

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal to the Commissioner is disallowed. The decision of the Barnsley appeal tribunal dated 21 January 2002 is not erroneous in point of law, for the reasons given below, and therefore stands.

2. The legal reasoning of the appeal tribunal in this case went wrong in a substantial way, but the result reached was in my judgment the only one which could have been reached on the application of the correct legal approach. Therefore I have disallowed the appeal to the Commissioner rather than set the appeal tribunal's decision and substitute a decision to the same effect.

3. The appeal tribunal was concerned with the claim for housing benefit made on 26 February 2001. The claimant and her husband lived in a house owned by her sister, whom I shall call Mrs B. One of the reasons why Barnsley Metropolitan Borough Council (the Council) disallowed the claim on 29 June 2001 was that the claimant had been an owner of the property within the previous five years, as well as that the tenancy arrangement was considered not to be on a commercial basis.

4. On the first ground, regulation 7(1)(h) of the Housing Benefit (General) Regulations 1987 is relevant:

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

...

(h) he previously owned, or his partner previously owned, the dwelling in respect of which the liability arises [and less than five years have elapsed since he or, as the case may be, his partner, ceased to own the property, save that this subparagraph shall not apply] where he satisfies the appropriate authority that he and his partner could not have continued to occupy that dwelling without relinquishing ownership."

The words in square brackets were added, with some other words being omitted, with effect from 21 May 2001.

5. In regulation 2(1) "owner" in relation to a dwelling in England and Wales is defined, unless the context otherwise requires, as:

"the person who, otherwise than as a mortgagee in possession, is for the time being entitled to dispose of the fee simple, whether or not with the consent of other joint owners."

6. The appeal tribunal made very clear findings of fact, which are accepted as describing the circumstances accurately:

"On 18 May 1995 the Appellant took out letters of administration to the estate of her mother jointly with her sister, [Mrs C]. The Appellant's mother had died without leaving a will and the Appellant and her 2 sisters, [Mrs C] and [Mrs B], were equally entitled to share their mother's estate. The estate included the property [in question].

The Appellant and [Mrs C] took out letters of administration because their sister lived in Holland. In that capacity they attempted to sell [the property] but were unable to do so. It was then agreed that the house would be sold to [Mrs B] and a transfer of property took place to [Mrs B] on 17 October 1996. By that transfer, the Appellant and [Mrs C] transferred the beneficial ownership in the property to their sister, together with their respective beneficial shares in the property.

The Appellant and her husband then became tenants of [the property], the landlady being [Mrs B]."

7. The appeal tribunal decided that the claimant had previously been a co-owner of the property and therefore was not entitled to housing benefit because she was treated as not liable for rent under regulation 7(1)(h). The statement of reasons referred to the definition of owner in regulation 2(1) and continued:

"It is the Appellant's beneficial ownership of the property which is relevant. The fact that she was a joint administrator of her mother's estate and one of the persons who owned the property in that capacity until the sale to [Mrs B] is not material. In that capacity, she held the property upon trust for the persons who were entitled under the intestacy provisions. It was by chance that she was an administrator of the estate and I accept that she took on this task with [Mrs C] because their other sister, who was equally entitled to the estate with them, lived in Holland. However, the point which is material is that the Appellant was entitled to a one-third share in [the property] from the date of her mother's death until the time that it was sold to her sister [Mrs B]. She was therefore a previous owner of the property because she was entitled to dispose of the fee simple. As a person entitled to one-third share of the property under the implied trust for sale related to it, she was entitled to call for a sale of it."

It was noted that the proviso at the end of regulation 7(1)(h) did not help the claimant because she was not living in the property at the time when she ceased to own it.

8. The claimant now appeals to the Commissioner with the leave of the chairman of the appeal tribunal. When granting leave, she wrote that there was "an argument that the appellant, as a joint owner, was not an owner for the purposes of the regulation". That was the point raised in the application for leave to appeal.

9. The representative of the Council, in the written submission dated 15 May 2002, submitted that the appeal tribunal's decision had been right. Paragraphs 4 and 5 were as follows:

"4. As joint administrators the Appellant and her sisters were 'entitled to dispose of the fee simple' albeit in accordance with the rules on intestacy. At para 341 of Volume 17(2) (2000 Edition) Halsbury's Laws states: 'The entire ownership of the property comprised in the estate of a deceased person, both legal and equitable, which remains unadministered is in the deceased's legal person representative for the purpose of the administration. He has full control of all the items making up the state and can give good title to them.' At para 345 *ibid* it is stated that 'A joint representative is regarded as a single person'.

