

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is as follows. It is given under paragraph 8(4) and (5)(a) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000.
 - The decision of the Aberystwyth appeal tribunal under reference U/03/181/2002/0001, held on 3 April 2002, is erroneous in point of law in respect of housing benefit for Dedwyddfa.
 - I set it aside and give the decision that the appeal tribunal should have given without making fresh or further findings of fact.
 - My decision is the claimant is not entitled to housing benefit in respect of Dedwyddfa for the inclusive period from 30 April 2001 to 27 May 2001.

The appeal to the Commissioner

2. This case comes before me for decision as an appeal brought against the decision of the appeal tribunal with the leave of a district chairman of tribunals.
3. The parties are:
 - Ceredigion County Council, which is the appellant;
 - The housing benefit claimant, who is the first respondent. He has taken no part in the appeal, despite being invited to make written submissions and to attend the oral hearing.
 - The Secretary of State, who was joined as the second respondent.
4. Case management directions were given by Mr Commissioner Bano, but he transferred the case to me for decision. On reading the file and the written submissions of the local authority and the Secretary of State, I decided that the issues were sufficiently complex to require an oral hearing. The hearing was held before me in Cardiff on 22 October 2003. The local authority was represented by Mr M Dyson. The Secretary of State was represented by Mr H James. Both provided me with skeleton arguments. I am grateful to them for those arguments and for their oral contributions to the discussion of the complex issues raised by this appeal. The claimant did not attend and was not represented.

The history of the case*The move of home*

5. The claimant lived in one dwelling and then moved to another. His explanation for the move was this. He receives a disability living allowance consisting of the mobility component at the lower rate and the care component at the highest rate. The care component was awarded on the basis of a need for supervision by day and watching over at night. The daughter of his partner was his carer. She and her partner moved and he had to move with them so that she

could continue to care for him. His carer and partner took a tenancy of the property. The landlady did not object to the claimant living there with them, but he entered into an arrangement to rent it from them, although they would continue living there with him.

6. This was the explanation that was finally obtained by the local authority. I do not need to set out the tortuous process by which it was obtained.

The claims for housing benefit

7. Following the move, the claimant made two claims for benefit. One claim was in respect of the new dwelling. The other claim was in respect of the former dwelling for the duration of the notice period that he had not served.

8. The local authority refused the claim in respect of the new dwelling. It gave a number of reasons:

- the claimant was not liable to make payments in respect of the dwelling – section 130(1)(a) of the Social Security Contributions and Benefits Act 1992 and regulation 6 of the Housing Benefit (General) Regulations 1987;
- the arrangement under which he occupied the dwelling was not on a commercial basis – regulation 7(1)(a);
- his liability was to a close relative who also resided in the dwelling – regulation 7(1)(b).

9. The local authority also refused the claim in respect of the former dwelling. It considered this claim under regulation 5(5)(d), but decided that the claimant's dual liability was not unavoidable.

The appeals

10. The claimant appealed to an appeal tribunal against both decisions.

11. The tribunal dismissed the appeal in respect of the new dwelling. It accepted that the claimant had a genuine liability to pay for his occupation of this dwelling. But it decided that the arrangement was of a personal nature, rather than commercial.

12. That was sufficient to dispose of the appeal. But the tribunal went on to comment on two other possible bars to entitlement. As to regulation 7(1)(b), it decided that the claimant's carer was not a close relative. But it considered that the arrangement for occupation could have been created in order to take advantage of the housing benefit scheme under regulation 7(1)(l). This ground had not been raised before.

13. The tribunal allowed the appeal in respect of the former dwelling. It found that an immediate move was unavoidable so that regulation 5(5)(d) applied. It then concluded that the claimant was entitled to housing benefit in respect of the former dwelling for the 4 weeks of his notice period. In other words, it assumed that regulation 5(5) was concerned with actual liability only. Or, to put it another way, the tribunal assumed that the operation of regulation 7(1)(a) did not affect the operation of regulation 5(5)(d).

