JMe/1/LM Commissioner's File: CIS/264/93

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: Brian James Gilbert

Social Security Appeal Tribunal: Plymouth

Case No: 333/07508

[ORAL HEARING]

1. The adjudication officer's appeal is allowed. The decision of the Plymouth social security appeal tribunal dated 4 January 1993 is erroneous in point of law, for the reasons given below, and I set it aside. The appeal is referred to a differently constituted social security appeal tribunal for determination in accordance with the directions given in paragraph 20 below (Social Security Administration Act 1992, section 23(7)(b)).

2. The issue in this appeal is the amount of interest on a mortgage loan to be allowed as housing costs in the calculation of the claimant's income support. At the beginning of his claim from 27 August 1991 the interest on the full amount outstanding [redacted] on the loan taken out by his partner in June 1990 was allowed on the basis that the loan was used entirely to purchase his home. In 1992, following routine enquiries of the mortgage lender, it appeared that the loan of £15005 had not been used to purchase the home and payment of housing costs was suspended from 31 March 1992. In a letter received on 11 May 1992, the claimant provided a breakdown of the items for which the loan had been used, as follows:

Full central heating (11 radiators)	£2,750*
Vinyl and fitted carpets	£3,150
Built-in wardrobe main room	£2,500
Marley double garage	£2,500
Base for garage (reinforced)	£ 250
Self-drive digger hire	£ 275
Building retaining wall to garden	£ 670*
Front porch UPVC	£1,900*
Front door UPVC	£ 350*

Rear door UPVC to new utility room	£ 425*
Window UPVC to new utility room	£ 250*
Sink unit, base and work top for new utility room	£ 175*
New door	£ 24*
New toilet suite and sink in cupboard	£ 75*
Tree replacement after storms	£ 90
Total	**£15,984**

3. On 21 May 1992 the adjudication officer determined that only the interest on the amount of the loan used for the items marked with an asterisk in the list above was allowable as a housing cost and issued a decision that the claimant was not entitled from 31 March 1992 to housing costs for interest payments on the remainder of the loan because it was not reasonable in the circumstances for interest due on that part of the loan to be met. The claimant appealed. He attended the hearing before the appeal tribunal and gave evidence about the reasons for the fitting of vinyl and carpet to the whole house, the installation of the fitted wardrobes, the building of the double garage and the replacement of the trees.

4. The appeal tribunal allowed the appeal to the extent of deciding that the claimant was entitled from 31 May 1992 to housing costs for interest on the part of the loan used for vinyl and fitted carpet, built-in wardrobes, double garage, base and digger hire. Its findings of fact set out the history of the claim. Its reasons for decision were recorded as follows:

> "[The claimant] satisfied the Tribunal of the reasons for the various items of expenditure which had been disallowed as housing costs and the tribunal has considered these in the light of Para. 8(3) of Schedule 3 which sets out the list of measures accepted as undertaken with a view to improving the fitness for occupation of the dwelling occupied as the home.
> The Tribunal noted that the house was said to be cold, with stone floors on the ground floor, and inadequately carpeted, and therefore felt that the provision of vinyl and carpet would improve the insulation of the dwelling and should therefore be allowed under Para. 8(3)(j).
> As regards the built-in wardrobes, the tribunal considered that if at the time they were built in they were fulfilling a need which [the claimant] could afford at that time, then it was reasonable in the circumstances for these to be taken into account as improving the dwelling for occupation.
> With regard to the three items covering the building of the double garage, the Tribunal noted that Regulation 2 defines a dwelling occupied as the home as meaning the dwelling together with any garage, garden and outbuildings, normally occupied by the claimant as his home. They therefore felt

that in this day and age the building of a garage was an improvement which was reasonable in the circumstances, that it was reasonable for [the claimant] to excavate and prepare the base himself, and that just because it was a double garage it did not make the improvement unreasonable in the circumstances."

