Commissioner's File: CIS/13059/1996

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992
SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal brought by the claimant against a decision of the London West social security appeal tribunal dated 14 December 1995. At the oral hearing before me, the claimant was represented by Mr Simon Cox of counsel, of the Free Representation Unit, and the adjudication officer was represented by Mr Leo Scoon, of the Office of the Solicitor to the Departments of Social Security and Health. I have been greatly assisted by the submissions of both Mr Cox and Mr Scoon.

2. There is no dispute as to the facts of the case. The claimant owned a three bedroomed flat in Kilburn which she bought in 1990 with the help of a mortgage of approximately £148,000. It was a "low start" mortgage and, by the time she claimed income support in 1994, some £160,000 was owing. At the time of her claim, there were two tenants living in that flat. Each was let a bedroom - with shared use of the kitchen, bathroom and toilet, stairs and lobby - under an assured shorthold tenancy. The claimant was living with friends elsewhere. The flat was then valued at £145,000 and so the value of the capital asset was nil for the purpose of the Income Support (General) Regulations 1987. As the claimant did not live in the flat, she was not entitled to have the mortgage payments met within her income support as "housing costs" but part of the payments were met by the tenants' rent which was not taken into account as income. The precise ground upon which the tenants' rent was not taken into account at that time is not disclosed in the papers before me and is not relevant to this appeal.

3. On 18 July 1995, the house where the claimant had been living was sold by its owners and she moved back to her own flat. She was now entitled to have her mortgage interest payments met through her income support as "housing costs", but only to the extent of the interest on £125,000 (incorrectly taken at one time as being £115,000). The adjudication officer decided that the income from the tenants now had to be taken into account in full, subject to a disregard of £8 per week under paragraph 19(a) of Schedule 9 to the Income Support (General) Regulations 1987. The claimant appealed, seeking to have income from the tenants offset against the shortfall in her mortgage interest payments and the premiums on her endowment policy and buildings insurance. Before the tribunal, the

adjudication officer submitted that the amount of the income to be disregarded should be £13.20 for each tenant (there being a disregard under paragraph 19(b) as well as under paragraph 19(a)) but otherwise resisted the appeal. The tribunal accepted the adjudication officer's submission and allowed the appeal only to that extent. The chairman granted the claimant leave to appeal.

4. It seems to me that if the adjudication officer and tribunal were right, as Mr Scoon submitted they were, the result is one that must have been wholly unintended by the legislature. I find it difficult to see why a person whose housing costs are not met in full through income support should not be permitted, or even encouraged, to take in tenants to meet the unmet part of the costs. However, as Mr Scoon submitted, if that is the effect of the legislation then that is the decision I must give.

5. Although each of the tenants had exclusive possession of one bedroom of the flat, it is not possible to consider the flat as being more than one dwelling for income support purposes. Regulation 2(1) of the Income Support (General) Regulations 1987 provides that, in those Regulations:-

> "'dwelling occupied as the home' means 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,..."

Mr Cox realistically conceded that the whole of the claimant's flat had to be regarded as her home, notwithstanding that she had parted with the possession of two of the three bedrooms, because it was impracticable to sell any part of the flat separately.

6. By regulation 40 of the Income Support (General) Regulations 1987, the "gross income" of a claimant is to be fully taken into account as his or her income for the purpose of determining entitlement to income support, subject to the provisions of Schedule 9. In CIS/563/91, a Commissioner held that "gross income" meant income *before* the deduction of any expenses incurred in order to receive it. Mr Cox did not seek to challenge that decision.

7. Those provisions of Schedule 9 that might conceivably have any relevance to the present appeal are paragraphs 15, 18, 19, 20, 29 and 30 which, in July 1995, provided that, in calculating a claimant's income, there should be disregarded:-

> " 15. (1) Subject to sub-paragraph (3) and paragraphs 36, 37 and 39, £10 of any charitable payment or of any voluntary payment made or due to be made at regular intervals, except any payment to which sub-paragraph (2) or paragraph 15A applies.
>
> (2) Subject to sub-paragraphs (3) and (6) and paragraph 39, any charitable payment of voluntary payment made or due to be made at regular intervals which is intended and used for an item other than food, ordinary clothing or footwear, household fuel, rent or rates for which housing benefit is payable, any housing costs to the extent that they are met under regulation 17(1)(e) or 18(1)(f) (housing costs) or any

accommodation charges to the extent that they are met under regulation 19 (persons in residential care or nursing homes) of a single claimant or, as the case may be, of the claimant or any other ember of his family or is used for any council tax or water charges for which that claimant or member is liable.