The appeal to the Commissioner

14. The local authority appealed against the decision in respect of the former dwelling. Leave was given by a district chairman of tribunals.

15. The claimant has not appealed against the decision in respect of the new dwelling. So the tribunal's reasoning on that decision is not before me.

The legislation

16. Housing benefit is paid under the statutory authority of section 130 of the Social Security Contributions and Benefits Act 1992. That provides that

'(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'.

17. This basic provision requires both occupation and liability. However, both of those requirements may be varied. In some circumstances, a dwelling is treated as being occupied as a person's home even if it is not. In other circumstances, a person who is actually liable to make payments in respect of a dwelling is treated as not liable. Those circumstances are set out in the Regulations. They are made under the authority of section 137(2)(h) and (i):

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

- (h) as to circumstances in which a person is or is not to be treated as occupying a dwelling as his home;
- (i) for treating any person who is liable to make payments in respect of a dwelling as if he were not so liable'.

18. Regulation 7(1)(a) is made under the authority of section 137(2)(i). It provides:

'(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-

- (a) the tenancy or other agreement pursuant to which he occupies the dwelling is not on a commercial basis'.

19. Regulation 5(5)(d) is made under the authority of section 137(2)(h). It provides:

'(5) Where a person is liable to make payments in respect of two (but not more than two) dwellings, he shall be treated as occupying both dwellings as his home only-

- (d) in the case where a person has moved into a new dwelling occupied as the home, except where paragraph (4) applies, for a period not exceeding four benefit weeks if he could not reasonably have avoided liability in respect of two dwellings'.

The arguments at the oral hearing

20. Mr Dyson presented three arguments at the oral hearing. He argued that regulation 5(5)(d) did not apply. If any of his arguments is correct, the tribunal went wrong in law.

21. Mr Dyson's first argument was the *actual liability argument*. This was that the claimant was not actually liable to make payments for the occupation of the new dwelling. The tribunal had been wrong to find that he was and its reasoning was, anyway, contradictory.

22. Mr James told me that the Secretary of State was not interested in this issue. But he submitted that the tribunal had not dealt adequately with it, because it had not investigated and made sufficient findings of fact.

23. Mr Dyson's second argument was the *avoidable liability argument*. This was that the claimant's dual liability was avoidable. It was not necessary for the claimant's carer to live with him. This was shown by the fact that she had been working, and so was not available to care for him by day, while he was living in his former home. And his housing benefit claim form contained the statement that he needed someone to stay overnight only 'on bad days'.

24. Mr James told me that the Secretary of State was not interested in this issue. But he submitted that on the evidence the tribunal was entitled to make this finding.

25. Mr Dyson's third argument was the *interpretation argument*. This was that the effect of regulation 7(1)(a) was that the claimant did not have the dual liability necessary for regulation 5(5)(d) to apply. Mr James told me that this was the only issue in which the Secretary of State was interested.

The actual liability and avoidable liability arguments

26. These two arguments really challenge the reasoning underlying the tribunal's decision on the claim in respect of the claimant's new dwelling. That decision is not under appeal. It dealt with a different claim and the findings and reasoning on which it was based are not binding on me under the principle in *CIS/1330/2002*.

The actual liability argument,

27. On this argument, I agree with Mr Dyson that the tribunal's reasoning appears to involve an element of contradiction. It decided that the claimant was genuinely liable to pay for his accommodation. But the reasons that it gave suggest either that there was no intention to create legal relations in that arrangement or that it was a sham. However, there are some fine distinctions here. And, unlike me, the tribunal had the chance to question the claimant about the arrangement he made. Although it is not binding on me, I consider it appropriate to adopt the tribunal's approach to actual liability, because it was better placed than I am to investigate it.

The avoidable liability argument,

28. On this argument, I agree with Mr Dyson that there is some doubt about the help that the claimant received from his carer. I have taken into account that an award of a disability living allowance is based on the help that is reasonably required, not on the help that is given.

