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CJSA 5493/1999

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SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CJSA/5493/1999

Starred Decision No: 20/01

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Mr P Cichosz,
Office of the Social Security and Child Support Commissioners,
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.

so as to arrive by 4th June 2001

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1. This appeal, brought with my leave, succeeds in part. The decision of the Social Security Appeal Tribunal on 23 2 99 was erroneous in point of law, as explained below, and I set it aside. But I consider it expedient to make such fresh or further findings of fact as will enable me to make my own decision under s14(8)(a)(ii) of the Social Security Act 1998. This is that the appellant is entitled to have included in his weekly housing costs for the year 1 6 97 to 31 5 98, in addition to those amounts already allowed by the adjudication officer and which have not been in dispute, the amount of £1800 for miscellaneous items, as shown eg at page 25K, but not those for bad debts, depreciation, and replacement of kitchens and bathrooms. As there seems to be some minor discrepancy in the figures provided by the Housing Society (see page 25K), I am reluctant to name a precise weekly figure, and refer the appeal back to the Secretary of State (in succession to the adjudication officer) for exact calculation. Any dispute on the working out of this may be referred back direct to me.

2. I held an oral hearing at which the appellant was represented by Mr Vokes of counsel and the Secretary of State by Miss Powick of the DSS Solicitor's Department. I am grateful to both of them for their help. I issued a further direction after the oral hearing, to which the Secretary of State's officer responded. The appellant's representative had no further comment.

3. The appeal concerns payments the appellant is liable to make under a co-ownership agreement. A copy of this agreement appears at pages 94-104, and it was not disputed by the date of the oral hearing that it was a co-ownership agreement, because it provides in clause 6(1)(b) and the First Schedule for an outgoing member who has been in the premises for 5 years or more to receive certain capital sums, subject to adjustment for under- or overpayment of rent or previous breaches of the agreement. By clause 4 the Housing Society bound itself to do a number of things, includingto maintain the structure and common parts and clean and light the latter. By clauses 2(1) and 3(1) the member agreed to pay rent in the amount set out in the Third Schedule, subject to the Society's right set out in clause 2(2) to alter the rent to take into account, *inter alia*, the cost of repairs, maintenance and management, the cost of providing services, reasonable amounts to be set aside for contingencies or to any reserve or amenities fund, and any other

expenditure and outgoings properly incurred whether in connection with the property or otherwise. There was a separate obligation in paragraph 17 of the Fourth Schedule to pay in addition for domestic heating and hot water. Breach of these obligations could lead under clause 7 to repossession.

4. It is clear, therefore, that all the amounts into which the rent has been broken down are amounts which the appellant was bound under the agreement to pay as a condition of occupying the dwelling. It is also clear that some at least of them involved the determination and arranging of what the co-owners would otherwise have had to do for themselves, as required by the common appendix to R(IS)3/91 and R(IS)4/91.

5. The appellant had lived in the premises since 1987, and it seems that each year he notified the local office of the amount of co-ownership costs he would be required to pay for the next year commencing on 1 June (see eg page 30 for the year beginning 1 6 95). The local office paid up without further query. The Society notified the appellant that his monthly rent for the year beginning 1 6 97 would be £180.12, and he passed this on to the local office. But this time an adjudication officer probed more deeply and asked the Society for a breakdown of this figure. The result appears at page 10; it showed £80.99 for rent (also referred to as loan charges), £88.95 for maintenance (also referred to as non-loan charges) and £10.18 for heating (the latter no doubt under paragraph 17 of the Fourth Schedule to the co-ownership agreement). The adjudication officer had no quarrel with the element characterised as rent; and it was later agreed by all that the heating costs could *not* be met because they were excluded under paragraph 16(2)(a) of Schedule 2 to the Jobseekers Allowance (JSA) Regulations 1996. I need not consider them further.

6. But the adjudication officer pressed during 1996 for a further breakdown of the items behind the projected £88.95 per month per member maintenance figure; and the results of correspondence and telephone calls are set out at page 25K. The adjudication officer allowed most of these items (including those for administration and cleaning of common parts), but refused those for replacement kitchens (£4,800), replacement bathrooms (£2700), bad debts (£3465), "miscellaneous" (£1800) and depreciation (£500).

