

Remitted

Commissioner's File: CIS/15984/1996

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12/12/97

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

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

Claimant's name:

Tribunal venue:

Tribunal number:

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DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is as follows:

1.1 The decision of the Wolverhampton Social Security Appeal Tribunal held on 17th April 1996 is erroneous in point of law: see paragraphs 15 and 16 below.

1.2 Accordingly I set it aside and, as it is not expedient for me to give a decision on the claimant's appeal from the adjudication officer's decision, I refer the case to a differently constituted Social Security Appeal Tribunal for determination.

1.3 I direct the Social Security Appeal Tribunal which rehears this case to conduct a complete rehearing. In particular I direct the tribunal

to determine whether any, and if so what, grounds exist upon which the decision awarding Income Support to the claimant fell to be reviewed;

that the burden of proof is on the adjudication officer to show that the claimant has capital over the threshold for entitlement to Income Support and on the claimant to show that the case falls within paragraph 3 of Schedule 10 to the Income Support (General) Regulations 1987.

2. This is an appeal to the Commissioner against the decision of the tribunal brought by the claimant through her Attorney with the leave of the tribunal's chairman. The adjudication officer supports the appeal.

3. This case relates to the proceeds of sale of the claimant's former home. The claimant was in receipt of Income Support from 1988. She lived in the home with her mother. Following her mother's death in April 1992 the claimant was admitted to hospital under the Mental Health Act. Her admission was compulsory, but she remained at the hospital on a voluntary basis until November 1993. She then moved to a nursing home as a first stage of her rehabilitation and in order to learn to live independently. In February 1996 she moved into a shared, rented flat where she received considerable support. The former home was

sold in July 1995.

4. The relevant legislation is paragraph 3 of Schedule 10 to the Income Support (General) Regulations 1987. It provides for there to be disregarded in calculating the claimant's entitlement to benefit

"Any sum attributable directly to the proceeds of sale of any premises formerly occupied by the claimant as his home which is to be used for the purchase of other premises intended for such occupation within 26 weeks of the date of sale or such longer period as is reasonable in the circumstances to enable the claimant to complete the purchase."

5. There are a number of Commissioners' Decisions referred to in the adjudication officer's submission to the tribunal. They will be included in the papers before the tribunal at the rehearing of this case. I need only refer to those which contain points relevant to this case. They are the following.

6. In CIS/321/1990, paragraph 7 the facts were that within 26 weeks of the sale of the claimant's former home he paid a deposit on a piece of land. The purchase was delayed and the sale fell through with the prospective vendor returning the claimant's deposit. At the end of the 26 weeks there were no ongoing negotiations for any purchase. The Commissioner held that in order for paragraph 3 to apply the claimant had to have found a house within the 26 week period and that the extension of the period was to allow completion. It was unnecessary on the facts to define what was meant by "find" and "completion". The claimant did not even have any specific land in mind for possible purchase and, therefore, did not on any view satisfy the necessary condition of having found premises for purchase with the result that there was no power to consider the extension period. The Commissioner was concerned with the time at which events must occur and not with the meaning of "to be used".

7. In CIS/629/1992, paragraph 6 the Commissioner referred to CIS/321/1990 and held that it did not apply where it would be unfair to do so, such as where a vendor pulled out of a sale just before the end of the 26 week period. The facts of the case are not stated and the Commissioner did not discuss in detail the interpretation of paragraph 3. This Decision records the particular Commissioner's dissatisfaction with CIS/321/1990, but its reasoning is limited to noting that in some circumstances the result produced by that case was "unfair".

8. In CIS/685/1992, paragraphs 15 and 16 the Commissioner expressly refused to follow CIS/321/1990. He held that it was not necessary to identify any specific property within the 26 week period, which referred to the purchase of premises and not to the intention to occupy. He said that the claimant had an absolute right to the benefit of paragraph 3 if the proceeds were to be used for the purchase of new premises and that thereafter there was a general discretion to extend the period to allow the claimant to find new premises and to complete the purchase in the sense of obtaining title and occupation. The Commissioner did intimate that it was not sufficient for the claimant to show a mere hope or aspiration to use the proceeds to purchase new premises at some future date. Beyond this he did not discuss what was meant by the words "to be used" because the issue did not arise in that case. As he recognised, the key issue in the case was the reasonableness in the circumstances of an extension.

9. CIS/12/1993, paragraph 11 contains a brief comment that the intention to purchase must be more than a mere hope. The meaning of "to be used" did not arise for decision and there was no further discussion of the point.

10. The remarks in both CIS/685/1992 and CIS/12/1993 were not essential for the decisions in those cases. They did no more than to indicate that hopes and aspirations were insufficient to satisfy the condition that the proceeds "to be used" for the purchase of a new premises.

11. The only Commissioner's Decision in which the meaning of these words was discussed in detail is CIS/8475/1995, paragraphs 28 to 30. The Commissioner held that they were to be interpreted strictly and that more than a genuine intention to use the proceeds for the purchase of new premises was required. It was necessary for there to be an element of certainty involved. The Commissioner held that a binding obligation so to use the proceeds was not required, but that there should be a practical commitment to purchase. He gave as examples of the necessary certainty and practical commitment the existence of a contract awaiting completion and an agreement subject to contract.

