CAS

Non-remit

PLH *Commissioner's File: CIS 15052/96*

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992
SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Claimant's Name.
Claim for:
Appeal Tribunal:
Tribunal Case Ref:

[ORAL HEARING]

1. This appeal by the claimant succeeds, as in my judgment the decision of the social security appeal tribunal given on 27 February 1996 was erroneous in point of law in two important respects. I set it aside and substitute my own decision that for the purposes of the income support claim he made on 16 October 1995 the claimant is not to be treated as having any income in respect of the leasehold shop premises on which he remained liable as tenant to the head landlord while they were in fact occupied by another tenant who paid the whole of the rent to the landlord direct. The case is referred back to the adjudication officer to recalculate the applicable amount for income support from 16 October 1995 without the claimant being treated as having any income in respect of the leasehold property, and also to take account of any outstanding points on the applicable amount for the period from 16 October 1995 to 2 January 1996 referred to in the adjudication officer's written submissions on the appeal at pages 129-131.

2. I held an oral hearing of this appeal at which Stewart Wright of Counsel, instructed by H C L Hanne and Co, appeared for the claimant and Leo Scoon of the solicitor's office, Department of Social Security, appeared for the adjudication officer.

3. The issue on the appeal arises out of a short lived attempt by the claimant to establish himself in business in a retail shop over the period June to October 1995. According to his evidence which was accepted by the adjudication officer and the tribunal, he signed a lease in June of that year for a minimum period of two years on a retail grocers' and off licence shop in South London, acquired some basic equipment such as a refrigerator cabinet and attempted to stock up the shop with money that he borrowed. He was never able to afford to stock up the business properly and within four months it had become apparent to him that he was not going to be able to make a success of it. In October 1995 he took the very sensible decision to cut his losses rather than get himself deeper into debt, and managed to find another tenant who was willing to take on

the shop with what little stock then remained. However the landlord refused to release the claimant from the extensive covenants he had given under the original lease and would not permit it to be assigned outright to the new tenant, preferring to adopt a "wait and see" attitude to whether he would manage to keep up with the rent. All that he would permit was an arrangement under which the claimant remained legally liable as tenant under the original lease, but the property was sublet to the new tenant at an identical rent which it was understood between the three of them would be paid by the new tenant to the landlord direct.

4. These arrangements were carried into effect, and at all material times after 16 October 1995 the new tenant paid the full rent direct to the landlord. From then on the claimant derived no income from the property and had no effective interest in it apart from acting as an insurance policy for the landlord, who retained the ability to enforce the claimant's original legal liabilities for the rent and other obligations under the lease should the new tenant fail to discharge them.

5. The documentary evidence of these arrangements and the terms of the lease and underlease is at pages 1-23, 64-73 and 87-120 of the case papers and was amplified by the claimant himself in oral evidence before the tribunal. The irresistible inference from the undisputed evidence is that what took place, when the landlord refused to allow the claimant to drop out of the picture altogether because he doubted the new tenant's ability to keep up with the rent, amounted to an agreement between the three of them under which the landlord gave his consent to what was legally a subletting of the premises to the new tenant upon terms which included the new tenant paying the rent under the headlease to the landlord direct. There was never any profit element in the sublease arrangement for the claimant (see pages 3-5) and I am satisfied that the arrangement did not give the claimant any right to insist on payment of the rent to himself under the sublease without it being passed on immediately to the landlord. I so find as a fact.

6. The adjudication officer nevertheless determined that the claimant's income support should be calculated on the footing that his position as the intermediate landlord would have given him a right to insist on payment of the full rent to himself under the sublease, with the result that this had to be treated as "notional income" possessed by him for the purposes of income support under reg 42(3) Income Support (General) Regulations SI 1987 No. 1967, which applies to "any income which is due to be paid to the claimant but has not been paid to him". The adjudication officer considered that this required the claimant to be treated as possessed of an income equal to the full rent provided for in the sublease without any offset for his obligation under the original lease to pay the identical amount to the landlord at the same time. In consequence, his income support was drastically reduced.