(3) Sub-paragraphs (1) and (2) shall not apply -

(a) to a payment which is made by a person for the maintenance of any member of his family or of his former partner or of his children;

(b) in the case of a person to whom section 23 of the Act (trade disputes) applies or in respect of whom section 20(3) of the Act (conditions of entitlement to income support) has effect as modified by section 23A(b) of the Act (effect of return to work).

(4) For the purposes of sub-paragraph (1) where a number of charitable or voluntary payments fall to be taken into account in any one week they shall be treated as though they were one such payment.

(5) For the purposes of sub-paragraph (2) the expression 'ordinary clothing or footwear' means clothing or footwear for normal daily use, but does not include school uniforms, or clothing or footwear used solely for sporting activities.

(6) Sub-paragraph (2) shall apply to a claimant in a residential care home or nursing home only if his applicable amount falls to be calculated in accordance with regulation 19.

18. Any payment made to the claimant by a person who normally resides with the claimant, which is a contribution towards that person's living and accommodation costs, except where that person is residing with the claimant in circumstances to which paragraphs 19 or 20 refers.

19. Where the claimant occupies a dwelling as his home and the dwelling is also occupied by another person, and there is a contractual liability to make payments to the claimant in respect of the occupation of the dwelling by that person or a member of the family -

(a) £4 of the aggregate of any payments made in respect of any one week in respect of the occupation of the dwelling by that person or a member of his family, or by that person and a member of his family; and

(b) a further £9.20, where the aggregate of any such payments is inclusive of an amount for heating.

20. Where the claimant occupies a dwelling as his home and he provides in that dwelling board and lodging accommodation, an amount, in respect of each person for whom such accommodation is provided for the whole or any part of a week, equal -

(a) where the aggregate of any payments made in respect of any one week in respect of such accommodation provided to such person does not exceed £20.00, 100% of such payments; or

(b) where the aggregate of any such payments exceeds £20.00, £20.00 and 50% of the excess over £20.00.

29. (1) Subject to sub-paragraph (3), any payment received under an insurance policy, taken out to insure against the risk of being unable to maintain repayments on a loan to which paragraph 7 or 8 of Schedule 3 applies (interest on loans to acquire an interest in the dwelling, or for repairs and improvements to the dwelling, occupied as the home) and used to meet such repayments, to the extent that it does not exceed -

(a) subject to sub-paragraph (2), the amount, calculated on a weekly basis, of any interest which is excluded under paragraphs 7, 8 and 10 of Schedule 3;

(b) the amount of the payment, calculated on a weekly basis, due on the loan attributable to the repayment of capital; and

(c) the amount, calculated on a weekly basis, of the premium due on that policy.

(2) The amount to which sub-paragraph (1)(a) refers shall be taken into account in calculating the amount to be excluded under this paragraph only for such period during which either -

(a) there is applicable to the claimant 50 per cent. of his eligible interest under paragraph 7 of Schedule 3; or

(b) the amount of the loan to be taken into account is restricted by virtue of paragraph 7(6B) or 10 of Schedule 3.

(3) This paragraph shall not apply to any payment which is treated as possessed by the claimant by virtue of regulation 42(4)(a)(ii) (notional income).

30. Except where paragraph 29 applies, any payment made to the claimant which is intended and used as a contribution towards -

(a) the amount of eligible interest which is not met under paragraph 7 or 8 of Schedule 3 (interest on loans to acquire an interest in the dwelling, or for repairs and improvements to the dwelling, occupied as the home);

(b) the capital repayments -

(i) where the loan is one specified in paragraph 7(3)(a) or 8(1)(a) of Schedule 3; or

(ii) where the loan is one specified in paragraph 7(3)(b) or 8(1)(b) of Schedule 3 only to the extent that the capital outstanding on that loan represents the capital balance outstanding on the previous loan at the time when the loan was taken out;

(c) any payment or charge specified in paragraph I of Schedule 3 to the extent that that payment or charge has not been met;

(d) his rent in respect of the dwelling occupied by him as his home but only to the extent that it is not met by housing benefit; or is accommodation charge but only to the extent that the actual charge increased, where appropriate, in accordance with paragraphs of Schedule 4 exceeds the amount determined in accordance with regulation 19 (residential care and nursing homes) or the amount payable by a local authority in accordance with Part 111 of the National Assistance Act 1948."