12. The adjudication officer now concerned with this appeal submits (at page 28 of the papers before me) that the Commissioner was not apparently made aware of all the relevant case law on paragraph 3. I assume that the Commissioner was aware at least of those Commissioners' Decisions which were mentioned in the notes to the then current edition of Mesher and Wood's Income Related Benefits: The Legislation. That he did not discuss them is not surprising, as they did not discuss the meaning of "to be used" with which he was concerned.

13. The Commissioner correctly captures the essence of those words in the need for an element of certainty. His comments must, however, be read in their context. These are ordinary English words and as such they do not fall to be interpreted as a matter of law. The only question that arises is their application in the circumstances of the case as a question of fact. The examples given by the Commissioner are no more than that. The concept of practical commitment is readily shown by the existence of a contract or an agreement subject to contract. It was established in that case because by the date of claim for Income Support the claimant had identified a plot of land, obtained planning permission and engaged the services of a builder. It will be less easy to demonstrate practical commitment in the days immediately following the sale of the former home. It may not be feasible to begin immediately to seek alternative accommodation, for example because the location will depend on outstanding job applications. Much will depend on the circumstances of the case. It will not always be easy to draw a line between this and a mere genuine intention. This task becomes easier once the 26 weeks has expired, because there is then an interplay between the degree of certainty required and the reasonableness of any extension. The greater the degree of uncertainty the less reasonable any extension. There is no scope for this approach in the initial 26 weeks.

14. I have considered the representations from the claimant's representative on the Decisions considered above. Those representations appear at pages 73 and 74 of the papers before me. For the reasons set out above I do not agree with the analysis proposed by the representative. However, my interpretation of CIS/8475/1995 is a little more favourable to the claimant than that of the adjudication officer which the representative was seeking to

refute.

15. Against this background I come to the tribunal's decision in the case before me. The tribunal's reasons begin with the puzzling statement that the claimant

"has to show that she has an intention to use those proceeds in the purchase of another home if that circumstance arises for more than 26 weeks after the sale."

This suggests that the tribunal thought that the claimant had an absolute right to a disregard for 26 weeks. This is not what paragraph 3 provides. There is no disregard unless the conditions set out are satisfied. The statement is all the more puzzling in that the tribunal's decision nonetheless was that the claimant was not entitled to benefit from the date of sale of her former home. This confusion of reasoning is an error of law.

16. The tribunal's reasons go on to distinguish between a hope and an intention, and conclude that it was not possible for there to be an intention formed in view of the difficulty of predicting whether the claimant could ever live in her own property again. The tribunal did not have the advantage of having the guidance contained in Commissioner's Decision CIS/8475/1996 which had not been decided at the date of hearing. Nonetheless its effect is retrospective and the tribunal has failed to approach the case with the correct test in mind. The tribunal's decision is erroneous in law on this account.

17. I have considered whether I should give my own decision rather than refer the case for rehearing. As there may be evidence which was not considered relevant at the time of the hearing, a fresh examination of the facts is appropriate. By the time the former home was sold the claimant was still in the nursing home. As she had been in the home for some 18 months and left the home a few months later, it is likely that there was evidence of her progress at that stage that suggested a possible return to independent living. There is no evidence of the investment of the proceeds of sale by the Attorney which may be of relevance in deciding whether they were "to be used for the purchase of other premises". This factual inquiry is better conducted by a tribunal than by me. I have, therefore, directed a rehearing.

18. A further point is raised by the adjudication officer. The claimant executed an Enduring Power of Attorney on 24th February 1993. The written submission to the tribunal by the claimant's representative stated that the power was granted because the claimant "was considered to be mentally incapable of dealing with her financial affairs". The adjudication officer submits that this shows that the power was not properly entered into and the appeal, having been made by the Attorney, is invalid. I reject that submission. There was no issue as to validity for the tribunal to investigate. The fact that a person cannot cope financially does not mean that they do not have the mental capacity to make a deed. There was nothing in the evidence before the tribunal to suggest that the claimant might have lacked mental capacity in the eyes of the law, although undoubtedly her practical capacity to cope with certain aspects of her life was diminished. On this point I agree with the representations of the claimant's representative which appear at pages 72 and 73 of the papers before me.

19. The legal test of capacity for the purposes of a grant of an Enduring Power of Attorney was decided in by Hoffmann J in In re K (Enduring Powers of Attorney), In re F [1988] Chancery 310. The test is whether or not the claimant understood the nature and effect of the power which she was granting. As a minimum his lordship said (at page 316)

that this requires an understanding of the following.

"First, (if such be the terms of the power) that the attorney will be able to assume complete authority over the donor's affairs. Secondly, (if such be the terms of the power) that the attorney will in general be able to do anything with the donor's property which he himself could have done. Thirdly, that the authority will continue if the donor should be or become mentally incapable. Fourthly, that if he should be or become mentally incapable, the power will be irrevocable without confirmation by the court."

If there is evidence before the tribunal which rehears this appeal to call into question the validity of the power under which the Attorney acted, the matter must of course be investigated.

20. The tribunal's decision is erroneous in law and must be set aside. I cannot give the decision which the tribunal should have given on its findings of fact and it is not expedient for me to make further findings of facts. There must, therefore, be a complete rehearing of this case before a differently constituted tribunal. As my jurisdiction is limited to issues of law, my decision is no indication of the likely outcome of the rehearing. The tribunal will decide afresh all issues of fact and law on the basis of the evidence available at the rehearing in accordance with my directions in paragraph 1.3 above.

Signed: **Edward Jacobs**
 Deputy Commissioner

Date: **10th December 1997**