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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

[ORAL HEARING]

1. The decision given by the social security appeal tribunal on 8 March 1994 was in my judgment correct but the reasons they gave were inadequate. I therefore allow the appeal by the adjudication officer but only to the extent of substituting my own decision to the same effect, namely that a loan of some £36,000.00 obtained by the claimant from Barclays Bank in October 1988 to enable her to buy out sitting tenants of a property of which she already owned the freehold was a loan to "acquire an interest in the dwelling" for the purposes of paragraph 7(3) Schedule 3 Income Support (General) Regulations 1987 S.I. No. 1967, so that interest on it and on any replacement loan counts as eligible interest under that paragraph.

2. I held an oral hearing of this appeal at which the claimant was represented by Mr D. Forsdick of Counsel from the Free Representation Unit and the adjudication officer by Mr R.A.J. Cousley, a solicitor to the Department of Social Security. I am grateful to them both for their able and helpful submissions which were enhanced by the use of skeleton arguments. The only issue on the appeal was whether the loan did or did not qualify under the wording in paragraph 7(3) of Schedule 3.

The facts

3. So far as necessary for this appeal the material facts can be stated very simply. The claimant is a lady now aged 39 whose marriage broke up at the end of 1986. The matrimonial home had to be sold in order to raise funds and pay off debts for her and her husband and she was left on her own with her young son, no home of her own and no assets other than the mortgaged freehold of part of a bungalow (the matrimonial home had been the other part), which continued to be occupied by tenants who had lived there for many years and had a protected weekly tenancy under the

Rent Act 1977.

4. For a time the claimant kept herself going in rented accommodation by doing part-time work, with the rent she received from the tenants paying for the comparatively small mortgage. However she soon found that she was getting into debt as it was costing her more to live than she had imagined and her husband stopped paying her maintenance. In her own words, she was not as careful with money as she suddenly needed to be, and was blind to her worsening financial situation.

5. At the end of 1986 she was forced to apply for income support, but then discovered that while the rent paid to her by the tenants was counted as part of her resources, no allowance could be made for the mortgage payments she made because she was not occupying the property. It had been hoped that the tenants would be eligible for council accommodation so that the claimant could make a home for herself and her son in the property she owned, but this plan foundered when, after determining the contractual tenancy by a notice to quit, she failed in an application to the County Court for an order for possession of the premises. Finally an arrangement was reached between her and the tenants, and incorporated in an agreement made on 7 October 1988, under which they vacated the premises in consideration of a payment of £36,000.00 which she borrowed on mortgage from Barclays Bank. There is no dispute that she then moved into the property as her home and that the arrangement and the loan were made for the purpose of enabling her to do so.

Nature of the tenants' rights

6. I have referred throughout to "the tenants" although the strict legal position was that they were a married couple of whom the husband had been registered as the tenant with a weekly protected tenancy, and following the expiry of the notice to quit he became "statutory tenant" with the right to continuing possession and the other rights conferred by the Rent Act 1977; and his wife of course occupied the property with him. Although the agreement drawn up on 7 October 1988 refers to him as "the tenant" there is no real evidence to suggest that any contractual tenancy had in fact been revived at the time he and his wife vacated the premises, and for the purposes of this decision I will assume, without deciding, that the only rights in respect of the property that he or his wife had at this date were those derived from the Rent Act consisting of a statutory and non assignable personal right to remain in exclusive occupation of the property but not amounting to any estate or interest in it under the normal law of real property: see Megarry & Wade, Law of Real Property, 5th Edition page 1109. As will be seen, the distinction between this status and that of a continuing tenant under a contractual weekly tenancy is in my judgment immaterial for the present purpose.