5. The adjudication officer applied for leave to appeal to the Commissioner, on the grounds that wardrobes and floor-covering constituted furnishings, which were not covered by paragraph 8(3) of Schedule 3 to the Income Support (General) Regulations 1987, and that the appeal tribunal erred in adopting the claimant's ability to meet the cost of improvements as the criterion of reasonableness. Leave was granted by a Commissioner on 2 June 1993. Written submissions were made on the claimant's behalf by Mrs A Spalding of Liskeard Citizens Advice Bureau and on behalf of the adjudication officer, following which a request on behalf of the claimant for an oral hearing of the appeal was granted. The oral hearing took place on 27 April 1994. The claimant was not able to attend. He was represented by Mrs Spalding and by Mr D Williams of Cornwall Welfare Rights Unit. The adjudication officer was represented by Mr J Polland of Central Adjudication Services. I am grateful for the assistance of all the representatives.

6. Before dealing with the submissions made at the oral hearing it is convenient to set out the relevant parts of paragraph 8 of Schedule 3 to the Income Support (General) Regulations 1987 ("Schedule 3"), as in force on 31 March 1992.

> "8.--(1) There shall be met under this paragraph an amount in respect of interest payable on a loan which is taken out, with or without security, for the purpose of--
> (a) carrying out repairs or improvements to 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 met under this paragraph had the loan not been paid off,
> and which is used for that purpose or is to be so used within six months of the date of receipt or such further period as is reasonable, and the amount to be met under this paragraph shall be calculated as if the loan were a loan to which paragraph 7 applied.
> [(2) revoked]
> (3) In this paragraph "repairs and improvements" means major repairs necessary to maintain the fabric of the dwelling occupied as the home and any of the following measures undertaken with a view to improving its fitness for occupation--
> (a) installation of a fixed bath, shower, wash basin, sink or lavatory, and necessary associated plumbing;
> (b) damp proofing measures;

(c) provision or improvement of ventilation and natural lighting;
(d) provision of electric lighting and sockets;
(e) provision or improvement of drainage facilities;
(f) improvement in the structural condition of the dwelling occupied as the home;
(g) improvements to the facilities for storing, preparing and cooking food;
(h) provision of heating, including central heating;
(i) provision of storage facilities for fuel and refuse;
(j) improvements to the insulation of the dwelling occupied as the home;
(k) other improvements which are reasonable in the circumstances."

In regulation 2(1) of the same Regulations "dwelling occupied as the home" is defined as:

> "the dwelling together with any garage, garden and outbuildings, normally occupied by the claimant as his home including any premises not so occupied which it is impracticable or unreasonable to sell separately, in particular, in Scotland, any croft land on which the dwelling is situated;"

7. Mr Polland put forward five respects in which he submitted that the appeal tribunal had erred in law. First, its decision awarded housing costs from 31 May 1992, when the adjudication officer had reviewed the award of income support from 31 March 1992. Second, it had failed to make findings of fact on the dates on which the various improvements were carried out, because if the loan was not used for an item within six months, there would need to be a finding that an extension was reasonable before the interest relating to that item could be allowed under paragraph 8(1) of Schedule 3. Third, the appeal tribunal erred in allowing the interest relating to the amount spent on vinyl and carpet, because those items were not envisaged as included in paragraph 8(3)(j) and the appeal tribunal did not make sufficient findings of fact on what was on the floor previously. Fourth, it did not explain why the claimant needed the built-in wardrobes at the time and did not show that it had considered all the relevant factors in considering reasonableness. Fifth, while it was accepted that the building of a garage could be something that improved the fitness for occupation of a dwelling and was reasonable, the appeal tribunal had not made sufficient findings of fact to form a basis for such a conclusion in the circumstances. In relation to both the built-in wardrobes and the garage, the ability to pay was one relevant factor, but only one, in determining what was reasonable. The appeal tribunal had not given any reasons to show that it had exercised its discretion judicially.

