

SOCIAL SECURITY ACTS 1992-2000

**APPEAL FROM DECISION OF APPEAL TRIBUNAL
ON A QUESTION OF LAW**

DECISION OF THE SOCIAL SECURITY COMMISSIONER

<i>Appellant:</i>	<i>[the claimant]</i>
<i>Respondent:</i>	Poole Borough Council
<i>Claim for:</i>	Housing Benefit
<i>Appeal Tribunal:</i>	Bournemouth
<i>Tribunal Case Ref:</i>	
<i>Tribunal date:</i>	22 March 2004
<i>Reasons issued:</i>	1 May 2004

1. This claimant's appeal is dismissed, as in my judgment there was no material error of law in the decision of the Bournemouth appeal tribunal consisting of a chairman Mr P J Norman sitting alone on 22 March 2004, confirming the local authority's refusal of the claim for housing benefit submitted on behalf of the claimant by his wife's son on 11 July 2003. I do not think there is any answer to the point on which the tribunal chairman based his decision, namely that the rent liability in respect of which the claim was made (to pay £600 a month, under the terms of a letter dated 18 August 2003 drawn up by the son and signed by the claimant) was not one for which housing benefit could be claimed as any tenancy thereby created was a "long tenancy" excluded by regulation 10(2)(a) **Housing Benefit (General) Regulations 1987** SI No. 1971. In addition there is in my judgment no doubt that the undisputed evidence before the tribunal showed the claimed liability to have been created in order to take advantage of the housing benefit scheme, so the council had also been right to reject the claim on that alternative ground under regulation 7(1)(1) *ibid*: the chairman was therefore wrong to accept the argument to the contrary for the claimant on that point, though this made no difference to his actual decision or the outcome of the case.

2. The claimant, a man now aged 65, and his wife are both profoundly deaf and disabled. They depend for the management of their affairs almost entirely on the claimant's stepson (his wife's son by a previous marriage), who has acted as their representative throughout these proceedings and handled all the material transactions on their behalf. He was himself due to retire on a service pension at the end of last year after 22 years' service in the Royal Marines. Unhappily his own wife and son also suffer from a degree of disability so the burden on him of planning for the care the entire family

needs, both now and in the future as they all get older, is a heavy one. He says himself that his mother and stepfather are totally reliant upon support in all aspects of everyday life, and that is a responsibility that has fallen on him. Of his stepfather he says:

"[The claimant] as previously stated has a limited understanding of the written word. He is aware that I am trying to help them both in this process, but as for a full understanding of the documentation and the mechanics he will never have that due to his disability."

There is no suggestion that in the arrangements he has made and caused his mother and stepfather to make, the son has acted other than in complete good faith for the purpose of making the best provision possible for the entire family. Nor is there any suggestion of the arrangements having been other than entirely open and above-board at all times.

3. There is no dispute or lack of clarity over what was in fact done, and the argument on behalf of the claimant between the son and the local authority is simply over its legal effect. That is a question of law under the housing benefit regulations and is the only question before me: the son's various further complaints about the level of advice and assistance provided to him by members of the Council's staff, and his suggestion that there has in some way been discrimination against his mother and stepfather as disabled people, are outside the scope of this appeal.

4. The material facts which as I say are not in dispute appear from the chairman's findings and the agreed documents. In early 2002 the claimant and his wife were living in their own house in Canford Heath, Poole, which they owned subject to a small mortgage with the Abbey National. The claimant was at that time still employed as a machine operator in the Council workshop for disabled workers where he had worked for some years, earning something over £150 a week; and his wife had a small occupational pension in addition to the state retirement pension she was already drawing. They each also were getting disability living allowance at the middle rate for care and lower rate for mobility, and had no other savings or assets to speak of.

