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TOC/1/LM **Commissioner's File:** CIS/203/89

SOCIAL SECURITY ACT 1986

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

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

Name: Alfred Evans

Social Security Appeal Tribunal: Worcester

Case No: Not Known

[ORAL HEARING]

1. Our decision is that the unanimous decision of the Worcester social security appeal tribunal given on 10 August 1989 is erroneous in point of law. Accordingly we set it aside and refer the case to another tribunal for rehearing.

2. This is an appeal by the adjudication officer against the decision of the tribunal allowing the claimant's appeal against the decision of the adjudication officer, issued on 7 December 1988, regarding the claimant's entitlement to income support. The sole issue in this appeal is whether or not the claimant is entitled to the cost of emptying the septic tank at his home as a "service charge" or as a charge analogous thereto.

3. We held an oral hearing of this and an associated appeal on 2 April 1990, when the adjudication officer was represented by Mr James Latter, of Counsel, instructed by the Solicitor to the Departments of Health and Social Security. The claimant was represented by Mr Mark Rowland, of Counsel, instructed by Miss V. Chapman on behalf of the Child Poverty Action Group. We are indebted to both Mr Latter and Mr Rowland for their assistance, and we particularly note the helpful submission dated 26 March 1990 by Mr Rowland outlining the principal contentions on behalf of the claimant.

4. The claimant, who is a married man, is the owner/occupier of a house which does not have the benefit of main drainage. He has a cess pit which requires emptying periodically at a cost, at the material time, of £93 a year. The claimant had been in receipt of supplementary benefit, which included an amount in respect of the cost of emptying the cess pit, but the adjudication officer decided that no such sum could be included in the claimant's income support.

5. The claimant appealed and, on 10 August 1989, the tribunal allowed his appeal. They found as a fact that the claimant was

the owner of his home and paid a "service charge of £91.00 per annum for the emptying of the septic tank". As the claimant's undisputed evidence was that he paid "£31 three times a year", we hold that the figure of £91 was in error for £93. The tribunal's reasons for their decision were that -

> "The previous decision was based on an incorrect interpretation of the appellant's situation in that he and his wife are the owners of their house and are liable to a service charge of [£93] per annum."

6. We have been assisted by a submission dated 18 October 1989 by the adjudication officer now concerned with the case. We do not need to consider in detail all the points raised therein, in the circumstances of this case it suffices to say that we find the tribunal's decision is clearly in breach of the requirements of regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986 [SI 1986/2218], in failing to make adequate findings of fact or give sufficient reasons for their decision, which is consequently erroneous in point of law. On that ground we set it aside. Our reasons for our decision, including the relevant law, are set out in the appendix annexed hereto.

7. The adjudication officer's appeal is allowed.

(Signed) R F M Heggs
Commissioner

(Signed) M H Johnson
Commissioner

(Signed) W M Walker
Commissioner

Date: 30 May 1990

APPENDIX

INTRODUCTION

1. Each of the two cases to which this appendix relates raises an apparently simple question, namely what is comprehended by the expression "service charges" in paragraph 1(f) of Schedule 3 to the Income Support (General) Regulations 1987 [SI 1987/1967] - ("the Income Support Regulations").

2. In CIS/182/89 the issue arises because at the hearing before the appeal tribunal the claimant raised a question about the inclusion, as part of his eligible housing costs for calculating his entitlement to income support, of his liability to pay £31 three times a year for the emptying of the septic tank at the house, of which he was the freehold owner and occupier. The tribunal held that the emptying of the septic tank was a service, for which there was a charge, and so was a service charge within the meaning of paragraph 1(f) of Schedule 3 to the Income Support Regulations. In CIS/203/89 the issue arises because the claimant maintained that a charge levied upon her in respect of the cost of roof repairs fell, having regard to the terms of her lease, also within the ambit of "service charges" for the purpose of the same provision.

3. The question of the interpretation of "service charges" has thus arisen both in regard to a freeholder and a leaseholder. But, because the relevant legislation falls to be applied equally in Scotland as well as England we have had regard to the somewhat different system of landholding involved. We are satisfied, however, that the various different methods by which a dwelling may be occupied as a home under either system of law are immaterial for the purpose of interpreting the relevant regulations. For these reasons we regard each claimant whose case is before us, as the "occupier" of his or her home. We intend that term to mean any person who has a legal right to occupy the property forming his or her home. And by legal right we mean right gained by any legally recognised method of transferring the interest of occupancy of lands and hereditiments, or of heritage. In any such case there will be some form of contract reflecting the rights of that occupier and in either it or in an ancillary document, will be found covenants, heritable burdens or other terms which may require examination when considering whether any particular obligation is properly to be regarded as a service charge. We refer to any and all such as "conditions".

