

Key 52 not invalid. Must value share in prop, not whole of prop & then divide into shares.

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38/93

Commissioner's File: CIS/417/1992

SOCIAL SECURITY ACT 1986

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

DECISION OF THE SOCIAL SECURITY COMMISSIONERS

Dowell

[ORAL HEARING]

1. Our decision is that the decision of the social security appeal tribunal dated 4 November 1991 is erroneous in law. We set it aside and refer the case to another social security appeal tribunal for determination in accordance with our directions.

Representation

2. The claimant in the present appeal did not appear. She was represented by Mr. V. Willson, Welfare Rights Officer. The rest of the representation in this appeal was the same as in the associated appeal the reference to which on Commissioners' file is CIS/391/92 (Palfrey). The definitions in Palfrey are adopted.

Nature of the appeal

3. This is the second of the three appeals referred to in Palfrey and is the second appeal where a claimant has left the family home and gone into residential care. We have decided in Palfrey that, where regulation 52 applies, the deemed equal share of a claimant is to be calculated by ascertaining its current market value in the real world, as though it were actual capital and that the regulation is valid and intra vires.

4. The present appeal concerns a claimant who, with her daughter and son-in-law had purchased a freehold property (known as "Treadings") as a family home. At the time of the decisions of the adjudication officer and of the appeal tribunal it was thought that she had a $\frac{1}{4}$ share. They all lived in the property. Later, the claimant went into a residential home and claimed income support. An adjudication officer and the appeal tribunal rejected the claim on the basis that the claimant's interest in her former home was worth more than £8,000 (the prescribed capital limit). She appealed to the Commissioner and

at that stage it was contended that regulation 52 applied.

The period in issue

- 5.(1) This commences with the date of receipt of the claim in the appropriate office: see regulation 6 of the Social Security (Claims and Payments) Regulations 1987. That is the date when entitlement to income support, as a general rule commences; see paragraph 6(1) of Schedule 7 to those Regulations.
- (2) That date was either 10 or 11 April 1991. The claim form was signed on 10 April and a letter from the local office refers to "your recent claim" is dated 11 April 1991. The only legible date stamp on the claim form states that the form was received on 28 March 1991!
- (3) The claim is for an indefinite period: see regulation 17(1) of the Claims and Payments Regulations.
- (4) So the period in issue runs from 10 or 11 April 1991 and will continue (subject to regulation 17(4)) down to the date of a final decision on the claim.

The relevant law

6. The relevant statutory provisions are set out in the Second Appendix to Palfrey.

The adjudication officer's decision

7. On 8 May 1991, the adjudication officer issued the following decision:

"Mrs. Dowell is not entitled to Income Support because she is deemed to have capital in excess of £8,000."

8. The claimant appealed against this decision. Her representative stated that the claimant had a legal $\frac{1}{4}$ share in the home of her daughter and her husband. She was senile and suffered from diabetes. Her son-in-law and daughter were not in a position to pay £202 a week residential fees and without the benefit of income support the claimant would have to return to their home. The daughter had health problems and her doctor (letter enclosed) stated she would not be able to stand the strain of looking after her mother.

9. In his written submission on the appeal, the adjudication officer stated that Mrs Dowell was an 80 year old widow who currently resided in a residential care home in Chard. On 10 April 1991 she completed a claim form, having been admitted to the care home on 15 March 1991 and this being a permanent arrangement. She stated that she owned property ("Treadings") and on enquiry her reply was that she had a quarter share of in that the property. There was no mortgage. There was no

disregard under Schedule 10 of the Regulations. The value of the property was £75,000. Allowing 10% for selling cost gave a value of £67,500 and $\frac{1}{4}$ of this would be £16,875 so that the claimant had a capital asset in excess of the prescribed limit of £8,000 and so was not entitled to income support.

The appeal tribunal's decision

10. The appeal tribunal's unanimous decision was;

"The claimant's appeal from the decision of the Adjudication Officer issued on 8 May 1991, that she was not entitled to income support because she was deemed to have capital in excess of £8,000, is DISALLOWED."

11. Their recorded findings of fact were;

"(1) The claimant, an 80-year old widow, was permanently resident at Sunnymede, a residential care home in Chard, to which she had been admitted on 15 March 1991. On 10 April 1991 she made a claim for income support.

(2) The claimant stated in her SP1 that she had savings of £1,200, a retirement pension of £72.20 per week & an annuity of £98.87 per quarter.

(3) The claimant owned a quarter share of the freehold of Treadings, Crimchard, which she had purchased jointly with her daughter & son-in-law, Mr. & Mrs. Stringer. There was no mortgage on the house, the value of which was £75,000. Mr. & Mrs. Stringer lived in the house; there was no intention to sell the house or to buy the claimant's interest therein.