5. In early 2002 after the claimant's wife had a fall and broke her arm it was decided that this house, which had stairs, was no longer suitable for them and the son organised for them to sell it and move into a bungalow which was purchased nearer his own home in Oakdale, Poole. The net sale proceeds of the parents' house, £76,862.54, were all applied towards the cost of the new bungalow which was purchased by the son and his wife. A solicitor's letter at the time recorded his instructions that this use of the sale proceeds was to be by way of gift: page 85. The purchase price paid for the bungalow on completion on 20 May 2002 was £122,000 and all but a small amount of

the difference was provided by a new mortgage for some £43,500 taken out by the son and his wife with the same lender. The monthly payments on the new mortgage were some £200 for interest plus something over £160 for capital repayment: see the following year's statement at page 96.

6. The claimant and his wife moved into the bungalow and began paying monthly amounts by two separate standing orders in favour of the son and his wife for £200 plus £105, which thus covered the whole of the interest on the new mortgage plus getting on for two-thirds of the capital repayments. No tenancy or other agreement was entered into to record what, if any, legal arrangements were intended at this time between the four of them about the basis on which the claimant and his wife were occupying the bungalow.

7. Matters continued in that way until early in the following year when the claimant applied for and obtained working tax credit, which is a means-tested benefit based on income. As a disabled person with relatively low earnings he was awarded £1,827.39 for the year from 6 April 2003, on the basis of a combined income for himself and his wife for the relevant preceding tax year of £15,503 (excluding the disability living allowance which does not count for this purpose): pages 43 to 44. Shortly after that the son started making enquiries of the council about the possibility of further means-tested assistance for his mother and stepfather in the form of housing benefit and council tax benefit.

8. After what appear to have been numerous discussions with individual officials about the eligibility requirements for housing benefit (which of course include, as well as a means test, a liability for rent under a tenancy agreement) he submitted a letter dated 7 July 2003 (headed "Draft Copy": pages 49-50) to the council in the following terms:

"Poole Borough Council, C/O Mrs Smythe

Dear Mrs Smythe

Reference: Tenancy Letter pertaining to [the claimant and his wife]

As soon as the authority to commence date and rent figure are forwarded the following letter subject to your approval will be completed and submitted.

1. I Mr [the son] the landlord agree to let [the bungalow] in its entirety to Mr and Mrs [the claimant and his wife] with effect from (date authority granted) until such time that they wish to terminate the agreement or both parties are deceased.

2. Rent at (to be set in line with Housing Department recommendation) to be paid from (date authority granted) monthly until termination of this agreement as stated above.

3. All charges for water, sewerage, gas, electricity, telephone and Council tax pertaining to [the bungalow] are the sole responsibility of the tenants.

We [the claimant and his wife] agree to the tenancy as stated above.

[Here the letter bore the signatures of both the claimant and his wife].

Should this be acceptable, please let me know the start date and approved rent figure and I will get the document signed and then submit the completed agreement.

Yours sincerely

[the son]"

9. Some weeks later he submitted a completed direct payment declaration dated 3 August 2003 signed by the claimant, his wife and himself to authorise payment of their housing benefit to him as landlord, and after that a further letter dated 18 August 2003 to a different official of the Council saying:

"1. Firstly, I would like to take this opportunity to thank yourself and all the other members of your department that were involved in assisting me in making this claim on behalf of [the claimant and his wife]. As you are aware both my stepfather and mother are profoundly deaf and in need of constant assistance in order to maintain their minimal level of independence within the community. The authorisation of this claim will now ensure their future stability at [the bungalow] as the financial burden of a second mortgage which I placed upon myself in a vain attempt to personally ensure their stability will now be alleviated. Thanks again.

2. Please find attached the completed Tenancy Letter."

10. That was accompanied by a completed tenancy agreement letter bearing the same date, 18 August 2003, and signed by the claimant, his wife and the son: page 56. It was in the same terms as the earlier letter forwarded as a draft except that in paragraph 1 the agreement for letting to the claimant and his wife was stated to be "with effect from 07 July 03 until such time that they wish to terminate the agreement or both parties are deceased" and in paragraph 2 the rent was specified as "£600 to be paid from 07 Jul 03 monthly until termination of this agreement as stated above."

