

## DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is as follows. It is given under paragraph 8(4) and (5)(b) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000.
  - 1.1. The decision of the Whittington House appeal tribunal, held on 16<sup>th</sup> April 2002 under reference U/45/256/2001/00432, is erroneous in point of law.
  - 1.2. I set it aside, make findings of fact and give the decision appropriate in the light of them.
  - 1.3. I find as facts the matters set out in the claimant's witness statement of 29<sup>th</sup> January 2003 which are summarised in paragraphs 6 to 9.
  - 1.4. My decision is that it is appropriate for the whole of the rent for the dwelling to be apportioned to the claimant under regulation 10(5) of the Housing Benefit (General) Regulations 1987 to count as eligible rent for the purposes of those Regulations.

### The appeal to the Commissioner

2. This case concerns the housing benefit payable to a claimant whose joint tenant is not contributing towards the rent. The first respondent is the housing benefit claimant. The appellant is his local authority. The Secretary of State was joined as the second respondent after initially refusing the invitation to be a party to the proceedings.
3. The case comes before me on appeal to a Commissioner against the decision of the appeal tribunal brought by the local authority with the leave of a district chairman of tribunals.
4. In view of the issues raised by the appeal, I directed an oral hearing. It was held before me in London on 23<sup>rd</sup> January 2003. All three parties were represented by counsel. Miss J Richards appeared for the local authority. Mr S Carrott appeared for the claimant. Miss M Demetriou appeared for the Secretary of State. I am grateful to all counsel for their clear and helpful submissions.

### The facts and history of the case

5. I take my statement of the facts of the case from the witness statement made on 29<sup>th</sup> January 2003 by the claimant at my request. It is credible and I have no reason to doubt any of what it contains.
6. The claimant was born on 7<sup>th</sup> January 1941. He has lived in the dwelling with which this case is concerned for about 30 years. The property is owned by the local authority. The claimant's wife was the tenant until her death in 1995. The claimant and his step-son then became joint tenants. The step-son spent most of his time with his girlfriend rather than at the dwelling, although he had mail delivered there.

7. The arrangement between the claimant and his step-son was that they would split the rent equally between them. The step-son made some contributions towards the rent, but they were irregular and unpredictable. As far as I can tell, he seldom (if ever) paid his full share. The claimant paid as best he could and has used his savings to that end. Nonetheless, arrears built up. Since October/November 1999, the step-son has made no contribution to the rent at all. In fact, he and his girlfriend have disappeared. The claimant does not know where they are. He has no way of finding out their whereabouts or of contacting them.

8. The claimant is not in good health. That was obvious from the observations I was able to make of him at the oral hearing. He uses a walking stick. He has high blood pressure and poor circulation. His doctors suspect that he has prostate cancer. He is due to have an operation.

9. His mother is 86 years old. She had a triple heart by-pass operation in late 1999 or early 2000. She used to live with the claimant's sister, but after the operation it was more convenient for her to live with the claimant. The sister is elderly and can no longer look after their mother.

### **The legislation**

10. The relevant legislation is contained in the Social Security Contributions and Benefits Act 1992 and the Housing Benefit (General) Regulations 1987.

11. Section 130(1) provides:

‘(1) A person is entitled to housing benefit if-

- (a) he is liable to make payments in respect of a dwelling in Great Britain which he occupies as his home’.

12. This is supplemented by the enabling provision in section 137(2)(j):

‘(2) Regulations may make provision for the purposes of this Part of this Act-

- (j) for treating any person who is not liable to make payments in respect of a dwelling as if he were so liable’.

13. Regulation 6 is made under that authority. It provides that

#### **‘Circumstances in which a person is to be treated as liable to make payments in respect of a dwelling**

6.-(1)... the following persons shall be treated as if they were liable to make payments in respect of a dwelling-

- (a) the person who is liable to make those payments; or

...

- (c) a person who has to make the payments if he is to continue to live in the home because the person liable to make them is not doing so and either-
  - (i) he was formerly a partner of the person who is so liable, or
  - (ii) he is some other person whom it is reasonable to treat as liable to make the payments’.

14. There is a separate enabling provision in section 137(2)(i):

‘(2) Regulations may make provision for the purposes of this Part of this Act-

- (i) for treating any person who is liable to make payments in respect of a dwelling as if he were not so liable’.

Regulation 7 is made under this provision, as its heading shows: **Circumstances in which a person is to be treated as not liable to make payments in respect of a dwelling.**

15. There is another relevant enabling provision in section 130(4):

‘(4) Regulations shall prescribe the manner in which the appropriate maximum housing benefit is to be determined in any case.’

16. That must be the enabling authority for regulation 10, especially regulation 10(5). No other possibility was suggested. That regulation provides:

‘(1) 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-

- (a) payments of, or by way of, rent’.

