JGM/LS

Commissioner's File: CSB/817/1985

C A O File: AO 2541/85

Region: Midlands

SUPPLEMENTARY BENEFITS ACT 1976

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Joan Christine Bulmer (Mrs)

Social Security Appeal Tribunal: Rochdale

Case No: 15/4/9

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal dated 15 April 1985 is erroneous in point of law and it is set aside. The matter must be referred to another tribunal.

2. The claimant in receipt of supplementary benefit had the amount to be awarded reassessed from 19 November 1984; and she appealed against the new assessment on the ground that the amount to be allowed for mortgage interest was incorrect. According to the form AT 2 which, has not I think been contradicted, the claimant borrowed from her bank against the deposit of the deeds of total property a sum of £37,313.59 for the purchase of the house in which she was already residing, the property comprising residential and restaurant premises. By 13 February 1985 the amount owing to her bank on an account that had no other entries except interest was £48,728.31 the difference being accounted for by interest that has been capitalised (ie added to the capital of the loan, so as itself to carry interest).

3. The adjudication officer allowed in respect of interest only 26 per cent of the money advanced for the purpose excluding the amount added for unpaid interest. This was on the basis that interest on the interest was not allowable under regulation 15 of the Supplementary Benefit (Requirements) Regulations 1983 [SI 1983 No 1399] (the Requirements Regulations); and on the basis that only 26 per cent of the property for which the advance was made was the home, the rest being a restaurant. The adjudication officer's decision was confirmed on appeal by the local tribunal and the claimant now appeals to the Commissioner. She was represented at the oral hearing before me by Mr M Richardson Welfare Rights Officer with the Oldham social services and the adjudication officer was represented by Mr E O F Stocker, barrister.

4. The appeal turns on the provisions of regulation 15(1) of the Requirements Regulations which as amended by SI 1984 No 1102 with effect from 6 August 1984 provides as follows:

"There shall be applicable under this regulation in respect of any mortgage or other loan taken out for the purpose of acquiring an interest in the home -

(a) where section 26 of the Finance Act 1982 applies to payments of interest on the loan, the amount attributable to the interest which is payable after deduction of income tax at the basic rate, or

(b) where section 26 does not apply to those payments, the amount attributable to the interest which is payable without deduction of income tax,

and in either case the amount shall be calculated on a weekly basis."

5. The first matter to be determined is whether the "home" included or did not include the restaurant premises, since, if it did, the entire loan was taken out for the purpose of acquiring an interest in the home. "Home" is defined in paragraph 2(1) of the Requirements Regulations so far as material as follows:

" 'the home' means the accommodation, with any garage, garden and outbuildings, normally occupied by the assessment unit and any other members of the same household as their home.....and it includes also any premises not so occupied which it would be impracticable or unreasonable to expect to be sold separately, in particular the croft land where, in Scotland, the home is a croft."

6. It is not suggested that the restaurant falls within the first part of the above definition. But it is suggested that it constitutes premises that it would be impracticable or unreasonable to expect to be sold separately. It is not entirely clear that this question was raised before the tribunal, as the form AT 2 itself suggests that it had been established that the residential premises could be separated from the restaurant. But it is clear that the confining of the interest allowed to that on 26 per cent of the amount borrowed was the ground of the claimant's appeal. In my judgment this put in issue the question whether it was right to limit the interest to this percentage or at all; and in particular the questions whether the whole of the property mortgaged constituted the home; and whether, if it did not, there was any right to apportion the mortgage interest over the aggregate of the property charged. The tribunal made no finding on the question whether the restaurant premises were property that it was impracticable or unreasonable to expect to be sold separately. This raises questions not only of the practicability and/or reasonableness of physically severing the parts of the property but also (as the reference in the definition of croft lands indicates) any conveyancing or legal impediments to doing so such as the fact that the two are subject to a common mortgage (not by itself an insuperable obstacle) (see Decision R(SB) 27/84 at paragraph 14(6)). The new tribunal must reach a conclusion on this.

7. If the tribunal find that the home included the restaurant, it will be obvious that the entirety of the loan was taken out for the purpose of acquiring an interest in the home. It will follow that (subject to the effect if any of regulation 21 of the Requirements Regulations, which was

not considered at the hearing of the present appeal and to the point about capitalised interest considered below), the claimant will be entitled to succeed. On the other hand if the tribunal conclude that the restuarant was not part of the home the position will be that there is a loan taken out for the purchase of the home and the restaurant, and the tribunal will have to consider the proper method of treating that for purposes of the Requirements Regulations.