11. The completed housing benefit claim form had been submitted with the first letter and received on 11 July 2003: pages 1 to 19. It was completed by the son on behalf of his mother and stepfather and had stated the rent payable by them to be £600 months "W.E.F. start date on verbal OK – TELCON Mr [the son] /Mrs Smythe – OK pre tenancy agreement. See Part 14". In answer to the questions "What sort of tenancy do you have? How long is the tenancy for?" the answers given were "Permanent tenancy. Permanent."

12. On Part 14 of the form (“Anything else you need to tell us”) the son wrote:

“Authority to rent property sought as both parents are profoundly deaf and they were moved to [the bungalow] with a view to providing long term care as the location is close to my residence. The financial burden has forced this action as discussed fully with Mrs Smythe. ...”

The declaration at the end of the form was signed by both the claimant and his wife, with the son also signing to confirm that he had filled in the contents of the form but these had been explained or translated into sign language for the claimant and his wife and the information was confirmed accurate.

13. On 3 September 2003 the officer considering the completed housing benefit claim decided it had to be disallowed (pages 64-65) on the ground that the rent liability claimed had been created in order to gain housing benefit and thus fell within regulation 7(1)(l) by which:

“Circumstances in which a person is to be treated as not liable to make payments in respect of a dwelling

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

(l) ... the appropriate authority is satisfied that the liability was created to take advantage of the housing benefit scheme ...”

In the appeal on behalf of the claimant against that rejection the council relied additionally on the point that the letter of 18 August 2003 on which the claim had been based was an agreement for the lives of the claimant and his wife, and on the authority of the decision of a Commissioner in case **CH 2743/03** that constituted a “long tenancy” for which under regulations 2(1) and 10(2)(a) no housing benefit could be payable.

14. The rejection of the claim was confirmed by the tribunal chairman on the second of those grounds, though not the first. In his statement of reasons issued to the parties on 1 May 2004 at pages 106 to 110, he referred to section 149(6) **Law of Property Act 1925** under which a lease for life or for lives is made to take effect as a leasehold term of 90 years, and held that this applied to the tenancy agreement letter of 18 August 2003 with the result that it counted as a “long tenancy” excluded from the housing benefit scheme by regulation 10(2), saying,

“Unfortunately for the Appellant it is this provision that entitles the Local Authority to refuse the application for housing benefit and looking at the nature and terms of the Appellant’s tenancy I must follow the decision referred to in CH/2743/03 ...

it is clear that the parties intended the tenancy to be permanent. The Appellant's application for housing benefit refers to the tenancy as being permanent... the Appellant put permanent tenancy and this surely must have been the correct intention bearing in mind the circumstances of the case and the fact that the landlord used the Appellant and [his wife's] money to part finance the purchase of [the bungalow]."

15. He accordingly confirmed the local authority's rejection of the claim on that ground despite having held in the earlier part of his decision that its original ground of rejection had been wrong. On that he said there had been an initial liability to pay rent created at the outset when the monthly payments of £305 began to be made, and the appellant's dominant purpose had been to live in accommodation near his wife's son and daughter-in-law. Although he found the son "did not negotiate an increased rent with the Appellant and [his wife] directly" at the time he drafted the tenancy letter and submitted the housing benefit application on their behalf, the proposal to increase the rent to £600 per calendar month was not unreasonable nor was that high in comparison with market rents prevailing in this area of Poole. The chairman found there was no "dominant intention to abuse the system" and that regulation 7(1)(l) did not apply.

16. On the point about the length of any tenancy created by the agreement letter of 18 August 2003, I have to accept the written submissions on behalf of the Council that the tribunal chairman's conclusion was the correct one in law, and his reasoning unimpeachable. If that letter was effective to create a proper legal liability at all (and it was a necessary part of the claim for housing benefit that it was), then its only possible construction was that the claimant and his wife had the right to remain in the property as tenants at the stated rent of £600 a month throughout their joint lives, and the survivor for the rest of his or her life, or until they (and not the landlord) chose to terminate the agreement. There is no escape from the conclusion that such a tenancy is in law one for life or for lives, accurately described by the son himself as "permanent" so far as the claimant and his wife as named tenants were concerned. In law such a tenancy takes effect as one for a term of years longer than 21 years, so as to count as a "long tenancy" within the definition in regulation 2(1) of the Housing Benefit Regulations: see section 149(6) **Law of Property Act 1925**. Since under regulation 10(2) housing benefit rent allowances are not payable for rent under "long tenancies" (apart from shared-ownership tenancies granted by housing associations or authorities, which this is not) the nature of the tenancy stated to have been created on 18 August 2003, in respect of which the claim to benefit was made, is necessarily fatal to the claim. It does not I am afraid matter for this purpose that the son did not realise all the legal implications of the type of liability his document purported to create: there can be no doubt, as the tribunal chairman found, that he plainly did intend it to create a "permanent" tenancy lasting for the duration of the lives of the claimant and his wife.