‘(5) Where more than one person is liable to make payments in respect of a dwelling, the payments specified in paragraph (1) shall be apportioned for the purpose of calculating the eligible rent for each such person having regard to all the circumstances, in particular, the number of such persons and the proportion of rent paid by each such person.’

### **The interpretation of regulation 6 and its relationship with regulation 10(5)**

#### *The arguments for the local authority and the Secretary of State*

17. Miss Richards and Miss Demetriou presented separate but supporting arguments on the interpretation of the legislation. They were to the same effect. Miss Demetriou made no submissions on the merits of the application of the legislation to this case.

18. The combined argument on interpretation was this.

19. Regulations 6 and 10(5) deal with different things. Regulation 6 deals with liability for rent. Regulation 10(5) deals with proportion of the rent in respect of which housing benefit may be paid.

20. The claimant is a joint tenant. Each joint tenant is liable for the whole of the rent. So as joint tenant, the claimant is liable for the whole of the rent. He is covered by section 130(1)(a) and by regulation 6(1)(a). Regulation 6(1)(a) is strangely worded: it treats someone as liable who is actually liable. It is also unnecessary, because it provides to the same effect as section 130(1)(a). Nevertheless, it is there and it applies to the claimant.

21. It is, therefore, unnecessary to apply regulation 6(1)(c)(ii) to the claimant. Anyway, it does not apply. It deals with persons who are not otherwise liable but who have to pay in order to remain living in their home. It is made under the authority of section 137(2)(j).

22. As more than one person is liable to make payments (the claimant and his co-tenant), regulation 10(5) applies. It is a mandatory provision. The local authority has to apply it if there is more than one person liable to make payments under regulation 6. In this case, there is. Regulation 10(5) has to be applied. The local authority has to decide how to apportion payments between the claimant and his co-tenant.

23. I deal separately with the arguments on the exercise of the discretion on apportionment.

#### *The argument for the claimant*

24. Mr Carrott's argument proposed a different interpretation of regulation 6 and 10. His argument was this.

25. Regulation 6(1)(c)(ii) in its terms applies to the claimant. The co-tenant is liable to make payments in respect of the dwelling. He is not making those payments. If the claimant does not make those payments, he will not be able to continue living in his home. It is reasonable in the circumstances of his case to treat him as liable to make the payments. Although Mr Carrott did not put his argument in these words, it only works if the claimant is not only treated as liable and becomes the sole person liable.

26. As the operation of regulation 6(1)(c)(ii) makes the claimant the sole person liable for the rent, regulation 10(5) does not apply. That provision only applies if more than one person is liable. Once regulation 6(1)(c)(ii) has operated, that is no longer the case. So, the claimant is treated as liable for the whole rent and no issue of apportionment arises.

27. Mr Carrott pointed out that the application of regulation 6(1)(c)(ii) was not absolute. It only applies if its effect was 'reasonable'.

28. This argument was accepted and applied by the appeal tribunal.

#### *My conclusions*

29. I accept the arguments for the local authority and the Secretary of State. I reject the argument for the claimant. My reasons are these.

30. Regulation 6(1)(c) consists of two conditions. If they are satisfied, head (ii) adds a further condition. If all three conditions are satisfied, the consequence set out at the beginning of regulation 6(1) applies.

31. The first two conditions are: (a) 'the person liable' to make payments in respect of the dwelling is not making them; and (b), as a result, another person has to make the payments in order to continue to live in the home. In the case of joint tenants, both are liable to make the payments. The singular may be read to include the plural: see section 6(c) of the Interpretation Act 1978. But Mr Carrott's arguments requires 'the person' to be interpreted as 'one of the persons'. That may be permissible in some contexts, but there is no justification for that interpretation in this context. It produces the strange and anomalous result that a person who is actually liable for the whole rent is treated as if liable for it. But that is not all. The result of Mr Carrott's interpretation gets stranger yet.

32. If the two conditions in regulation 6(1)(c) are satisfied, the further condition in head (ii) must be considered. This is whether it is reasonable to treat some other person as liable. So, on Mr Carrott's argument, a person who is actually liable for the whole rent is treated as liable for it, but only if it is reasonable to do that.

33. There is another problem with Mr Carrott's interpretation. Joint tenants are each severally liable for the whole of the rent. That satisfies both section 130(1)(a) and regulation 6(1)(a). As far as the claimant is concerned, it is unnecessary to interpret regulation 6(1)(c)(ii) to produce that effect. The only reason why Mr Carrott relies on the provision is to remove the co-tenant's liability. Regulation 6(1)(c)(ii) does not and cannot have that effect.