8. In reply, Mrs Spalding submitted first that the slip in the recording of the date from which the appeal tribunal's decision operated was not a reason to overturn its decision, and that the adjudication officer could deal with the "missing" months. Second, the point on dates and use within six months had not been raised by the adjudication officer before the appeal tribunal, so that it did not have to be dealt with expressly. Third, there was sufficient explanation of the need for floor-covering. The appeal tribunal's reasons adopted as findings of fact the evidence given at the hearing by the claimant. The chairman had recorded in her note of evidence that the claimant's partner "did not have adequate floor coverings in the house prior to that and had been in receipt of extra heating allowance for the property under the old supplementary benefit system. The house was a four bedroomed semi-detached house at the end of a row, and had stone floors downstairs. The carpets had helped to make the house a great deal warmer." Fourth, there was sufficient explanation of the need for the built-in wardrobes, again by reference to the chairman's note of the claimant's evidence, in which it was recorded that "they had wardrobes fitted in their bedroom which could not be removed, following a move round of the furniture when he had moved in." Mrs Spalding submitted that what had been said was that the claimant's partner's wardrobes and storage space was inadequate when the claimant moved in and that the wardrobes which he owned were too large for the property, so that the built-in wardrobes had to be fitted. Fifth, it was accepted that all the circumstances needed to be looked at in considering reasonableness under regulation 8(3)(k), but it was submitted that the appeal tribunal had sufficiently identified the needs of the household and other factors. Contrary to what had been put forward in the adjudication officer's application for leave to appeal and written submission to the Commissioner, the ability to pay for an improvement at the time is a relevant factor. At the date of the loan, there were two vehicles used by members of the household and the building of a garage when a person can afford it is not unreasonable.

9. At the oral hearing, I raised the question of whether a restriction on the categories of improvement which come within paragraph 8 is produced by the words in paragraph 8(1)(a) "for the purpose of carrying out repairs or improvements to the dwelling occupied as the home" (my underlining). Mr Polland had not previously considered that question and preferred to make an open submission, merely stressing that an improvement under paragraph 8(3)(k) does not have to be analogous to anything listed in the previous heads. Mrs Spalding had included as part of her primary argument the submission that there is no general requirement in paragraph 8(3) that an improvement has to be structural. That was shown, she said, by the facts that the definition of the dwelling occupied as the home in regulation 2(1) is not restricted to bricks and mortar, that there is no reference in paragraph 8 to the fabric of the dwelling for

improvements, as there is for major repairs, and that paragraph 8(3)(f) expressly refers to improvements in the structural condition of the dwelling, showing that the other heads are not so restricted. She cited paragraph 9 of Commissioner's decision CIS/129/1993 in which the Commissioner said:

> "The point was made that there is a contrast between the definition of 'major repairs' which have to be 'necessary to maintain the fabric of the dwelling occupied as the home' (my underlining) and the definition of 'improvements' which makes no reference to the fabric of the dwelling occupied as the home but is wider in terms ie 'any of the following measures undertaken with a view to improving its [ie the dwelling's] fitness for occupation'. In my view that point is validly made. If it had been desired to restrict improvements to the actual fabric of the home it would have been easy for paragraph (3) of paragraph 8 to do that. I must therefore hold that the use instead of the broad phrase 'any of the following measures undertaken with a view to improving its fitness for occupation' were meant to have a wider meaning."

In relation to the particular words in paragraph 8(1)(a), Mr Williams submitted that the intention was merely to restrict consideration to the dwelling occupied as the home and to exclude repairs and improvements made in relation to other property. He argued that providing that the test of reasonableness in all the circumstances is met, the provision of furnishings and appliances can be said to be improvements to the dwelling and to be undertaken with a view to improving its fitness for occupation.

10. I shall deal with the five points initially made by Mr Polland in the order in which he raised them. On some points I shall be very brief, because I am satisfied that the appeal tribunal erred in law in its general approach to paragraph 8 of Schedule 3. That general conclusion needs to be explained in some detail at the appropriate point, for the guidance of the new appeal tribunal which must re-hear the appeal.

