

Buller 107

Esther

PLH

Commissioner's File: CH 3169/04

SOCIAL SECURITY ACTS 1992-2000

APPEAL FROM DECISION OF APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This claimant's appeal is allowed, as in my judgment the decision of the Leeds appeal tribunal consisting of the district chairman Mr D Kenningham sitting alone on 29 June 2004 erred in law in the way it dealt with the question of whether the claimant had deprived himself of a substantial amount of capital for the purpose of obtaining housing benefit. I set the decision aside and remit the case to a further tribunal for that question to be considered again in relation to the claim of 7 May 2002 on which housing benefit was originally awarded for the period from 13 May to 13 October 2002 inclusive.

2. The claimant is a man now aged 42, who has suffered from schizophrenia for many years and has had difficulty in coping on his own after his mother died. His condition fluctuates, depending among other things on how regularly he takes his medication; and in the words of the report from his consultant psychiatrist in evidence before the tribunal at page 100, at times he does require admission to a hospital to stabilise his mental state. In between bouts of illness requiring admission to hospital, his general level of function is reasonable in some areas. He can get by but he has lived in a general level of chaos which others would find intolerable. He has a slightly eccentric view of life and this in combination with his mental illness leads him into difficulties.

3. This appeal is principally concerned with events in the first half of 2002 at which time the claimant was living on his own in a flat in Knaresborough as tenant of a housing association. He was living on long-term incapacity benefit, disability living allowance and income support, and from March 2001 had been awarded housing benefit based on his income support entitlement. Towards the end of 2001 he came into a very substantial windfall, in the form of entitlement to a share in the estate of an aunt of his who had died. Unhappily as will be seen the arrival of comparatively substantial wealth for a person in his position living on benefits proved a mixed blessing and a destabilising influence. The claimant spent the money he received from his inheritance, and by the

time the matter came to be considered by the tribunal a couple of years later had little left to show for it and was in a substantially worse mental state, having had to be readmitted to hospital and facing eviction and homelessness as a nuisance to his neighbours.

4. The immediate background to the events giving rise to this appeal was that on 30 November and 11 December 2001 respectively the claimant received two separate cash distributions from his aunt's estate, totalling either £41,500 or £42,000: an amount of disposable capital that of course meant he no longer remained entitled to the means-tested benefits he was currently claiming. There is equally no doubt the claimant shortly afterwards understood as much, having either been advised about the relevant capital limits or found out about them for himself: since as found by the tribunal and not disputed, he telephoned the local authority on 2 January 2002 to say that he had received a substantial bequest exceeding £16,000 and no longer wished to claim housing benefit. His then current award of housing benefit was accordingly terminated, from 3 December 2001 which was the date his capital first went over the £16,000 limit as a result of the first distribution. There is no dispute about the withdrawal of that entitlement, or that the claimant then became liable to repay the authority £167.58 housing benefit he had already received for the period 3 to 16 December 2001.

5. The appeal to the tribunal arose out of the *further* claim to housing benefit he submitted only four months later at the beginning of May 2002. In that claim he stated that his capital now consisted only of £12,000 in two building societies, plus a small number of shares shown elsewhere to be worth about £2,000. On the basis of this claim (at which time he was also understood still to be drawing income support) housing benefit was awarded and paid to him for the period 13 May to 13 October 2002 inclusive, a total of £1,820.50. After a time however inquiries were made of the claimant about his capital and what had happened to it, and these eventually resulted in the decision under appeal to the tribunal, which was given on 12 November 2003.

6. By that decision the authority first determined that the £167.58 overpayment for the short period from 3 December 2001 was legally recoverable from the claimant, and that as I say is uncontroversial. It went on however to determine that the much larger amount of £1,820.50 for the period 13 May to 13 October 2002 had also been paid in excess of the claimant's true entitlement, on the stated ground that he had deprived himself of capital totalling £68,845 for the purpose of claiming benefit. He therefore had to be treated as possessing capital in excess of £16,000 for the purposes of his claim from 13 May 2002, with the result that there was no entitlement and he was legally liable to repay the amount already paid to him for that period: see pages 82 to 85.

7. The decision letter did not specify how the £68,845 of which the claimant was alleged to have deprived himself before 13 May 2002 was made up. Nor did the authority's written submission to the tribunal, which alleged only that the claimant had received capital of £22,000 on 30 November 2001, £20,000 on 11 December 2001, and another £30,735 "but the date of that payment is unknown". It then however asserted (pages 1E-1G) that the claimant had intentionally deprived himself of capital in order to claim housing benefit in that

"... as detailed above the appellant received [sic] a bequest of £79,975 in November 2001, but he says that his capital was below the limit for housing benefit purposes of £16,000 by May 2002. ... The burden of proving that a claimant no longer has capital rests with the claimant ... The decision maker does not believe that the appellant has supplied satisfactory evidence of legitimate expenditure and has only provided receipts for approximately £13,000. The local authority has therefore correctly decided to assume notional capital in respect of the difference."

