RSB 20/84

JGM/MC

CSB 62/1983

SUPPLEMENTARY BENEFITS ACTS 1976

APPEAL FROM DECISION OF SUPPLEMENTARY BENEFIT APPEAL TRIBUNAL
ON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Capital resources
- failure to disclose
Section 20 repayment

Name:

Supplementary Benefit Appeal Tribunal: Southampton

Case No: 13/272

/ORAL HEARING/

1. My decision is that the decision of the supplementary benefit appeal tribunal dated 7 September 1982 was erroneous in point of law and it is set aside. The matter must be referred to another tribunal.

2. The claimant made a claim for a supplementary allowance on a form dated 4 January 1982. In that form he gave particulars of his resources as constituting a sum of £443.62 in a bank account, but he made no reference to the ownership of a house (to which I shall refer as "the premises") in which he was not living at the time but which he had purchased with sitting tenants in it, with a view to having somewhere to live in the event that he should lose his job and the tied accommodation that went with it. He had purchased the premises in March 1979, and it would appear that the purchase price was £22,300 and that there was a mortgage on the premises taken out for the purchase of which £13,497.78 was at the relevant time outstanding. If the purchase price represented no more than the value of the property and it was not property that fell to be disregarded as a resource, it is clear that the claimant was not entitled to the normal supplementary allowance because the value of his resources exceeded £2,000, the figure then ruling under regulation 7 of the Supplementary Benefit (see Supplementary Benefit (Resources) Regulations 1981 /S.I. 1981 No. 1527/, (the Resources Regulations)); though the claimant might have brought himself within the provisions of the Supplementary Benefit (Urgent Cases) Regulations 1981 /S.I. 1981 No. 1529/ (the Urgent Cases Regulations). Accordingly the benefit officer, when he became aware that the claimant owned the premises, gave a decision pursuant to section 20 of the Supplementary Benefits Act requiring repayment of the resulting "expenditure" involved in paying the benefit taken to be the whole amount of the benefit paid.

3. Section 20 of the above Act so far as relevant provides as follows:-

> "If, whether fraudulently or otherwise, any person misrepresents, or fails to disclose, any material fact, and in consequence of the misrepresentation or failure -

(a) the Secretary of State /for Social Services/ incurs any expenditure under this Act; or

(b) .....

the Secretary of State shall be entitled to recover the amount thereof from that person".

The benefit officer concluded that the claimant had failed to disclose the facts about the premises and that in consequence he had been paid supplementary benefit (the amount of which he computed to be £798.95), and that this was expenditure incurred by the Secretary of State in consequence of such failure to disclose. He gave a decision requiring repayment of this amount. The claimant's appeal to the supplementary benefit appeal tribunal was dismissed. The tribunal by implication found the value of the premises to be the difference between the purchase price and the amount of the outstanding mortgage or at all events sufficient to make the value of the claimant's capital resources (including the money in the bank) exceeded the crucial figure of £2,000; and indeed in the absence of any suggestion to the contrary there was no other conclusion that they could reach. Should the new tribunal come to a materially different conclusion on this the claimant's appeal to them would succeed; and much of what is said below (which is based on the assumption that the new tribunal's conclusion on the value of the premises is the same or practically the same as that of the first tribunal) will be irrelevant. The claimant now appeals to the Commissioner. He presented his own case at the oral hearing before me. The benefit officer was represented by Mr E O F Stocker of the Solicitor's Office of the Department of Health and Social Security.

4. The claimant repeated before me the account of what took place when he made his claim that he had previously given to the appeal tribunal, viz that he took all the documents concerning the premises (among other documents) to the interviewing clerk who said that he did not want to see them. He mentioned that he had been sent a form indicating what he should bring with him and that he had brought everything. He said also that when he took the same documents to an office concerned with the grant of legal aid in connection with some other matter that office had immediately appreciated that he owned the premises.

5. The claimant's evidence on this point is relevant on this appeal only in so far as it bears on the question whether the appeal tribunal correctly dealt with the matter. Their finding was as follows: "When appellant signed a statement on 4 January 1982 claiming supplementary allowance he did not declare ownership of this property /viz the premises/". Mr Stocker suggested that it was for consideration whether this was an adequate way of dealing with the point in issue, which was whether the claimant had failed to disclose the matter. Disclosure can be made otherwise than by a declaration. The claimant's evidence was that he had brought with him a bundle of documents including those relevant to ownership of the house; and it was for the tribunal to decide whether they accepted that this was correct, and if so whether what took place ought fairly to be regarded as a disclosure of the relevant matters. The finding does not indicate that they considered the question of disclosure by conduct at all. In considering this

question the new tribunal should have regard to the fact that the claim form that the claimant signed seems to have been made out in another hand (possibly that of the interviewing officer) and signed by the claimant. The new tribunal should start with the twin propositions that the fact that the claimant did not specifically mention the house does not automatically mean that he did not disclose it; and that the fact that he handed in a bundle of documents from which it was possible to extract the facts about the house does not automatically mean that he did disclose it. They should inquire into what took place and reach a conclusion whether that ought fairly to be regarded as disclosure or ought not to be so regarded. If the tribunal come to the conclusion that it ought be regarded as disclosure that will be the end of the matter and the claimant will succeed.