11. On the first point, the making of the appeal tribunal's decision operative from 31 May 1992, rather than 31 March 1992, may well have been a slip of the pen, or of the dictating machine. However, it has not been corrected and must stand for the time being. It perhaps reflects a wider failing to appreciate that the adjudication officer's decision under appeal could only have been operative as part of a review decision. Since the previously operative decision was one awarding the claimant income support for an indefinite period, that decision could only be revised once a ground of review under section 104 of the Social Security Act 1975 (section 25 of the Social Security Administration Act 1992) had been established. Thus the effect of the appeal tribunal's decision, if it could be interpreted as a

review and revision of the existing award, would seem to be that the claimant was entitled to have the full interest on the loan met as a housing cost from 31 March 1992 to 30 May 1992. There were clearly no findings of fact to justify such a conclusion, nor any determination of whether a ground of review existed, and if so from what date. The adjudication officer's decision as transcribed onto the first page of the form AT2 was one purporting to alter an award of benefit on the emergence of a potential ground of review, although it was deficient in dealing only with the revised decision, and so the deficiency could be corrected on appeal by the appeal tribunal (CSSB/540/1989, paragraph 13). If the appeal tribunal had properly considered the review question, it might have focused its attention on the date from which the ground of review was established (a point to which I return in the directions to the new appeal tribunal). The errors of law in failing to deal properly with review and revision were not mere technicalities, but were material errors.

12. I reject the second ground put forward by Mr Polland. In the circumstances, I consider that it was not an error of law for the appeal tribunal to fail to record findings of fact as to the date of the loan and the dates on which the various works for which it was alleged to have been used were carried out. A social security appeal tribunal is an inquisitorial body, whose object is the ascertainment of the truth (R(IS) 5/93), and so is not bound by concessions made by any party to the proceedings or by a failure by one party to raise a matter which might go against the other party. An appeal tribunal should deal with any legal questions which arise either directly from the evidence put before it or from further investigation which is reasonably called for by that evidence. That is perhaps particularly appropriate where an appeal tribunal rejects the ground on which an adjudication officer has initially decided against a claimant. The adjudication officer's written submission on form AT3 may not have expressly covered other possible obstacles to entitlement to or payability of benefit, although it would be desirable for that submission, or the presenting officer's oral submission to the appeal tribunal, at least to mention such obstacles if they have already been excluded from consideration by the adjudication officer. If the matter is not dealt with in the initial submissions, an appeal tribunal may need to investigate in order to produce the necessary evidence and may also need to give the parties an opportunity to make submissions on any new questions raised. However, there must be some sensible limit to the extent of the burden imposed on appeal tribunals. In this case the adjudication officer had determined that the interest represented by the portion of the loan spent on various substantial works did qualify to be met as a housing cost. The adjudication officer must presumably have considered the point about whether the works were carried out within six months after the date of the loan in coming to that decision. In those circumstances I consider that it was not an error of law for the appeal tribunal to fail to

seek evidence and to record findings of fact about the dates of the works. I am reinforced in that conclusion by the fact that there is not a simple six month time limit imposed by paragraph 8(1) of Schedule 3. If the proceeds of the loan are used or are to be used within such further period as is reasonable the interest on the loan may qualify. The adjudication officer may be assumed to have considered any question of extension so far as was necessary in coming to the decision partially in favour of the claimant. I must stress that my conclusion is related to the particular circumstances of the present case, and that its effect is not that the appeal tribunal was prohibited from making the investigation referred to; merely that it was not an error of law to fail to do so.

13. I need make no decision on the awkward question of whether interest on a loan can qualify under paragraph 8 of Schedule 3 in so far as it relates to works carried out before the taking out of the loan. Such a situation might not fall within the ordinary meaning of the words of paragraph 8(1). However, I have heard no argument on that question, and for the same reasons as given in paragraph 11 above I consider that the appeal tribunal was entitled to assume that the point would, if it was necessary, have been considered by the adjudication officer and resolved in the claimant's favour in coming to the decision to award limited housing costs.

14. On the award for carpet and vinyl floor-covering, I incline towards Mr Polland's submission that the appeal tribunal did not make sufficient findings of fact on the nature of the needs for floor-covering in all the rooms of the house, and on exactly what was provided, in replacement of what, in each room. Even though the appeal tribunal's reasons for decision might reasonably be read as incorporating an acceptance of the claimant's evidence as recorded in the chairman's note of evidence, there was not enough detail. However, I consider that the appeal tribunal's conclusion was flawed in a more fundamental sense. I accept that if paragraph 8(3)(j) of Schedule 3 is looked at in isolation, then the provision of carpet or other floor-covering could be said to improve the insulation of the dwelling occupied as the home. I also accept that such provision could be made "with a view to improving" that dwelling's fitness for occupation, within the first part of paragraph 8(3). However, those provisions cannot be looked at in isolation from paragraph 8(1), in which the primary condition for the meeting of amounts of interest is imposed, or from the overall purpose of Schedule 3 of defining what amounts are to be met as housing costs. The condition in paragraph 8(1) requires that the loan should have been taken out for the purpose of "carrying out repairs or improvements to the dwelling occupied as the home" or of paying off another loan for that purpose. Paragraph 8(3) merely defines what the words "repairs or improvements" mean in that condition. It does not affect the over-riding condition that the repairs or improvements must be to

