 2002. The appeal tribunal's decision, as set out in a corrected decision notice, was as follows:

> "1. The valuation of the property the subject of the appeal as at the date of the decision appealed is £142,500. The tribunal having considered all the relevant evidence adduced in relation thereto prefers and adopts the valuation from the appellant's valuers dated 22/12/99.
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> 2. The tribunal having noted the objections raised by the appellant on balance accepts the evidence adduced by the decision maker that suitable alternative property in Box, Wiltshire at a price of £79,950 was available in May 1999.
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> 3. The tribunal is
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> (a) satisfied that the appellant's case falls within the circumstances summarised in Schedule 2 Paragraph 12(1)(c) Jobseeker's Allowance Regulations 1996 in that making allowances for the mortgage, £98,000, and the costs of sale calculated at £10,425 (£3,300 penalty plus 5% of £142,500) the amount required to be borrowed to purchase suitable alternative property would be less than the amount of the appellant's housing costs allowed for in respect of the property in which he was and is residing
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> (b) not satisfied that the provisions of paragraph 12(4) can be invoked having regard to all the relevant factors set out in paragraph 12(5) including but not limited to the question whether the appellant's children's education might be adversely affected by a move (as no change of school would be likely following a move to Box); and considering carefully but not being persuaded that the prospective

success and recovery of damages by the appellant should be taken as a relevant factor in making this order (following the reasoning adopted by the previous tribunal in this regard)

(c) satisfied following the decision of Mr Commissioner Mesher in the decision overturning the previous tribunal's decision (CJSA/2536/2000 at paragraph 25 and following) that the claimant's applicable amount shall be restricted to an amount for housing costs limited to £45,875 with effect from 19/11/99."

3. The claimant now appeals from that decision with my leave. He does not take issue with most of the decision. His argument is that the appeal tribunal should have taken into account debts incurred for the purposes of paying off the mortgage which had been in place before the mortgage of £98,000 was taken out and of paying that mortgage in assessing the resources which he would have had available to purchase alternative property if he had sold his home. That in itself would have increased the amount on which interest could be allowed if there were a restriction on housing costs, but the claimant has also argued that it would alter the balance of relevant factors on the question of whether it was reasonable to expect him to seek alternative cheaper accommodation. He argues that under paragraph 12(4) of Schedule 2 to the Jobseeker's Allowance Regulations 1996 (the JSA Regulations) no restriction at all should have been applied to his housing costs.

4. The Secretary of State supported the appeal in the submission dated 14 August 2002, to the extent of agreeing that the appeal tribunal erred in law in not taking account of the claimant's debts as at 14 May 1999. However, it was submitted that only debts charged on the property in question should be deducted in calculating what the net proceeds of the sale of the property would be. It was suggested that it would be preferable for the Commissioner to substitute a decision, but that the claimant would then need to provide further evidence of his debts and whether they were charged on his home.

5. In reply, the claimant made this statement:

"In August 1995 I remortgaged [the home] to Devon and Cornwall Securities, who were only prepared to advance £98,000. I needed to borrow £130,000 to settle the Charge to Lloyds Bank. To make up the shortfall I borrowed £20,000 from [KN] - that debt was secured by legal charge dated 8 August and, £13,000 from [WC] that debt was not secured by legal charge but was secured by my promise of repayment from the sale of [the home] if ultimately necessary. In other words, if I sell [the home] before repaying [WC], I am obliged to repay him from the proceeds.

Apart from the above, I owed my mother around £12,000 which was advanced piecemeal to enable me to pay the mortgage repayments and meet various living expenses. Additionally, I owed around £8,000 on my Lloyds Access credit card. Please see the bundle at page 112 line 4 for confirmation that I have already given evidence on this matter."

Included with the reply was a letter from the Weymouth District Land Registry confirming that

a charge dated 8 August 1995 to [KN] had been registered on 23 August 1995 and had been removed from the charges register on 25 January 2000.

6. The claimant had also requested an oral hearing, which I granted. The claimant attended. The Secretary of State was represented by Ms Rosemarie Topping of the Office of the Solicitor to the Department for Work and Pensions. I am grateful to both the claimant and to Ms Topping for helpful submissions.

7. I set out below that relevant parts of paragraph 12 of Schedule 2 to the JSA Regulations, it being agreed that the outgoings of the claimant's home were higher than those for suitable alternative accommodation in the area (paragraph 12(1)(c)), so that the first condition for applying a restriction on housing costs was met, and that under paragraph 12(6) any restriction would not bite until 19 November 1999:

> "(3) Subject to the following provisions of this paragraph, the amount of the loan which falls to be met shall be restricted and the excess over the amounts which the claimant would need to obtain suitable alternative accommodation shall not be allowed.
> (4) Where, having regard to the relevant factors, it is not reasonable to expect the claimant and his family to seek alternative cheaper accommodation, no restriction shall be made under sub-paragraph (3).
> (5) In sub-paragraph (4) `the relevant factors' are--
> (a) the availability of suitable accommodation and the level of housing costs in the area; and
> (b) the circumstances of the family including in particular the age and state of health of its members, the employment prospects of the claimant and, where a change of accommodation is likely to result in a change of school, the effect on the education of any child or young person who is a member of his family, or any child or young person who is not treated as a part of his family by virtue of regulation 78(4) (foster children)."