The Income Support Regulations

7. Under regulation 17(1)(e) of the Income Support Regulations

cited above, the "applicable amount" used in assessing a claimant's needs for a week of claim is to include 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". This is the gateway through which all claims for help with housing costs must pass so that if an expense or outgoing is not among those prescribed in Schedule 3 no income support can be paid for it. Paragraph 1 of Schedule 3, which is expressed to be "subject to the following provisions of this Schedule" sets out a list of the types of payment which may be "applicable" for this purpose. (a) is mortgage interest payments, (aa) is hire purchase interest to buy a dwelling occupied as a home, and (b) is interest on loans for repairs and improvements to such a dwelling, and so on. Even the possibility of claimants having to pay to make their home in a tent is covered, by (g).

8. Paragraph 2 is headed "Basic condition of entitlement to housing costs" and sets a general test to be met before housing costs can qualify:

> "2. Subject to the following provisions of this Schedule, the housing costs referred to in paragraph 1 shall be met where the claimant, or if he is one of a family, he or any member of his family is treated as responsible for the expenditure to which that cost relates in respect of the dwelling occupied as the home which he or any member of his family is treated as occupying."

9. "Dwelling occupied as the home" is defined by regulation 2(1) so far as material as "the dwelling together with any garage, garden and outbuildings, normally occupied by the claimant as his home ... ". Paragraph 7 deals with "interest on loans to acquire an interest in the dwelling occupied as the home" and provides by sub-paragraph (1) that depending on the claimant's circumstances either a proportion or the whole of the "eligible interest in his case" is to be met under that paragraph.

10. Sub-paragraph (3) which contains the words that give rise to this appeal reads as follows:

> "Subject to sub-paragraphs (3A) to (6B) and paragraphs 7A and 7B, in this paragraph "eligible interest" means the amount of interest on a loan, whether or not secured by way of mortgage or, in Scotland, under a heritable security, taken out to defray money applied for the purpose of -
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> (a) acquiring an interest in the dwelling occupied as the home; or
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> (b) paying off another loan but only to the extent that interest on that other loan would have been eligible interest had the loan not been paid off."

11. The other provisions referred to in paragraph 7(3), contain various refinements and qualifications on the computation of eligible interest which are not here material. The expression "interest in the dwelling" is not defined anywhere. Nor is the expression "mortgage interest payments" in regulation 17(1)(e) and paragraph 1(a) of Schedule 3, but it was common ground (correctly in my view, in view of the opening words of paragraph 1) that the interest for which the claimant was liable had to fall within the definition of "eligible interest" under paragraph 7(3) for it to qualify for income support.

12. The only other provision of Schedule 3 which has to be noted is paragraph 10 which imposes restrictions on meeting housing costs where these include payments which are treated as unnecessary or excessive. Under sub-paragraph (1) where the dwelling occupied as the home is occupied with security of tenure under various enactments of which the first is "a protected or statutory tenancy for the purposes of the Rent Act 1977", a restriction is imposed where additional costs are incurred as a result of the claimant or a member of his family acquiring "some other interest in the dwelling occupied as the home".

General approach to construction of paragraph 7(3)

13. Each side made submissions on the general approach I should adopt in construing the expression "acquiring an interest in the dwelling occupied as the home" in paragraph 7(3). Mr Cousley reminded me that I have a duty to give effect to the wording actually used in the legislation in the absence of any real doubt as to what the intendment of that wording is, and submitted that although this might appear to be a hard case on the wrong side of the line, that line had to be drawn somewhere and Parliament by using the language it did had chosen to set it by reference to the acquisition of an interest in the proprietary sense. Mr Forsdick urged me to adopt a more purposive construction taking into account the harsh consequences that would follow from interpreting the wording literally in this way, and of the apparent concern of Schedule 3 that the costs to be met should be those related to occupation, this consideration being more important and relevant than the nature of any interest acquired.

14. I must of course remind myself that "where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral": see per Lord Diplock in Duport Steels v Sirs, [1980] 1 WLR 142 at 157D. However while I may not seek to interpret according to my own view of what the purpose of the enactment should be or should have been, it is equally well established that I can and must have regard to the apparent purpose of the legislation as gathered from the legislation itself when determining what construction is to be placed on the wording used. "In the interpretation of statutes the courts must faithfully endeavour to give effect to the expressed intention of Parliament as gathered from the language

used and the apparent policy of the enactment under consideration": per Lord Keith in the same case at p. 168B; and to the same effect Lord Scarman at p. 168H: " ... our law requires the judge to choose the construction which in his judgment best meets the legislative purpose of the enactment."