8. The tribunal chairman upheld the decision of 12 November 2003 after considering the written evidence including a rather confused assortment of account documents produced by the claimant, a detailed written submission made by his CAB representative on his behalf and further evidence about his mental state including several psychiatric reports and a mental health services risk assessment dating from early 2004. The chairman recorded findings of fact that from the residuary estate of his aunt the claimant had received:

"... household contents and personal effects valued at £166.67, a Toyota motor car valued at £500, stock exchange investments valued at £2,064.45 and national savings certificates of £4,509.37. In addition he received cash payments of £22,000 on 30 November 2001, £20,000 on 11 December 2001 and £30,735.40 on 16 January 2002."

9. With the exception of that last date these details were derived from an undated executors' account of the claimant's share of his late aunt's estate, at page 81. However a systematic look at the various account details to be found at pages 22 to 25, 41 to 49, which include some duplicates but show the transactions on the claimant's main building society account over the whole period 27 September 2001 to 19 June 2003, shows that the last date given in the chairman's findings is actually out by a whole year: the final distribution to the claimant from his late aunt's estate was not received until 16 January 2003. The sum paid into his account on that date was £30,945.41, including no doubt a little extra interest for the period after the executors' statement had been prepared.

10. The chairman recorded that by his representative the claimant admitted he was not entitled to housing benefit for the period from 3 December 2001, when his actual

capital had been over the limit of £16,000, and that there had been an overpayment of £167.48. The statement of the chairman's findings and reasons at pages 110 to 111, issued to the parties on 19 July 2004, continued:

"In respect of the period 13 May 2002 to 13 October 2002 [the claimant] denies that he has deprived himself of capital for the purpose of securing entitlement to housing benefit. First of all I am satisfied that [he] knew that there was a capital limit of £16,000 because on 2 January 2002 he telephoned the local authority to say that he had received a substantial bequest and no longer wished to claim housing benefit.

It is clear that [he] spent his inheritance imprudently. He has repaid debts though there is no proof that creditors were pressing. He attempted to set up a business though his psychiatrist says he has not the wherewithal to function and run a business. He has indulged in compulsive drinking and he has bought items for his home and enjoyment. He has spent money on foreign holidays."

11. The statement referred to evidence about the claimant's psychiatric condition, including that of the community psychiatric nurse working with him that he was unlikely to have fully appreciated the potential implications of his behaviour, but continued:

"Neither of the consultant psychiatrists suggests that [the claimant] is incapable of managing his own affairs. There is no Power of Attorney and there is no order of the Court of Protection. ... Although I accept that [he] suffers from a mental illness with relapses and remissions depending upon whether medication is taken, I am not satisfied that he is so severely disabled mentally that he is incapable of managing his own affairs or incapable of realising that he was spending his money imprudently. He spent large amounts on alcohol, substantial amounts on non-essential items and extravagant living and I am satisfied that a significant operative purpose of the expenditure was to secure entitlement to housing benefit. [The claimant] is therefore to be treated as having notional capital which exceeds £16,000 in the period under consideration and so he is not entitled to housing benefit. In this period there has been an overpayment of £1,820.50 which together with the sum of £167.58 amounts to £1,988.08 which the Council is entitled to recover from [him]."

12. In my judgment the appeal on behalf of the claimant against that decision is entitled to succeed. I agree with his representative Ms Jeanette Bovo of the Harrogate CAB that the reasoning process set out in the last paragraph quoted is insufficient to show how the claimant was held to have deprived himself of the variously stated capital amounts *for the purpose of obtaining housing benefit* in the context of his claim of 7 May 2002, in the face of the evidence about his mental condition which cast doubt on his capacity to do anything as organised as planning for the future, appreciate the potential implications of his behaviour or think through situations in a logical manner. As Ms Bovo says in her observations in reply:

"Whereas in the normal course of events a person who knows the capital limits may be held to have disposed of capital with the significant operative purpose of securing benefit, this general approach cannot be applied in a case where a person has a severe and enduring mental illness that affects their ability to act and reason in a rational way."