THE STATUTORY PROVISIONS

4. Regulation 17(1)(e) of the Income Support Regulations deals with the assessment of housing costs within a claimant's applicable amount as follows -

> "(e) any amounts determined in accordance with Schedule 3 (housing costs) which may be applicable to him in respect of mortgage interest payments or such other

housing costs as are prescribed in that Schedule."

And that Schedule provides, in so far as it is relevant, that -

"Eligible Housing Costs

1. Subject to the following provisions of this Schedule, the amounts which may be applicable to a person in respect of ... prescribed housing costs ... (applicable amounts) are -

(a) mortgage interest payments;

(aa) interest payments under a hire purchase agreement to buy the dwelling occupied as a home;

(b) interest on loans for repairs and improvements to the dwelling occupied as the home;

(c) payments by way of rent or ground rent relating to a long tenancy and, in Scotland, payments by way of feu duty;

(d) payments under a co-ownership scheme;

(e) payments under or relating to a tenancy or licence of a Crown tenant;

(f) service charges;

(g) where the dwelling occupied as the home is a tent, payments in respect of the tent and the site on which it stands;

(h) payments analogous to those mentioned in this paragraph."

.....

"Interest on loans to acquire an interest in the dwelling occupied as the home.

7.(1) Subject to paragraphs (2) to (9), the following amounts shall be met under this paragraph ... [prescribed percentages in circumscribed cases of the interest involved in the stated purpose] ..."

"Interest on loans for repairs and improvements to the dwelling occupied as the home.

8.(1) Subject to sub-paragraph (2) there shall be met under this paragraph ... [interest on loans or replacement loans for the purposes stated, so far as the latter fall within sub-paragraph (3)] ..."

"Other housing costs

9.-(1) Subject to sub-paragraph (5), there shall be met under this paragraph the amounts, calculated on a weekly basis, in respect of the housing costs specified in paragraph 1(c) to (h) subject to the deductions specified in sub-paragraph (2).

(2) Subject to sub-paragraph (3), the deductions to be made from the weekly amounts to be met under this paragraph are -

(a) where the costs are inclusive of [certain .... fuel charges]...

(b) where the costs are inclusive of ineligible service charges within the meaning of paragraph 1 of Schedule 1 of the Housing Benefit (General) Regulations 1987 (ineligible service charges) the amounts attributable to those ineligible service charges ....

(3) [Provision as to calculation of housing costs in certain circumstances].

(4) Where as compensation for [certain] work carried out ... payment of the costs mentioned in paragraph 1(c) to (g) are waived, they shall .... be treated as payable.

(5) Where an amount calculated on a weekly basis in respect of housing costs specified in paragraph 1(e) (Crown tenants) includes amounts in respect of water charges ...

5. From the foregoing it is clear that paragraph 1 of Schedule 3 lists the amounts which may be applicable to a person in respect of housing costs and then certain subsequent paragraphs deal with particular heads thereof - thus paragraph 7 deals with paragraph 1(a) and (aa), and paragraph 8 with paragraph 1(b). Paragraph 9 deals with paragraph 1, (c) and (h), which includes, at (f), service charges and, at (h), payments analogous thereto. But by paragraph 9(2) it is required that a deduction be made from the weekly amount of housing costs if they include ineligible service charges "within the meaning of paragraph 1 to Schedule 1 to the Housing Benefit (General) Regulations 1987".

6. Paragraph 1 of Schedule 1 to the Housing Benefit (General) Regulations 1987 [SI 1987/1971] (the "Housing Benefit Regulations") lists a number of "ineligible service charges". The only provision therein with a direct bearing upon our consideration is paragraph 1(g) which disallows all charges, meaning of course service charges, not otherwise specified in the paragraph "...which are not connected with the provision of adequate accommodation". But the whole paragraph is of some assistance and may, we think fairly, be summarised as disallowing

charges for meals, laundry, certain defined leisure items, cleaning of non-communal rooms and windows, transport, the acquisition of furniture and household equipment, and for the use thereof where it is to become the property of the claimant, and general counselling and support services - broadly so far as unrelated to the provision of adequate accommodation. Next, regulation 10(1)(e) provides for an element of benefit in respect of service charges, "payment of which is a condition on which the right to occupy the dwelling depends". Regulation 10(7) then defines "service charges" for the purposes of that regulation and those of Schedule 1 as -

> ".. periodical payments for services, whether or not under the same agreement as that under which the dwelling is occupied, or whether or not such a charge is specified as separate from or separately identified within other payments made by the occupier in respect of the dwelling; and 'services' means services performed or facilities (including the use of furniture) provided for, or rights made available to, the occupier of the dwelling."

