

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the Housing Benefit Appeal Tribunal dated 6 March 2003 is erroneous in law. I set that decision aside and, as empowered by section 68 of the Child Support, Pensions and Social Security Act 2000 as read with paragraph 8(5)(a) of Schedule 7 to that Act, I give the decision which I consider the tribunal should have given which is:-

The claimant is not precluded from entitlement to Housing Benefit by virtue of regulation 7(1) of the Housing Benefit (General) Regulations 1987. The rent, within the meaning of regulations 2 and 10(1), which he pays should be calculated as a weekly amount in accordance with regulation 69 and his entitlement to Housing Benefit assessed on that basis.

2. The Housing Authority appeals against the tribunal's decision that the claimant is entitled to Housing Benefit. Leave to appeal to a Commissioner was granted on the Housing Authority's application to the chairman of the tribunal and would appear to have been granted by a District Chairman of the Appeal Service.

3. The factual background to the case is amply explained in the statement of the reasons for the tribunal's decision which is in the following terms:-

"This appeal is against a refusal of Housing Benefit. [The claimant] attended the hearing; the [Housing Authority] was represented by [presenting officer].

The arrangements under which [the claimant] occupied his home were unusual and I can readily understand why the District Council had doubts about the eligibility of these arrangements for Housing Benefit. The facts that the arrangements are unusual does not, however, necessarily bar entitlement; the provisions about Housing Benefit are drawn quite widely.

The facts are these. [The claimant and his late wife] used to live in a home of their own. Unfortunately, in 1992, they were forced to leave this and were not able to afford to acquire another home of their own. Their daughter owned a house in which she now lives. She had lived in it but her work took her abroad. [The claimant and his wife] moved in with her but shortly afterwards she went abroad with her husband and the arrangement was that [the claimant and his wife] could live in the house. They were to pay the mortgage and pay for repairs and maintenance on the house. This arrangement was to continue as long as the daughter and her husband were abroad.

The daughter and her husband are still abroad. When the arrangement was first made, none of them had expected that the work would entail them being abroad so long but that is how it has worked out.

I asked the [claimant] what the arrangement would have been if they had returned to this country. He said that they imagine that they would all have lived in that house together and would have taken stock about the financial position and probably made a fresh arrangement. That, however, is hypothetical; the reality is that [the claimant] has

honoured the arrangement made in 1992; bank statements have been produced that show that he maintained the outgoings on the mortgage.

[The claimant] applied for and was granted Council Tax Benefit some time ago. He did not apply for Housing Benefit; his wife was alive until 4 years ago. Her pension, together with his, enabled him to pay the outgoings in the respect of the house. It was only after her death and the loss of her pension that he began to experience some difficulty in meeting his obligations. He apparently mentioned this in a discussion in the District Council Office and a member of the staff suggested that he might apply for Housing Benefit. He was apparently assisted by a member of staff in completing the Housing Benefit application form.

In rejecting the application, the District Council argued that the arrangements were within regulation 7(1)(a) of the Housing Benefit (General) Regulations 1987, i.e that the agreement was "not on a commercial basis". They also made reference to regulation (1A) which is inserted into regulation 7; they also suggested that it was possible that eligibility was barred because the arrangements were to be regarded as a "long tenancy" (see regulation 10(2)(a) coupled with the definition of the long tenancy in regulation 2).

The District Council did not allege that there was no liability on [the claimant]. Nevertheless, I feel it right to comment on that and do so further below.

Many of the points made by the District Council are true. It is unusual to have payments which fluctuate depending upon mortgage interest rates, it is also unusual for the building society to send the statements of amounts due to someone in [the claimant's] position and to collect the amounts due direct from his bank account. It is true that there is no formal tenancy agreement in written form.

They state – "Despite being in receipt of Council Tax Benefit for a considerable number of years no claim for Housing Benefit was made as no truly commercial rental liability could be established. Before dealing with the question as to whether or not liability is to be excluded on the basis that the arrangements were not "commercial", I will address the question of liability. Section 130 of the Social Security Contributions and Benefits Act 1992 reads as follows:

"A person is entitled to Housing Benefit if –

(a) He is liable to make payments in respect of a dwelling in Great Britain in which he occupies at his home....."

It is, therefore, essential to be eligible that there is a legal liability. It seemed to me that, although the District Council had not explicitly raised this issue, this was more fundamental in this appeal than the issue of commerciality. The District Council touched on this obliquely when, in their submission, they stated – "liability can only be considered as a casual arrangement which would not be viable or occur with a tenant who was not a family member".

Was there legal liability here so as to come within the provisions of Section 130?

