

DECISION OF SOCIAL SECURITY COMMISSIONER

1. The decision of the Greenock appeal tribunal (the tribunal) held on 4 February 2002 is not in error of law.

The background

2. The claimant and her late husband in 1985 purchased the council house which they had previously rented for a sale price of around £8,000 after the appropriate discount had been made. By 1989, £27,196.44 was the amount secured on the house under a mortgage with the Bradford and Bingley Building Society and one with another firm, as this included loans which the claimant had taken out for the benefit of a business run by her son, James.

3. In 1989 the claimant transferred the property to her other son, William, who was then living with her but now lives elsewhere with his wife. William secured a mortgage on the property in the sum of £28,695 with the Leeds Building Society, which was used to repay the previous loans charged on it.

4. William rented the house back to his mother. She keeps the mortgage payment book applicable to William's current loan and, when in receipt of Housing Benefit, she used that money to pay both the mortgage payments and the property insurance. When the mortgage interest rate increased or decreased, she adjusted the amount paid on the mortgage appropriately. William plays no part in the arrangements for payment of his mortgage. There appears to be no additional sum paid by the claimant for rent other than her direct discharge of the mortgage obligations.

5. Housing Benefit was initially paid in respect of the tenancy but, after investigations, a new claim on 25 May 2001 was refused on the basis that the claimant was treated as not liable to make payments in respect of her dwelling, as the tenancy agreement was not on a commercial basis. Until the date of the tribunal hearing, the claimant continued to make the owner's mortgage payments.

The statutory criteria

6. So far as material, regulation 7 of the Housing Benefit (General) Regulations 1987 (the regulations) reads as follows:-

“(1) A person who is liable to make payments in respect of a dwelling shall be treated as though he were not so liable where –

- (a) the tenancy or other agreement pursuant to which he occupies the dwelling is not on a commercial basis

.....

(1A) In determining whether a tenancy or other agreement pursuant to which a person occupies a dwelling is not on a commercial basis regard shall be had *inter alia* to whether the

terms upon which the person occupies the dwelling include terms which are not enforceable at law."

The tribunal decision

7. The claimant appealed to a tribunal and was present at the hearing with her representative, a welfare rights officer, (the representative) who has represented her ever since.

8. The primary findings of fact made by the tribunal are set out in eleven numbered paragraphs over two pages. There is then a page of reasoning, which concludes in its two penultimate paragraphs:-

"I agree with the representative that Disability Living Allowance should not, per se, be used for the payment of rent but Disability Living Allowance can be used at the discretion of the person to whom it is paid. It is non-means tested and how it was applied was not the issue before me today.

Taking account of the closeness of the relationship between the parties in this case, the reason for the original transfer, the fact that there is no formal agreement or any recorded means of ascertaining exactly the terms of any such agreement, the fact that [the claimant] deals with any repayments without any intervention from her son whatsoever and the fact that the amount paid varies according to the mortgage repayments which would not be a normal scenario for a commercial agreement, I consider that the Authority have successfully shown that the agreement here is not on a commercial basis. Had [her son, William,] intended to enforce the terms of any agreement, I consider it likely that he would have entered into a formal agreement with his mother to protect his own interest."

9. The appeal was therefore refused.

Appeal to the Commissioner

10. Leave to appeal was sought by the representative on two grounds. The first was that the tribunal misread regulation 7(1A) in referring to the landlord's lack of intention to enforce the terms of the agreement. Secondly, complaint is made about the reasoning by the local authority when refusing housing benefit and it was said:-

"Another important factor is that [the claimant] would not be evicted due to refusal of housing benefit and in fact would be able to pay her 'rent' by using her entitlement to disability living allowance."

It is submitted that, by dismissing the appeal, the tribunal has implicitly accepted that reasoning by the Council, which is erroneous.

11. The district chairman refused leave to appeal but leave was granted by a commissioner, without further specification. The council does not support the appeal. An oral hearing was requested by the representative, which was refused by a legal officer to the commissioners because she was satisfied that the appeal could properly be determined without a hearing. No reconsideration of this determination was requested by either party.

My conclusion and reasons

A commercial basis

12. In support of the appeal, the representative has supplied a copy of CH/0627/2002. However, I find no support in that case for the representative's contentions, rather the reverse applies.

13. CH/0627/2002 confirms that whether an arrangement is or is not on a commercial basis is a question of fact and that "commercial" is an ordinary English word that does not need to be defined.

14. The tribunal has correctly set out the burden of proof, which is that it lies on the Authority.

15. The tribunal has rightly concentrated on the nature of the tenancy agreement and not on the reasons for it. The tribunal sets out its findings on the basis of the arrangement in an entirely factual way. Moreover, its findings reflect all the terms of the arrangement. It has made full findings of primary fact on every material matter and then drawn rational inferences therefrom that the tenancy agreement was not on a commercial basis.