(4) Mrs. Stringer was born on 8 September 1933; she suffered from thyroid trouble & hypertension, for which she received medication. She received no social security benefits, had a part-time job driving children to school. Her husband was employed full-time. She was not incapacitated.

(5) The claimant owned a capital asset, the value of which exceeded £8,000 & which could not be disregarded."

12. Their recorded reasons for their decision were;

"The relevant legislation in this case was summarised in the AO's submission.

The claimant had a quarter share in the freehold of Treadings, Crimchard, Chard, as she had been admitted to Sunnymede on a permanent basis on 15 March 1991, Treadings could no longer be regarded as her home. The claimant's daughter, Mrs. Stringer & her husband, Mr. Stringer, were beneficially entitled to the remaining interest in

Treadings, on which there was no mortgage & which was valued at £75,000. After deduction of 10% for the expenses of sale, its net value was £67,500. There was no intention to sell the property, nor was it proposed to buy out the claimant's interest. Mrs. Stringer was under 60 years of age & although receiving medication for her thyroid & blood pressure problems, she had a part-time job & was not incapacitated. Her husband was employed full-time. The value of the claimant's interest could not therefore be disregarded under any of the provisions of Schedule 10 & as its value was not therefore to be disregarded under any of the provisions of Schedule 10 & as its value was £16,85, well in excess of the capital limit of £8,000, income support was not payable."

Subsequent proceedings

13. The claimant appealed against this decision submitting that the tribunal erred in law in their approach to the valuation of the property. Regulation 52 applied. The claimant should be considered as having a third share and that share should have been valued. Enquiry of local estate agents had been unable to find one who said that this share had any value at all if the other persons with a share did not wish to buy out her third share.

14. Later, in response to a Nominated Officer's direction, it was stated that the property was not registered land. A photocopy of the conveyance to the claimant, her son-in-law and her daughter was produced. A recital in that conveyance states that the son-in-law provided £25,000, the daughter £25,000 and the claimant £25,000 of the purchase price of £75,000. In the operative part of the conveyance, in consideration of £75,000 paid to the Vendors, the Vendors conveyed the property to the Purchasers (the son-in-law, daughter and the claimant) "TO HOLD unto the Purchasers in fee simple as beneficial tenants in common in shares proportionate to their respective contributions to the purchase price aforesaid". It was declared that the Purchasers or other Trustees for the time being should have the power of an absolute owner.

15. As explained in Palfrey, all 3 appeals were heard by a single Commissioner in the first instance but, for the reasons set out in Palfrey (paragraphs 21-23) it has proved necessary to have a complete re-hearing of all three appeals before a Tribunal of Commissioners.

Was the appeal tribunal's decision erroneous in law?

16. Yes, it was. There was in evidence before the tribunal a doctor's letter that the claimant was quite senile and that her daughter was physically and mentally unable to stand the strain of looking after her, and a letter signed by them both saying the property was valued at £75,000, that the claimant had a $\frac{1}{4}$ share and that there was no intention of selling the property or buying the claimant's $\frac{1}{4}$ share.

17. The tribunal accepted this "valuation" and the statement of the shares in which that property was said to be held and, after deducting 10% for the expenses of sale divided the result by 4 and found that to be the value of the claimant's share. But what the tribunal were required to do by regulation 49 of the General Regulations was to ascertain the current market value of the capital possessed by the claimant. Her share, if the letter was accepted, was $\frac{1}{4}$, and the daughter and her husband had no intention of selling the property or buying the claimant's share. It was incumbent on the tribunal to explain how, in the light of this evidence, they concluded that the $\frac{1}{4}$ share had the value that they attributed to it. There was no professional valuation of the share. No account was taken of the fact that the daughter and son-in-law did not wish to sell the property.

18. Neither the "valuation" nor the stated shares should have been accepted without further enquiry. The signatories of the letter were not qualified valuers and there is no indication as to how they arrived at the valuation that they did. The statement of the shares in which the property was held should have been verified by asking for the document or documents under which the property was acquired. It was most unlikely that such a document would simply state that a $\frac{3}{4}$ share belonged to the daughter and her husband without specifying the terms on which such share should be held (e.g. equally as tenants in common, or as joint tenants, or as to $\frac{3}{8}$ ths each). If the tribunal, which has, as pointed out in Palfrey, inquisitorial or investigatory duties, had asked for the conveyance, which is now in evidence, they would have found that the husband of the daughter, the daughter and the claimant each paid £25,000 of the £75,000 purchase price on 15 April 1988 and the property was conveyed to them "in fee simple as beneficial tenants in common in shares proportionate to their respective contributions to the purchase price" (i.e. in equal one third-shares as tenants in common). That declaration was (in the absence of fraud or mistake, which is not suggested) conclusive as to the beneficial ownership: see the decision of the House of Lords in Pettitt v Pettitt [1970] A.C. 777 at page 813 letter E and paragraph 27.