5. Moreover, as the only beneficiaries entitled to the entire estate, the Appellant and her sisters were entitled to call for the transfer of [the property] to themselves or for its sale under the implied trust for sale. Regulation 2 makes it clear that it is immaterial whether the Appellant was entitled to act alone or required the consent of her sisters."

10. Following a "no comment" reply from the claimant's representative, Mr Young of Mexborough & District Citizens Advice Bureau, Mr Commissioner Bano on 25 October 2002 directed an oral hearing of the appeal and also asked the Secretary of State for Work and Pensions whether he wished to be joined as a party to the appeal. The Commissioner asked a question whether the definition of "owner" in regulation 2 of the Housing Benefit Regulations was intended to be exhaustive.

11. The Secretary of State did express the wish to become a party to the appeal, and so became the second respondent. A representative made a written submission dated 20 December 2002. The submission did not support the appeal. It was submitted that the definition of "owner" in regulation 2 was intended to be exhaustive for the purposes of construing any reference to related concepts, such as "owned", "own" and "ownership" through the Housing Benefit Regulations. Neither of the other parties had any further comment.

12. The hearing took place on 15 July 2003 at Doncaster County Court. The claimant was present, represented by Mr Young. The Council was represented by Mr McKenzie, a solicitor employed by the Council. The Secretary of State was represented by Mrs Haywood of the Office of the Solicitor to the Department for Work and Pensions. Although I am grateful for everyone's attendance, the submissions did not really add anything to what had already been put in writing. In particular, Mr Young did not put forward any submissions of law.

13. The legal position as I see it is as follows. The definition of "owner" in regulation 2(1) of the Housing Benefit Regulations applies in the Regulations to the use of that word, and cognate expressions such as "own", "owned" and "ownership", unless the context otherwise requires. Although its application in regulation 7(1)(h) produces results which might be described as capricious or harsh, I can see nothing in the context to indicate that the intention in regulation 7(1)(h) was to do anything other than adopt the definition in regulation 2(1). I note

that in *R v Housing Benefit Review Board for Sedgemoor District Council, ex parte Weaden* (1986) 18 Housing Law Reports 355, no argument was raised that the regulation 2(1) definition did not apply to the counterpart of regulation 7(1)(h) in the 1982 Regulations.

14. The formula in the definition in regulation 2(1) might be thought rather odd. It uses the very specific legal term "fee simple". This refers to the legal estate which can be held in freehold land. It denotes legal ownership, rather than any equitable rights which might exist because of the existence of an express or implied trust. Put very simply, where there is a trust of freehold land, the trustee or trustees hold the fee simple, the legal interest, but for the benefit of the person or persons in favour of whom the trust has been imposed. The latter are the beneficiaries. Since, subject to the terms of the trust and the general law, the beneficiaries are entitled to the profits from the land or the proceeds of sale if it is sold, they are said to have the beneficial interest in the land.

15. One must then ask what "entitled to dispose of the fee simple" means. It seems to me that the primary meaning must cover the person or persons who hold the fee simple, ie that legal estate. It is that person or persons who will have to transfer the fee simple to anyone else and thereby dispose of it. I note that in *R v Sheffield Housing Benefits Review Board, ex parte Smith* (1994) 28 Housing Law Reports 36 (which was not cited at the oral hearing), Blackburne J gave the opinion that the expression was not "confined to a person in whom, whether alone or with others, the legal estate to the freehold dwelling is currently vested" (page 47). But he also considered that the expression did not extend to a person whose only interest in the dwelling was "as a beneficiary entitled, if and when the trusts affecting it should be fully executed, to share in the ultimate net proceeds of sale". The fact that such a person in combination with all the other beneficiaries might in law be able to bring the trust to an end and compel the trustees to dispose of the freehold interest did not alter his conclusion. Blackburne J expressly recognised that the expression of those opinions was not necessary to the decision in the case before him. Nor were the opinions expressed by Kennedy LJ in *Fairbank v Lambeth Magistrates' Court* [2002] EWHC 785 (Admin), 25 April 2002. There the definition of "own" was found not to be relevant to the question of whether the claimant had committed the criminal offence of making a statement or representation which he knew to be false when omitting from a claim form a house registered in his name which he said that was bought with his father's money and held entirely on resulting trust for the father. But Kennedy LJ suggested that even in such a case the trustee would be the owner within the meaning of the definition in regulation 2(1), regardless of having to consult beneficiaries in order to sell. It was the trustee who was entitled to sell.

16. Those consistent expressions of opinion seem to me well-founded and in accordance with the general principles of land law and trusts. In the situations described the trustee or trustees are within the meaning of a person entitled to dispose of the fee simple, the freehold legal estate, whether or not any other persons might also be within the meaning.