15. While due weight must of course be given to the use of the words "acquiring an interest" it seems to me that I must also have regard to the concepts embodied in "dwelling occupied as the home" and the basic condition of entitlement by reference to occupation under paragraph 2. In addition, the restrictions imposed under paragraph 10 are consistent with the indications in paragraphs 1 and 2 that the primary purpose of the Schedule is to give assistance with the costs necessarily incurred by the claimant in acquiring or keeping the right to a roof over his or her head and that it is not concerned with giving public assistance for the acquisition of certain types of property right only.

16. The point of income support is to give emergency help to those whose own resources are so depleted that they are unable to provide for themselves the basic necessities of life. If such help is not given with the costs of housing, claimants will be made homeless in addition to their other troubles, which is unlikely to benefit either them or the community. It must be part of the legislative purpose to avoid this and I cannot see how it furthers that purpose if fine distinctions have to be made according to the nature of the rights involved in relation to the dwelling.

17. In common with all income support, public assistance with mortgage interest involves the community picking up the cost for those who by ill luck or financial mis-management have found themselves unable to cope on their own, but this is a necessary part of the statutory purpose as I have sought to identify it. As it has turned out, it has also involved a large part of the social security budget being transferred to the banks and building societies who overlent so heavily in the economic conditions engendered during the 1980's, (thus neatly illustrating the point that economic and social policy are indissoluble, and prompting the thought that the claimant was not the only one who needed to come to her financial senses); but wider questions of whether such consequences were ever intended by Parliament are a good example of the kind of consideration which is extraneous to the legislation itself and must therefore be left out of account in ascertaining the meaning of the words used under the principles laid down in the House of Lords and cited above.

"Acquiring an interest"

18. In my judgment, the expression "acquiring an interest in the dwelling" has to be looked at as a whole in the context of the statutory purpose as discernible from Schedule 3, though for convenience of argument points on the meaning of "interest" and "acquire" were made separately at the hearing. Both advocates

agreed that what was important was what the claimant acquired on the buy-out. They differed in how they analysed what happened. Mr Cousley on behalf of the adjudication officer said that a landlord could not in these circumstances acquire what the statutory tenants had, since they had nothing they could assign: they had only a statutory right of occupation which was not an interest. He relied on the Commissioner's decision in case CIS/454/93 (* 35/94) where it was held that a spouse's right of occupation protected by a Class F land charge was not an "interest in the dwelling" for the purposes of paragraph 7(3)(a) because it was not an estate, interest or charge in or over land under section 1(3) Law of Property Act 1925. He further submitted that a landlord buying out a sitting tenant did not in any event acquire anything when a tenancy right adversely affecting his existing interest was simply extinguished by being surrendered.

19. Mr Forsdick on the other hand said it was sufficient to count as "acquiring an interest in the dwelling" if after the transaction the landlord was left with something different from what he had before, for which purpose a landlord's freehold reversion subject to an existing tenancy and the freehold of an owner occupier in possession were to be regarded as chalk and cheese. Alternatively he said that the extra bundle of rights the claimant got as a result of her buy-out, namely the right of immediate and exclusive occupation and the absence of any competing right to possession or occupation, were sufficient to amount to an "interest" in the context of paragraph 7(3). He relied for this purpose on a dictum in the Commissioner's decision in case CIS/063/93 (* 54/94) where for the purposes of the capital disregard under paragraph 3 of Schedule 10 to the Income Support Regulations the expression "proceeds of sale of any premises formerly occupied by the claimant as his home" were held to include a payment received by a statutory tenant for surrender of his rights to his landlord. In paragraph 9 the Commissioner held that the surrender could be a "sale" for this purpose even though the tenancy could never be sold to a third party, and specifically rejected the proposition that the surrender was "not a true sale of a proprietary interest in the property".