19. Regulation 52 was never considered, or if it was considered, referred to in the record of the tribunal's decision, at all. If the share of the claimant was, as the tribunal held (wrongly) $\frac{1}{4}$, and regulation 52 applied, the claimant had a deemed share of one third.

The arguments on appeal

(1) Regulation 52

20. Mr. Willson submitted that regulation 52 was a two part regulation, the first part of which directed the claimant to have a deemed equal share and the second the means by which capital was to be calculated. The market value of the deemed share had to be ascertained by applying regulation 49. Where the claimant has in fact an equal share, regulation 52 has no effect. The result is the same whether it applies or not (it probably

applies). The irrationality of regulation 52 is that where the shares are equal it makes no sense and where the claimant's share is larger or smaller a requirement to attach a market value to something which does not exist and which cannot be realised is irrational.

21. Mr. Cooper submitted that it was now clear that the claimant and his daughter and son-in-law were beneficial tenants in common on one third shares. A valuation by the district valuer after the tribunal hearing gave the property a value of £70,000. He submitted that regulation 52 applied even when one third shares were specified in the deed. In other respects, his submissions were the same as in Palfrey.

22. Mr. Drabble's submissions on regulation 52 are set out in Palfrey.

Application of regulation 52

23. The parameters (or boundaries) of regulation 52 have not been argued before us. The regulation clearly applies in Palfrey's case for the reasons given in paragraphs 38-43 of that decision. In the present case, the claimant has an actual $\frac{1}{3}$ share or, if regulation 52 applies, a deemed $\frac{1}{3}$ share. We have held that any deemed share falls to be valued as if it were actual capital and at current market value. So it makes no difference whether or not regulation 52 applies.

24. It is unnecessary, for the purpose of the appeals in Palfrey and the present case to decide whether regulation 52 has any wider application and accordingly we express no opinion on whether that regulation applies so as to deem actual unequal shares to be treated as equal shares. That is a question that can be decided when it is raised.

Directions to the new tribunal

25. We set aside the decision of the appeal tribunal as erroneous in law for the reasons set out in paragraphs 16 to 19 above and refer the case to another appeal tribunal which should be entirely differently constituted. The issue before the fresh tribunal will be whether the claimant has shown that he is entitled to income support during the period in issue (see paragraph 5 above). This turns on whether the current market value of his actual (or deemed) share of the proceeds of sale and net rents and profits until sale of the freehold (i.e. the fee simple) of the property known as "the Treading" does not exceed £8,000.

26. The claimant has discharged the onus of proving this, in the first instance by producing evidence (now at page T41 of the case papers) that the Manager of the Elderly Persons Home had:

"attempted via local estate agents, and so far have not been able to find one that would show that this share has any value at all if the other persons with a share do not

wish to buy out her share. Their comments have been it would not be possible to sell Mrs. Dowell's share and so would have no value"

27. There is a District Valuer's Valuation of that share dated 29 September 1992 which values it at £23,250 on the assumption that the Court would order a sale and at £19,750 on the assumption that it would not. The whole property is valued at £70,000. There is no explanation at all as to why the District Valuer considered (1) that a one third share of property worth £70,000 was worth £23,250 on the assumption that the Court would order a sale and (2) a value of £19,250 if it would refuse to order a sale. The hypothetical purchaser at the date of claim would have to estimate the value at the time of purchase, the risk that he might not get an order for sale and that he might have to wait until the claimant's daughter and son-in-law were dead before the property could be sold with vacant possession. He would also have to take into account the fact that, if his application for sale forthwith were to fail he would be liable in the ordinary course to pay his own and the defendants' costs. He would have to bear in mind the powerful argument that an order for sale would not be made: see paragraph 53(4) of Palfrey a copy of which should be before the tribunal. This valuation should not be relied on as an estimate of the value of the claimant's share.

28. If the adjudication officer still considers that there was, at the date of claim or subsequently, a market for the claimants' equal one third share as tenant in common in the proceeds of sale and net rents and profits until sale of "the Treading" notwithstanding the local estate agents evidence that it is unsalable and has no value, the onus is on the adjudication officer to show that the estate agents are wrong, that there is market for such a share and to show what that value is, based on comparables (if any) or other acceptable evidence. The procedure for valuation should follow that set out in paragraphs 46 to 48 of Palfrey. Failing acceptable evidence contravening the views of the local estate agents, the claim for benefit should be allowed and the appeal must succeed.

29. Our decision is set out in paragraph 1.

(Signed) Kenneth Machin
Chief Commissioner

(Signed) V.G.H. Hallett
Commissioner

(Signed) J.G. Mitchell
Commissioner

(Date) 20 May 1993