Billch 198

CH/883/2006

DECISION OF THE SOCIAL SECURITY COMMISSIONER

I must dismiss this appeal as the decision of the Liverpool appeal tribunal dated 20 December 2005 is not erroneous in law.

REASONS

1. This is an appeal by the claimant's local authority against a decision of the appeal tribunal (which consisted of a chairman sitting alone) in favour of the claimant. The claimant, who is a woman born in 1976, lives in a house owned by the claimant's mother. It appears that from 1997 until late 2004 the claimant lived in the house together with her sister; there was a tenancy agreement between the mother and the two daughters commencing on 1 May 1997 for a period of 15 years (pages 1D to 4 of the papers). The claimant's sister had claimed and received housing benefit ('HB') in respect of the rent payable under the tenancy agreement. In late 2004 the claimant's sister moved out of the house.

2. In May 2005 the claimant claimed HB backdated to 15 December 2004; she produced a copy of a fresh tenancy agreement between her mother and herself dated 15 December 2004; only the first page of it is in the papers. It provides that the property is let by the claimant's mother to the claimant for a term of "25 years beginning on December 04" at a rent of £80 per week (page 13).

3. Initially the local authority awarded HB with effect from the date of the claim; the request for a backdated award was referred to a more senior officer within the authority. As a result of his intervention, the local authority determined that HB should not have been awarded at all and that there had been a recoverable overpayment.

4. The only issue regarding the claimant's entitlement relates to the possible application of regulation 10(2)(a) of the Housing Benefit (General) Regulations 1987, which provides, so far as material, that benefit "shall not be payable in respect of ... payments under a long tenancy". A 'long tenancy' is defined in regulation 2 of the Regulations, which says that it "means a tenancy granted for a term of years certain exceeding twenty one years, whether the or not the tenancy is, or may become, terminable before the end of that term by notice given by or to the tenant or by re-entry, forfeiture ... or otherwise ....".

5. The claimant appealed; the decision was reconsidered but not changed (page 19). The appeal came before the appeal tribunal in November 2005. The tribunal adjourned the appeal to 20 December 2005, directing that in the meantime the local authority should reconsider its decision. The reason for the adjournment was to give the local authority an opportunity to consider a point raised by the tribunal; this was that the purported tenancy agreement between the claimant and her mother was not effective to create a tenancy of 25 years because it was not under seal as is required by section 52 of the Law of Property Act 1925; the tribunal considered that instead a weekly tenancy had arisen between the parties.

6. Section 52 of the Law of Property Act 1925 provides so far as material that

(1) All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed.

(2) This section does not apply to

(d) leases or tenancies or other assurances not required by law to be made in writing ....

7. Section 53(1) provides in general that no interest in land can be created or disposed of except in writing, but section 54(2) creates an exception for certain leases for a term not exceeding three years. The effect is that a lease for more than three years does not create a legal estate unless made under seal.

8. The appeal came back before the tribunal in December 2005. The local authority accepted that the tenancy agreement of December 2005 could not a grant a legal estate because it was not in the form of a deed, but submitted that the agreement was effective to create an equitable lease for 25 years. It relied on *Walsh v Lonsdale* (1882) 21 Ch D 9 and the maxim that "equity sees as done that which ought to be done".

9. The tribunal rejected the local authority's submission. Its reasoning (page 32) was that the reference in regulation 10(2(a) to 'a term of years certain' was a reference to a legal estate of a term of years absolute within the meaning of section 205 of the Law of Property Act. Not being a deed, the tenancy agreement could not create a term of 25 years. The tribunal accepted that the claimant might be able to obtain an order for specific performance of the agreement to grant such a lease but, in the absence of an order for specific performance, the agreement was ineffective to create a tenancy of 25 years. The local authority did not dispute that there was a tenancy, and the tribunal agreed, but it was not a tenancy for more than 21 years falling foul of regulation 10(2)(a).

10. The local authority applied to the Commissioner for leave to appeal. A Commissioner directed the authority to submit a fuller submission on the issue of law and the authority has done so (pages 48-51). It submits that a specifically enforceable agreement to create a legal interest creates an equivalent equitable interest; it was inconsistent of the tribunal to recognise that the tenancy agreement would be considered valid in a court of equity but was void for the purposes of the HB Regulations. The submission also referred to the obligation to register leases of more than 7 years' duration under the Land Registration Act 2002. In the event of the Commissioner rejecting its argument, the local authority asked the Commissioner to consider whether there was any tenancy at all and to give guidance to local authorities on the conflict that the Commissioner's decision would reveal between the HB Regulations, the Law of Property Act and the Land Registration Act.