7. There were some obscurities in the evidence, but I find that bathrooms and kitchens were replaced only where a member could show they were no longer fit for use, rather than as part of a deliberate rolling programme of refurbishment, given that the development was over 20 years old; but of course I do not know what standards the development managers applied in concluding that such items were no longer fit for use. As my decision has turned out, the question does not matter; but the managers seem to make a rough estimate of how many bathrooms and kitchens are likely to need replacement in the course of a year and provide a figure accordingly. It is clear that these estimates are prepared well in advance: the correspondence about the 1997/8 figures was taking place in the summer of 1996.

8. Bad debts represents provision, which the Society is obliged by the Housing Corporation and the terms of its development loan to make, for defaulting members. No-one seems to have got to the bottom of what "depreciation" meant, and indeed I am not even clear where the figure came from. It appears on page 25K, but not on page 27 which shows the figures supplied by the Society. "Miscellaneous" has been said at various times to cover stationery, office telephone, plants, tools, cleaning materials, postage and batteries for smoke alarms.

9. The adjudication officer's decision, though applicable from 1 6 97, took effect only from 19 9 97 (it seems); any overpayment before that date is properly not sought to be recovered. The ground of review cited in the decision reproduced at page 25A is change of circumstances due to an increase in the monthly rent from 1 6 97; but it is apparent from page 25J that the appeals officer knew the proper ground to invoke was that the earlier decisions were erroneous in point of law under s25(2) of the Social Security Administration Act 1992: they paid whatever the appellant was told to pay under the co-ownership agreement in full, including even the heating costs which could not possibly (and are not argued to) be eligible. Were they otherwise wrong to do so?

The legislation

11. Schedule 2 to the JSA Regulations is in terms which reflect Schedule 3 to the Income Support (General) Regulations, under which the appellant earlier received his housing costs in full. Paragraph 1(1) provides for the

payment of housing costs which a claimant is liable to meet in respect of the dwelling occupied as the home and which qualify under paragraphs 14-16. Paragraph 14 refers to home loans and has no application here. Paragraph 15 refers to loans for "repairs and improvements", being "any of the following measures undertaken with a view to maintaining the fitness of the dwelling for human habitation or, where the dwelling forms part of a building, any part of the building containing that dwelling", and sets out a list ofof measures. Only subparagraphs (1)(a) and (f) are in issue here: (a) covers provision of a fixed bath, shower, wash basin, sink or lavatory and necessary associated plumbing; (b) covers provision of facilities for preparing and cooking food.

12. Paragraph 16, headed "Other housing costs", provides, so far as material,

> (1) Subject to the deduction specified in sub-paragraph (2)...there shall be met under this paragraph the amounts, calculated on a weekly basis, in respect of the following housing costs -
> (a) [rent or ground rent on a long tenancy];
> (b) service charges;
> (c) [rentcharges];
> (d) payments under a co-ownership scheme;
> (e) [Crown tenancies]
> (f) [tents and their sites]
>
> (2) Subject to sub-paragraph (3) [not material], the deductions to be made from the weekly amounts to be met under this paragraph are -
> (a) [not material];
> (b) where the costs are inclusive of ineligible service charges within the meaning of paragraph 1 of Schedule 1 to the Housing Benefit (General) Regulations 1987 (ineligible service charges) the amounts attributable to those ineligible service charges or where that amount is not separated from or separately identified within the housing costs to be met under this paragraph, such part of the payments made in respect of those housing costs which are fairly attributable to the provision of those ineligible services having regard to the costs of comparable services;

(c) any amount for repairs and improvements, and for this purpose the expression "repairs and improvements" has the same meaning as it has in paragraph 15(2).

13. Paragraph 1 of Schedule 1 to the Housing Benefit Regulations characterises as ineligible service charges a number of items (a)-(f), but for the purposes of this appeal the only material item is

(g) charges in respect of any services not specified in sub-paragraphs (a) to (f) which are not connected with the provision of adequate accommodation.

14. So service charges and payments under a co-ownership scheme may be met so long as they are not excluded as being either repairs or improvements under paragraph 15(2) or service charges ineligible because not connected with the provision of adequate accommodation.