Having heard [the claimant], I came to the firm conclusion that so far as he was concerned there was a bargain he had made in 1992, which he had to honour. After his wife's death, it had begun to be a struggle to meet the outgoings but there was no question in his mind that he should fail to honour them. I asked him whether he might have contemplated asking his daughter to help or let him off the obligation but he was adamant that he not only had not done this, he would not have contemplated doing so.

It may be that, if he had ever failed to make the payments due, his daughter would not in fact have taken action in the courts against him but that is a different matter from whether she would have had the legal right to do so if she wished. My conclusion was that there was a definite bargain in 1992, that [the claimant] had regarded this as being one that he must honour throughout and he had consistently done so even though, after his wife's death, this had become increasingly difficult for him to do so.

All the ingredients for a binding agreement exist. He had the right to occupy the house, there was a settled agreement between him and his daughter and there was an intention between the two of them to create a legal agreement.

This conclusion is buttressed by the statement on page 8B by his daughter that she would not be in a position to keep the house if he failed to pay and would be forced to end the arrangement.

I turn now to the points made by the District Council which suggest to them that the arrangements were not "commercial". The main point which features in their decision letter of 5 September 2002, page 19(a) and in their submission is that the "rental liability is determined by the amount of your daughter's monthly mortgage repayments rather than by rates for similar accommodation in the private rental market".

The submission is accompanied by extracts from the relevant regulations. The District Council quote regulation 10(1)(a) which refers to "payments of, or by way of, rent". They omit sub-paragraph (b). This extends eligibility beyond what is normally viewed as rent to "payments in respect of a licence of permission to occupy the dwelling".

It seems to me that these two sub-paragraphs show clear intention that eligibility is not to be construed narrowly and restricted to what in traditional terms may be regarded as rent. Even sub-paragraph (a) uses the expression "payments by way of". Either way, it seems to me that, although unusual, payments which fluctuate in the way that they did here does not bar entitlement. In reaching the conclusion that they did, the District Council may have been misled into viewing eligible payments as restricted to what was traditionally and normally conceived of as rent. The legislation is framed in wider terms.

Regulation 7(1A) states that regard shall be had as to whether the terms upon which the person occupies the dwelling "includes terms which are not enforceable at law". There is no evidence here, in my view, that any terms were unenforceable at law.

The question was also raised as to whether the arrangements fell within the definition of a "long tenancy". This is defined as a tenancy granted for a term exceeding 21 years or one which includes provisions for perpetual renewal. This has no application here.

The District Council attached some importance to the fact that, although [the claimant] had claimed Council Tax Benefit some years ago before, he had not applied for Housing Benefit. It does not seem to me that any significance can be attached to this; his explanation that he did not do so earlier because he and his wife together were able to make the payments is a perfectly understandable reason for not claiming. Indeed, his evidence to me was that it had not occurred to him that he might be able to claim until it was suggested to him in a discussion in the District Council Office.

It is also suggested by the District Council that the arrangements were not commercial because the amount paid was below market rents. It is, however, well established that charging a low rent does not necessarily make an arrangement non-commercial and I accept a comment by the Citizens Advice Bureau on behalf of [the claimant] (at page 12D), "whilst [the claimant's] daughter could not afford to subsidise our client's housing costs, it would be unlikely that she would wish to make a profit out of him either". I accept this view.

It was for the above reasons that I allowed the appeal."

4. The Housing Authority, in its statement of grounds for appealing the tribunal's decision, accepts that the claimant has a legal liability to make the payments which he does make in respect of his occupancy of the house to which his claim for Housing Benefit relates. However, the authority disputes the tribunal's conclusion that the arrangement can be classified as commercial within the meaning of regulation 7(1)(a) of the Housing Benefit (General) Regulations 1987. The authority argues that it is required to have regard to the question of whether the arrangement between landlord and tenant is at "arm's length" or more akin to the arrangements that would exist between close relatives who generally only make contributions to their keep or household running costs.

5. The landlord's responsibilities in a commercial agreement are, argues the authority, to charge a rent at a regular figure, ensure that appliances are safe to use, maintain the upkeep of the property, obtain safety checks each year, pay the mortgage or such other liability or charge as is attached to the property and keep a record of the rent payments received. The tenant's responsibilities are to pay the rent in advance, pay for his own use of utilities, not to damage the property, not to sublet without the landlord's agreement and keep records of his payments of rent. The tenant is absolved of the obligation to pay rent if the property is found to be uninhabitable. In contrast to those obligations it would appear that under the arrangement between the claimant and his daughter the claimant pays the mortgage on the property, he pays the premium on his daughter's endowment policy and he pays for the upkeep of the property. The authority asks if the claimant would be obliged to continue to make payments if the property was found to be uninhabitable. The fluctuations in the amount which the claimant can be obliged to pay under his arrangement with his daughter is so unusual as to be an indicator that the arrangement is not a commercial one. A further indicator that the arrangement is not commercial is the fact that although the daughter could take court action to evict her father if he was not making the agreed payments it is unlikely that she would do so.