11. The Commissioner granted leave to appeal (page 75). The Secretary of State for Work and Pensions accepted an invitation to intervene in the appeal and has made a submission (pages 84-89). His counsel explains that, while payments of rent under a 'long tenancy' are not eligible for housing benefit, such payments are included as eligible housing costs for the purposes of income support; a claimant can thus be

eligible for one or other benefit, depending on the length of the lease . The Secretary of State goes on to submit that, because it had failed to create a legal estate, the tenancy agreement had failed to create a 'long tenancy' within the definition in the Regulations, and accordingly the claimant was eligible for housing benefit. He also argues that the agreement failed to create a term certain (another element in the definition of a long tenancy) as it failed to specify the day in December 2004 on which the term started. He suggested it was nevertheless likely that a weekly periodic tenancy existed.

12. The local authority responded (pages 92-95) pointing out that an equitable lease was a lease for the purposes of the Regulations, which did not require registration with the Land Registry; local authority HB departments ought not to be burdened with considering whether a particular tenancy agreement is valid, but should be able to take the agreement at face value and apply the Regulations.

13. The issue in the appeal is whether the words in the General Regulations 'a tenancy granted for a term of years certain exceeding twenty one years' include an agreement to grant such a tenancy where the agreement fails to create a legal estate by virtue of not being under seal but (on the face of it) equity would enforce the agreement. The issue is complicated by the fact (noted by the tribunal) that the Regulations use language which is similar to the terminology of the Law of Property Act but does not correspond exactly to it. But in my judgment the tribunal was correct in its conclusion that equitable interests of this sort are not included.

14. At one level the competing arguments are almost evenly matched. The regulation speaks of a 'tenancy granted' for a term of 21 or more years and it is undeniable that the present agreement fails to create such a tenancy because it purports to create a term of more than 21 years but is not under seal. On the other hand (as the local authority retorts) the regulation does not expressly say that there has to be a legal estate at common law; there is on the face of it here a specifically enforceable agreement by the claimant's mother to grant such a tenancy; equity would enforce the agreement and, by the maxim that equity regards as done that which ought to have been done, would regard an equitable lease as already existing.

15. However, the tribunal was in my judgment right to hold that the reference in the regulation to a 'tenancy granted' is to a tenancy granted at common law, and does not include an agreement to grant such a tenancy, even if enforceable in equity, for the following reasons (which largely correspond to the reasons given by the tribunal).

16. Equity operates *in personam* and not *in rem*; that is to say, it creates rights enforceable against people, not directly against things. The proposition that a person has 'an equitable interest' in a piece of property is a shorthand way of saying that he has an equitable right, enforceable against the legal owner of the property, to make that person deal with the property in a particular way. But equitable interests are not absolute; they are dependent on a court with equitable jurisdiction being prepared to grant an order of specific performance. Orders of specific performance are discretionary and not automatic and the right to one can be lost in various ways, such as acquisition of the legal estate by a *bona fide* third party in certain circumstances or by the conduct of the person seeking to enforce the right (such as his breach of the agreement he seeks to enforce).

17. For this reason, the maxim that 'equity sees as done that which ought to have been done' only applies in courts which have jurisdiction to grant specific performance. In *Foster v Reeves* [1892] 2 QB 255 the Court of Appeal rejected the proposition that, if equity would grant specific performance of an agreement, then 'the case must be treated in all courts as if a decree of specific performance had already been made'. That case concerned an agreement to grant a lease which had not been made under seal and was therefore ineffective at common law; the Court of Appeal held that a county court, which did not have jurisdiction to grant specific performance of the agreement, did not have jurisdiction to enforce a claim for rent which would only be due under the agreement *if* it were specifically enforced. Fry LJ observed that "The question whether specific performance would be granted in any case is an inquiry which might involve difficult questions of law and fact; and a county court judge, having determined these questions, would not be entitled to decree specific performance, but only to say that some other court would do so. I should not infer that this was a course likely to have been intended by the legislature".

18. Though local authority decision-makers, appeal tribunals and Commissioners have power to take cognisance of principles of equity as well as those of the common law, they do not (as the tribunal rightly observed in the case of appeal tribunals) have power to make orders of specific performance between claimants and their landlords. By parity of reasoning to that of Fry LJ, I do not consider that the maker of the Housing Benefit (General) Regulations intended that they should be required to investigate whether specific performance of such an agreement would be granted by a court having equitable jurisdiction. When the Regulations refer to 'a tenancy granted', they refer in my judgment only to a tenancy effectively granted at common law. The tribunal was therefore not wrong to hold that the position was different in the tribunal from the position in a court having jurisdiction to grant equitable remedies.

