RAS/1/LM Commissioner's File: CIS/754/91

SOCIAL SECURITY ACT 1986
SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal:

Case No:

[ORAL HEARING]

1. is now, I think, 30 years old. She has Down's syndrome and has for some years been entitled to an attendance allowance and a severe disablement allowance. She has also, since March 1986, been in receipt of supplementary benefit and then, since 11 April 1988, income support. She lives with her parents. On 20 November 1989 's mother, who had been appointed by the Secretary of State to act for her in social security matters, asked that the award of income support should be reviewed so as to include a severe disability premium pursuant to paragraph 13 of Schedule 2 to the Income Support (General) Regulations 1987. An adjudication officer eventually decided that was entitled to the premium from 11 April 1988 (when the income support scheme commenced) until 8 October 1989 when the condition of entitlement to the premium changed because of the amendment of the definition, in regulation 3 of the 1987 Regulations, of "non-dependant". In August 1990 a request was made for payment of the premium as from 9 October 1989. That was refused by the adjudication officer. appealed and the Derby social security appeal tribunal decided that she was entitled in the period 9 October 1989 to 30 September 1990 but not from 1 October 1990 when the definition of "non-dependant" was further amended. appealed to the Commissioner contending that she continued to satisfy the condition after 1 October 1990. I held an oral hearing of her appeal and at the same time heard the case of CIS/630/92, which raises the same issues. Mr Robin Allen of Counsel appeared for and Mr Rabinder Singh, also of Counsel, appeared for the adjudication officer.

2. To qualify for the severe disability premium an income support claimant must be a "severely disabled person" as in effect defined by paragraph 13(2) of Schedule 2 to the 1987 Regulations. Paragraph 13(2)(a)(ii) requires that the claimant should have "no non-dependants aged 18 or over residing with

him". "Non-dependant" is, as I have said, defined by regulation 3. The definition has been tightened up from time to time. The original version and the successive amended versions are set out in the Appendix to this decision. Essentially a "non-dependant" is" ... any person except someone to whom paragraph (2) applies, who normally resides with a claimant". Paragraph (2) then excludes various kinds of people from the definition notwithstanding that they are residing with the claimant. It is this paragraph (2) list that has undergone the several amendments. The first version was effective from 11 April 1988 to 9 April 1989. The next version ran until 8 October 1989. From 11 April 1988 to 8 October 1989 the adjudication officer, as I have said, had accepted that Ms Boddy's parents were excluded from being "non-dependants" by paragraph 13(2)(c) as being persons who "jointly occup[ied] the claimant's dwelling". In doing so the adjudication officer applied the interpretation of "jointly occupies" given in CIS/180/1989. Ms Boddy has been paid for that period and it is not in issue.

3. From 9 October 1989 paragraph 3(2)(c) was much expanded to read -

> "(c) a person who jointly occupies the claimant's dwelling and either is a co-owner of that dwelling with the claimant or his partner (whether or not there are other co-owners) or is liable with the claimant or his partner to make payments in respect of his occupation of the dwelling;"

The circumstances of and her parents no longer fitted into (c) and it then became case, which the tribunal accepted, that paragraph (d) applied because s parents were persons to whom she was "liable to make payments, in respect of [her] occupation of the dwelling". From 1 October 1990 what had been sub-paragraph (d) was sub-divided into sub-paragraphs (d), (da) and (db) and the words "on a commercial basis" were added so that (d), (da) and (db) could apply only if the liability was "to make payments on a commercial basis". The tribunal had, as I have said, accepted that succeeded on the version of (d) up to 1 October 1990 but did not accept that the liability to make the payments to her parents was on a commercial basis. I should add that from 11 November 1991 a further restriction operated to the effect that "close relatives" could no longer come out of the definition of "non-dependant". It is common ground that, at least from that date, would not be entitled to the premium.

4. In this decision I am concerned with regulation 3(2)(d) as it applied in the period 9 October 1989 to 30 September 1990 and in particular with the meaning of the words "liable to make payments, in respect of his occupation of the dwelling;". I am also concerned with "on a commercial basis" as from 1 October 1990.