7. Reference was made in the submissions before us to regulation 18 of the Supplementary Benefit (Requirements) Regulations 1983, as amended, [SI 1983/1399] ("the Requirements Regulations") which are now no longer in force, to show that in the system that preceded income support certain housing requirements had been provided for. That regulation contained a clear provision for recurring charges for the emptying of septic tanks and a clear provision for service charges of which examples were given as the "...maintenance, insurance, management and the cleaning of, common areas." And it ended with a provision, regulation 18(1)(g), in these terms -

> "(g) outgoings analogous to those mentioned in this Part."

THE AUTHORITIES

8. In considering the questions arising on these appeals we had the benefit of two Commissioners' decisions. The first decision, that on file CIS/4/88, held that water charges were not service charges because they were not connected with the provision of adequate accommodation. They were ineligible service charges for housing benefit being outside the scope of regulation 10(e) of the Housing Benefit Regulations and thus also of Schedule 1 thereto. The second decision, on file CIS/157/89, held that charges for emptying a cess-pit at a dwelling occupied by the claimant as his home, and of which he was the freehold owner, was not a service charge. After a wide ranging and helpful review of the statutory provisions in their historical context the Commissioner concluded, at paragraphs 15 and 16, that, at least in the context of a landlord/tenant relationship, a service charge required to be one made in respect of a service rendered to the tenant by the landlord and that the question of analogy requires careful consideration of the particular facts in each case. In the case of a freehold occupier the obligation to pay must be found in the terms and conditions subject to or upon

which the occupier holds the property and in which the payee must be identified. The Commissioner concluded that a service charge payable by an occupier pursuant to an agreement with, or under a statutory obligation to, a third party who has no connection with the terms and conditions subject to which the householder holds the property could only be described as "analogous" by an abuse of language. We agree, but for the reasons given in paragraph 11 below, we think that there is a shorter answer.

9. In paragraph 8 of CIS/4/88 the Commissioner pointed out that the primary question as to what is comprehended by the expression "service charges" requires some consideration of the intention of the legislature, which is to be derived from the language used in the relevant provisions. And, as he further pointed out at paragraph 6, consideration of the history of the provision and its predecessor in the Requirements Regulations leads to the conclusion that whilst many of the provisions in those regulations are reflected in the Income Support Regulations there is a conspicuous omission from Schedule 3 of those Regulations in respect of the provision in what was regulation 18(1)(d) of the Requirements Regulations for recurring charges for the emptying of cess-pits and septic tanks. The normal canon of construction is that a material change from one version of legislation to another evinces an intention of the legislature to make a change in effect. Whilst it would not be right to say that Income Support Regulations are but another version of the Requirements Regulations, in an updated form, nonetheless there is a sufficient practical relationship between the two for us to feel bound to conclude that the omission was deliberate and that it was therefore intended that such charges should be covered by the Income Support Regulations only if they fell squarely within some express provision thereof. Under the Requirements Regulations a claimant would have been able to include his septic tank emptying charges, whether they were charges that fell due under a private contract which he had made or because of some other liability and whether or not within the terms upon which he had acquired his home. However, we must now start from the position that the intention of the Income Support Regulations is that any such automatic entitlement was deliberately excluded.

"SERVICE CHARGES"

10. Against that background we turn to consider "service charges", bearing in mind that they must be such as to form part of an individual's "housing costs". We note that neither that phrase nor "service charges" is defined for the purpose of the Income Support Regulations. Housing costs must therefore be taken in the normal sense of English as meaning those costs associated with the provision of housing for an individual and, where appropriate, his or her family. So it is in relation to that provision that service charges must be interpreted. However, paragraph 1 of Schedule 3 of the Income Support Regulations has a side heading "Eligible Housing Costs". Further, paragraph 1 of Schedule 1 to the Housing Benefit Regulations speaks in terms of "...service

charges ... not ... eligible", and paragraph 1(g) provides that service charges are ineligible insofar as they are not connected with the provision of adequate accommodation. The words in paragraph 9(1)(b) of Schedule 3 to the Income Support Regulations - "..within the meaning of paragraph 1 of Schedule 1 to the Housing Benefit Regulations..." are, we are satisfied, limited to that purpose; there is no linkage to regulation 10 of the Housing Benefit Regulations other than for the purpose of the definition of "service charges" and "services". (Those definitions are included solely for the purpose of ascertaining whether a particular service charge is excluded from the scope of eligible housing costs. It provides no guide as to those which <u>are</u> within the scope of eligibility.) Accordingly in our view service charges related to the provision of a claimant's home are only restricted or cut down if and in so far as they are not connected with the provision of adequate accommodation.