8. The relationship between paragraphs 18, 19, 20 and 30 was considered in CIS/82/93 which was decided at the same time as CIS/563/91. Mr Cox did not seek to argue that the tenants in this case were persons who normally resided with the claimant so that their payments could be disregarded under paragraph 18. Even more clearly, they were not people to whom the claimant provided board and lodging accommodation and so the payments could not be disregarded under paragraph 20. On the other hand, it is common ground that paragraph 19 did apply to the claimant. The question is whether paragraph 30 might also apply. A similar question arose in CIS/82/93, although in that case the Commissioner had held paragraph 18 to apply, rather than paragraph 19. At paragraph 22 of his decision, he said:-

"22. I should consider whether any other provision of Schedule 9 might apply in addition to or as a more extensive alternative to paragraph 18..... I raised the possibility of paragraph 30(d) applying. The provision is to disregard:

'Except where paragraph 29 applies, any payment made to the claimant which is intended and used as a contribution towards -

(d) his rent in respect of the dwelling occupied by him as his home but only to the extent that it is not met by housing benefit; or [not relevant];'

Although the literal words of paragraph 30(d) would seem to cover payments made under a contractual liability by a sub-tenant or licensee of a tenant, I accept Mr Cooper's submission that, in view of the specific provision made in paragraphs 18, 19 and 20 of Schedule 9, paragraph 30(d) cannot be interpreted as extending to such payments. A legislative clarification of the relationship between paragraph 30 and paragraphs 18, 19 and 20 would, however, be helpful."

In the present case, I am, of course, concerned with paragraph 30(1)(a) rather than paragraph 30(1)(d).

9. Mr Cox pointed out that the Commissioner deciding CIS/82/93 did not have the advantage of hearing legal argument on behalf of the claimant, who was not represented, and he submitted that I should not follow paragraph 22 of that decision. Mr Scoon, however, submitted that that case was entirely correctly decided. He submitted that paragraph 30 of Schedule 9 to the Regulations applied only where there was no contractual liability between the payer and the payee. I prefer Mr Cox's submission on this point.

10. At paragraph 14 of CIS/82/93, the Commissioner made it clear that the paragraphs of Schedule 9 are not necessarily mutually exclusive. I agree. Some may be, but I am not persuaded that the application of any of paragraphs 18 to 20 implies that paragraph 30 should not also apply. The reason that I have come to that conclusion is that I am not convinced that paragraphs 18 to 20 are concerned with the same sorts of payments as paragraph 30. Paragraph 30 is concerned with payments designed to meet some of the claimant's own housing costs, whereas, in my view, paragraphs 18 to 20 are, at least primarily, designed to meet other costs incurred by a claimant in providing board and accommodation for people other than his "family".

11. It is not always easy to discern the policy underlining the provisions of Schedule 9 and it is certainly not obvious that the policy is wholly consistent throughout the Schedule or that there is any significance in the order in which those paragraphs appear. However, it seems to me unlikely to have been the *intention* that any of paragraphs 18 to 20 should apply to disregard a payment used for meeting the claimant's housing costs, because I see absolutely no reason why the legislator should have intended that result when some or all of those housing costs might well be met through income support or housing benefit. It seems fairly clear that the purpose of regulation 20 is to provide an easy way of calculating the proportion of board and lodging payments which should be regarded as covering expenses rather than profit, the former only being disregarded under that paragraph. Presumably paragraph 20 provides for the calculation of a notional figure for expenses due to the practical difficulty of assessing the true level of expenses where a number of people are living in the same dwelling and, for instance, meals for lodgers are cooked with those for the claimant's family. Similar considerations may underlie paragraph 18, the assumption being that in most

cases where that paragraph applies there will be no real profit to the claimant. It seems highly unlikely that it was intended that either paragraph 18 or paragraph 20 would apply so as to require there to be disregarded any significant element of the payments which was designed to meet the claimant's own housing costs. In any event, when one looks at paragraph 19, it is obvious that the object of that particular paragraph is to allow a notional sum for incidental expenses of letting property to be met from the rent received but that it is not intended that that paragraph should enable a proportion of the claimant's housing costs to be met.

12. 1 note that, in CIS/82/93, the Commissioner held paragraph 18 of Schedule 9 to apply in a case where the "lodgers" bought their own food and where he found that only £47 of the £70 per week payments went to cover their living and accommodation expenses (including a one third share of the claimant's rent). He held that only £47 per week of each "lodger's" payments fell to be disregarded under paragraph 18. It is unnecessary for me to consider whether, on the facts of the case, I would have reached the same conclusion as the Commissioner did or whether I would have held that paragraph 18 did not apply at all in that case, because the wording of paragraph 18 was amended between the date of the Commissioner's decision and the beginning of the period with which I am concerned and it is fairly clear that paragraph 19 would now apply instead of paragraph 18. 1 take the view that, if the present paragraph 18 does apply to any case where the "lodger" is making a significant contribution to the claimant's own housing costs, it is an anomaly created by the particular phrasing of the paragraph and does not detract from the broad proposition that paragraphs 18 to 20 were not *intended* to make specific provision for disregarding any payment designed to meet the claimant's own housing costs. I therefore do not accept that it is implicit that paragraph 30, which is intended to make such provision, cannot apply to payments, made by a tenant of the claimant who lives in the claimant's own dwelling, to which paragraph 19 applies.