17. I would add that I have grave doubt whether the agreement set out in that letter could actually be enforced against the claimant and his wife if it were ever to be disputed by them or on their behalf, in view of the circumstances in which it was entered into and the son's position of influence in relation to them. There must for that matter be similar doubts over the whole arrangement by which the entire value of their previous house was handed over, and most of the mortgage payments on the new bungalow in the son's name actually funded by them, should it be in anyone's interest to challenge it. But for *present* purposes it could do the claimant's case no good to argue against the effectiveness of the arrangements: to get the housing benefit claim on its feet at all it had to be shown that the property belonged to the son as landlord, and that the claimant was legally liable to him as tenant for the rent of £600 a month under the agreement alleged.

18. As to the purpose for which that agreement of 18 August 2003 was entered into I have also to accept the submissions on behalf of the council that here the chairman misdirected himself, and reached a conclusion that no reasonable tribunal properly directing itself and taking account of the evidence could have reached, when he held the liability under that agreement had not been created to take advantage of the housing benefit scheme. The sole liability to pay rent that was relied on for the purposes of the housing benefit claim was the liability to pay £600 a month purportedly created by the agreement letter dated 18 October 2003. The tribunal chairman in my judgment plainly misdirected himself by focusing not on the purposes for which that document and that alleged liability had been brought into being, but on what he inferred must have been the original purpose of the move and the standing order arrangement for £305 a month the previous year, at which time no housing benefit claim appeared to have been in prospect.

19. The important question for regulation 7(1)(l) is the purpose for which the actual liability by reference to which housing benefit is claimed was created, and it has I am afraid to be an irresistible inference from the son's actions and the letters and documents he produced at the time that his *sole* purpose in producing the tenancy agreement letter of 18 August 2003 and getting his stepfather and mother to sign it was to enable the housing benefit claim by reference to the liability of £600 a month provided for in that letter to succeed. There was simply no other indication in the evidence before the tribunal of the creation of that letter, and the liability for which it provided, having been for any other purpose at all.

20. It does not in my judgment make any difference whether that letter replaced some different liability to be inferred from the original arrangement and the making of the £305 standing order arrangement the previous year, though I personally doubt

whether there was evidence of an intention to create a legal tenancy at all at that stage as the tribunal chairman assumed. Nor I am afraid does it make any difference that the son may have been acting from the best of motives, and saw the conclusion of the agreement and the making of the housing benefit claim as the best way of enabling him to provide security and a continuing income for the entire family. Insofar as the liability relied on under the agreement of 18 August 2003 was an effective liability at all, the only reasonable conclusion the tribunal could have reached on the undisputed evidence was that it had been created to take advantage of the housing benefit scheme and therefore fell within the exclusion under regulation 7(1)(l). Although not argued before the tribunal the further point taken on behalf of the council in the course of this appeal that any liability so created also fell to be excluded under regulation 7(1)(a) because the tenancy agreement letter of 18 August 2003 was not one entered into on a commercial basis has in my judgment also to be accepted as sound.

21. For those reasons, this appeal has to be dismissed. The tribunal chairman's conclusion that the tenancy relied on on behalf of the claimant was an excluded "long tenancy" was right, and in any event his actual decision that the claim for housing benefit could not be allowed was the only one that could reasonably have been reached.

(Signed)

P L Howell

Commissioner

1 February 2005