11. It then follows, in our view, that the attempt made in the submission and in CIS/4/89 to use regulation 10(1)(e) of the Housing Benefit Regulations as a positive definition of service charges, namely that their payment must be a condition on which the right to occupy the dwelling depends, does not apply to the expression when used for the Income Support Regulations. We further conclude that the expression is to be interpreted liberally, particularly as its scope is not trammelled by reference to examples, as in the Requirements Regulations. It means no more and no less, in our view, than that the charges must be made for services provided in connection with a claimant's housing. But that is only the positive side. The negative side as we have already noted, is that charges in respect of any services not connected with the adequacy of the accommodation are disallowed. The emphasis is on the word "adequate"; that is to say that service charges related to something other than the adequacy or sufficiency of the accommodation are excluded.

<u>THE SUBMISSIONS</u>

12. We turn now to the principal submissions which were put before us. We start with those dealing with the general question of interpretation. The first was a submission by Mr Rowland that there should be no distinction as between those who occupied by virtue of a lease - leaseholders - and those who were owner-occupiers - freeholders. We are aware that in paragraphs 14 and 15 of CIS/157/89 the Commissioner appeared to regard service charges as primarily relating to the former relationship. It may well be the case that the majority of such charges made binding upon occupiers is most usually found, in England at any rate, in leasehold provisions. But we are aware that precisely the sort of arrangement which the Commissioner found difficulty in focusing as an example in the case of freeholders is becoming quite normal in the case of privately developed housing estates in Scotland where facilities are provided for all owners in common, either by the superior or by an arrangement involving a third party as a factor, to do the administrative work and levy, as and when required, the

appropriate charges such as for - as was tentatively suggested in CIS/157/89 - the maintenance and development of common pathways and gardens. But there are there also well understood obligations on owners there in the freehold sense - that is, properly, on infeft proprietors. Amongst them are obligations of a similar nature imposed either by the common law, or by real burdens - broadly the equivalent of covenants in English law - in the titles. Thus many tenemental properties have specific provision as to how the stair and other parts of the building owned in common will be lit, and, it may be, kept clean and painted. The same or similar may also be found in the landlord/tenant relationship. But it is enough to refer to these few examples to show that in this British provision there cannot be room for any differentiation according to the nature of the right by, or the source of the law under, which the occupier has right to his home.

13. The next major contention revolved around the question whether there was a difference between a service charge and that which was analogous to it, upon the basis that the former related to a charge for a service provided to the occupier by someone with a different but concurrent interest in the land - such as, presumably, in England a landlord and in Scotland both a landlord and a superior; whereas the analogy provision would be appropriate to the charges in respect of something provided by a third party, although again to the occupier. For reasons which will appear later we do not accept that distinction. The mere fact that there is a provision for payments analogous to those mentioned otherwise in paragraph 1 of Schedule 3 to the Income Support Regulations does not necessarily mean that an analogy is possible to each and every one of them. Thus, as was observed at paragraph 8 of R(SB) 5/87, there may be certain things so sufficiently clearly defined in a list, such as the one in issue, to indicate that analogy is not possible although it may be open in the case of other items. For our part we have great difficulty in envisaging anything which would be akin to or have a partial likeness to service charges which were not in fact so called, but were housing costs analogous to service charges and thus form part of the applicable amount. It rather seems to us that such items either would or would not be service charges. There may be analogies to some of the other payments mentioned in that paragraph 1, but since this decision does not depend on or call for a full consideration of that we reserve our opinion on that point. We are satisfied that we can deal with both the present cases by having regard to what is is or is not a service charge.

