Housing Costs — Reconnections CPAG
Loan — Doesn't matter that
Original Loan Carries No Interest

★ 107/94

JM/1/LM **Commissioner's File:** CIS/119/94

SOCIAL SECURITY ACT 1986
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

[ORAL HEARING]

1. This is a claimant's appeal, brought by leave of the chairman of the social security appeal tribunal, against a decision of that tribunal dated 5 September 1993 which disallowed the claimant's appeal against a decision issued by the adjudication officer on 13 May 1993. My own decision is as follows:

(1) The aforesaid decision of the appeal tribunal is erroneous in point of law and is set aside.

(2) Without making fresh or further findings of fact, I can give the decision which I consider that the appeal tribunal should have given.

(3) Into the assessment of his income support from 3 December 1991 the claimant is entitled to have carried housing costs reflecting the interest ("eligible interest") on a loan which stood at £59,000 on that date.

(4) The adjudication officer and the claimant/the claimant's representative shall endeavour to agree the arrears of benefit thrown up by this decision. Should such agreement not be reached, either party shall have liberty to apply to the Commissioner for the restoration of this appeal for the final determination of those arrears.

2. The facts of this case are relatively simple and not in dispute. For ease of cross-reference, I set them out in sub-paragraphs:

(a) The claimant was born in 1958 and lives with his wife

in a house to which I shall refer as "No 23".

(b) The claimant bought No 23 in 1986. The purchase price was £67,000. Mortgage Express advanced £35,000 by way of mortgage. Four friends, or relatives, made to the claimant four separate loans to a total of £23,000 - and that sum, too, went towards the purchase price. The balance was paid out of the claimant's own funds. None of the four personal loans carried interest and none was the subject of a fixed term. The agreement was that repayment would be made if and when demanded. (The claimant is a Muslim - and that sort of arrangement is in no way unusual in Muslim society.)

(c) Mortgage Express did not have an office in the locality of No 23. If a postal repayment instalment arrived late, an extra charge of £20 was made. The claimant decided to change his mortgagee. On 24 August 1990 a mortgage was executed whereby the Woolwich Building Society advanced £36,000 on the security of No 23 - and the Mortgage Express mortgage was discharged.

(d) Throughout the foregoing transactions the claimant was in regular employment and able to meet his commitments.

(e) In July/August 1991 - due, no doubt, to the recession - the claimant's friends asked for the repayment of the four loans. The claimant was in no way embarrassed by "negative equity". He went back to the Woolwich seeking a further advance of £23,000. He was successful. The letter of offer was dated, or was delivered on, 7 August 1991.

(f) The claimant did not immediately accept that offer. At about that time he went to Pakistan for a short holiday. His employers closed for two weeks in August - and knew, I think, that the claimant was going to Pakistan for his holiday. But the claimant's confirmation of his return flight was mishandled in Pakistan. He was a few days late in getting back to England; and when he turned up for work, he was dismissed for unauthorised absence.

(g) On 18 September 1991 the claimant accepted the offer of loan by the Woolwich. The further mortgage was executed on 8 November 1991. The whole of the advance of £23,000 was devoted to paying off the four creditors. (The papers contain the written acknowledgment of each of the four of them.)

(h) But by then the claimant was out of work. He claimed unemployment benefit. That was awarded from 24 November 1991. On 3 December 1991 he made his

claim for income support. In Part 9 of the claim form he entered £58,000 as the size of "the original mortgage or loan". Various enquiries were made. Income support was awarded as from 3 December 1991; but housing costs were assessed on the basis of a loan of £36,000 (cf sub-paragraph (c) above). It is common ground that it was not until 13 May 1993 that the adjudication officer issued a formal decision excluding the £23,000 from the appropriate loan total. That is the decision which lies at the forensic root of these proceedings. And the sole live issue in this appeal is whether that £23,000 was rightly excluded.

3. The resolution of that issue depends upon the construction to be put upon paragraph 7(3) of Schedule 3 to the Income Support (General) Regulations 1987:

> "(3) Subject to sub-paragraphs (3A) to (6), in this paragraph 'eligible interest' means the amount of interest on a loan, whether or not secured by way of a mortgage or, in Scotland, under a heritable security, taken out to defray money applied for the purpose of -
>
> (a) acquiring an interest in the dwelling occupied as the home; or
>
> (b) paying off another loan but only to the extent that interest on that other loan would have been eligible interest had the loan not been paid off."