17. However, the submission made by the Council goes further. The principle stated in the extract quoted from Halsbury's Laws is that, while the estate of a deceased person is still being administered the personal representatives of the estate have the complete ownership of the

property in the estate, so that there is no separation of legal and beneficial ownership. Section 1(1) of the Administration of Estates Act 1925 provides that all land owned by the deceased vests in the personal representatives. To spell that out a little more, although in the case of an intestacy the administrators hold the property in the estate on a statutory trust for sale, there is high authority that during the course of administration those who are entitled to the estate under the intestacy rules do not have any beneficial interest in any specific property (see *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694 and *Eastbourne Mutual Building Society v Hastings Corporation* [1965] 1 WLR 779, whatever the answer might be where there is a will which specifically bequeaths property to a person: R(IS) 1/01). Once the process of administration is complete, and it is known that the property is not required to meet debts, expenses or liabilities of the estate, the administrators then become trustees. To be able to show a good title to land so as to be able to transfer it, they should execute an assent, either to vest the property in themselves as trustees or to transfer it to the person or persons entitled under the intestacy rules.

18. Applying those principles to the definition of "owner" in regulation 2(1) of the Housing Benefit Regulations would produce the answer that during the administration of an estate, the only persons entitled to dispose of the fee simple are the administrators. It would be quite possible that the fee simple would have to be disposed of during the administration, to meet debts or other costs or liabilities. Once the administration was finished, and if property became vested in the administrators as trustees, the principles in paragraphs 14 to 16 above would apply. This could produce a potentially very unfair result. As the chairman of the appeal tribunal pointed out, if someone with no entitlement as next of kin merely happens to agree to be an administrator of an estate on an intestacy, there seems no reason of public policy (in particular the avoidance of abuse of the housing benefit scheme) or of justice or logic why the person should be denied entitlement to housing benefit if he or she later takes on the tenancy of a dwelling which was part of the estate.

19. However, I do not have to decide conclusively whether that result is required by the plain words of the Housing Benefit Regulations or whether ownership as a personal representative of the estate of a deceased person, rather than in a personal capacity, could somehow be taken out of the scope of the definition in regulation 2(1). That is because in the circumstances of the present case, whatever the proper legal footing, the claimant is caught as a previous owner of the dwelling in question and excluded from entitlement by regulation 7(1)(h). She is not helped by the five-year limit introduced with effect from 21 May 2001. On the basis adopted below, the claimant was an owner immediately before 17 October 1996, so that five years had not expired by 29 June 2001, the date of the decision under appeal.

20. The claimant was undoubtedly one of the two administrators of her mother's estate for a period. If the principles relied on by the Council apply, she was an owner within the definition in regulation 2(1) for that period. And for that period she also had a right in her personal capacity as a next of kin that the estate be properly administered. Under the terms of the definition it did not matter that there was another co-owner. But as I do not know when the period of administration came to an end, it is possible that that period was outside the five-year limit as applied at some date from 21 May 2001 to 29 June 2001.

21. It appears from the form of the transfer to Mrs B on 17 October 1996 (page 15) that the title to the property had previously been transferred to all three sisters. The transfer was made on 17 October 1996 from all three of them to Mrs B on consideration of her paying the claimant and Mrs C £4,000 each. The claimant and Mrs C must therefore either have executed an assent vesting the property in themselves as trustees and then transferred the property, both the legal and the equitable interests, to all three sisters or have by an assent directly vested the property in all three of them as the persons entitled under the intestacy rules. In either case, at the crucial point immediately before the transfer to Mrs B of 17 October 1996, the claimant had a one-third share of the legal and beneficial ownership of the property under a joint tenancy. The legal estate would have been subject to the statutory trust for sale. Those circumstances were certainly enough to bring her within the definition of "owner", and again the existence of co-owners who would need to consent to the transfer of the fee simple did not alter that result. Thus for a period within five years of the latest date which the appeal tribunal could take into account the claimant had been an owner of the relevant dwelling and was caught by regulation 7(1)(h).

22. In the circumstances of the case, the appeal tribunal's decision was the only one in law available to it. Its reasoning was flawed, because it relied on the claimant's entitlement to a share of the property on the distribution of her mother's estate as indicating ownership and adopted the approach that only beneficial ownership was relevant. But as I have not had to reach a definitive conclusion on the legal principles applicable in all circumstances, I disallow the claimant's appeal on the basis that the appeal tribunal's decision was correct in law even if the reasoning was not.

(Signed) J Mesher
Commissioner

Date: 18 July 2003