5. There is no dispute that "liable to make payments" in the

provisions in question refers to legal liability as distinct for example from a moral or ethical obligation. Mr Allen and Mr Singh had initially disagreed as to the precise nature and extent of the legal liability. Mr Singh submitted in effect that the liability must be a contractual liability which among other things demands that there should have been an intention to create legal relations; in a family situation particularly where, as in this case, parents were looking after their severely handicapped daughter, there was unlikely, said Mr Singh, to be the necessary intention that whatever arrangements were made between the daughter and her parents should be attended by legal consequences: see e.g. Balfour v Balfour [1919] 2 KB 571, Horrocks v Forray [1976] 1 WLR 230 and Fulwood and Chesterfield Borough Council (transcript 9 June 1993) per Hoffman L.J. page 7D. Mr Allen eventually accepted that "liable to make payments" did mean contractually liable and he submitted that such a liability was to be implied from the facts that was the licensee of her parents (which Mr Singh did not dispute) and that the parents received her benefit payments and did so in effect in return for the continuation of the licence; if circumstances changed so that the parents did not continue to receive the payments they could terminate the licence. Mr Allen relied on CIS/195/91 (Scarborough) and the discussion of that case by the Tribunal of Commissioners in the common Appendix to CSIS/28/92 and CSIS/40/92.

6. Scarborough was essentially concerned with the meaning of "commercial basis" as introduced into the provisions from 1 October 1990. The tribunal in that case had held that in the circumstances, which were very similar to those of Mr Scarborough was liable to his parents to make payments in respect of his occupation of what perhaps might be called his part of the house. On appeal to the Commissioner the solicitor for the adjudication officer accepted that the tribunal had rightly decided that matter, Mr Scarborough being liable to make his weekly contribution at least in the sense that if he did not do so his licence to remain could be terminated. The two Scottish cases decided by the Tribunal of Commissioners raised different issues because in Scots domestic law any purported contract with a mentally handicapped person - an incapax - is, depending on the degree of handicap, void ab initio and not voidable as in English domestic law: see Gloag, "Contract" 2 ed. page 92 and Ashton and Ward, "Mental Handicap and the Law" (1992) page 22. So the Tribunal of Commissioners, proceeding from the premise that Scarborough had been rightly decided under English law (as Counsel for the adjudication officer in those cases accepted), then considered whether the position for Scottish claimants might be rescued by the application of the Scots doctrines of recompense or negotiorum gestio. The Tribunal of Commissioners concluded that that was indeed the case. They said (paragraph 34) -

> "We are happy to find, in the result and upon reflection, that our conclusions as set out above in regard to the consequence of the application of the domestic law of Scotland in such cases concerning incapax claimants living

with parents can produce a result not wholly dis-similar in practical terms to that conceded for England in Scarborough."

7. Mr Singh said that in Scarborough it was clear that the tribunal had correctly analysed the circumstances and were right to conclude that there was the requisite liability. The essential matters he said were these -

(a) there must be an obligation to make payments derived from a recognised source of law e.g. contract;

(b) the obligation to make the payments must be in respect of the occupation of the premises and not e.g. for food and clothing;

(c) the power to bring the licence to an end must be referable to a breach of the condition to make the payment under the contractual licence and not to some other matter.

And being satisfied that the tribunal in Scarborough had sufficiently dealt with those matters and had reached a sustainable conclusion he accepted that the concession in Scarborough had been rightly made. The Tribunal of Commissioners in the Scottish cases had of course proceeded on the basis that "liable" meant contractually liable; it was only because there could be no contract with an incapax in Scots law that the Tribunal explored the possibilities of recompense and negotiorum gestio.

8. In the end, as it seemed, there was nothing between Mr Allen and Mr Singh as to the matters requiring consideration in the detection of legal liability and I take the view that those matters were correctly identified by Mr Singh as set out above. It follows that in any particular case the appeal tribunal must make findings of fact as to the matters which are relevant to (a), (b) and (c) in paragraph 7 above. So there would need to be findings as to the terms on which a claimant lives in his parent's home, what payments are made and in respect of what, whether for example the parents might have incurred a cost in providing accommodation in accordance with the claimant's needs, how contributions made by the claimant are applied - if e.g. they go towards the rent or mortgage that would be a stronger case than if they are used for the claimant's own personal needs. And having made appropriate findings of fact a tribunal will need to consider whether in those circumstances it is right to conclude that there was a contractual liability. Crucial to that will be the question whether there was, in the family situation in issue, an intention to create legal relations.

9. Such an intention may be inferred from a course of conduct: see Scarman L.J. in Horrocks v Forray (supra) at page 239. And it might not be too difficult to imply such an intention in the case of an adult member of the family making regular payments "in respect of his occupation of the dwelling". As Mr Allen pointed

out, many of the family situation cases in which it was held there was no such intention are husband and wife cases where there might well be a public policy not readily to infer such an intention. Mr Allen also made the point, and I think it may have substance, that in a case where the parents depend on the financial contribution, because they are themselves in poor circumstances, possibly on income support, it may be easier to infer an intention to create legal relations than in a case where the parents are well off and do not need the money.