The arguments

15. The arguments have been that either *all* payments under a co-ownership scheme are to be met under paragraph 16(1)(d), none of them being properly characterised as service charges under paragraph 16(1)(b) and therefore not subject to the deductions in paragraph 16(2)(b) or (c); or that if they are so subject, none of the disputed items constitutes a repair or improvement nor is connected to anything other than the provision of adequate accommodation.

16. The adjudication officer up until the 1997/8 housing costs appears to have adopted the first argument. The regular inquiry notices refer simply to "co-ownership costs. But then there was a change of mind, and the deductions were sought to be applied. It might be thought that the concession on behalf of the appellant that his domestic heating costs were properly not met under paragraph 16(2)(a) indicated that he too was no longer pursuing the first argument; he no doubt ran the risk of repossession if he did not pay those costs just as much as if he did not pay the others. But I suppose it could be said that those costs were imposed by the Fourth Schedule to the agreement and were therefore separate from the "rent"

covered in the Third Schedule and arguably not payments under the co-ownership scheme.

17. The tribunal decided that replacement kitchens and bathrooms were not included within paragraph 15(2), given its finding that there was some sort of rolling programme of refurbishment, as well as emergency replacements. But it seems to have thought that it was dealing with an ordinary "repairs and improvements" case, because it decided that depreciation, bad debts and "miscellaneous" could not fall within paragraph 15(2) either and that these findings concluded the matter. In fact, of course, they did not. All the findings meant was that these items were not to be deducted from the weekly payments under paragraph 16(2)(c); it had still to be decided whether they could have been deducted under (b) as service charges not connected with the provision of adequate accommodation.

18. I sympathise with the tribunal. The provisions it was considering are extremely complicated, and I have had to keep reminding myself (it is clear from my earlier directions that I was originally overlooking it) that what the appellant wants is that the disputed items should *not* be repairs or improvements, nor (if paragraph 16(2) is relevant at all) ineligible service charges, but should be eligible service charges and nothing else. His representative seems to have fallen into the same error, because in the original grounds of appeal he was angry with the tribunal for *not* accepting the bathrooms and kitchens as repairs or improvements. However, the tribunal's decision was manifestly wrong, and I must set it aside.

The hearing before me - co-ownership payments are a special case

19. Mr Vokes first sought to persuade me that co-ownership was different from other forms of tenure. The regulations provided for it separately, and this was because it is crucial to the members of such a scheme that all payments should be made. If the dwellings in a scheme crumble for lack of maintenance, or major improvement when necessary, or if the terms of the development loan are not complied with so that the loan is called in, there will be dire consequences for all - not only to their present accommodation but also to whatever capital entitlement they may have accrued. An owner-occupier may defer maintenance without risking repossession. The owner of a "flying freehold" who defaults on service charges may be sued by the

management company. A tenant of a private landlord, or of a housing association which merely lets and makes service charges, may be evicted without the remaining tenants being put at risk. But when a co-owner is repossessed and goes away leaving bad debts, the housing society will not in practice take him to court, so provision for bad debts is necessary in the interests of the other co-owners (no doubt why the Housing Corporation insists on provision being made). In effect, Mr Vokes agreed with the adjudication officers who had previously allowed the whole of the co-ownership payments without asking what they represented. .

20. Miss Powick disagreed, pointing out that the property of private landlords and flying freeholders was just as liable to fall apart through lack of maintenance. I tend to agree with her, and also doubt that either would sue for bad debts where the amounts were relatively small and there was little chance of recovering them from a defaulter.

21. But my main reasons for disagreeing with this argument is twofold. Paragraph 16 is headed "Other housing costs". Paragraph 14 deals with home loans to owner-occupiers, paragraph 15 with loans for repairs and improvements. Straightforward rent, whether to a private landlord, a local authority or a housing association, is a matter for housing benefit. But this would leave various other forms of payment, such as ground rent and service charges, and certainly payments under co-ownership schemes, otherwise unprovided for. So they are included in paragraph 16(1) to make sure they are covered as housing costs. But the introductory words of subparagraph (1) subject all of them, and not merely service charges, to the deductions in subparagraph (2), so even though it is probably correct that co-ownership payments are treated as something separate from service charges, they are subject to the same deductions.

