Severe Disability Premium – did the claimant have equitable proprietary interest in the house & therefore was he a "co-owner"

RAS/1/LM Commissioner's File: CIS/201/90

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: J B (Mrs) appointee for C B

Social Security Appeal Tribunal: Stockport

Case No: 616:03676

[ORAL HEARING]

1. The effect of the interim decision in this case dated 9 August 1991 was that the claimant was entitled to the severe disability premium from 11 April 1988 to 8 October 1989. The case then awaited the outcome of Foster in the House of Lords and decisions to be made in CIS/754/91 (Boddy) and CIS/630/92 (Mistry); it has also awaited my decision on the proprietorial interest point dealt with below. As is well known, the outcome in Foster does not assist the claimant and I do not need to dwell on that further. Decisions have now been given in Boddy and Mistry, both parties have been supplied with copies and have had the opportunity of making submissions. The issues raised by those cases which remain to be dealt with in this case are fully explained in those decisions, and the relevant statutory provisions are fully set out in the Appendix to Boddy.

2. The claimant succeeded in respect of the period 11 April 1988 to 8 October 1989 because of the meaning given to regulation 3(2)(c) by CIS/180/89. From 9 October 1989 for a claimant to bring himself within 3(2)(c) joint occupation was not enough; there also had to be co-ownership or joint liability to make payments, presumably to a third party, in respect of the occupation of the dwelling. At the oral hearing of this appeal which preceded the interim decision referred to above, Mr Lyons for the claimant submitted that regulation 3(2)(c) remained applicable even after 9 October 1989 because the claimant was said to have a beneficial interest in the house in which he and his parents lived and which was owned by them and the co-ownership condition was therefore satisfied. The oral hearing was adjourned for further written submissions on this point. It was then resumed after Boddy and Mistry had been decided and I also heard two other appeals on the same point, CIS/39/92 and CIS/290/92. On the resumed oral hearing Mr Lyons again represented the claimant in this case and also the claimant in CIS/290/92. Mr P. Stringer, a welfare rights worker, represented

the other claimant. Mr A. Cousley of the Solicitor's Office Departments of Health and Social Security represented the adjudication officer in the three cases.

3. The claimant in this present case is severely physically and mentally handicapped as is shown by his entitlement to attendance allowance, severe disablement allowance and mobility allowance. The family house was purchased in 1971 on a 25 year mortgage in the joint names of the parents. At that time the claimant was 4 years old. Alterations were made to the house so that it could better accommodate the claimant. These alterations were paid for partly by the family from their own resources and partly by their local authority. The claimant's mother is his appointee for social security purposes. The claimant's benefit money is paid to her as appointee and, at any rate, since he turned 18 it has been pooled with other family money and the mortgage, together with other household expenses, has been paid from the pool. In those circumstances Mr Lyons submitted that the claimant had an equitable proprietary interest in the house, was thus a co-owner and therefore remained entitled to the severe disability premium pursuant to regulation 3(2)(c) even after the amendment having effect from 9 October 1989.

4. A number of relatively recent cases have developed the principle that a person who contributes to the cost of a property might in certain circumstances thereby acquire an equitable interest in it. I do not I think need to traverse all the cases because the rules are conveniently set out in the judgment of Lord Justice Mustill (as he then was) in the leading case of Grant v Edwards 1986 Ch 638. I do not need to recite the facts of that case though I should perhaps mention that it concerned a couple who lived together as husband and wife, and most if not all of the cases have been concerned with what I might loosely call matrimonial situations.

5. The rules as formulated by Lord Justice Mustill (at pages 651 - 2) are -

"(1) The law does not recognise a concept of family property, whereby people who live together in a settled relationship ipso facto share the rights of ownership in the assets acquired and used for the purpose of their life together. Nor does the law acknowledge that by the mere fact of doing work on the asset of one party to the relationship the other party will acquire a beneficial interest in that asset.

(2) The question whether one party to the relationship acquires rights to property the legal title to which is vested in the other party must be answered in terms of the existing law of trusts. There are no special doctrines of equity, applicable in this field alone.

(3) In a case such as the present the enquiry must proceed in two stages. First, by considering whether

something happened between the parties in the nature of bargain, promise or tacit common intention, at the time of the acquisition. Second, if the answer is "Yes", by asking whether the claimant subsequently conducted himself in a manner which was (a) detrimental to herself, and (b) referable to whatever happened on acquisition. (I use the expression "on acquisition" for simplicity. In fact, the event happening between the parties which, if followed by the relevant type of conduct on the part of the claimant, can lead to the creation of an interest in the claimant, may itself occur after acquisition. The beneficial interests may change in the course of the relationship.)

(4) For present purposes, the event happening on acquisition may take one of the following shapes.

   (a) an express bargain whereby the proprietor promises the claimant an interest in the property, in return for an explicit undertaking by the claimant to act in a certain way

   (b) An express but incomplete bargain whereby the proprietor promises the claimant an interest in the property, on the basis that the claimant will do something in return. The parties do not themselves make explicit what the claimant is to do. The court therefore has to complete the bargain for them by means of implication, when it comes to decide whether the proprietor's promise has been matched by conduct falling within whatever undertaking the claimant must be taken to have given sub silentio.

   (c) An explicit promise by the proprietor that the claimant will have an interest in the property, unaccompanied by any express or tacit bargain as to a quid pro quo.

   (d) A common intention, not made explicit, to the effect that the claimant will have an interest in the property, if she subsequently acts in a particular way.