the dwelling occupied as the home. I reject Mr Williams' submission that the condition in paragraph 8(1) is directed only to excluding repairs and improvements which relate to properties other than the dwelling occupied as the home. Paragraph 8(1) certainly has that effect, but I am satisfied that it also has the further effect noted above. If that were not the case, there would be no criterion by which to distinguish expenditure which can properly be said to amount to a housing cost from expenditure on furniture or household equipment, which would not in the ordinary use of language be described as a housing cost. If one imagines a person with a completely unfurnished and unequipped house, the provision of basic furniture (such as a bed, chairs, table) and household equipment (such as a cooker or a refrigerator) would in the ordinary use of language be said to improve the fitness for occupation of the house and to be a reasonable improvement. Why should a loan used for such provision, which then seems to come within paragraph 8(3)(k), not come within paragraph 8? It does not seem to me to be acceptable to say, as Mr Polland does, that the paragraph was not envisaged as covering such provision. The question is not what was envisaged, but what the words of paragraph 8, in their proper context, cover. I consider that the words of paragraph 8(1), although admittedly capable of different meanings, must, given the context of a provision whose purpose is to define the scope of housing costs, must be interpreted as I have interpreted them in order to provide a criterion for defining the scope of paragraph 8.

15. In my view, paragraph 9 of CIS/129/1993 (set out in paragraph 8 above) should not be understood as inconsistent with that conclusion. I note that the potential effect of the words of paragraph 8(1) had not been specifically drawn to the attention of the Commissioner who decided that case, and possibly he might have expressed himself slightly differently if those words had been in the forefront of his thinking. He was dealing with what he described as "somewhat unusual and special" circumstances. There was no road access to the claimant's home. In order to carry out necessary renovations, contractors required road access. A loan was used to pay for the construction of a road across a neighbouring farmer's land to the public highway. The farmer retained ownership of the land on which the road was constructed, but granted the claimant a permanent right of way over it. The Commissioner decided that the construction of the road, although mainly carried out on property other than the claimant's, was undertaken with a view to improving the fitness for occupation of the dwelling occupied as the claimant's home and was a reasonable improvement in the circumstances. He stressed that his decision was not necessarily a precedent "for other cases where monies may have been expended on alleged improvements, the work being done on premises which are not owned or occupied by the claimant" and that in CIS/129/1993 the claimant obtained a permanent right of way which would thereafter

be an appurtenance of the dwelling occupied as the home. In those circumstances, it could perfectly properly be concluded that the gaining of that permanent benefit, which would apparently run with the property and was not a mere personal benefit for the claimant, was an improvement to the dwelling occupied as the home within the scope of paragraph 8(1)(a). All that paragraph 9 of CIS/129/1993 should be understood as having decided is that an improvement does not have to be to the "actual fabric of the home". It does not decide that paragraph 8(1) imposes no condition beyond those in paragraph 8(3).