10. The tribunal in the present case did not make sufficient findings as to the matters to which I have just referred and it is not plain whether they rightly concluded that Ms Boddy was "liable to make payments in respect of [her] occupation". The findings of fact on the matters mentioned above - not intended to be an exhaustive list - may also be relevant to the "commercial basis" point which arises from 1 October 1990. I should perhaps say that the tribunal did indeed make a very valiant effort to cope with this more than usually complex case.

11. Very late in the day Mr Allen made a quite new submission. In the alternative he put his case on the basis of quasi contract. He submitted, referring to In Re Rhodes [1890] 44 Ch. D. 94, that where a person of sound mind spends money on behalf of a person under a disability expecting to be repaid for what are properly described as "necessaries" the law will acknowledge a liability out of the estate or financial interests of the disabled person. Such liability to pay for goods supplied has of course, since the Sale of Goods Act 1893, been a statutory liability. Mr Allen submitted, relying on a passage in Chitty on Contracts: General Principles (paragraph 559), and In Re Rhodes, that a similar though non-statutory liability arose in relation to the provision of necessary accommodation. Thus, said Mr Allen, on the facts of Ms Boddy's case, and the many other such cases, there was a quasi contractual liability to make the payments in return for the accommodation and that satisfied the words of the provision.

12. The principle on which Mr Allen relied is one aspect of the law of restitution as fully explained in Goff and Jones "The Law of Restitution" 3 ed. 1986 at page 344 as follows -

> "Generally, persons suffering from incapacity can contract for the supply of necessaries. Moreover, if a person suffering from incapacity enters into a contract for the supply of necessaries, and the contract is for some reason ineffective, his liability to pay for necessaries received, though it may be quasi-contractual, will not be based on any concept of necessitous intervention; it will be founded on his request.
>
> Exceptionally, however, necessaries may be supplied to a person in an emergency and without request. It is with these cases that we are concerned in this chapter. In a Welfare State, examples of necessitous intervention in such circumstances may be few and far between, but those that do

exist show that the courts are prepared to reimburse a stranger if he intervenes in such an emergency.

Mentally Disordered Persons

In Williams v Wentworth it was suggested that:

> "however beneficial to the lunatic, the expenditure may have been, yet, as the lunatic was incapable of contracting, no debt could be constituted; but I am of the opinion, that in the case of money expended for the necessary protection of the person and estate of the lunatic, the law will raise an implied contract, and give a valid demand or debt, against the lunatic or his estate ..."

Before a supplier can obtain payment for necessaries supplied to a mentally disordered person in a case of necessitous intervention, he must satisfy the following conditions. He must show that there was some necessity, which may be done by proving that he supplied necessaries; that he was a suitable person to intervene (such as, for example, a relation), and that he intervened bona fide in the interests of the mentally disordered person. Moreover, he must intend to charge, and it has been said that the onus is on him to prove such an intention.""

Those are the principles. It was not in issue between Mr Allen and Mr Singh that liability in restitution can arise only in the case of a person who has no contractual liability at all e.g. an infant or what used to be called a lunatic and whose "contract" therefore is void rather than voidable. That is of course the case of the Scottish incapax but restitution in English domestic law is by no means the same as recompense in Scots law.

13. The availability of restitution depends, as Goff and Jones makes clear, on proof of an intention to charge. Furthermore the principle, as conceivably relevant to Ms Boddy's kind of case, might appear, from what is said in Goff and Jones, to be confined to emergency situations and it is difficult to see how such a case could be so described. In these cases it will always be necessary to decide whether the degree of mental handicap is such that there is no contractual capacity. In Ms Boddy's case it seems clear from their findings that the tribunal appreciated the point and were in no doubt that she had the capacity to enter into at least a voidable contract. And, as Mr Singh pointed out, she was eventually a party to the written licence to which I refer below. Thus there would seem to be no doubt that [redacted] has sufficient contractual capacity and it follows that restitution would not be available in her case.

14. [redacted] did of course appeal in respect of the tribunal's decision as it concerned "commercial basis" and, for the reasons to which I refer below, the tribunal's decision is erroneous in law in respect of that matter. It is also erroneous in relation to "liable to make payments" because the findings of fact and the

reasons are insufficient on that particular matter. I must therefore set their decision aside and, because I do not have sufficient facts to enable me to substitute my decision for that of the tribunal, I remit the case for rehearing by a differently constituted tribunal.