8. There is no doubt that the appeal tribunal of 21 January 2002 erred in law in the way agreed on behalf of the Secretary of State. The claimant in his written submission following the remission of the case for rehearing expressly mentioned the debts to KN, WC, to his mother and on credit cards in more or less the same terms as in paragraph 5 above. He said that KN had demanded a charge on the home to protect his position and that WC had been prepared to accept the claimant's word that he would repay the loan from the proceeds of various court actions or from the proceeds of sale of the home. He also said that he had promised his mother that he would repay her from the proceeds of sale of the home if ultimately necessary. The chairman on 21 January 2002 recorded the claimant's submission about taking the debts into account (see the record of proceedings at page 207). However, in the statement of reasons (page 214) it was said that it was common ground and not disputed that the mortgage costs were restricted to £98,000, and it was calculated that, after paying off the mortgage and allowing £10,425 for costs and the redemption penalty, the claimant would have £34,075 available to put towards the purchase of alternative property. Thus, not only was no account taken even of the loan apparently charged on the home, but there was nothing at all said about the claimant's submission on this point. For

those reasons, the decision of the appeal tribunal must be set aside as erroneous in point of law.

9. It is clearly expedient for me to substitute a final decision on the facts and I am satisfied that I have sufficient evidence to do so.

10. On the central question of law, Ms Topping maintained the view put forward in the submission of 14 August 2002, that only debts secured on the property in question were to be taken into account in computing under paragraph 12(3) of Schedule 2 to the JSA Regulations the amount of the net proceeds of sale that the claimant could put towards buying alternative accommodation. An analogy was drawn with regulation 111(a) of the JSA Regulations (regulation 49(a) of the Income Support (General) Regulations 1987) on the calculation of the value of capital. There the valuation of any asset is to be the current market or surrender value less 10% for the expenses of sale and the amount of any encumbrance secured on it. It is firmly established that for that purpose other liabilities are not to be deducted from the value of capital (R(SB) 2/83). However, I do not find the analogy helpful. The existence of those rules for valuing capital does not seem to me to have any bearing on the interpretation of the test in paragraph 12(3) and its specific terms - "the amounts which the claimant would need to obtain suitable alternative accommodation". Nor do I find the reference to Commissioner's decision R(IS) 9/91, approving the approach in R(SB) 6/89, helpful. R(IS) 9/91 was to do with the Income Support Regulations before they had the provision equivalent to paragraph 12(3). At the time, the regulations simply talked of the excess not being allowed, without saying how the excess was to be calculated. R(IS) 9/91 decided that the comparison was to be between the outgoings in the present property and the outgoings which the claimant would have in alternative property. On the facts, there was no dispute that the net proceeds of sale of the present property would have been easily enough to buy an alternative property outright, so that the housing costs were restricted to nil. The decision said nothing about how the net proceeds of sale were to be calculated.

11. There is nevertheless a strong case in favour of the Secretary of State's position. If a debt is secured on the claimant's home, the home cannot be sold until the charge or other security is discharged. In all but the most unusual cases that will only happen on the claimant repaying the debt. There is therefore a clear justification for deducting a secured debt in carrying out the hypothetical calculation of the net proceeds of sale of the home and consequently of what loan, if any, the claimant would need to obtain suitable alternative accommodation. It can be argued that the same does not apply for other debts, even if the debt becomes legally repayable on the sale of the home. The claimant would be able to sell the home, although faced with the consequences of having a legally repayable debt outstanding. There would be a clear and relatively simple rule to apply, as proof of the existence of a charge or other security in the case of real property would normally be readily available. And, as Ms Topping submitted, the existence of non-secured debts would not be ignored completely, but could be taken into account in considering whether it is not reasonable to expect the claimant to seek alternative cheaper accommodation.

12. However, I must look at the specific words of paragraph 12(3) of Schedule 2 to the JSA Regulations. The test is of the amount (of loan) which the claimant "would need" to obtain

suitable alternative accommodation. That seems to point one towards an assessment of the circumstances in practical and realistic terms. In another context (that of when expenditure was for the purpose of securing benefit), Mr Commissioner Rice said this in paragraphs 13 and 14 of decision R(SB) 12/91:

> "A person has to pay his debts. He has no choice in the matter and if he has no choice, then any divesting of capital resources in pursuance of the reduction or discharge of his indebtedness cannot be for the purpose of securing supplementary benefit or any increase thereof. ...
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> Of course, the above principle only applies where the relevant debt is immediately payable. If the obligation to repay does not mature for several years, or, as in the case of the usual mortgage of house property, there is no need to repay the sum borrowed, provided the agreed interest and capital repayments are kept up, then any premature repayment of indebtedness will be a voluntary act constituting a deliberate choice."