20. Mr Forsdick also relied on the fact that in case CIS/626/92 the late Commissioner had held that interest payable on a loan to procure the surrender of a protected weekly tenancy from a tenant under the Rent Acts before the contractual tenancy had been determined by a notice to quit was eligible interest under paragraph 7(3)(a), although unhappily the Commissioner was never able to give his reasons. It was common ground that the fact that the claimant already owned one interest in the property was no bar to a loan taken out to acquire a further interest being eligible under paragraph 7(3), as held by the same Commissioner in R(IS) 7/93.

21. The meaning of "interest" in this context was commented on by another Commissioner in R(IS) 18/93 at paragraph 12, where he held as a matter of construction that it meant "either a freehold

or leasehold interest or some lesser interest such as the interest of a tenant in common or joint tenant". That was not an exhaustive definition nor was it meant to be: see the decision in CIS/336/93 (* 8/94) paragraph 11, where the Commissioner cautioned against attempting an exhaustive definition and said that where "other interests" arise, they should be considered on their merits. I respectfully agree.

22. Without attempting an exhaustive definition, it seems to me that while the primary sense in which the expression "interest" is used in paragraph 7(3) must be that of some kind of proprietary interest, no necessary purpose of the legislation is served by restricting it to an "interest in land" as that expression is understood for the purposes of the Law of Property Acts in England and Wales. Apart from the anomalies this restriction might create by excluding beneficial interests in the proceeds of sale of land (cf. section 205(1)(ix) Law of Property Act 1925, and Snell's Equity 29th Edition page 486), paragraph 1 of Schedule 3 shows a plain intention that income support for housing costs is not to be restricted to persons having interests in land: a "dwelling" for this purpose may be a caravan held on hire purchase, or even a tent.

23. In addition, in the particular context of freehold and leasehold interests, the provisions above noted in paragraph 10 appear to contemplate that both protected (i.e. contractual) and statutory tenancies under the Rent Act 1977 fall within the concept of "interests" as used in the Schedule, since paragraph 10(1)(b) refers to "some other interest in the dwelling" than the various types of tenancy or statutory right of occupation listed, without making any differentiation. This in my view is a sufficient indication within the legislation itself that "interest" is not to be confined to its Law of Property Act sense; though it is contemplated as being an interest of a proprietary nature or some closely analogous right of tenure or occupancy similar to that of a true tenant. It is also to be noted that the eligible loan interest under paragraph 7(3) is not actually tied to the acquisition of an interest over which a legal or equitable charge is taken by the lender, which would necessarily restrict it to a proprietary right over which a charge was capable of being granted.

24. Where then should one drawn the line? In my view although in the context of mortgage interest the concept of a proprietary right is clearly uppermost, it would frustrate rather than further the purpose of the legislation to draw the line in terms of conveyancing technicalities so as to exclude rights which, in their impact on the landlord's rights, are similar to those of tenants in all practical respects. Similarly although "acquire" must be given due force, it seems me inconsistent with any rational purpose of the legislation to construe the word as excluding the case where an interest is bought in only for the purpose of extinguishing it: since then despite what was said in R(IS) 7/93 about the existence of a previous interest being no bar, no landlord could buy his tenant's interest in by way of surrender and be treated as acquiring anything for the purposes

of paragraph 7(3), however long that interest still had to run and however close it was to absolute ownership in practical effect (for example a 99 year lease at a low ground rent).