16. Evaluation of the evidence and determination of the merits is for the tribunal, provided all relevant matters are considered and none which are irrelevant, rational inferences are drawn and the determination made is adequately explained. All of this has been done. The whole decision reflects the tribunal's careful consideration of the factors involved but, in particular, the second of the two paragraphs of its reasoning, set out above in my paragraph 8, gives the crux of its decision. The tribunal quite rightly laid emphasis on the fact that the son never received any money for rent, but rather a sum was paid directly by his mother to the mortgagee in pursuance of the son's mortgage obligations and for the property insurance, and that what the claimant paid to live in the house was always the amount of the current mortgage payment plus property insurance, albeit that varied. In the light of those particular findings, it is questionable whether any reasonable tribunal could have held this agreement to be on a commercial basis. It is a highly unusual facet of a commercial landlord and tenant relationship where the landlord takes no part whatsoever in the monetary transactions involved for the tenant to live in the home. It is also highly significant, as the tribunal earlier observed in its decision, that the mother in effect had the same outgoings both before and after the transfer of the property, when she changed from owner to tenant of it.

Regulation 7(1A)

17. The tribunal placed no reliance on the above so, accordingly, did not misread it.

18. The tribunal did not suggest that the agreement contained any terms which are unenforceable at law and then reasoned from this that therefore the agreement was necessarily not on a commercial basis.

19. Its reasoning was quite different and legitimate. It found from all the evidence that it was unlikely that the son would seek to evict his mother or pursue any court action for rent arrears. In no way did they regard this as conclusive. The son's lack of willingness to

enforce his legal rights was merely one constituent in the overall view which, as CH/0627/2002 endorses, has to be taken on the necessary inferential fact of whether the tenancy was on a commercial basis. It was entirely proper for the tribunal, without recourse to regulation 7(1A), to look at the landlord's *intentions* with respect to enforcement.

20. As Commissioner Jacobs points out at paragraph 14 of CH/0627/2002, some of the comments of Commissioners in cases of severe disability premium in income support may not be applicable in the different context of housing benefit. It is correct that the Tribunal of Commissioners at paragraph 13 of R(IS)11/98 said that a tribunal was:-

".... wrong to see as crucial the fact that, as they thought, the parents would not require their daughter to leave the family home if she did not continue to make her payments."

The tribunal did not regard the son's apparent unwillingness to evict his mother in the event of non-payment as crucial. They simply used it, as they were entitled to do, as one of several relevant constituent factors underpinning their overall conclusion. They did not give it any more weight than was proper.

Rehearing on an appeal

21. A tribunal conducts a complete rehearing in fact and in law. The tribunal made it wholly clear that it did not endorse the council's statement about disability living allowance and its use. The representative is misguided in considering that, because a tribunal affirms an adverse decision, it impliedly accepts the reasoning behind that decision. A good tribunal, as this one was, leaves the claimant in no doubt whatsoever as to the basis and reasoning of its own decision.

Nature of the arrangement

22. What was required by CH/0627/2002 (see 18.2) is that "the whole nature of the arrangement must be considered". Thus, the representative's complaint that the tribunal failed to give proper consideration to the *history* of the arrangement is misconceived. By its comprehensive findings of primary fact, the tribunal fully considered the nature of the arrangement made, which included the history. It is noted that William was staying in the house when he took on the mortgage. It is also noted by the tribunal that investigations by the council following a claim in June 2000 is what led to a reappraisal of the claimant's circumstances. Commissioner Jacobs rightly states that a tribunal must carry out sufficient investigations itself. However, what is sufficient has to be judged in the context of the materials before the tribunal already. The answers made by the claimant at interview and her highly significant affirmation at the tribunal hearing that she paid the mortgage direct to the building society, combined with the extensive findings of fact about the nature of the arrangement made, demonstrate that no further investigations were required to fit the term "sufficient".

The Human Rights Act 1998

23. In the statement of reasons, a comment is made that the tribunal was:-

".... somewhat uneasy with the fact that the representative today was employed by the same Authority as was responsible for making a decision on Housing Benefit. [The representative] made a very able and detailed submission on behalf of the appellant but, in view of the recent decision in the Gillies case, I wonder whether the appellant could view her representative as 'impartial'."

24. The tribunal was entitled to comment on a matter arising from the circumstances in front of it, but I agree with the representative that the views expressed were misguided. However, it made no difference whatsoever to the substance of the decision made. Had it done so, I would, in any event, have substituted my own decision to the same effect as that of the tribunal, so compelling is the evidence in the case.

25. As has been observed by the Court of Appeal in *Skjevesland v Geveran Trading Co. Ltd.* (reported in *The Times* 13 November 2002), although a judge has to be free from any actual or apparent bias, the representative has no such duty. The court may be able to prevent an advocate from acting in certain extreme circumstances, but some connection between a representative and an opposing party or a witness does not justify a rehearing of the case as it might do if the judge had such a connection.

26. An individual can choose whom he or she wishes to instruct and is free to judge whether he or she is satisfied with the representative's background. *Gillies* is about the possibility of the state imposing a biased doctor on the claimant, but the state has nothing to do with the individual's choice of representative. If the tribunal perceives a conflict, this could influence how it weighs points made. If this were the case, it would require to put that concern to the parties for comment and then take those comments into account.

Summary

27. The tribunal made ample findings of primary fact, addressed all relevant matters and took into account no irrelevant considerations, adequately investigated all pertinent issues, did not misdirect itself in law and fully explained its reasoning. As was said at paragraph 25 of CH/0627/2002:-

"The issue for the Commissioner is: was the tribunal *entitled* to reach the conclusion that it did on the facts that it did?"

This tribunal was so entitled and, accordingly, the appeal against its conclusion is dismissed.

(signed)
L T PARKER
Commissioner
Date: 28 November 2002