The Commissioner went on to stress that a tribunal would have to be satisfied that there was a legal debt capable of enforcement in the courts and that it was immediately repayable.

13. Certainly, in the case of a debt which was incurred for the purpose of acquiring a claimant's home or for paying off a loan which had been taken out for that purpose, it seems to me that if the debt meets the R(SB) 12/91 conditions and it is shown that it was a term of the agreement that it became repayable on the sale of the home, it would be practical and realistic to take account of that legal obligation under paragraph 12(3). It does not matter that the debt would not need to be repaid to allow the home to be sold at all. I therefore reject the case for the Secretary of State. For the purposes of the present case, I do not have to go any further and decide whether the same principle applies when the debt was incurred for some other purpose. Where a debt is secured on the home, the purpose of the debt does not seem to matter, and I am not sure why in principle it should be any different for non-secured debts. Perhaps, though, it would be necessary to have particularly clear evidence that the debt would only become legally payable on the sale of the home. For, if the claimant had been prepared to accept the consequences of having an outstanding legally payable debt before the home was sold, the justification for taking the debt into account on the sale of the home is undermined.

14. I must now apply the principle to the evidence in the present case and make the necessary findings of fact. There is no dispute about the debt of £20,000 to KN. In addition to the letter from the Land Registry, the claimant has now produced a letter from KN dated 2 December 2002, copies of two bank drafts from February 1995 for £10,000 each made out to the claimant's solicitors and a copy of the completion statement for the remortgage showing a record of a sum of £20,000 received and a note that no account had yet been taken of another firm's fees for the second charge. Ms Topping accepted that the £20,000 was to be taken into account in calculating what the claimant would have had available if he had sold his home.

15. The evidence about the debt to WC is less clear. I have set out in paragraphs 5 and 8 above what the claimant has said about that debt. I take into account that he did not mention the

debts to KN and to WC until after I had remitted the case to a new appeal tribunal for rehearing, although I accept that there was a brief mention of debts in the record of proceedings of the appeal tribunal of 27 January 2000 and the claimant has said that the chairman on that occasion did not want any further details. At that stage the main disputes were over the valuation of the home and the question of the date on which any restriction of housing costs should start. On balance I do not regard the time at which the point was specifically raised as reducing the credibility of the claimant's evidence.

16. In addition to the above, the completion statement for the remortgage showed a sum of £13,000 received. And the claimant produced a letter from WC dated 2 December 2002 to confirm that he had lent the claimant £13,000 in February 1995 to enable him to reach a settlement with his bank to enable him to retain his home. The letter continued:

> "I remember that my cheque was made out to [the claimant's] solicitors, Messrs Forrester & Forrester of Chippenham. The loan was made without documentation as [the claimant] is a long standing and trusted friend. However, it was agreed that the debt would be repaid from the eventual sale of [the claimant's] home should he be unable to repay me from any other sources.
> I can confirm that the debt remains outstanding and I remain content to wait for repayment."

That is confirmation of the claimant's case. However, it looks very much, from the layout and typing as compared with another letter of the same date signed by the claimant's mother, that the letter was typed up by the claimant for WC to sign. And £13,000 is a lot of money for a friend to lend without security and apparently interest-free. Those factors raise some doubts about weight to be given to the letter. However, on balance and having had the benefit of now having seen and heard the claimant at two oral hearings, I accept that the terms of the agreement with WC were as described by the claimant and in the letter of 2 December 2002.

17. The purpose of the loan from WC was to enable the claimant to pay off his mortgage with Lloyds Bank. I am satisfied that the debt was one capable of enforcement in the courts and that under its terms payment would have become immediately due if the claimant had sold his home. On that basis, the £13,000 was also to be taken into account under paragraph 12(3).

18. I have mentioned above the money owed to the claimant's mother. A letter from her dated 2 December 2002 stated that various sums had been loaned to make interest payments to the bank (which must mean Lloyds Bank) and to reach a settlement with the bank. She said that the claimant had promised to repay the loans from the sale of his home if ultimately necessary. However, I am not satisfied that there was ever any intention to create legal relations when the loans were made in their piecemeal way or when the claimant made promises about repayment. I am not satisfied that these were legal debts capable of enforcement in the courts. They are not to be taken into account under paragraph 12(3). Nor are the amounts outstanding on credit cards. Those were legally enforceable debts, but the obligation to pay was not connected to the sale of the home.