The position if failure to disclose is established

6. If however the tribunal come to the conclusion that what took place did not amount to disclosure, there will have been a failure to disclose. The tribunal will then have to go to the question what expenditure was incurred by the Secretary of State in consequence of the failure to disclose. It is contended on behalf of the claimant that consideration has then to be given to the question what would have been payable (e.g. under the Urgent Cases Regulations), if disclosure had been made. On this issue one of the written submissions of the benefit officer now concerned is that this is too complex and remote a matter and that tribunals are not required to speculate as to a wholly different basis on which an award might have been made.

7. I am not able to accept this last proposition in that wide general form. If the situation is reversed and as a result of a failure to disclose a claimant is paid too little and then applies for review, the question (whether there is to be any offset in determining what is to be awarded on revision falls to be considered in detail whether this involves consideration of different matters or not (see Decision C.S.B 749/82 (not reported)) and it has never been suggested that it is too much to expect tribunals to go into this; further in the parallel jurisdiction under the Social Security Act 1975 it is always necessary under section 119 of that Act as a preliminary to requiring repayment that the decision awarding the benefit required to be repaid (in part or in whole) should be revised on review (or on appeal), and on such review all relevant matters have to be taken account. I am thus not impressed by an argument that these questions are too complex or too remote. Moreover even though review is not a necessary preliminary to a requirement of repayment under section 20, there is nothing to prevent such a review and a claimant can appeal against a refusal to review (see Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980 /S.I 1980 No 1605/ rule 4.

8. In my judgment it is a good starting point for the consideration of the amount that can be required to be repaid under section 20 to consider what would be the revised decision that would be given if and when the full facts are known, and treat the excess of the amount payable under the original decision over that payable under such a revised decision as the amount of the expenditure resulting from the

relevant misrepresentation (or misrepresentations) or failure (or failures) to disclose. I recognise that there is a possibility that this is not a panacea for all cases. Indeed I noted Decision C.S.B 347/83 (not reported), where the effect of an alleged failure to disclose was to alter the member of the assessment unit entitled to claim and Decision C.S.B 477/82 (not reported) where the Commissioner rejecting a submission on the part of the benefit officer that "expenditure" in section 20 meant "over-expenditure" arrived at an amount of over-expenditure under one head and refused to allow the off-set of under-expenditure under another head. The problems that arose in these cases do not arise here, though I have misgivings about the latter decision as it reveals an imbalance between the position of overpayment and underpayment and I do not find the words of the section so intractable as to demand such a conclusion.

9. The present case is in my judgment only a more complex instance of, not differing in principle from, the commoner (and simpler) cases in which for instance a claimant misrepresents the number of rooms in his house and is thus awarded a larger heating addition than that to which the actual number of rooms **entitles** him. When such misrepresentation comes to light the benefit officer concludes that the expenditure incurred in consequence of the misrepresentation is not the whole of the supplementary allowance paid for the relevant period, nor even the whole of the heating addition, but the amount by which the heating addition paid exceeded that which ought to have been paid. In other words it is necessary (whether or not there is any review) to compare the amount paid with the amount that is payable under the review decision or would have been payable if there had been a review decision.

<u>The question whether the premises are disregarded resources and the consequences of them being so found</u>

10. I can see no reason for differentiating the present case. And the first enquiry in the event that there is found to have been a failure to disclose is as to the amount that would have been payable if the facts not disclosed had been disclosed. The first question that would then arise would be whether the premises would nevertheless have fallen to be disregarded as a capital resource on the ground that they were in terms of regulation 6(1)(a)(ii) of the Resources Regulations, "premises which have been acquired and not yet occupied by the assessment unit but which it is intended will be the home within 6 months of the date of acquisition or such longer period as is reasonable in the circumstances". It is clear that no reliance can be placed on that provision unless it is found reasonable to extend the 6 month period. The evidence before the first tribunal does not seem to have been directed to this question, and although I have been given information relevant to it, I have no power to make findings on it or to say whether it is accurate or complete. The evidence includes evidence that the claimant had been in tied accommodation which he was still occupying after losing the relevant employment and was in need of fresh accommodation and was trying to obtain possession of the premises which he owned from the tenants; and that he did eventually secure such possession but by that time, having a new employment in prospect with its own tied accommodation, he never in the end occupied the premises.

This is evidence which if accepted and not outweighed by other evidence on relevant matters the tribunal could find the premises to have been such as to be disregarded under regulation 6(1)(a)(ii); but the question whether they are to be so disregarded will be for the new tribunal.

11. If the tribunal find that the premises can be disregarded as capital resources under the foregoing provision then it will follow that the claimant could not have been refused an allowance on the bare ground that his resources including the premises exceeded the £2,000 limit in regulation 7 of the Resources Regulations. It would then be necessary to go on to consider what (having regard to any income derived from the premises) would have been the amount of the claimant's allowance. The premises were yielding a rent of £200 per month (roughly (£46.15 per week) but this was entirely used up by the claimant in paying (1) the mortgage interest on the mortgage on the premises taken out for the purpose of their acquisition and (2) the rates on the premises which, I believe, were payable by the claimant.