The relatively few words in sub-sub-paragraphs (a) and (b) have given rise to innumerable questions and many decisions of the Commissioner. To me - at least - it seems surprising that the Commissioner has, apparently, not yet pronounced upon the applicability of (b) to cases where "that other loan" was interest free. (For most of their life the Supplementary Benefit (Requirements) Regulations 1983 had no equivalent provision; but virtually identical words featured as regulation 17(1)(b) thereof with effect from 26 January 1987.)

4. The claimant appealed to the appeal tribunal against the adjudication officer's decision of 13 May 1993. He has been ably assisted by Mr A Griffith, of the Luton Law Centre. The claimant appeared before the appeal tribunal - and Mr Griffith represented him thereat. Mr Griffith's submission was that paragraph 7(3)(b) fell to be read as if the word "any" appeared between "that" and "interest", thus -

> " .... but only to the extent that <u>any</u> interest on that other loan would have been eligible interest .... etc".

The tribunal did not accept that submission; but there and then the chairman granted leave to appeal to the Commissioner. It is only right that I should congratulate the chairman upon the exemplary detail in which was completed the form AT3. The papers

in the bundle are relatively sparse. But for the chairman's careful note, I should have had great difficulty in reconstructing the narrative.

5. The first submission of the adjudication officer now concerned, dated 8 April 1994, supported the conclusion of the appeal tribunal. But I myself did not regard the issue as being by any means open-and-shut. I so said in a direction dated 16 September 1994, when I directed an oral hearing. The adjudication officer now concerned then made a further written submission, dated 14 October 1994. Therein he resiled from his earlier submission. He accepted that the interpretation of regulation 7(3)(b) was "open to argument"; he commented that the legislature could readily have worded (b) so as to exclude replacement loans which replaced interest-free loans, if that had been the legislature's intention; and he wrote: "It has been confirmed that policy-makers intended that income support would be allowed in cases such as this one." That last sentence is, of course, of limited assistance in the construction of legislation. But I was glad to read it, for it accorded with the view to which I myself was coming in respect of such public interest as underlies paragraph 7(3)(b).

6. Notwithstanding the further submission of the adjudication officer, I did not cancel the oral hearing. The issue seems to me to be of some significance; and this is, of course, an inquisitorial jurisdiction. The claimant himself did not attend the hearing. (I had not expected him to.) But Mr Griffith came; and the adjudication officer was ably represented by Mr H Dunlop, of counsel, instructed by the Solicitor to the Departments of Health and Social Security. I myself enjoyed the hearing; and it was certainly not fruitless. I have been assisted by the wide-ranging exchange of views.

7. It has never been contended that the eligible interest on a replacement loan must be restricted (in percentage terms) to the interest which was payable on the replaced loan. In paragraph 10 of his initial submission, the adjudication officer now concerned wrote:

> "I submit that the provisions of sub-paragraph 7(3)(b) above restrict the amount of eligible interest on the later loan to the interest payable on the first ones, that is, nil."

I do not think that the adjudication officer was there intending to do more than to submit that if no interest was payable on the replaced loan, then no interest could be eligible in respect of the replacement loan. At the hearing before me, Mr Dunlop readily agreed that if the claimant's friends had lent the money at an annual interest rate of $^1/_2$%, then there would never have been any query raised about treating as eligible the whole of the interest charged by the Woolwich on the £23,000 (cf paragraph 2(g) above). And - although I did not press him on the reductio ad quasi absurdum - Mr Dunlop was inclined to agree that the like would obtain if each lender had stipulated

for one peppercorn a year by way of interest. So there has certainly never been behind the legislation any principle to the effect that the liability of the income support fund is not to be increased in consequence of the replacement of one loan by another. And if we get down to one peppercorn, why should we draw the line at nil?

8. But, of course, if the language of legislation is plain, admitting of only one meaning, questions such as the one which I have just posed are vain (see, for example, the House of Lords case of Stock v Frank Jones (Tipton) Ltd [1978] 1 WLR 231, per Lord Scarman at pp 238-239). It is my own view that the language of paragraph 7(3)(b) is plain - and justifies this claimant's case. But if there is any ambiguity, then it is proper to resolve that ambiguity by reference to the intention of the legislature, as such intention can be gleaned from the rest of the relevant instrument (in this case, the General Regulations 1987). And if the legislature intended that the full interest on the replacement loan should be met in cases where the replaced loan carried only $^1/_2$% (or only, even, an annual peppercorn), it seems legitimate to assume that the intention extended to cases where the replaced loan was interest free. As Mr Dunlop put it: Why should a claimant fall victim to his own good business arrangements? Had this claimant had to have recourse to income support before the interest free loans were called in, the income support fund would, in fact, have been a substantial beneficiary. It does not seem to me to be in any way an affront to the general public interest that the income support fund should be fallen back upon when the original lenders have to terminate their generosity.