Nevertheless, the claimant's comment on his housing benefit claim form at least casts doubt on his need for watching over regularly at night. The information is not sufficient for me to reach a firm conclusion without further investigation with the claimant. But it is at least possible that that investigation would show that the past history of the claimant's care would show that he could have managed for the duration of the notice period, perhaps by using his disability living allowance to pay for a temporary alternative carer.

29. My Dyson put his argument in terms of whether the claimant needed to move at the same time as his carer. However, the issue is whether the claimant could reasonably have avoided liability in respect of two dwellings. Even if I accept that the claimant did need the services of his carer and had to move when she moved, he could still have reasonably avoided liability for the new dwelling. The claimant could have moved and lived with the carer and her partner, but postponed the financial arrangement over the accommodation until his notice period in his former dwelling was ended. In that way, he could have secured accommodation for himself (the landlady did not object to him living there) and maintained the services that his carer could provide, while avoiding dual liability. The tribunal did not consider this possibility. It thereby went wrong in law. On the basis of this analysis, regulation 5(5)(d) did not apply and the claimant was not entitled to housing benefit in respect of his former dwelling.

The interpretation argument

30. That is sufficient to dispose of the appeal. but it would be wrong not to deal with this argument, which was the key argument at the oral hearing.

31. The tribunal certainly went wrong in law in that it failed to identify the issues of interpretation that arose on interaction of regulations 5(5)(d) and 7(1)(a). So, I can approach this issue afresh.

32. Mr Dyson and Mr James were agreed in their submissions that regulation 5(5)(d) did not apply if the claimant was excluded from entitlement by regulation 7(1). Their arguments must first overcome the wording of regulation 5(5). The opening words refer only to actual liability – 'Where a person *is* liable'. This is in contrast to other provisions that distinguish between actual liability and the position as it is deemed to be. I accept that the Regulations do not draw this distinction consistently. Regulation 6(1)(a) is a stark instance of this in that it provides that a person who is liable to make payments is to be treated as liable to make them. But that is an isolated case. Generally, the distinction is expressly made. That suggests that the deeming effect of regulation 7(1)(a) in respect of the claimant's new dwelling has no relevance to the operation of regulation 5(5)(d).

33. However, both those provisions are deeming provisions. Is it possible to find in the deeming effect of either provision support for the position of the Secretary of State and the local authority?

The approach to deeming provisions

34. 'There is too much of this damned deeming.' So said Lord Mildeu in *Travers v Travers*, as cited by Sir Robert Megarry in his *Miscellany-at-Law* on page 361.

35. The proper approach to the interpretation of deeming provisions is summarised in Francis Bennion's *Statutory Interpretation* (4th edition) at page 815:

'The intention of a deeming provision, in laying down an hypothesis, is that the hypothesis shall be carried as far as necessary to achieve the legislative purpose, but no further.'

This approach was approved and followed by the Court of Appeal in *DEG-Deutsche Investitions und Entwicklungsgesellschaft mbH v Koshy* [2001] 3 All England Law Reports 878 at paragraph 16 (setting out counsel's argument relying on this passage) and paragraph 20 (accepting that argument). That decision is authority for the proposition that the effect of a deeming provision does not necessarily apply indiscriminately in all other related provisions (paragraph 20).

The purpose of regulation 7

36. Regulation 7 has been considered by the courts and the Commissioners. I do not need to cite authorities. The purpose is well known. Indeed, it is evident from the terms of regulation 7. There is an obvious unity of purpose among the different heads of regulation 7(1). That makes it appropriate to consider the purpose of regulation 7 as a whole.

37. The purpose of regulation 7 is to exclude from entitlement to housing benefit a claimant who would otherwise be entitled but whose payments in respect of the occupation of a dwelling is not the proper subject of the housing benefit scheme. An arrangement may be excluded either because it involves an abuse of the scheme or because its nature or circumstances are such as to involve the risk of an abuse.