12. However, under regulation 11(5)(c) of the Resources Regulations, income from property disregarded under regulation 6(1)(a)(ii) has to be taken into account as an income resource subject to a disregard of £4 per week. If this £4 per week is all that can be deducted from the rent there would on the figures now before me have been no allowance payable. The tribunal will or may therefore have to consider whether the gross rent from the premises constitutes income from them within regulation 11(5) or only the net rent after allowable deductions are made from it; and in the latter case it would have to be determined what deductions are to be allowed.

13. As with the Income Tax Acts there is no relevant definition of the word "income" in regulation 11(5). I think that it is appropriate to apply the distinction that has been developed in decisions under the Income Tax Acts between periodical payments which are "pure income" not susceptible of deductions, and those which are only factors in arriving at an amount of income. Interest for instance is pure income while payment of rent from chattels is not (see Re Hanbury (1939) 38 TC 588, approved in Campbell v IRC /1970/ AC 77 at page 96 and 107-108). On this basis rent is income only after allowable deductions, if any, are made from it. Under income tax law interest became a deduction from (or more strictly a charge on) income as a by-product of the law about deducting income-tax in paying the interest (see Howe v IRC /1919/ 2 KB 336). This has no relevant to the computation of income resources and I can see no justification for deducting the mortgage interest from the rent in arriving at the income from the premises. Liability for mortgage interest is dealt with for social security purposes in an entirely different way by including it, in particular cases, as a requirement, e.g interest on a mortgage taken out for the purpose of acquiring an interest in the home or for repairs and improvements of it (under what are now regulations 15 and 17 of the Supplementary Benefit (Requirements) Regulations 1983 /S.I 1983 No 1399/); but although regulation 14(4) of those regulations, re-enacting a like provision in earlier regulations, contains provision under which it may sometimes be possible to include mortgage payments

connected with the acquisition of premises that are to be the home, the premises with which this case is concerned were acquired too long before the relevant time for that provision to be applied. It follows in my judgment that the mortgage interest is not a permissible deduction from the rent in arriving at a figure for the income of the premises. This conclusion is in conformity with Decision R(SB) 7/83.

14. This last mentioned decision does however suggest that certain other items may be permissible deductions. It is, however, difficult to use the income tax law as a guide to what is permissible because rent of land in the United Kingdom has always been specifically dealt with in the income tax legislation. The analogy of rent for chattels is however sufficiently close to indicate that rent is not to be regarded as pure income; and the statutory provision about what is a permissible deduction from rent of land (to be found in section 72(1) of the Taxes Act 1970) may be a rough guide to what it is permissible to deduct. At all events I am satisfied that for present purposes if land is let on terms that the landlord pays the rates the amount of rates payable is a permissible deduction from the rent. I express no opinion on whether anything else is deductible or not. If it be found that the premises are to be disregarded the tribunal will proceed to compute the income resources derived from them by deducting from the rent any amount found to be deductible (e.g in respect of rates) on the application of the above and by deducting further the £4 per week disregarded under regulation 11(5) of the Resources Regulations. They will then compute the amount of the supplementary allowance that would have been payable if the claimant's income resources had included the amount so computed, and the aggregate of the excess during the period in question of the amount actually paid and the amount so computed will be the aggregate of the expenditure incurred in consequence of the failure to disclose.

The position if the premises are not disregarded as capital resources

15. If the tribunal conclude that the premises are not to be disregarded under regulation 6(1)(a)(ii) of the Resources Regulations then regulation 7 of those regulations will preclude the payment of any allowance unless the Urgent Cases Regulations can be invoked. Under these regulations, the amount of allowance payable during the period in question could not in any case be more than could have been awarded if the premises were disregarded, and during the first weeks of the period of payment would have been reduced below that figure by regulation 5(3)(a) and (b) of those regulations. But before the regulations could be applied at all the claimant would have to bring himself within one of the regulations in 18 to 24 (of which only 18 and 24 seem at first sight to be even potentially relevant). Further the claimant declared himself as having £443.62 in the bank. Under regulation 3 of the Urgent Cases Regulations benefit can be paid only where funds to meet the expenses in question are not readily available, and in determining what is readily available regard is to be had to any capital. It is clear that initially at least the claimant had available resources to meet his current requirements in the bank, and that no payment could be made under the Urgent Cases Regulations while that might be expected to last. At first sight it may seem anomalous that the

amount required to be repaid should exceed the amount in the bank. But it has to be remembered that (notionally at least) the net income from the premises would have been coming in to supplement that money; and I do not think that it would be a proper exercise of whatever element of discretion may be conferred by the terms of regulation 3(1) to limit the amount required to be repaid by reference to the amount in the bank account. This question will arise only if the case be held to fall within one or other of regulations 18 to 24. Without that there could have been no payment under the Urgent Cases Regulations, and (if the issues of disclosure and disregarded resources go against the claimant) the whole amount paid during the period in question would be recoverable expenditure.

16. The appeal is allowed.

(Signed) J G Monroe
Commissioner

Date: 28 February 1984

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