19. I am aware that in CH/3586/2005 a Deputy Commissioner was prepared to assume that the definition of a long tenancy did not include the requirement that the grant should create a legal estate. However, the Deputy Commissioner found that the agreement in that case was not a long tenancy for other reasons, and it was unnecessary for her to consider the law as closely as I have done.

20. I have sympathy with the local authority's argument that local authorities ought to be able to take a tenancy agreement 'at face value' and not have to consider extraneous legal issues raised by provisions such as section 52 of the 1925 Act. But I do not consider that that is how the HB Regulations work. A local authority administering HB is required to determine whether a particular periodical payment falls within one of the categories in regulation 10(1) and is not in one of the categories excluded by regulation 10(2). This inevitably requires the authority to do more than merely note the existence of a tenancy agreement (and the existence of a tenancy is not, of course, a requirement of regulation 10(1)).

21. Moreover, the HB regime (which is more generous than income support because of the 'taper' provision in section 130 of the Social Security Contributions and Benefits Act 1992) is – putting it broadly – designed to cover the periodical payments that a person is required to make in order to live in a property which he does not own; other expenses of occupation of a property, and expenses incurred by owners of property, are met (if at all) by income support. The provisions on long tenancies in regulation 10(2)(a) read with

regulation 2 seem to me to be designed to set an (inevitably arbitrary) dividing line between claimants who are not in economic terms the owners of the property they occupy and those who are: long leaseholds are typically acquired in return for a premium which is more significant financially than any ground rent, have a capital value, are bought and sold and the holders of the leasehold interest - though they are in law tenants - are normally regarded as temporary owners of the property. It seems to me that the regime applied to owners is not intended to be applied to claimants unless they actually hold a long term interest of a sort which typically has a capital value; that will not be the case in respect of a tenancy agreement which is not under seal unless the agreement is specifically enforceable, and for the reasons given above that is not a matter upon which HB decision makers can form a conclusion.

22. I do not therefore need to decide whether the tenancy agreement here was not a long tenancy for the alternative reason suggested by the Secretary of State: that the term was uncertain as the day in December 2004 on which the term started was not stated. My tentative view is that the term would be construed as starting on 1 December, but it is unnecessary to reach a firm conclusion on the point.

23. The local authority's submissions refer also to the requirements of the land registration legislation, and ask for guidance as to them. Though these did not form part of the tribunal's reasoning, and I have not had the benefit of submissions on the point, I offer the following tentative observations.

24. By virtue of sections 4 and 7 of the Land Registration Act 2002, a lease for more than seven years of unregistered land, even if made by deed, is ineffective to create a legal estate but has effect 'as a contract made for valuable consideration to grant or create the legal estate concerned'. This means that it creates an equitable interest only. By section 27, a lease for more than 7 years of registered land likewise 'does not operate at law until the relevant registration requirements are met'. It therefore seems to me that, like leases for more than three years (and certain leases for not more than three years) that are not made under seal, leases for more than 7 years that are not registered will, at most, take effect in equity only. This means that they do not amount to a 'tenancy granted' within the meaning of the General Regulations.

25. In all those cases, therefore, a decision-maker will have to conclude that no tenancy in the terms of the document in question exists; this may be relevant both to possible exclusion of the lease from eligibility for HB pursuant to regulation 10(2)(a) and also to whether the claimant is a person liable to make payments. However, as the tribunal; found to be the case here, there may well be a periodic tenancy in existence at common law. If so, then on the face of it the tenant will be liable for rent so long as neither party has given notice to terminate the periodic tenancy (the claim that failed in *Foster v Reeves* was for an instalment of rent for a period after the tenant had given notice to quit; it was not due at common law, in the absence of specific performance of the mutual agreement to grant and take a lease for a longer period).

26. The local authority has asked me to consider whether there was any tenancy at all in this case. As to that, the tribunal found that there was a weekly tenancy and the only issue can be whether that finding involved an error of law. I do not see that it can. The tenancy agreement itself indicated that the parties intended to create a tenancy at a weekly rent, and I can see no grounds for supposing that there was not an intention to

grant a tenancy at a weekly rent. The only thing that the agreement failed to do at common law, for want of a seal, was to create a fixed term of 25 years.

(signed on the original) **Nicholas Paines QC**
Deputy Commissioner

10 November 2006