34. It does not have that effect, because it makes no reference to the liability of the person who is not making the payments. That is easily explained. That person remains liable for the payments. However, despite that liability, the person is not entitled to housing benefit if the payments are not being made.

35. Moreover, the provision cannot have that effect, because it is contained in a regulation that sets out circumstances in which a person is to be treated as liable to make payments. That is not the place to find a provision that has the opposite effect of treating a person as not liable. The obvious place for a provision to that effect is in regulation 7.

36. Even if Mr Carrott's argument on regulation 6(1)(c)(ii) were correct, regulation 10(5) would still apply. That provision consists of a condition and a consequence. The condition is that 'more than one person is liable to make payments'. The claimant is actually liable. So is his co-tenant. That satisfies the condition.

37. The effect of regulation 6(1)(c)(ii) only applies for the purposes of housing benefit. Its effect is that a person is treated as liable. It does not affect actual liability. That remains unaffected by regulation 6. There is no power under the housing benefit scheme to alter actual liability. That can only be done by contract. The housing benefit legislation distinguishes between a person who is actually liable and one who is treated as liable. The condition in regulation 10(5) refers to actual liability. So, it does not apply if someone is only treated as liable.

38. The tribunal accepted the claimant's argument. That argument is wrong in law. So, the tribunal's decision must be set aside.

**The discretion on apportionment under regulation 10(5)***The arguments for the local authority and the Secretary of State*

39. Miss Richards and Miss Demetriou presented separate but supporting arguments on the exercise of the discretion on apportionment. They were to the same effect. They both invited me to give general guidance on this issue.

40. Their combined argument was this. The discretion on apportionment must be exercised in the light of all the circumstances of the case. The only test is relevance. Subject to that, there is no limit to the circumstances that may be relevant. The proportion of the rent that a claimant is paying is relevant, but it is not necessarily the predominant factor.

*The argument for the claimant*

41. Mr Carrott's primary argument was that the claimant was entitled to succeed without reference to regulation 10(5). He made argument on that provision, but I could not entice him into further discussion.

42. Mr Carrott's argument was this. The only factors relevant to the discretion on apportionment are those that relate to payment of the rent or other charge for accommodation. The size of the accommodation is irrelevant. A local authority is not entitled to take account of this, as it would put it at an advantage relative to private landlords. This factor can only be taken into account under the local authority's own code on housing management. It must not use the housing benefit scheme as a means of housing management. The discretion on apportionment should be exercised in favour of the remaining co-tenant, unless either regulation 11 or 12 applies. Article 8 of the European Convention on Human Rights and Fundamental Freedoms is also relevant.

*My conclusions*

43. I accept the arguments for the local authority and the Secretary of State. I reject the argument for the claimant. My reasons are these.

44. Regulation 10(5) provides that the discretion must be exercised by taking into account 'all the circumstances'. I find no reason for limiting those words. They mean what they say, subject of course to the circumstances being relevant. That is really the difference between the arguments put to me. What may be relevant?

45. I reject the argument that the proportion of rent actually paid is the predominant factor or that it should determine the exercise of the discretion subject only to regulations 11 and 12. It is a relevant factor and it may be a predominant factor in a particular case. But to elevate it into a predominant factor in all cases is wrong. It is contrary to the terms of regulation 10(5) which create a discretion to be exercised in all the circumstances of the case. There are statutory models that could have been followed to ensure that certain factors predominate over others in the exercise of a discretion. They have not been used. The language used could not be more general.

46. I also reject the argument that factors relating to the accommodation are irrelevant. This is relevant and may be significant in a particular case. A local authority is in a different

position from a private landlord. However, issues relating to accommodation may be relevant in the case of a private landlord. That landlord may be able, like a local authority, to offer a tenant more appropriate accommodation. Alternatively, that accommodation may be available elsewhere in the market. There is no reason why that possibility may not be taken into account in a particular case.

#### **CIS/8415/1995**

47. Mr Carrott also relied on the decision of Mr Commissioner Powell in *CIS/8415/1995*, in which he followed the decision of Mr Commissioner Goodman in *CIS/743/1993*. Those cases were concerned with housing costs for income support. The relevant provision reads:

‘Where responsibility for expenditure which relates to housing costs met under this Schedule is shared, the amounts applicable shall be calculated by reference to the appropriate proportion of that expenditure for which the claimant is responsible.’

The Commissioner decided that a claimant who was jointly liable for and actually paying the full amount of the interest on a loan was entitled to have the whole amount taken into account under that provision.

48. I do not doubt the correctness of these decisions. However, I do not find them helpful in the interpretation of the housing benefit legislation. The wording is different. Regulation 10(5) clearly creates a discretion on apportionment. The Commissioners interpreted the income support provision as not involving a discretion.