8. The last tribunal in fact treated the amount of the loan as apportionable as between the two items notwithstanding that it was negotiated as a single loan for the whole. They effected their apportionment by reference to an apportionment of rateable values made by the housing department of the local authority. Mr Richardson did not suggest that there was inadequate evidence of the fact of this apportionment having been made or the manner of its making. There seems to have been only an uncontested statement of the fact by the adjudication officer in the form AT 2. I take it therefore to be accepted that this was a proper apportionment of them. But he did suggest first of all that there should be no apportionment at all and secondly that, if there could be an apportionment, it could only be effected on proper evidence of relative values and not by a comparison of rateable values.

9. On the question whether there can be apportionment at all Mr Richardson relied on Decision R(SB) 27/84. In this case it was held that in valuing the home and property not constituting the home in terms of the Social Security (Resources) Regulations 1981 [SI 1981 No. 1527], under which the home is simiarly defined, a mortgage extending to cover the whole of both items had, under regulation 5(a)(ii) of the regulations last mentioned, to be deducted from the value of the part that did not constitute the home (which was itself a disregarded resource); and, by implication, that no account need be taken of any possible right of contribution or indemnity that the owner of such land might have against the owner of any other land so charged. The Commissioner in that appeal pointed out that there was in those regulations no provision for apportionment; and Mr Richardson argues that there is similarly in the Requirements Regulations no provision for apportionment.

10. I do not however think that the absence of any provision for apportionment in the Requirements Regulations concludes the matter. In Decision R(SB) 21/85 the Commissioner (at paragraph 18(1)) sounded a precautionary note as to the relevance of Decisions R(SB) 27/84 to the present question. He pointed out that the conclusion in that case was founded on the undoubted fact that the lender of money on the security of the two properties had the right to resort to either of them for the entire debt. By contrast, it would be inaccurate to say in this case that the claimant borrowed the entirety of the money borrowed for the purpose of buying each of the premises (the residential accommodation and the restaurant) she borrowed the whole only for the purpose of buying the aggregate of the two premises. She may be more accurately described as having borrowed a part of the money for the purpose of acquiring part of the property, and part of the money for the purpose of buying the other part. But it cannot be deduced from the documents themselves how much was borrowed for each purpose; and if the claimant furnished some part of the purchase price out of her own money there could be a question how that was to be appropriated to the respective parts. Though I recognise that questions of apportionment and appropriation may be difficult, I have reached the

conclusion that as a matter of law apportionment and, if necessary, appropriation has to be effected.

11. I feel fortified in this view by a consideration of the reference in regulation 15(1)(a) to section 26 of the Finance Act 1982. This section relates to mortgage interest relief at source (MIRAS) in the case of what is there called "relevant loan interest" a phrase defined (in schedule 7 to that Act) by reference to, among other things, schedule 9 to the Finance Act 19 Paragraph 15 of this schedule provides expressly for apportionment in cases of what I will call dual purpose loans and there can I think be no doubt that some part of the interest on such a loan may be relevant loan interest to which section 26 of the Finance Act 1982 relates, while some other part is not. An apportionment so effected is in the case of a MIRAS mortgage carried into the Resources Regulations for the purpose of operating regulation 15(1)(a); and unless there is a parallel apportionment in the case of non MIRAS mortgage and other loans there will be an imbalance.

12. How is this apportionment to be effected ? And how is any question of appropriation of so much of the purchase price as was not borrowed at all to be resolved ? There is nothing in the law relating to supplementary benefit to prevent a person from electing at the time of the purchase of two items one of which is to be the home to apply his own money exclusively to the purchase of the item which is not the home; and to apply the borrowed money to meet the balance of the aggregate cost, thereby maximising the amount of the loan interest that will be counted among his housing requirements. But, in my judgment, such an appropriation (express or implied) must be effected at the time of purchase. One cannot after the event deem oneself to have done this. If one does not appropriate at the time of purchase, one will be treated as having expended one's own money and the borrowed money rateably in the purchase of the whole. This rateable apportionment should be effected by reference to the amount of the purchase prices if separately fixed; or failing that the relative values of the two or more parts at the date of purchase. This will commonly be a matter of estimate and opinion. In my judgment in the absence of any other evidence a tribunal is entitled to look at rateable values as evidence of relative value of different properties. I hold therefore that, (if the restaurant is found not to have been part of the home) the amount of the interest falls to be apportioned between interest on the amount of the mortgage or loan taken out for the purchase of the home and the balance of the amount of the mortgage or loan.