22. A similar arrangement seems to have existed under the supplementary benefit regime. Regulation 16 of the Resources Regulations 1983 expressly included as an owner-occupier a person who occupied a home under a co-ownership scheme, for the purpose of the allowance then made for insurance and "essential routine minor maintenance"; but regulation 18, headed "Miscellaneous outgoings", included payments under a co-ownership scheme which were not eligible for rent allowance under the housing benefit scheme - along with ground rents, service charges, Crown tenancies, tents,

crofting tenancies, water rates and charges for the emptying ofcess pits, with similar deductions imposed by reference to housing benefit regulations. I conclude that because they would not otherwise be covered, co-ownership payments have always had to be specifically provided for; but I read no more into it than that. I am fortified in this conclusion by the common appendix to R(IS)3/91 and R(IS)4/91, which declines to make any distinction between different forms of tenure in relation to service charges. This is the point I made in my latest direction. The Secretary of State's officer now concerned agreed with me. The appellant's representative had no comment.

Replacement kitchens and bathrooms as repairs or improvements

23. Having held that co-ownership schemes are subject to the subparagraph (2) deductions, I go on to consider (c), which deducts any amount for repairs and improvements as defined in paragraph 15(2). Mr Vokes argued that merely replacing something which has become substandard through age would not fall within that subparagraph; and nor would it be a repair. I agree with both those submissions, as did Miss Powick, who stressed that these matters are only allowable where they are done with a view to maintaining the fitness of a dwelling for human habitation. It would have been in Mr Vokes's interest to adopt the submission of the Secretary of State's officer that "provision" in subparagraph (2) can only mean provision for the first time. Unfortunately for this argument, as Miss Powick agreed, if this was the intention of the draftsman it has been subverted, by the High Court in connection with similar provisions under the Social Fund, and by Commissioners. I need cite only CJSA/7070/99, at pages 108-113 of the papers. The facts were indeed different, but the principle is that where existing facilities are not of anything like an acceptable standard for human habitation, "provision" includes replacement, together with any work reasonably necessary and incidental to it.

24. Whether or not any of the replacements carried out by the Society were rendered necessary by other members' abuse of their fittings, or by accidental damage, I do not know. But in so far as they were, those replacements would fall within paragraph 15(2) and the cost would hence have to be deducted from the co-ownership payments under subparagraph 16(2)(c).

"Adequate accommodation" means something special in co-ownership

25. Mr Vokes redeployed his contention about the special nature of co-ownership in his argument that none of the disputed items was an ineligible service charge under subparagraph 16(2)(b) because all were connected with the provision of adequate accommodation under paragraph 1(1)(g) of Schedule 1 to the Housing Benefit Regulations. "Adequate" is not defined, but one meaning would be "fit for the intended purpose" - in this case, co-ownership. There are obligations of prudence (if not of law, I was not addressed on this) which require the scheme managers to replace substandard kitchens and bathrooms so as to maintain the scheme as a whole at a level consonant with the interests of the members as a whole. Further, co-ownership accommodation would not be "adequate" unless proper provision were made for depreciation, bad debts and miscellaneous outgoings, for the reason that the scheme would fall apart otherwise. He cited CIS/1460/95 (with the papers), also relating to a co-ownership scheme, where various items were accepted as connected with the adequacy of the accommodation. These included (in addition to items already accepted by the adjudication officer on the present appeal), payments to repairs and maintenance reserves, maintenance of fire equipment and the replacement of fixtures and fittings in the communal lounge.

26. Miss Powick initially argued that "adequate" implied the same strict test as the fitness for human habitation test in paragraph 15(2), but I understood her ultimately to agree with me that it was capable of a somewhat looser interpretation. Nonetheless, she urged that it was "a pretty basic standard" that was contemplated, the minimum necessary. Unless as a matter of fact and degree kitchens and bathrooms were in a very bad state, their replacement would not go to the adequacy of the accommodation; replacing them merely because they had been there a long time and it might be a good idea to replace them with something more in line with modern standards would not be enough. And depreciation, bad debts and miscellaneous expenses could never go to the adequacy of the accommodation.