13. In my judgment there is no doubt that the test of whether a claimant is shown to have deprived himself of capital “for the purpose of” securing entitlement to housing benefit so as to fall within the notional capital provisions of regulation 43 **Housing Benefit (General) Regulations** 1987 SI No 1971 is a subjective one, depending on the evidence about the particular claimant in question. It does not in my view adequately address or answer the point to say as the chairman did that because a person is not completely incapable of managing his affairs or of realising he was spending his money imprudently, it follows as a matter of course and without further analysis that all such spending is done for the purpose of securing entitlement to benefit. Such a jump is impermissible as it omits any real consideration of the actual purpose of the particular person involved.

14. In addition, the decision is in my view flawed in that it fails to provide any breakdown or analysis of the actual amounts or occasions in respect of which the claimant is being found as a fact to have (a) deprived himself of capital and (b) done so for the purpose of obtaining benefit. Nor is there any real attempt at evaluation of such explanations as the claimant did put forward for particular items. If the generalised comment that “**He has repaid debts though there is no proof that creditors were pressing**” was so intended it can only be described as perverse, in the light of the two letters dated 24 January and 22 April 2002 at pages 50-51, which show that the Bank of Scotland and HSBC had each resorted to debt collecting agencies for the recovery of substantial amounts due. No bank puts a debt into the hands of “Intrum Justitia” or “Metropolitan Collection Services” unless it is pressing for payment. The claimant’s own evidence at page 29, to which the decision did not refer either, was that over £6,700 of the payments he made in early 2002 was attributable to settling these debts.

15. It is further regrettable that before expressing their decisions in the generalised terms they did neither the authority nor the tribunal attempted to analyse the actual movements on the claimant's account over the crucial period, from 2 January 2002 when he telephoned to say his capital was over the £16,000 limit to 2 May 2002 when he signed the fresh claim form. If one does so it can be seen that in fact the scale of the claimant's spending was nothing like that apparently assumed in the general conclusions reached against him.

16. As shown by the evidence in the account statements, all of which was before both the authority and the tribunal, the claimant had £21,831.39 in his main cardcash account at the start of the material period on 2 January 2002. At the end of it, on 2 May 2002, the balance on that account stood at £4,250.67, to which must be added

some £10,000 for the remaining balance on the internet account he had opened in the meantime with an initial transfer of £18,000 on 3 January 2002, making the difference between his opening and closing balances on his building society accounts some £7,581. To that however must be added the cheque for £15,500 paid into it on 25 January 2002 which the claimant accepted as repayment of the £17,000 he had paid to his brother on 7 December 2001 to help him buy a car: so the approximate total of his expenditure to be accounted for over the period in question was a little over £23,000.

17. Of this total, £5,981.68 was accounted for by three cheques, the largest on 30 January 2002 approximating to the debt collector's settlement amount shown on page 50; £8,435 by various electronic fund transfers including a further £3,561-odd on 21 February 2002 which the claimant had also identified as a debt repayment; £3,510 by cashcard and other round-sum withdrawals of £100-£300 at a time; and the balance of some £5,160 by other (presumably counter) withdrawals for which no detail is shown. What the case needed, and what it did not get, was someone to go through these various heads of expenditure in conjunction with such explanations as were put forward by the claimant and reach a specific determination as to (a) what if any amounts represented deprivations of capital in excess of a reasonable level of general expenditure in the circumstances in which the claimant then found himself; and as regards *those* (b) what had been his purpose at the time and whether this included the intention to get rid of his money for the purpose of enabling himself to claim housing benefit again.

18. It is self-evident that no rational conclusion on those issues could be based on the authority's apparent assumption, and the tribunal chairman's apparent finding, that the claimant had managed to dissipate a sum of as much as £60,000 or more over the period under consideration down to the making of his further claim for housing benefit on 7 May 2002, when the evidence showed nothing of the kind.

19. For those reasons, I set aside the decision of 29 June 2004 and remit the case in accordance with paragraph 8(5)(c), Schedule 7 **Child Support Pensions and Social Security Act 2000** to a differently constituted tribunal for redetermination of the claimant's appeal against the authority's decision of 12 November 2003 on both entitlement and overpayment issues.

20. I direct the new tribunal that as quite correctly assumed by the previous chairman and not disputed on this appeal, the correct test to be applied in determining whether the claimant is shown to have deprived himself of capital for the purpose of securing entitlement to housing benefit is the well-established one applied on similar

wording in the main social security legislation, namely whether the securing of such entitlement is shown to have been a “significant operative purpose” of the claimant’s relevant actions in disposing of his capital.