6. A further difficulty which the Authority has with this case is that it is not clear from the information provided by the claimant and his daughter what is the amount which the claimant is supposed to pay. His representative states that it is £231.53 per month (mortgage interest of £180.63 plus the endowment policy premium of £50.90). The rent certificate provided by the daughter states that the rent is £240 per calendar month. The bank statements produced to vouch the payments being made by the claimant show a payment of £273.77 per month (£222.87 for mortgage interest and the endowment premium of £50.90). A new application form submitted after the tribunal hearing has quoted a rental figure of £231.53 per month which is lower than the figures shown on the bank statements.

7. In my view the tribunal has made a valid evaluation of the evidence before it and was entitled to come to the conclusion that the arrangement between the claimant and his daughter is not one which is struck at by regulation 7(1)(a) of the Housing Benefit (General) Regulations. The unusualness of the arrangement between the claimant and his daughter does not bring it within the scope of regulation 7(1)(a) and neither does the fact that the claimant pays for things, such as repairs and buildings and contents insurance, which the landlord would normally pay. A full repairing and insuring lease of a furnished property would be unusual but not completely unknown and is not necessarily not commercial. To my mind the arrangement between the owner of a property and the occupier will be other than commercial only if it confers no benefit on the owner which is proportionate to the benefit conferred on the occupier. In this case the owner clearly benefits from the arrangement because it enables her to retain the house while she is abroad and have it occupied by somebody whom she can trust to look after it and its contents.

8. The only error which I see in the tribunal's decision is that the tribunal has not addressed satisfactorily the question of the extent to which the payments made by the claimant in return for his daughter's permission to occupy her house come within the scope of regulation 2 of the General Regulations as read with regulation 10. Regulation 2 defines "rent" as including all those payments in respect of a dwelling specified in regulation 10(1). The opening words of regulation 10(1) are:-

"Subject to the following provisions of this regulation, the payments in respect of which Housing Benefit is payable in the form of a rent rebate or allowance are the following periodical payments which a person is liable to make in respect of the dwelling which he occupies as his home – "

An important word there is "periodical". That word qualifies all of the forms of payment specified in the remainder of paragraph (1). "Periodical" as used in regulation 10(1) seems to me to indicate payments which are made at regular intervals but not one-off payments. Therefore, the regular payments of building society interest, premiums on the endowment policy and buildings and contents insurance which the claimant makes come within the scope of head (b) of paragraph (1) and probably also head (a). Regular payments for the routine checking of appliances belonging to the landlord and for the checking of the state of the buildings would also come within the scope of those heads. However, payments made as and when required for repairs and renewals would not.

9. The Housing Authority touches on that point when it argues that for the arrangement between the landlord and the occupier to be on a commercial basis the payments made by the occupier normally have the characteristic of being "regular". I take the authority to mean that

the payments must be made at regular intervals and be of the same amount. In the generality of cases where entitlement to Housing Benefit is not in issue that proposition would not be correct. It is perfectly possible for a commercial lease or licence to provide that the amount payable in respect of the occupation of premises will vary, for example by including a percentage of the profit made from the business run in the premises by the occupier. However, in the interpretation of regulation 10 it has to be remembered that the purpose of the General Regulations is to provide for the calculation of entitlement to a weekly benefit. For the occupier's payments to or on behalf of the landlord to come within the scope of regulation 10 they must, therefore, be made at regular intervals and be of an ascertainable amount so that the weekly rental figure can be calculated in accordance with regulations 69 of the regulations.

10. In this case the tribunal, having decided that the arrangement between the claimant and his daughter is commercial for the purposes of regulation 7(1), should have gone on to direct the Housing Authority to ascertain what periodical payments are being made by the claimant (I should think that there is a mixture of monthly and annual payments), apply regulation 69 to convert all of those payments to weekly amounts and assess the claimant's entitlement to Housing Benefit in the light of the aggregate weekly figure. On account of the tribunal's failure to include such directions in its decision I have set the decision aside. I have included the necessary direction in the decision which I have made in substitution for that of the tribunal. The Housing Authority should now ascertain from the claimant and his daughter exactly what regular payments the claimant makes throughout the year in respect of his occupancy of his daughter's house and make the necessary calculation.

11. For the foregoing reasons the claimant's appeal succeeds and my decision and directions are in paragraph 1 and 10 above.

(Signed) R J C Angus
Commissioner

(Date) 18 November 2003