27. Miss Powick expressly disclaimed the argument previously raised that to allow payments in respect of the kitchens and bathrooms in the present context would permit co-owners to have capital expenditure covered by

housing costs, whereas everyone else would be limited to the interest on loans taken out for purposes of improvement. She agreed that this would be so if I allowed the appeal, but the loss would have to lie where it fell.

28. In reply, Mr Vokes said that if Miss Powick was right, co-owners would never be able to have the items in dispute covered, and would stand to lose their property. So far as that goes, I observe, so would a private tenant.

29. I have taken careful note of CIS/1460/95 and the common appendix to it and five other decisions. But (subject to what I say below about depreciation and miscellaneous expenses) I have concluded that it does not help the appellant with the disputed items. CIS/1460/95 says in paragraph 2 that it concerned a co-ownership scheme, though I am not quite sure how this squares with the appellant being a long leaseholder, and the common appendix does not mention it. However, although the appeal turned on the same provision about adequate accommodation as is in issue here, the distinction drawn (in the context of sheltered accommodation) was between adequate accommodation and personal needs, as contemplated by paragraph 1 of Schedule 1 to the Housing Benefit Regulations. The facts were different, and there was no question of the payments allowed (see paragraph 5 of the appendix) covering anything done to the interior of other residents' bungalows, nor bad debts.

30. I do not see my way to allowing as part of the appellant's housing costs the capital cost of replacing other members' bathrooms and kitchens to modern standards. Certainly it is desirable to keep the components of a scheme up to scratch, but I do not consider that what is desirable is the same as what is "adequate". I would not confine "adequacy" with quite the same stringency as is now applied to improvements by paragraph 15(2) (as interpreted); but there are limits. I see no reason why 20-year-old kitchens and bathrooms, in the absence of accident or abuse, should not still be serviceable enough to be "adequate".

31. Nor do I see how I can allow the bad debt provision, however necessary to the lawful operation of the scheme, as having anything closely enough to do with the adequacy of the accommodation. Certainly if the development loan were called in because the managers had no money to make bad debt provision there could be worry and inconvenience for the

members as a whole; but I hardly imagine this could lead to their mass eviction. Individual members who do not pay this part of their rent are at risk; but so are other tenants who cannot pay the bad debt part of their service charges, and at least if the member has been in the scheme more than 5 years (as this appellant has), an adjustment can be made to his capital sum under clause 6(1)(b).

32. I have, however (largely without recourse to considerations of adequacy or to CIS/1460/95) concluded that the present appellant should have the items variously included under "miscellaneous" allowed as part of his housing costs. It is surprising to me that stationery, postage and telephones should not have been included under administration costs (which were allowed), or cleaning materials under cleaning costs, or plants under gardening, or tools under gardening or other of the headings allowed. I do not see why the appellant should be penalised because of the particular accounting practices adopted by the Society. As to smoke alarm batteries, these are quite possibly required under fire safety regulations and can have a bearing on the adequacy of the accommodation; and fire equipment costs were allowed in CIS/1460/95.

33. I have toyed with the idea of allowing the "depreciation" item by analogy with the payments to a repairs and maintenance reserve which was allowed in CIS/1460/95. But that reserve was expressly for future maintenance of the site, the common areas and the outside of each bungalow. Here, I simply do not know what the "depreciation" item of £500 was for (if it was indeed charged); no one has bothered to find out, and I am reluctant to remit the case purely on this ground. I imagine that it is a prudent sinking fund run by the managers by virtue of the contingencies or reserves provision in clause 2(2)(e) of the agreement, or the provision for all other expenditure properly incurred in clause 2(2)(f). But I do notice that although £500 is a relatively small sum per flat, when multiplied by the 100 units which the scheme comprises (page 25K) it comes to £50,000 - on the balance of probabilities a larger sum than would likely be required for future maintenance of the site and common parts. If it was further provision towards the programme of replacing windows (mentioned at page 19), questions would again arise under paragraph 16(2)(b) or (c). It will be open to the appellant, subject to further evidence, to bid for the inclusion of depreciation (in principle permissible following CIS/1460/95) in later years.

34. The appeal is accordingly allowed to the limited extent set out in paragraph 1 above.

(signed on original) Christine Fellner
Commissioner

5 February 2001