9. As I have indicated, however, I do not myself regard the language of paragraph 7(3)(b) as being ambiguous. I consider it significant that the word "the" was omitted between "that" and "interest". It would have been very simple to have written -

> " .... but only to the extent that the interest on that other loan would have been .... etc".

In some ways, that is the wording which would spring most readily to mind. I cannot think that the omission of "the" was fortuitous. Certainly its omission accords with what we are told was the intention of the "policy-makers" (see paragraph 5 above). It is tempting - but, in my view, misleading - to dwell upon the concluding words "had the loan not been paid off". Certainly, if one asks the question, "What would the eligible interest have been had the loan not been paid off?", the answer must be "Nil". But the question is, in the context of the whole of sub-sub-paragraph (b), misplaced. It ignores the omission of the word "the" to which I have just drawn attention; and, in consequence, it begs the issue. It is my confident view that the words "had the loan not been paid off" are there simply to assist in the identifying of the type of loan of which replacement is recognised. For clarity, I repeat the whole of (b):

> "(b) paying off another loan but only to the extent that

interest on that other loan would have been eligible interest had the loan not been paid off."

The basic type of loan which gives rise to "eligible interest" is covered by sub-sub-paragraph (a), ie a loan taken out to defray money applied for the purpose of "acquiring an interest in the dwelling occupied as the home". The draftsman did not repeat those words in (b). He defined the replaced loan as one on which interest would have been eligible interest had that loan not been paid off. As I have indicated, I do not think that the words "had the loan not been paid off" assist - one way or the other - in the determination of the issue before me. To put it another way: those words would create no infelicity were, as Mr Griffith suggested, the word "any" to be read between "that" and "interest".

10. I do not think that the issue is susceptible of any further useful discussion. My resolution thereof is reflected in paragraph 1(3) above. I have there given the figure of £59,000. That is the sum of £23,000 and £36,000. That latter figure comes, of course, from the transaction described in paragraph 2(c) above. In paragraph 9 of his initial submission the adjudication officer now concerned submitted that that figure should have been £35,000 - the sum originally advanced by Mortgage Express (cf paragraph 2(b) above). I can see force in that submission. But £36,000 was the figure accepted by the local adjudication officer when he issued his decision on 13 May 1993; and £36,000 was the figure to which the adjudication officer adhered at the appeal tribunal hearing. (At two places in the entries on form AT3 it is made clear that "the Department themselves did not wish to take any action over the difference between the original mortgage of £35,000 and the re-mortgage of £36,000".) There was mention at the tribunal hearing of solicitor's fees and surveyor's fees. But nothing conclusive was established; and, in the light of the express concession of the issue by the presenting officer, the appeal tribunal cannot be faulted for pursuing the issue no further. Mr Dunlop could offer no assistance as to the relevant factual background; and Mr Griffith said - reasonably enough - that he himself had looked no further into the relevant facts because, in the light of the local adjudication officer's attitude, there was no live issue. I am not disposed - at this late stage in the proceedings - to send the case back to an appeal tribunal simply so that the validity of the local adjudication officer's considered concession can be more fully explored.

11. Although it has no direct bearing upon the resolution of the issue of law, I am enheartened by the reflection that there cannot in this case be the very least suspicion that the claimant has sought to "work the system" to his own advantage or to the disadvantage of the taxpayer. As can be seen from the narrative summarised in my paragraph 2 above, at the time when his friends called in the loans and at the time when the claimant received his offer of the Woolwich advance of the further £23,000, the claimant was in full-time employment and had every expectation of remaining so. In fact I was informed by Mr Griffith that the

narrative has had a relatively happy outcome. The claimant's proceedings for unfair dismissal were settled before reaching a hearing; the claimant has been working as a self-employed taxi-driver; and the possession order made by the Luton County Court is suspended upon terms.

12. In paragraph 3 of my direction of 16 September 1994 I referred to paragraph 7(6) of Schedule 3 to the General Regulations (interest payable on accumulated arrears). Mr Dunlop told me that - reasonably enough - useful headway on the relevant calculations could not be made until the adjudication officer had this decision before him; and so be it.

13. The claimant's appeal is allowed.

(Signed) J Mitchell
Commissioner

Date: 9 November 1994