13. In particular, I do not accept Mr Scoon's submission that paragraph 30 applies only where payments are not made under a contractual liability. There are no words restricting paragraph 30 to such cases and it would have been unnecessary to provide for the exception of cases where paragraph 29 applies if Mr Scoon were right. Mr Scoon submitted that paragraph 30 applied primarily to voluntary payments made by relatives of a claimant. However, such payments are disregarded under paragraph 15(2) and it is not necessary to rely on paragraph 30 in such cases. It is true that there are some payments that are neither contractual nor voluntary or charitable: for instance, a non-discretionary payment made under a non-charitable deed of trust. However, I am not persuaded that paragraph 30 is effective only in such cases.

14. If I am right that paragraph 30 may apply to payments made by a tenant of the claimant, there remains the question as to what is meant by the phrase "payment .... which is intended to be used and is used as a contribution towards..... Mr Cox submitted that one has to look only at the intention of the claimant. Mr Scoon submitted that one must look at the intention of the payer.

15. I do not accept Mr Cox's submission on this point. He argued that a payment might not be "used" in the benefit week in which it is received and that the requirement that the payment be "intended" for a particular use would ensure that it was disregarded between the date of receipt and the date of use. That argument ignores the fact that the payment is income

only when it is received and so any disregard is effective only at that time. I accept that the payment may be "used" at some time after the date of receipt and nonetheless be disregarded at the time of receipt, because any other construction would be unfair and defeat the purpose of the provision. However, if the same approach is taken to the intention and one looks only at the claimant's intention, then the phrase "intended to be used" adds nothing to the word "is used". That might be an argument for saying that one should look at the intention at the date of receipt, but why should the date at which the claimant formed his or her intention to use the payment for a relevant purpose determine whether or not it should be disregarded and how is an adjudication officer to determine what a claimant's intention was at any particular date ? I do not consider that the legislator intended that one should look only at the claimant's subjective intention.

16. On the other hand, I do not accept Mr Scoon's submission that one must consider the specific intention of the payer which would mean that a claimant could expect payments from tenants to be disregarded under paragraph 30 only if the claimant discussed his or her private affairs with the tenants and explained exactly how he or she proposed to use the rent. Mr Cox argued that, if one has to look at the payer's intention at all, one can infer from a tenancy agreement that the tenant intends the landlord to use the rent, so far as is necessary, to pay the landlord's own liabilities on the property so that the tenants may continue to occupy it. I broadly accept that argument. It seems to me that "intended" is used in the sense of "designed" or "calculated" and one is entitled and required to look at the general context in which payments are made in order to ascertain the intention of the parties. The effect of this approach is that the nature of the payment is more important than the specific intention of the parties. In my view, that is the approach that is most likely to have been intended by the legislator. It leads to a sensible result and it is relatively easy to operate.

17. As, *prima facie,* paragraphs 18 to 20 and paragraph 30 are directed towards payments designed to cover different sorts of costs, there is no reason in principle why, in most cases, part of a payment should not be disregarded under paragraph 30 *in addition* to part of the payment being disregarded under any one of paragraphs 18 to 20. However, it is conceivable that, in some cases, it will be possible to establish that a part of a payment falling to be disregarded under one of those three paragraphs was designed to cover part of the claimant's own housing costs. To the extent that that is so, it will not be possible to say that any additional part of that payment was intended to be used and was used to cover the same element of housing costs. In other words, no part of any costs may be covered by two disregarded payments. That problem is unlikely to arise in any case where paragraph 19 applies.

18. I therefore accept that, in this case, in addition to the amount of the tenant's rent held by the tribunal to be disregarded under paragraph 19 of Schedule 9, there should also be disregarded an amount under paragraph 30, on the ground that the payments of rent were intended to be used and were used, to the extent necessary, as contributions towards the amount of eligible interest not met under paragraphs 7 and 8 of Schedule 3 to the Income Support (General) Regulations 1987 as in force in July 1995. From 2 October 1995, both Schedule 3 and paragraph 30 of Schedule 9 were amended by substitution. The new paragraph 30(1)(d)(ii) of Schedule 9 provides that there may be disregarded a payment made to the claimant which is intended to be used and is used as a contribution towards a policy of insurance taken out to insure against loss or damage to any building or part of a building

which is occupied by the claimant as his home. That provision will also apply in this case from the date when it was introduced. There is still no provision allowing there to be disregarded a payment in respect of a contribution towards the premium on an endowment policy.

19. I therefore allow the claimant's appeal. Her entitlement to income support is to be assessed in the light of paragraph 18 of this decision. If there is any further dispute arising in consequence of this decision, the case should be referred back to me or to another Commissioner.

M. **ROWLAND**
Commissioner
17 April 1997