7. The claimant not unnaturally appealed, and gave clear and convincing details of the extreme hardship to which this treatment subjected him and his family. The tribunal felt themselves unable to do anything about it and on 27 February 1996 gave a decision simply confirming the award of income support at the reduced amount. They said: "We find that he has a notional income of £105.76 made by way of rent. Appellant is due

rent under an agreement which is income. It has not been paid to him. It is income to be treated as possessed by him and regulation 42(3)(a) applies to those facts. Having so found it was not necessary to consider the other submissions".

8. Dealing with the claimant's contention that since any rent nominally due to him under the sublease had to be paid straight over to the head landlord it was not right to treat this money as "due" to him at all under reg 42(3), they said "We do not find that 42(3)(a) is to be interpreted in the restrictive manner which is contended on behalf of the Appellant. It is quite clearly 'any income which is due to be paid to the claimant but has not been paid to him.' Under (3) rent is due to the Appellant but has not been paid to him and accordingly it is income treated as possessed by him." His evidence of hardship they ignored as irrelevant.

9. It is rightly accepted on behalf of the adjudication officer that the sublease rent did not constitute actual income of the claimant, since none of it was ever paid to him. In my judgment it did not constitute notional income either, since "income which is due to be paid to the claimant" under reg 42(3) must be restricted by necessary implication to income payable to the claimant for his own benefit. In the context of the arrangement reached in October 1995, I do not think it right to describe the claimant's rights under the sublease as entitling him to be paid anything for his own benefit. The arrangement was always that the sublease rent should be handed straight over to the landlord who would accept it in discharge of the primary rent obligation under the headlease. It is quite unrealistic to view the situation as one where the claimant could have insisted on payment being made to him without strings for the purpose of keeping it for himself and letting the headrent go unpaid. The new tenant would have been quite justified in refusing to make such a payment because of the risk of forfeiture and losing his entire business.

10. For those reasons, I consider the tribunal's conclusion to be wrong on the main issue. The rent expressed to be payable under the sublease did not at any material time constitute income due to be paid to the claimant for his own benefit and did not therefore count as income to be treated as possessed by him under reg 42(3).

11. For the same reasons, I reject the adjudication officer's alternative submission that the rent reserved under the sublease could count as notional income under reg 42(2), "income which would become available to the claimant upon application being made but which has not been acquired by him..." This too must be confined to money available to be acquired by the claimant for his own benefit, which was not the case here.

12. As Mr Scoon very fairly pointed out the tribunal fell into a further error of law which was I think an unfortunate one in the circumstances. If their conclusion that the claimant was possessed of notional income under reg 42(3) was right, that made it necessary for them to consider a further question under regs 70-71 of the income support regulations which should not have been overlooked. Those regulations provide for urgent cases payments of up to 90% of the normal applicable amount in "notional income" cases under reg. 42(3) if the income in question is not readily available to the claimant and he or his family would otherwise suffer hardship.

13. Given the clear evidence in this case that the claimant had a young family and that both he and they were indeed suffering hardship as a result of the drastic reduction imposed on his income support, it was in my judgment a serious error both of law and of common humanity on the part of the tribunal and of the adjudication officers who dealt with the case not to have thought about applying this provision for themselves. It should be considered automatically in all cases of notional income under reg. 42(3) where there is any possibility of such hardship.

14. The other issue raised in the parties' submissions was whether any rental income the claimant was treated as possessing had to be brought in on a "gross" basis or only as a "net" figure after deductions. On the view I take of the case this, and the difficult issues that exercised the Commissioner in case CIS 563/91 which was cited to me, do not arise.

15. The claimant's appeal is therefore allowed and my decision in paragraph 1 above substituted.

(Signed)

P L Howell
Commissioner
26 June 1997