19. Those conclusions change the arithmetic quite significantly. On the valuation accepted by the appeal tribunal of 21 January 2002 and on the agreed basis that £98,000 was outstanding on the mortgage and that the costs of sale, purchase and removal, including the redemption penalty, would have been £10,425, that would have left £34,075 available. However, taking account of the secured loan of £20,000 and the unsecured loan of £13,000 would reduce that figure to £1,075. The appeal tribunal proceeded on the basis that the cost of suitable alternative accommodation, taking into account the problem of the school catchment area, was £79,950. That was the most expensive of five properties whose brief particulars, I think copied from newspaper advertisements, were put forward by the Secretary of State. The three cheapest were outside the catchment area of the children's school, but the Secretary of State said that the children would not have to move from the school once they had been admitted. The other property within the catchment area was advertised at £78,500. The Secretary of State has not in the appeal to me made any suggestion that a lower figure than £79,950 should be used and I consider that I should accept the view of the appeal tribunal, which will have been based to some extent on local knowledge of the property market, that £79,950 was the right figure for the cost of actually buying suitable alternative accommodation.

20. Ms Topping submitted that, if the claimant had to be assumed to need a loan of £79,950 or thereabouts to buy suitable alternative accommodation (which of course she did not concede), the difference between the interest on a loan of £98,000 and one of £79,950 was still a significant one. She submitted that, since the appeal tribunal had rejected any of the personal and family factors as justifying not seeking cheaper accommodation, it was still reasonable to have expected the claimant to make such a search. Thus paragraph 12(4) of Schedule 2 to the JSA Regulations was not satisfied, and there had at least to be a disallowance of the excess of housing costs over what would have been allowed on a loan of £79,950.

21. A gap in that submission is that it assumed that the claimant would have been able to obtain what to all intents was a 100% mortgage on the alternative accommodation. I consider that it cannot be assumed that any ordinary mortgage lender, even with the advantage of guaranteed direct payment so long as the claimant remained on JSA or income support, would have been prepared to make a 100% loan in the claimant's circumstances. He was an out of work self-employed car dealer. He would have had to disclose his credit card debt of around £8,000 at the time and presumably also his debt to his mother. I consider that any ordinary mortgage lender would have required a good margin in the security provided by the property.

22. The claimant submitted at the oral hearing that the difference between the interest on £98,000 and the interest on £79,950 was so small that it was unreasonable to have expected him to move. I reject that submission. The appeal tribunal had considered all the factors put forward by the claimant against moving (including the effects on the family, his prospects of getting back into business after successful litigation, the loss of having to sell what might become a fine and valuable home when half-renovated and the claimant's need for work premises if he got back into business) and concluded against him. The change in the figures from a gap of £52,125 is significant, but the remaining gap of at least £18,050 is also significant in the context of the amount allowed and the payment of the housing costs out of public funds (which had started in January 1998). I adopt the appeal tribunal's conclusion on this point.

23. However, the claimant's submission can be recast as one that it was not reasonable to expect him to seek alternative cheaper accommodation because suitable alternative accommodation was not in fact available to him, as he would not have been able to obtain a loan for the amount he needed to buy a property for £79,950 (see Commissioners' decisions R(SB) 7/89 and R(IS) 10/93). I reject that submission as well. The reason is this. The claimant was lucky enough to have generous and supportive friends and business colleagues who helped him with loans in February 1995 when he was forced to re-mortgage. I have taken those loans into account above, on the balance of the evidence available. I consider that, on the hypothetical basis that the claimant had been forced to sell his home in 1999 and to trade down to a property at £79,950, he would have been assisted again, so that by some combination of an ordinary mortgage lender and other sources he would have been able to obtain loans to cover a purchase at £79,950. That is especially so if one assumes that the claimant would agree to pay interest on the other loans. Just as I have done above in relation to paragraph 12(3) of Schedule 2 to the JSA Regulations, I have made an assessment in relation to paragraph 12(4) in practical and realistic terms. I conclude that suitable alternative accommodation was available to the claimant in his particular circumstances and that it was reasonable to have expected the claimant and his family to seek alternative cheaper accommodation.

24. Therefore the restriction of housing costs in accordance with paragraph 12(1) and (3) is to operate. I cannot ignore that on my calculations the claimant would have had just over £1,000 free from the sale of his home. With a little rounding I conclude that he would have needed loans of £79,000 to obtain suitable alternative accommodation at £79,950 and adopt that as the allowable amount under paragraph 12(3) for the calculation of interest. For the reasons given in my earlier decision and adopted by the appeal tribunal of 21 January 2002, that restriction cannot, by virtue of paragraph 12(6), operate from any date prior to 19 November 1999. My decision giving effect to those conclusions is set out in paragraph 1 above.

(Signed) J Mesher
Commissioner

Date: 14 February 2003