(5) In order to decide whether the subsequent conduct of the claimant serves to complete the beneficial interest which has been explicitly or tacitly promised to her the court must decide whether the conduct is referable to the bargain, promise or intention. Whether the conduct satisfies this test will depend on the nature of the conduct, and of the bargain, promise or intention.

(6) Thus, if the situation falls into category (a) above, the only question is whether the claimant's conduct is of the type explicitly promised. It is immaterial whether it takes the shape of a contribution to the cost of acquiring the property, or is of a quite different character.

(7) The position is the same in relation to situations (b) and (d). No doubt it will often be easier in practice to infer that the quid pro quo was intended to take the shape of a financial or other contribution to the cost of acquisition or of improvement, but this need not always be so. Whatever the court decides the quid pro quo to have been, it will suffice if the claimant has furnished it.

(8) In considering whether there was a bargain or common intention, so as to bring the case within categories (b) and (d) and, if there was one, what were its terms, the court must look at the true state of affairs on acquisition. It must not impute to the parties a bargain which they never made, or a common intention which they never possessed.

(9) The conduct of the parties, and in particular of the claimant, after the acquisition may provide material from which the court can infer the existence of an explicit bargain, or a common intention, and also the terms of such a bargain or intention. Examining the subsequent conduct of the parties to see whether an inference can be made as to a bargain or intention is quite different from examining the conduct of the claimant to see whether it amounts to compliance with a bargain or intention which has been proved in some other way. (If this distinction is not observed, there is a risk of circularity. If the claimant's conduct is too readily assumed to be explicable only by the existence of a bargain, she will always be able to say that her side of the bargain has been performed.)

Lord Justice Mustill added that (see page 653) -

"The propositions do not touch two questions of general importance. First, whether in the absence of a proved or inferred bargain or intention the making of subsequent indirect contributions, for instance in the shape of a contribution to general household expenses, is sufficient to found an interest. I believe the answer to be that it does not. The routes by which the members of the House reach their common conclusion in Gissing v Gissing [1971] A.C. 886 were not, however, the same and the point is still open. Since it does not arise here I prefer to express no conclusion upon it."

6. Now it seems to me that on the facts as I understand them

rule (4) in particular has not been satisfied. Furthermore, in the final passage I have quoted from the judgment of Lord Justice Mustill though he expresses no final conclusion, he suggests that "subsequent indirect contributions, for instance in the shape of a contribution to general household expenses" do not found an interest. While Lord Justice Mustill left the point open I do not believe it is for the Social Security Commissioner to make new law on such a point and I would not want to put forward a different view, even if I held one, from that tentatively put forward by the learned Judge.

7. Mr Lyons sought to persuade me that while there was no express bargain or explicit promise in this case there was "common intention" as in rule (4)(d). He had to concede that the claimant, because of the extent of his mental handicap could not himself have had the necessary intention but submitted that his mother, who generally looked after his affairs and was, as I have said, his appointee for social security purposes had the necessary intention on his behalf. That, I have to say, seems to me to be quite remote from reality; I agree with Mr Cousley that the mother in this case could not sensibly be regarded as having had the necessary intention for all parties and it seems to me that Mr Lyons' submission must fail on this point alone, quite apart from other points of difficulty including the "general household expenses" point to which I referred.

8. At the conclusion of the oral hearing I indicated that I would, on the proprietary interest point, either send the case back to a new tribunal to find the facts more thoroughly having regard to the principles of law, or conclude that the case must fail on this point. After further consideration of Grant v Edwards, I have come to the conclusion that the case fails on this point and I do not see any need to burden a new tribunal with it.

9. The outcome is that the proprietary interest point fails but the case must go to a new tribunal to deal with the period or periods from 9 October 1989 in accordance with the principles explained in Boddy. Paragraphs 7 to 10 show the essential matters to be considered. Paragraph 13 explains that where a claimant fails to meet the criteria set out in paragraph 7 no assistance can be derived from the equitable doctrine of restitution if the claimant has contractual capacity, and probably not even when such capacity is lacking. At this point I should probably also mention that, in my view, the question whether, having regard to the degree of the claimant's mental handicap, he has the contractual capacity to enter into a voidable contract is a different question from that considered in relation to the proprietorial interest point namely whether he had sufficient mental capacity to have formed the kind of intention required by Lord Justice Mustill's rules.

10. From 1 October 1990 to 10 November 1991 regulation 3(2)(d) became 3(2)(d), (da) and (db) and to satisfy any of those versions the liability is required to be "on a commercial basis". That particular matter is dealt with in paragraphs 4 and 5 of

CIS/195/91 (Scarborough), paragraphs 32 to 34 of the common Appendix to the decisions of the Tribunal of Commissioners in CSIS/40/92 and CSIS/28/92 and in paragraph 15 of Boddy.

11. From 11 November 1991 regulation 3(2)(d), (da) and (db) - now to be found in regulation 3(2A)(a), and (b) and (c) - do not assist a claimant where the other person in question is a close relative of the claimant or of his or her partner. That means that this route to entitlement will no longer be available to the claimant.

12. The new tribunal, when considering how the principles referred to above apply to the facts as established in this case, should have regard to paragraph 19 of Boddy and they will also want to keep in mind the facts in Scarborough and consider how the facts of that case differ from the facts before them.

13. In conclusion I should mention that while at one time Mr Lyons had put forward arguments in relation to the definition of "family" in regulation 3(2)(a) and in relation to section 16(1)(c) of the Interpretation Act 1978 he confirmed at the hearing that he no longer relied on those points. His concession that those points did not assist was in my view rightly made.

(Signed) R A Sanders
Commissioner

Date: 4 May 1994