16. In determining whether an improvement is to the dwelling occupied as the home, the adjudicating authorities must apply that test, and not some gloss or alternative test gleaned from explanations given by Commissioners. The essential line is one to be drawn by the application of common sense to the distinction between the provision of furniture, furnishings or household equipment and the making of improvements to a dwelling itself. In CIS/363/1993 the Commissioner held that the provision of domestic appliances such as cookers, refrigerators and washing machines could only be for the purpose of carrying out repairs or improvements to a dwelling if the appliances became fixtures of the dwelling. He enquired whether the appliances in that case were fitted in the kitchen so as to be for practical purposes irremovable or were merely slotted into gaps between fitted kitchen units. However, I do not think that a simple test in terms of the removability of the item in question, or removability without doing damage to the dwelling, is appropriate. There would be problems in construing some categories of improvement listed in paragraph 8(3), especially head (j) on insulation, if that was a universal test. In addition, removability is not the test applied in the law of real property for determining whether an item has become a fixture of any premises. The question of whether items are fixtures arises in a number of different contexts and the test developed by the law of real property is somewhat vague and impressionistic. It does not provide simple universal answers. Both the mode and extent of annexation to the premises and the object and purpose of the annexation are relevant. Thus, in some circumstances items which can be removed have been held to be fixtures of property and in some circumstances items which cannot be removed have been held not to be fixtures. In the present context, the question to be asked must be the one posed by the words of regulation 8(1), not some alternative question. The appeal tribunal of 4 January 1993 did not ask itself the right question and so erred in law.

17. The consequence of the approach that I have taken is that it will often be very difficult indeed for it to be shown that the provision of fitted carpet is an improvement to a dwelling, in view of the usual degree of attachment of the carpet to the dwelling and the purpose of that attachment. But I am not prepared to say that the provision of fitted carpet can never be

an improvement to a dwelling. Nor have I considered the consequences of the provision of other forms of floor-covering. Therefore, I have not found that it is an error of law in itself to meet interest on a loan used for the purpose of providing fitted carpets and other floor-covering within paragraph 8. The appeal tribunal's error was in not asking the right questions, which will now have to asked by the new appeal tribunal which determines the appeal.

18. On Mr Polland's fourth point, relating to the fitted wardrobes, I accept that the appeal tribunal made insufficient findings of fact as to the need for their provision and did not show that it had considered all relevant factors in determining that their provision was a reasonable improvement. At the oral hearing Mr Polland did not maintain the submission made in the document dated 6 October 1993 that the provision of fitted furniture cannot come within paragraph 8. The consequence of the approach taken above to the condition in paragraph 8(1) is that the provision of fitted furniture is capable of coming within paragraph 8 as an improvement, providing that the right questions are asked and answered.

19. On Mr Polland's fifth point, relating to the building of the double garage, I conclude that the appeal tribunal did just make sufficient findings of fact as to the need for the building of the garage and its reasonableness as an improvement. In coming to that conclusion I have ignored the more extensive explanation offered by Mrs Spalding at the oral hearing. I personally have considerable difficulty in accepting that the provision of a garage can be with a view to improving the fitness for occupation of a dwelling, but that point has not been taken at all in the adjudication officer's appeal to the Commissioner. In my view, the question of whether the provision of a garage is with a view to improving the fitness of occupation of a dwelling is one of fact to be determined on the circumstances of each case. Thus if the right questions are asked, if sufficient findings of fact are made and an adequate explanation is given, an appeal tribunal does not err in law in finding that the interest on a loan used for the construction of a garage comes within paragraph 8 or in reaching the opposite conclusion.

20. In consequence of the errors of law identified above, the decision of the appeal tribunal dated 4 January 1993 must be set aside. The appeal is referred to a differently constituted social security appeal tribunal for determination, since a good many additional findings of fact must be made. There must be a complete rehearing of the appeal, at which all issues of fact will be open on the evidence presented and the submissions made to the new appeal tribunal. Thus, the new appeal tribunal is not bound by any conclusions of the appeal tribunal of 4 January 1993, including those conclusions in which that appeal tribunal made no error of law. It must take its own view on all the

matters raised in the appeal. The new appeal tribunal should take care to deal properly with the questions of review and revision. It may wish to inquire why, since the obvious ground of review (ignorance or mistake as to a material fact) would seem to have been operative since the beginning of the award of income support on 27 August 1991, review and revision of that award was apparently sought by the adjudication officer only from 31 March 1992. The new appeal tribunal must apply the approach to the construction of paragraph 8 of Schedule 3 set out above, in particular in paragraphs 14 to 16. It may also find helpful the decision in CIS/453/1993 on reasonableness in paragraph 8(3)(k).

(Signed) J Mesher
Commissioner

Date: 20 June 1994