13. There remains the question of the capitalised interest. Is that to be treated as interest on the loan or only as interest on the interest on the loan, and thus as not interest on the loan itself ? On this question I have been referred to four unreported Commissioner's decisions which do not all point the same way. First came the Decision on file CSB 1108/82, which concerned a period beginning on 26 July 1982. At that time there were in force regulation 16(1) and regulation 20(2A) of the Supplementary Benefit (Requirements) Regulations 1980 [SI 1980 No. 1299]. Regulation 16(1) provided as follows:

> "There shall be applicable under this regulation in respect of any mortgage charged on and taken out for the purpose of acquiring an interest in the home, the amount calculated on a weekly basis, which is payable and attributable to mortgage interest." (my underlinig)

And regulation 20(2A) (inserted by SI 1980 No. 1774) provided as follows:

> "Where a sum is borrowed (with or without security), other than by way of a mortgage to which regulation 16 (mortgage payments) applies, for the purpose of acquiring an interest in the home, there shall be applicable the amount of the interest calculated on a weekly basis, on the sum borrowed."

The latter provision was introduced by an amendment that came into force at the same time as the original regulation and seems to have been intended to cover the omission from that regulation of interest on loans which were not loans on mortgage.

14. With effect from 9 August 1982 regulation 16(1) was amended and regulation 20(2A) was revoked both by SI 1982 No. 1125. The amendment substituted for the three words first underlined in the regulation as set out above the words "or other loan" and for the words underlined at the end of that regulation, as so set out, the words "interest on the loan". The princpial effect would seem to have been that loans not on mortgage were covered by regulation 16(1) so that regulation 20(2A) became superfluous. The Commissioner in the above decision on file CSB 1108/82 had to consider the regulations as they stood before and after the change. It appears that the benefit officer had made a submission to the effect that the interest on the sum borrowed in regulation 20(2A) included interest on capitalised interest, but that interest on the loan in the revised regulation 16(1) did not. The Commissioner rejected this distinction and held that both included interest on capitalised interest on the loan. The decision on file CSB 1106/82 is broadly to the same effect.

15. The next decision, on file CSB 467/83, concerned regulation 16(1) in its revised form. The Commissioner does not appear to have been referred to the decisions last mentioned and he considered the point to be a narrow one that he had not found easy to decide. He based his ultimate conclusion that interest on capitalised interest was not "interest on the loan" in terms of the revised regulation 16(1) on the fact that the words had been substituted for "mortgage interest" and, bearing in mind the deliberate change in wording, he concluded that interest on the loan was confined to interest on the original amount advanced or so much thereof as was still outstanding. He fortified himself by the reflection that this interpretation would encourage thrift. This conclusion was followed by another Commissioner in the Decision on file CSB 364/84, who was concerned with the case the subject of decision on file CSB 1108/82 on its return after a rehearing by a second appeal tribunal. This Commissioner held following the decision last mentioned that capitalised interest could be included down to 8 August 1982 but, in this respect preferring Decision on file CSB 467/83, that capitalised interest was not to be included thereafter.

16. Mr Stocker naturally invited me to follow the later decisions, pointing to the argument about the encouragement of thrift. Mr Richardson argued the other way and pointed out the hardship that would be suffered by those who struggle to live without supplementary benefit for a period and then have to give up the struggle and claim. I cannot decide that the regulation means one thing in one set of circumstances and another thing in another;

and I doubt if these considerations assist in the construction of the regulations. For my part I take the view that capitalised interest which was before the change unquestionably mortgage interest remained interest on the loan after it. I do not believe that any substantive change was intended when the regulation was altered other than the incorporation of regulations 16(1) and 20(2A) into a single regulation.

17. In point of fact the regulation has now been changed again to take account of the special case of MIRAS mortgages; and once again I should not expect this to make any substantive change. I have looked at the legislation relating to MIRAS mortgages to see if there is any indication whether capitalised interest is intended to be treated as relevant loan interest or not. I have found nothing conclusive one way or the other; but I have noted that the permissible monetary limit on the amount on which interest relief can be granted for income tax purposes is under paragraph 5 of schedule 1 to the Finance Act 1974 stated as a limit of the amount on which the interest is payable and not of the amount actually lent. This is at least consistent with allowing (within the permissible limit) interest on capitalised interest.

18. I direct the tribunal accordingly that interest on capitalised interest on a loan taken out for the purpose of acquiring an interest in the home is to be taken into account. The appeal succeeds.

(Signed): J G Monroe
Commissioner

Date: 14 January 1986