#### **Guidance on the exercise of the discretion on apportionment**

49. In response to the joint request of the local authority and the Secretary of State, I give the following guidance on the exercise of the discretion on apportionment. It is, of necessity, general. It concentrates, as it must, on the approach to the exercise of the discretion rather than on its outcome.

50. The only limit on the factors that may be taken into account is that they must be relevant. The factors I consider below are not exhaustive of the possibilities. Nor will they all be relevant in every case.

51. The comparative and cumulative relevance of each factor must be judged in the context of all the other factors. The relevance will depend on the combined circumstances of the case. There is no general rule that can be applied and no presumption that dictates the starting point for consideration.

52. As so much depends on the totality and context of the factors in a particular case, it is not helpful to argue by reference to decisions in other cases involving similar facts. Decisions of Commissioners and the courts are only binding in so far as they lay down the principles that apply.

53. Article 8 of the European Convention on Human Rights and Fundamental Freedoms is always relevant. However, it does not guarantee a claimant a right to remain in a particular home or a right to a particular amount of housing benefit. It provides only for ‘respect for his private and family life, his home and his correspondence’.

54. The number of tenants and the proportion of rent they each pay is specified as relevant by regulation 10(5).

55. The ability of each of the tenants to pay is also relevant. But this does not justify passing a disproportionate part of the rent to the tenant who happens to be entitled to housing benefit.

56. The demands being made by a landlord of a surviving joint tenant will always be relevant. The limits of the apportionment will be set by the extent to which the landlord is holding the surviving tenant responsible. In most circumstances, the landlord will expect that tenant to pay the whole of the rent. There is, of course, a difference between holding someone responsible and enforcing that responsibility. The fact that a landlord is refraining from enforcement action pending the decision on apportionment for housing benefit purposes must not be held against a claimant.

57. If one co-tenant leaves the other in the dwelling, it may be appropriate to make an apportionment for a period only. This could allow the remaining joint tenant a chance to find someone else to share the rent, to find other accommodation or to serve out a period of notice to quit the dwelling.

58. If one co-tenant leaves the other in the dwelling, it may be appropriate to take account of the possibility of obtaining other accommodation. A variety of factors will be relevant to whether this possibility should be taken into account. These are just examples. How long has the claimant lived in the dwelling? How old is the claimant? What is the claimant's state of health? Is the dwelling adapted for the claimant's disabilities? What links does the claimant have with the neighbourhood? If it is appropriate to take this possibility into account, the tribunal must be satisfied that there is alternative accommodation potentially available to the claimant. It must be appropriate for the claimant and for the claimant's circumstances.

#### **The exercise of the discretion to the facts of this case**

59. Miss Richards maintained that the decision made by the local authority was correct. She had on instructions to make any other submission. Miss Demetriou made no submissions on the merits of the application of the legislation to this case. Mr Carrott, consistent with his argument on interpretation, argued that only matters relevant to the payment of rent should be taken into account.

60. In my opinion, it is appropriate to apportion the whole of the rent to the claimant under regulation 10(5). In coming to that conclusion, I have taken into account all the circumstances of the case in so far as they are known to me. I have been particularly influenced by the following. (a) The claimant's age. (b) His state of health. (c) The presence of his mother, her age, her state of health and the fact that there is no one else appropriate to look after her. (d) The time that the claimant has spent in the dwelling. (e) The connections that he will have built up in the neighbourhood over those years. (f) The property was his marital home. (g) He has not caused or contributed to the financial problems with the rent. (h) He has done all he could to resolve those problems. (i) It is not in his power to do more. (j) He has no ability to control his step-son. (k) He cannot locate or communicate with his step-son. (l) Even if he could, he would not be able to influence his behaviour. (m) He has over the years paid more towards the rent than has been taken into account for housing benefit purposes. (n) He has

access to no other funds to pay the rent. (o) The local authority has sought possession of the dwelling.

61. In all those circumstances, it is not appropriate to expect the claimant to seek alternative accommodation and it is appropriate for the whole of the rent for the dwelling to be apportioned to him to count as eligible rent for the purposes of the housing benefit scheme.

**Conclusion**

62. I allow the appeal and give the decision that the tribunal should have given. It has the same practical effect as the tribunal's but is based on a different interpretation of the legislation.

63. I do not want the claimant to misunderstand the effect of my decision. It does not give him a right to have the full rent met for the dwelling for the rest of his life. My decision is subject to the local authority's power to supersede it in order to take account of changes of circumstances in the future. The local authority is entitled to make enquiries of the claimant of his circumstances from time to time in order to ensure that the apportionment I have decided remains appropriate.

**Signed on original**

**Edward Jacobs  
Commissioner  
4<sup>th</sup> February 2003**