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CAB



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SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL TO THE COMMISSIONER FROM A DECISION OF A SOCIAL SECURITY APPEAL TRIBUNAL UPON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal:

Case No:

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal dated 21 May 1991 is erroneous in law and is set aside. The claimant's case is referred to another tribunal for reconsideration.

2. This is an appeal by the claimant with leave on a question of law against the above-mentioned decision of a social security appeal tribunal, sitting in Reading on 12 April 1991, who had heard the claimant's appeal against the decision of an adjudication officer terminating her right to income support from 3 December 1990. The claimant's appeal was dealt with at a hearing held before me in Edinburgh at which the claimant appeared in person and was unrepresented and the adjudication officer was represented by Mr Neilson acting as the Solicitor in Scotland to the Department of Social Security. The issue in the appeal is as to the correct valuation of the claimant's capital interest in a family holiday chalet and whether the possession of that capital asset disentitled the claimant, or reduced her entitlement, to income support. The claimant's appeal to a Commissioner was transferred to the Scottish Office of the Commissioners because of the location of the property in question in Scotland at 45 Barend, Sandyhills, Dalbeattie. Disposal of the appeal was delayed pending the decisions of a Tribunal of Commissioners in England on the valuation, or disregard, of capital resources by way of heritable property in England. The relevant decisions (in the cases on Commissioner's file CIS/417/92 and CIS/391/92) were subsequently circulated in the present appeal and comments received. During the dependence of the present appeal the claimant disclosed that payment of income support to her had been resumed in pursuance of a new claim made in May 1991. The capital value of the claimant's share of 45 Barend was in this connection disregarded on the basis that the claimant had placed her share on the market. After the hearing before me it was confirmed by the Department of Social Security that payment of benefit had been resumed as from 8 May 1991 in pursuance of a further claim by the claimant dated 10 May 1991 which was supported by a letter from property agents dated 25 April 1991 confirming the preparation of sale particulars for the claimant's share of the property at an asking price of £11,000. It follows from that development, as Mr Neilson accepted on behalf of the adjudication officer, that in this appeal the question of the valuation of the claimant's share required to be ascertained in relation to the period from 3 December 1990 to 7 May 1991.

3. The essential facts of the case are not in dispute. The claimant, who was born on 17 June 1950, is a divorced lady living with her young son in owner occupied premises in England which are subject to a mortgage. The capital value of that property is of course disregarded as being the claimant's home. She received income support from the introduction of that benefit in 1988. In the course of 1990 the Department of Social Security became aware that the claimant had a further capital asset consisting of the $\frac{1}{4}$ share of a holiday chalet at 45 Barend above-mentioned, which had been conveyed to her by her parents by a Disposition dated 14 April 1988 and recorded in the General Register of Sasines on 12 May 1988. That Disposition, stated to be for "love, favour and affection" and "without any consideration being paid", conveyed the chalet to the claimant, her sister, and 2 brothers "equally between them and to the survivor or survivors of them and to their respective assignees and disponees whomsoever and to the executors of the survivor".

4. It was common ground in this case that as a result of that Disposition the claimant acquired a $\frac{1}{4}$ *pro indiviso* share of the property. In the light of a district valuer's letter valuing the property at £45,000 an adjudication officer on 20 January 1991 decided that the claimant was not entitled to income support from 3 December 1990 because she possessed a capital asset valued at £10,125 (£45,000 less 10%, divided by 4). That sum was in excess of the capital limit for income support purposes of £8,000. The claimant appealed against the termination of her benefit.

5. At the tribunal hearing the claimant produced a letter confirming the value of the chalet at £45,000 but pointing out that that figure included furniture and fittings valued at £5,000. The claimant also maintained to the tribunal that she could not sell her $\frac{1}{4}$ share of the chalet on the open market and that her sister and 2 brothers were not in a position to buy it. The tribunal unanimously refused the claimant's appeal. They included in their decision the following findings of fact:-

"2. The Appellant is the beneficial owner of a one quarter share in a holiday home in Scotland which excluding furniture and fittings is worth £40,000. By Regulation 52 of the Income Support (General) Regulations the Appellant's one quarter share is £10,000. There is no mortgage on the property and as there is no intention to sell the property by Regulation 49 of the General Regulations the Appellant's share of the property is valued at £10,000 less 10% attributable to a sale amounting to £1,000 so that the value of the Appellant's share of the property is £9,000. As the value of the Appellant's capital exceeds the prescribed amount of £8,000 set by Regulation 45 of the General Regulations the Appellant is not entitled to Income Support."