38. I note three features of the purpose so identified.

- It assumes that there is an actual liability between the claimant and the person providing the accommodation. That is made clear by the opening words of regulation 7(1) – 'A person who *is* liable to make payments'. Otherwise deeming would not be necessary. If there is no actual liability, the claimant is excluded from entitlement under section 130(1)(a) and regulation 6(1).
- The abuse or risk arises in connection with a particular transaction in respect of a specific dwelling.
- And it is protective of the housing benefit scheme. No doubt, in a particular case it will operate punitively against the claimant. But the emphasis seems to be on the protection of the scheme.

39. So, considered in isolation, the purpose of regulation 7 is limited to the transaction in question. Applying the approach set out by Francis Bennion, that purpose does not necessarily extend to other references to liability elsewhere in the Regulations. In particular, I reject the argument that it would necessarily be unjust, anomalous or absurd if the deeming effect of regulation 7 were not carried into a provision in so far as it deals with a different transaction in respect of a different dwelling.

The purpose of regulation 5(5)(d)

40. I come now to the purpose of regulation 5(5)(d).

41. There is an obvious general unity in regulation 5 in that it deals with occupation. It begins by providing (a) that the relevant dwelling for housing benefit purposes is the dwelling normally occupied as the claimant's home and (b) that there can only be one such dwelling at a time: regulation 5(1).

42. The regulation then makes a series of provisions that are worded as deeming provisions. It is doubtful whether all of them operate in all circumstances to alter the reality of occupation. They may do no more than bring certainty and ease of operation to the scheme by making specific provision that avoids the need for housing benefit officers to investigate and analyse the complexities of whether or not a person is actually occupying a dwelling. For example, a claimant who leaves a dwelling to go on holiday would, in law, remain in occupation of that dwelling. Nonetheless, regulation 5(8) covers this possibility as a temporary absence and provides that the claimant is to be treated as remaining in occupation of the dwelling while absent for a maximum of 13 weeks.

43. So, regulation 5 does not operate solely as a deeming provision. In part it makes provision for certainty and easier administration of the housing benefit scheme by substituting bright-line rules for the vaguer concept of occupation. However, in view of the circumstances in which regulation 5(5)(d) operates, its only function is as a deeming provision and it must be interpreted as such.

44. However, the purpose of regulation 5(5)(d) cannot be identified by considering that provision in isolation. It must be considered in the context of regulation 5 as a whole.

45. What are the relevant features of regulation 5(5)(d)?

46. First, like all the deeming provisions of regulation 5 it operates to the claimant's potential advantage. By ensuring occupation of a dwelling, it opens the possibility of entitlement in respect of that dwelling. Broadly, the regulation provides for three possibilities:

- The claimant is occupying more than one dwelling, but is treated as occupying only one dwelling for housing benefit purposes – like a student living away from home under regulation 5(3).
- The claimant is no longer occupying a dwelling, but the occupation notionally continues in order to preserve entitlement to housing benefit – like a tenant who has had to move out while repairs are carried out under regulation 5(4).
- The claimant is not yet occupying a dwelling, but the occupation is deemed to have begun in order to allow for the possibility of entitlement to housing benefit – like a person whose new dwelling has to be adapted for a disability under regulation 5(6).

47. Second, in limited circumstances the deeming provisions operate even more to the claimant's potential advantage by allowing for the possibility of entitlement to housing benefit in respect of two dwellings. Regulation 5(5)(d) is one of these limited circumstances. They are all set out in regulation 5(5).

48. Third, regulation 5(5)(d) is one of a number of provisions that deal with ongoing liability for a dwelling that is no longer, or not currently, occupied as the claimant's home. Each of these provisions deals with its own specific circumstances. Like those other provisions, regulation 5(5)(d) provides that the occupation notionally continues in order to protect potential entitlement to housing benefit.