15. If the new tribunal, following the principles explained above, conclude that was under a liability to make payments in respect of her occupation and that accordingly paragraph 3(ii)(d) applied that will enable to succeed at least to 30 September 1990. Thereafter, as I have said, there is the additional test of "commercial basis". As to that it was said in Scarborough (paragraph 5) -

> "I cannot see that "on a commercial basis" has any very precise or any technical meaning. The Shorter Oxford Dictionary defines "commercial" as meaning "1. Engaged in commerce, trade, 2. of or relating to commerce or trade and 3. viewed as a matter of profit or loss" and it seems to me that what one has to consider, on the facts of each case, is whether it is the sort of arrangement that might perhaps have been entered into by those concerned had they e.g. taken in a lodger. It is in my view possible but unlikely that an arrangement between close family members would be likely to be properly described as being on a commercial basis and perhaps even less likely in the case of a mentally and physically handicapped person living within his own family. At all events it seems to me to be entirely a matter of fact ... "

And the Tribunal of Commissioners said (paragraph 32 of the Appendix) that "on a commercial basis" -

> " ... imported to that concept something of an arms length test: i.e. what might be arranged with a paying lodger. A similar conclusion was reached in England in the case of Scarborough."

Now the tribunal in case appear, from what they said in their reasons, to have been influenced against finding a "commercial basis" in that case because there was no evidence that parents took in boarders. That however seems to me to be an irrelevant consideration. The test, as proposed in Scarborough, is whether, on the facts, "it is the sort of arrangement that might perhaps have been entered into by those concerned had they e.g. taken in a lodger". The Tribunal of Commissioners said (paragraph 33 of the Appendix) that it will be necessary for the adjudicating authorities "to take account of any payments actually made and then consider whether or not that is broadly in line with what a lodger might be expected to pay for the accommodation and facilities offered. We suspect that in many cases local knowledge will provide an answer ... ".

16. There was before tribunal a written "Licence" dated 6 June 1991 narrating certain background matters and setting out the terms on which was to occupy. While the

document is in legal or commercial form and is no doubt directed at establishing the existence of a liability and that it was on a commercial basis, I agree with the tribunal that it is not conclusive on either of those matters which must still be considered on the basis to which I have referred.

17. As I have said, from 11 November 1991 close relatives are in effect taken out of the list of persons who are not to be treated as non-dependants. So from that date Ms Boddy cannot succeed.

18. The outcome is that I allow Ms Boddy's appeal. It follows that her entitlement to the severe disability premium has to be reconsidered by the new tribunal in relation to the periods 9 October 1989 to 30 September 1990 and 1 October 1990 to 10 November 1991. That reconsideration will in the first place be directed towards the question whether in the circumstances there was a legal liability on the part of [redacted] to her parents in respect of her occupation and on that the new tribunal must have regard to the matters referred to above, keeping in mind that the adjudication officer does not challenge that on the facts as found in Scarborough the tribunal were right in that case to conclude that there was such a liability. If Ms Boddy fails on this point - as to which I express no view in the absence of complete findings - then she gets no assistance from the principle of quasi-contract or restitution. If she succeeds on legal liability then from 1 October 1990 "commercial basis" must be considered as explained in Scarborough and by the Tribunal of Commissioners. She will not on any view be entitled after 10 November 1991.

19. The statutory provisions in issue in this case apply of course throughout the United Kingdom. However in the important relevant respects referred to above the domestic law of England differs from that of Scotland. In the two Scottish cases the Tribunal of Commissioners said (paragraph 34 of the Appendix) that -

> "We are happy to find, in the result and upon reflection, that our conclusions as set out above in regard to the consequence of the application of the domestic law of Scotland in such cases concerning incapax claimants living with parents can produce a result not wholly dis-similar in practical terms to that conceded for England in Scarborough."

It may be however that claimants in England could find themselves in the position of having to satisfy a more onerous test than those in Scotland. That is because, if I am right, "liable to make payments" means contractually liable and the doctrine of restitution does not assist claimants in England in the way that recompense might in Scotland. Presumably it was never intended that the outcome should depend on whether the claim was made in England or Scotland and it is to be hoped that the adjudicating authorities in England will keep in mind the desirability of consistency between the two countries. In essence there should

be what I might call a broad approach to satisfaction of the condition keeping in mind that the adjudication officer has throughout accepted that in Scarborough it was right to conclude that the claimant was entitled to succeed in relation to the period 9 October 1989 to 30 September 1990. I should have thought that the facts in many of the cases are likely to be essentially indistinguishable from those in Scarborough.

(Signed) R A Sanders
Commissioner

Date: 11 November 1993