In their reasons the tribunal noted that the holiday home could not be disregarded as a capital asset and had to be taken into account as available capital and as such exceeded the capital limit for income support purposes.

6. Regulation 49 of the Income Support (General) Regulations 1987 contains the following material provisions:-

"49. Capital which a claimant possesses in the United Kingdom shall be calculated -

(a) ... [inapplicable], at its current market or surrender value, less -

- (i) where there would be expenses attributable to sale, 10%; .."

Regulation 52 of the same Regulations (which is headed "Capital Jointly Held") provides materially as follows:-

"... [inapplicable] where a claimant and one or more persons are beneficially entitled in possession to any capital asset they shall be treated as if each of them were entitled in possession to the whole beneficial interest therein in an equal share and the foregoing provisions of this Chapter shall apply for the purposes of calculating the amount of capital which the claimant is treated as possessing as if it were actual capital which the claimant does possess."

7. Following the decisions of the Tribunal of Commissioners in CIS/417/92 and CIS/392/92 above-mentioned it was accepted on behalf of the adjudication officer in this appeal that what fell to be valued for the purposes of regulation 49 in a case coming under regulation 52 was the value of the claimant's $\frac{1}{4}$ *pro indiviso* share of the holiday chalet and not the value of the whole property divided by 4. It was subsequently intimated on 24 August 1983 that the Chief Adjudication Officer had decided to apply for leave to appeal to the Court of Appeal in England against the Commissioners' decisions in those cases. Notwithstanding that development Mr Neilson on behalf of the adjudication officer accepted before me that those decisions were correct in their approach to the treatment and valuation of heritable property jointly held, such as the present claimant's capital resource, and that the tribunal in the present case had erred in law in adopting the opposite approach. It was not clear whether the proposed appeals to the Court, for which leave had been granted, were to proceed. In these circumstances and as I participated in the Tribunal of Commissioners' decisions concerned I have adopted the same approach to the construction of regulation 52, although recognising the differences between the English property law under consideration in those cases and the law of property in Scotland. I hold that the tribunal erred in law in the present case in that respect.

8. The tribunal decision is also erroneous in law in my judgment in failing to note that the termination of the claimant's existing entitlement to income support could only competently be done by a decision on review. There was no indication whatever in the adjudication officer's decision or his submission to the tribunal that the decision under appeal was made on review. Moreover as the termination was done retrospectively from 3 December 1990 it appears to me that the decision could not competently be made under regulation 17(4) of the Social Security (Claims and Payments) Regulations 1987 and that review and revisal would have to be effected under the statutory provisions of section 104 of the Social Security Act 1975, as it then was. The tribunal should have investigated the position in this regard and corrected it in their decision on being satisfied by the adjudication officer that grounds of review were established.

9. I set aside the decision of the tribunal and refer the claimant's case for reconsideration by another tribunal. As the new tribunal will require to accept my directions as to the incidents of *pro indiviso* property in Scotland and also my directions as to the proper approach to valuation of the claimant's *pro indiviso* share under regulations 49 and 52 above-mentioned, (unless those directions on the latter point are displaced by the Court of Appeal consequent upon the proposed appeals above mentioned), I consider that

the claimant's case can properly be put before a tribunal in England convenient to the claimant's home. However that may be, the new tribunal will require the benefit of a fresh valuation of the claimant's property on a correct basis and it will be for the adjudication officer to obtain this and put it before the tribunal. That valuation will of course require to be obtained from a valuer familiar with the locality of the holiday home. In this connection some background information which was not disputed may be of some relevance. The holiday chalet was completed about 1972 or 1973 and was occupied as a family holiday home. It was transferred by the claimant's parents to the children in 1986 as above-mentioned. It was understood by all concerned that it would be retained as a family holiday home. It has all along been used as such, with some additional outside lets, the proceeds of which are shared among the joint owners. The claimant has had no response to the advertisement of her share and, as stated to the tribunal, did not think that her sister and brothers were in a position to buy her share.