49. Fourth, regulation 5(5)(d) provides only temporary protection by deeming a person to be occupying two dwellings for a maximum of 4 benefit weeks. All the deeming provisions (with one exception), provide only temporary protection. Some, like regulation 5(5)(d), limit the protection to a specific number of weeks. In other provisions, the limit is set by the circumstances, like the duration of repairs to the dwelling (regulation 5(4)) or of a student's training course (regulation 5(5)(b)). The only exception is regulation 5(5)(c), which deals with the possibility that a family is so large that it has to be housed in more than one dwelling.

50. Fifth, in setting the circumstances in which the deeming provision applies and in fixing the period for which the protection is provided, regulation 5 involves a balance between providing financial support for the claimant in appropriate circumstances and limiting that protection in order to protect the budget for the housing benefit scheme. This is in contrast to regulation 7, the sole purpose of which is to protect the budget of the scheme from abuse.

51. The general purpose of the deeming provisions in regulation 5 is easy to discern. It is in its terms concerned exclusively with occupation as a basis for entitlement to housing benefit. It is not drafted in terms of entitlement, because there are other elements to entitlement apart from occupation. However, its deeming effects have an impact on entitlement.

52. In the case of regulation 5(5)(d), the deeming effect creates a notional occupation as a basis for potential entitlement to housing benefit in respect of the former dwelling. Its operation presupposes that the claimant was entitled to housing benefit in respect of the former dwelling. Otherwise, the reference to the former dwelling, and indeed the whole provision, would be redundant. If the move is the only change in the claimant's circumstances, entitlement to housing benefit is preserved.

53. Occupation of the new dwelling is not mentioned. All that is necessary for the purposes of regulation 5(5)(d) is that the claimant has 'move into' the accommodation and is liable to pay for it. Those matters are relevant to the proof of, but not necessarily decisive as to the existence of, occupation. In practice, though, they may be sufficient to establish occupation.

54. So far my analysis has not taken into account the limiting effect of the opening words of regulation 5(5). The whole paragraph is conditional upon the existence of dual liability. That condition sets the context in which the deeming effect is allowed to operate. The reason seems obvious - the claimant is in a transitional position in which there is an exposure to dual liability to pay for accommodation. It is that combination of circumstances that provides the imperative for additional temporary financial support.

55. So, considered in isolation, the purpose of regulation 5(5)(d) is limited to occupation and to occupation of the former dwelling. That is set in the wider context of regulation 5(5) as a whole of transitional exposure to a dual liability. Applying the approach set out by Francis Bennion, the purpose I have identified is equally applicable whether the claimant will or will not be entitled to housing benefit in respect of the new dwelling. The claimant will benefit from some temporary support even if that protection is limited to one dwelling, the former

dwelling. There is no scope for incorporating into the purpose of regulation 5(5)(d) any concern with liability under regulation 7. The emphasis under regulation 5(5)(d) is on occupation rather than liability and on the former dwelling which is unaffected by any abuse or risk of abuse in respect of the new dwelling.

56. I have not overlooked the risk of abuse of the housing benefit scheme. Housing benefit is a scheme that is notoriously exposed to this danger. It is always appropriate to consider as part of the purpose of any provision the need to avoid abuse. However, there is protection for the scheme built into the express terms of regulation 5. And my analysis leaves regulation 7 to control access to the scheme in respect of any transactions that abuse, or involve the potential for abuse of, the scheme.

Conclusion

57. The purpose of the deeming provisions in regulation 7 do not apply outside regulation 7, unless they are expressly incorporated. And the purpose of the deeming provision in regulation 5(5)(d) does not include the matters governed by regulation 7. Each deals with a separate aspect of entitlement. They operate independently.

Summary

58. I allow the appeal. It is not necessary to direct a rehearing. The decision that the tribunal should have given is clear. No further investigation into the facts is necessary. That allows me to substitute that decision for the one given by the appeal tribunal. That decision is in paragraph 1.

Signed on original

**Edward Jacobs
Commissioner
29 October 2003**