25. The line must of course be drawn somewhere, and the examples of money being paid to contractual licensees or to squatters to persuade them to vacate the premises quickly without the need for legal proceedings were used at the hearing to illustrate the point that it cannot be in every case where a property owner pays money to rid himself of incumbrances or impediments to his own beneficial occupation of the property that he satisfies the test of acquiring an interest. Like the Commissioners in decisions CIS/042/92 and CIS/336/93 I am wary of essaying a complete definition, but having regard to the scheme of the Schedule and to the points noted above it does seem to me that the solution most consistent with the wording and purpose of the Schedule, as well as the most practical one, is to set the line as including within "acquiring an interest in the dwelling" for this purpose the case where a property owner who does not have any present right of occupation or possession pays money for the purpose of buying out the rights or interests of those who have statutory rights so closely analogous to those of true tenants as to make no practical difference as regards the crucial question of the right to occupation or possession of the dwelling.

26. This approach appears to be the most consistent with the provisions of paragraph 10(1) to which I have already drawn attention. It would exclude the case of the squatters, who have no rights: the expense incurred by the owner in ridding himself of them would be in order to give effect to his existing rights, not acquire new ones. I think the considerations affecting such tenancy or analogous rights are different from those which the Commissioner had to consider in CIS/454/93, the case about the Class F land charge, since the right in that case did not extend to exclusive occupation and was not among those contemplated as an "interest" under paragraph 10(1).

27. For the purposes of paragraph 7(3) the process of buying out such tenancy or analogous interests should be treated in my judgment as one of acquisition, in the same way as the Commissioner in case CIS/063/93 contemplated it as a sale from the tenant's point of view. Whether in strict legal analysis the transaction is to be viewed as an acquisition in order to effect an extinguishment in the same instant, or as the acquisition of fresh rights of exclusive possession in the former landlord which spring up to fill the void left by the extinguishment of the corresponding rights of the former tenant, it is not necessary to decide.

28. Mr Forsdick pressed me with the mention of "any reversionary interest" in paragraph 5 of Schedule 10 (capital assets to be disregarded for income support) which as he pointed out has been held by a Tribunal of Commissioners and the Court of Appeal in case CIS/085/92 McDonnell (unrep. C.A. 8 February 1995) to include a landlord's reversion on a tenancy. He said that this

showed that such a reversion was regarded for income support purposes as a different interest from that of a freehold owner in possession; but I do not find this helpful and my conclusion is not based on any supposed difference in kind between the interest of a freehold owner before and after a lease or tenancy has been terminated. It is clear that it remains the same freehold interest: it has not ceased and been replaced, but has been enhanced by the acquisition or falling into possession of additional incident rights such as that of occupation.

29. Similarly my conclusion does not depend on, and is not intended to affect, the question of whether the interest on a loan obtained for this purpose is properly allowable for income tax or whether MIRAS applies. Under section 354 Taxes Act 1988 the wording although similar does have significant differences, and while I find it surprising that no tax tribunal or court is reported as grappling with the same kind of questions as have arisen in this case to determine whether tax relief is allowable on a loan to buy off statutory tenants, that will need to be separately considered if and when an issue on it does arise.

Conclusion

30. In my judgment therefore the loan of £36,000.00 taken out by the claimant from Barclays Bank in October 1988 was a loan to acquire an interest in the dwelling within paragraph 7(3) of Schedule 3. As indicated above the tribunal reached the same conclusion, but they based themselves solely on the point (correct as far as it goes) that paragraph 7 does not exclude the case of a person who already has one interest acquiring another. They failed to consider or give any reason on the much more difficult issues canvassed before me, despite having had these raised before them in the submissions of the adjudication officer. The record of their proceedings was thus insufficient: regulation 25(2) Social Security (Adjudication) Regulations 1986 S.I. No. 2218; and the failure to deal with and give reasons on a material issue argued before them was an error in law: see R(I) 18/61 paragraph 13, R(SB) 11/82 paragraph 14. Under section 23(7) Social Security Administration Act 1992 I have therefore to set aside their decision which I do, and substitute the decision which I consider the tribunal should have given as set out in paragraph 1 above. The appeal is thus formally allowed but the decision of the tribunal confirmed for the reasons I have given.

(Signed) P L Howell
Commissioner

Date: 14 March 1995