10. There is no doubt that a *pro indiviso* proprietor in Scotland can dispose of his or her share without realisation of the whole property and moreover can do so without the consent of the other proprietors. See *Bell's Principles s1073, Stair Encyclopedia of the Laws of Scotland*, Volume 18, paragraph 28. It is also clear that under Scots law there would be no sustainable defence by the remaining co-proprietors to an action for division or sale by a purchaser of the claimant's share seeking to realise the property to recoup his investment. The specific exceptional defences of contract or personal bar referred to in Upper Crathes Fishings Ltd v Bailey's Execs 1991 SLT 747 would not be in question in the present case.

11. Mr Neilson for the adjudication officer submitted that for the purposes of the valuation of the claimant's share the claimant had to be deemed to be a willing seller. He submitted however that a prospective purchaser of the claimant's share would recognise that he or she was buying into a family situation and that it would be reasonable to expect opposition, even if ill-advised, to any attempt by the purchaser to force a sale of the whole property. Mr Neilson submitted that the valuation required was a valuation of the claimant's *pro indiviso* share as at 3 December 1990, and over the next 5 months, on the basis of a willing seller and a willing purchaser for a reasonably quick sale, taking account of the considerations referred to above. It was also relevant he submitted to take account of the lack of response to the claimant having placed her share on the market. The resulting valuation he submitted would necessarily be lower than the figure produced by the valuation of the whole property divided by 4.

12. I accept the substance of all of Mr Neilson's submissions. The adjudication officer should accordingly obtain and submit a new valuation of the claimant's $\frac{1}{4}$ *pro indiviso* share of the chalet valued as a separate asset. The valuation will require to be that considered appropriate in the relevant period for the purposes of this appeal, that is between 3 December 1990 and 7 May 1991. Should any material variation of value be regarded as occurring during that relatively short period this should of course be noted. The valuation should proceed upon the basis of a willing seller and a willing purchaser on an assumption of a reasonably quick sale and should be firmly based on the fact that what is for sale is a $\frac{1}{4}$ *pro indiviso* share of the property. The co-proprietors should not be assumed to be willing to sell their shares and account should be taken of any diminution of the marketability and therefore the value of the subject arising from the limited share available and in particular any likely limitations in its re-

marketability as a *pro indiviso* share and the need for further negotiations and possible court action in the event of the purchaser wishing to acquire the whole property or force a sale of it. Some account may also be taken of the apparent lack of interest in the share as so far placed on the market. It need hardly be said that in the event of the claimant disagreeing with the resultant valuation she would be at liberty to obtain another valuation herself but it would require to be shown that the second valuation had been instructed on the same basis as above.

13. The new tribunal should first consider the question of grounds of review in the light of a further submission on that matter by the adjudication officer. The claimant's ownership of a $\frac{1}{4}$ share of the holiday chalet was no doubt a material fact for the purposes of review of the award of benefit in existence in December 1990. Whether or not it provides grounds for revisal will depend of course on the conclusions reached by the tribunal on the question of value. That will be the next matter for determination by the tribunal in the light of the valuation or valuations placed before them. From whatever figure is determined as the value of the claimant's *pro indiviso* share she will be entitled to the benefit of a 10% deduction under the provisions of regulation 49(1) quoted above. If the resulting figure of value continues to exceed £8,000 the claimant will not of course have entitlement to income support. If the resulting figure is between £3,000 and £8,000 the tribunal, in revising the claimant's entitlement to income support, will require to take account of the tariff income provisions of regulation 53 of the Income Support Regulations. If the resultant valuation is under the figure of £3,000 there will of course be no grounds for revisal affecting the claimant's entitlement to benefit.

14. The appeal of the claimant is allowed.

(signed) J G Mitchell
Commissioner
Date: 29 December 1993