21. That test is not of course a substitute for the language of the regulation itself, which requires that the purpose of securing such entitlement must be affirmatively established in relation to the particular claimant and his or her actions in each case in order for the “notional capital” provisions to apply. It has however evolved by long use and acceptance as perhaps the best way that can be got of expressing the perfectly valid point that a person’s actions may well have more than one purpose, and the existence of one does not necessarily negate another. Thus in order for the regulation to apply the securing of benefit does not have to be the claimant’s sole, or even his predominant, motive or purpose; and it is not a “wholly and exclusively” test. The point is neatly put in the decision of Mr J G Monroe who was I think the first Commissioner to use the expression, in paragraph 10 of case **R(SB) 40/85** when he said:

“It is not necessary that the purpose of securing, or increasing the amount of, supplementary benefit shall be the sole purpose, though it must be a significant operative purpose. For instance one can visualise a case of a man possessed of say £1,000 over the statutory limit whose resources fall short of his requirements to an extent that this £1,000 would make up the deficiency for 12 months. He might conclude that if he forthwith spent the £1,000 on carpeting his home from wall to wall he could start drawing supplementary benefit at once and thus be no worse off income-wise and have the benefit of the carpeting. It would be legitimate to conclude that if such was his purpose he had deprived himself of the £1,000 for the purpose of securing supplementary benefit, notwithstanding that another purpose was to have the house carpeted.”

22. Whether the securing of entitlement to benefit was, in this sense, among the purposes which led any particular claimant to act as he did is a question that must be determined by the tribunal of fact in the circumstances of each individual case, the test as already noted being one of subjective purpose: see in the housing benefit context *R (Beeson) v Dorset County Council* [2001] EWHC Admin 986, 30 November 2001, *per* Richards J at paragraphs 9, 37 (not challenged on this point in the Court of Appeal). In the great majority of cases this must be a matter of drawing such inferences as the tribunal of fact thinks fit from the surrounding circumstances, such as the claimant’s state of knowledge of the rules, the nature and timing of the disposals he makes and the timing and manner of his claims for benefit; since direct evidence to show such a purpose is in the nature of things unlikely. Such a task is however a perfectly normal one for a tribunal of fact to have to undertake, and this is of course by no means the only instance in the law when the purpose for which a thing is done may not be express, and has to be ascertained “as a matter of substance and of fact”: *re South African Supply and Cold Storage Company* [1904] 2 Ch 268, *per* Buckley J at p282. In using the word

“significant” Mr Monroe may perhaps have had in mind what was said by Lord Morris of Borth-y-Gest in *Sweet v Parsley* [1970] AC 132, 155A:

“In my opinion, the words ‘premises ... used for the purposes of ...’ denote a purpose which is other than quite incidental or casual or fortuitous: they denote a purpose which is or has become either a significant one or a recognised one though certainly not necessarily an only one.”

It is to that end that a tribunal must assess all the evidence and determine whether such a purpose on the part of the particular claimant before them can be inferred.

23. Finally, the existing caselaw in Commissioners' decisions on the same wording as that used in regulation 43 of the housing benefit regulations, and in particular the “significant operative purpose” test, was expressly affirmed by a strongly constituted Tribunal of Commissioners in case **R(IS) 1/91** at paragraph 22. In my judgment the principle so affirmed applies equally to housing benefit cases; it is significant that the context of that case was a claimant on benefit who came into a windfall, spent it quickly and imprudently and then claimed again after a few months when he had no money left. The decision was however careful to indicate that in assessing whether he had deprived himself of capital **“reasonable and modest living expenditure including the cost of accommodation, meals and other incidentals to a reasonable quality of life (not including gambling for example)”** could and should be deducted: paragraph 23.

24. I accordingly remit the case to a fresh tribunal to reconsider and reassess whether this claimant deprived himself of any (and if so how much) capital for the purpose of securing entitlement to housing benefit in relation to his claim for that benefit received by the authority on 7 May 2002. For this purpose I direct the tribunal to apply the principles of the established authorities I have sought to outline above. The period on which they must focus is the four months from 2 January 2002, when as the previous tribunal rightly recorded the evidence showed the claimant to be aware of the £16,000 capital limit, to 2 May 2002 when he signed the further claim form seeking to obtain housing benefit again and saying that his capital consisted of £12,000 in building society accounts plus the shares he owned worth something over £2,000. As well as the nature and pattern of his disposals, and his apparent ability over this period to open and operate accounts for himself, switch funds to cover his spending, arrange foreign holidays, submit claims, and so forth, the tribunal will need to take account of such evidence as there is about his mental state and capabilities over the same period; which in the nature of his condition may not necessarily have been the same as that shown by the psychiatric evidence in early 2004 when unhappily he had to be hospitalised.

25. The appeal is allowed and the case remitted for rehearing accordingly.

(Signed)

P L Howell
Commissioner
3 March 2005