14. The next principal subject of submission was as to the extent to which it was legitimate to look to other provisions in the Housing Benefit Regulations in order to seek to discover the scope of service charges for the purposes of the Income Support Regulations. This arose because, at paragraph 6 of CIS/4/88 the Commissioner refers to paragraph 9(2) of Schedule 3 to the Income Support Regulations which through paragraph 1 of Schedule 1 to the Housing Benefit Regulations brought into consideration regulation 10(6)(b) of these Regulations with regard to water

charges. He concluded that that route led to the conclusion that water charges were ineligible service charges for the purposes of housing benefit and income support. However the reference in paragraph 9(2) of the Income Support Regulations is only to paragraph 1 of Schedule 1 to the Housing Benefit Regulations and, as earlier indicated, it seems to us that any reference outside that provision is limited to the definition of service charges in regulation 10(7). In our view it is not legitimate to look beyond those provisions for assistance in the Housing Benefit Regulations as to the positive scope of the meaning of "service charges" for the purpose of the Income Support Regulations. Conversely it is legitimate so to look, but only to the limited extent we have indicated, for the purpose of determining the scope of the negative restrictions put upon the meaning of the expression.

OUR CONCLUSIONS

15. We now turn to consider more precisely the scope of the meaning of "service charges" in relation to housing costs. It seems to us that there is a basic distinction between, on the one hand, what might properly be called charges in respect of services rendered for housing and, on the other hand, charges which give rise to contractual duties which relate only to a particular house for the exclusive benefit of its occupier. Thus an occupier contracting with a painter for the painting of the outside of his house does not thereby acquire something which could properly be called, in our view, a service in relation to his house. Even if a group of occupiers entered into a contract with one of their number, or with an independent person acting as agent, to arrange for such decorating work, the result would be the same; there would be a contract for painting in return for payment. However, if by some means the occupiers were obliged to accept the determination of the agent or a third party as to when and how the decorating was to be arranged and were equally liable for the cost, then this would, in our view, be more of the nature of a service being provided, in the shape of the arranging for the painting rather than of the painting itself. Indeed, it seems to us that, in the context of housing, the essence of the concept of a service is the provision, that is to say the determination and the arranging, of what would otherwise be left to the occupier to do for himself. However, we feel that in order to put the commitment to such an arrangement onto the level of a service, it must not be one from which an occupier can withdraw at pleasure. We conclude that the arrangement must by some means be binding upon all those with the same interest in the property - e.g. all the tenants of a single landlord in a single property, or it must run with the land so as to be binding upon successors in occupancy.

16. But that is not the end of the matter. Even although a charge may fulfil the definition which we have just set out it may still fail to qualify as an eligible service charge being excluded by paragraph 1(g) of Schedule 1 to the Housing Benefit Regulations, because it is not connected with the adequacy of the accommodation.

THE RESULT

17. We now consider the instant cases in turn. We take first CIS/203/89 - that relating to the septic tank recurring charges. There is insufficient information to enable us to come to a final determination about this case and for the reasons given in its individual decision, it must be remitted for rehearing by another tribunal. But by way of guidance we can say this. If, as rather appears from what is contained in Mr Rowland's written submission, the arrangements giving rise to the recurring charges are contained in a private contract made by the claimant with a particular organisation limited to the purpose of emptying his septic tank then that will not qualify, according to our definition above, as a housing service charge. But if it is imposed upon him and others under, or by, the terms on which he holds his property, and that could include a statutory undertaker under a duty to empty septic tanks in the claimant's area and for which it is required to make a charge, which he is then obliged to suffer and pay, then the result would be otherwise on the positive side at least. So the new tribunal will have to concentrate on the terms of the arrangement by which this septic tank is emptied. They will, if they come to conclusions thus far favourable to the claimant, then finally have to consider whether the service - and we emphasise it is the service and not the charge - is or is not connected with the provision of adequate accommodation. At this stage any part played by an outside contractor, by the nature of the arrangement, may prove fatal to the claim as not being concerned with the provision of adequate accommodation. The provision of adequate accommodation is a question of fact for the tribunal.

18. Turning to CIS/182/89, however, we are able to give the appropriate decision ourselves. The relevant terms of the lease are before us and are quoted in its individual decision. It is clear that in relation to the premises in question this claimant and others have had imposed upon them a condition of making payment for a number of matters centrally provided and arranged by the landlords. It is an obligation that runs with the property and clearly relates to, or in other words is connected with, the provision of adequate accommodation, the landlord being the "provider". And there is, perhaps not surprisingly in the circumstances, no suggestion that the services provided do not relate to the adequacy of the accommodation. This case will therefore be remitted to the adjudication officer to arrange the appropriate financial payment.