DECISION OF THE COMMISSIONER

1. This is an appeal, brought by the claimant with the leave of a Commissioner, against a decision of the Plymouth social security appeal tribunal dated 11 September 1997. I held two oral hearings at the request of the claimant. At the first, in Cardiff, the claimant was represented by Mr John Nolan of the Free Representation Unit of the University of Plymouth Business School, and the Secretary of State was represented by Mr Huw James, solicitor, as agent for the Solicitor to the Departments of Social Security and Health. Following that hearing I received further evidence and submissions and then held a hearing in Plymouth at which the claimant was represented by Mr Joyce of the Free Representation Unit and the Secretary of State was represented by Mr Jarvis of counsel.

2. The claimant was injured in an accident in 1993 and has been in receipt of income support since 22 June 1993 on the basis that he is incapable of work. In 1989, he had taken out an endowment mortgage with the Portman Building Society. The endowment policies were with Standard Life and the premiums at the time of the hearing before the tribunal were £111.61 per month. A few days after he had taken out the mortgage, the claimant took out an income protection policy with the Tunbridge Wells Equitable Friendly Society (TWEFS). Under the terms of that policy, he paid monthly premiums and became entitled to "sickness benefit" in the event of his inability to follow his occupation. The terms provided that he would lose payments of sickness benefit if his premiums fell into arrears of four months or more. At the time of the hearing before the tribunal, he received £453.60 sickness benefit every four weeks and the premiums were about £46 per month. The tribunal upheld the adjudication officer's decision that the sickness benefit under the income protection policy had to be taken into account in full when calculating the claimant's income for income support purposes and that neither the amount of the premiums paid on that policy nor the amount of the premiums paid on the endowment policies could be deducted from that income.

3. So far as is material, regulation 40(1) and (2) of the Income Support (General) Regulations 1987 provides:-

> "(1) For the purposes of regulation 29 (calculation of income other than earnings) the income of a claimant which does not consist of earnings to be taken into account shall, subject to paragraphs (2) to (3B), be his gross income .....
>
> (2) There shall be disregarded from the calculations of a claimant's gross income under paragraph (1), any sum, where applicable, specified in Schedule 9.

Schedule 9 runs to over 60 paragraphs. Paragraphs 29 and 30 provide that there shall be disregarded in the calculation of income other than earnings-

> "29. (1) Subject to sub-paragraph (2) any payment received under an insurance policy, taken out to insure against the risk of being unable to obtain repayments from a loan which qualifies under paragraph 15 or 16 of Schedule 3 (housing cost in respect of loans to acquire an interest in any dwelling, or for

repairs and improvement to the dwelling, occupied as the home) and used to meet such payments, to the extent that it does not exceed the aggregate of -

(a) the amount, calculated on a weekly basis, of any interest on that loan which is in access of the amount met in accordance with Schedule 3 (housing costs);

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

(c) any amount due by way of premiums on

(i) that policy, or

(ii) 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.

(2) .....

30. (1) Except where paragraph 29 or 30ZA applies, and subject to sub-paragraph (2), any payment made to the claimant which is intended to be used in this use as a contribution towards -

(a) any payment due on a loan if secured on the dwelling occupied as the home which does not qualify under Schedule 3 (housing costs);

(b) any interest payment or charge which qualifies in accordance with paragraphs 15 to 17 of Schedule 3 to the extent that the payment or charges not met;

(c) any payment due on a loan which qualifies under paragraph 15 or 16 of Schedule 3 attributable to the payment of capital;

(d) any amount due by way of premiums on -

(i) an insurance policy taken out to insure against the risk of being unable to make the payments referred to in (a) to (c) above; or

(ii) 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.

(e) 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 his accommodation charge but only to the extent that the actual charge increased, were appropriate, in accordance with paragraph 2 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 III of the National Assistance Act 1948.

(2) ....."

Before the tribunal, the claimant had argued the TWEFS policy was a mortgage protection policy within paragraph 29 of Schedule 9. The tribunal rejected that submission because payments under the policy were not limited to the repayment of loans. Before me, Mr Joyce argued that the tribunal had erred and that the policy did fall within paragraph 29. Mr Jarvis contended that the tribunal were right as far as paragraph 29 was concerned but that they had erred in failing to consider paragraph 30.

4. However, there is a more fundamental issue that must be considered before I consider any paragraphs of Schedule 9. The claimant has complained that it is unfair that he should have to pay the premiums on the TWEFS policy out of his income support when the whole of the income from those policies is taken into account to reduce the amount of income support payable. He submits that he does not enjoy the benefit of the income and he points out that the Secretary of State would have to pay more income support if he stopped paying the premiums. In this respect, this case is indistinguishable from CIS/25/89 although the sums of money involved in that case were much smaller. The claimant in that case had an income of £21.60 per month from the Ideal Benefits Society provided he continued to pay premiums of £5 per month. The Commissioner applied the reasoning in *Chief Adjudication Officer v. Hogg* [1985] 1 W.L.R. 1100 (also reported as an appendix to R(FIS) 4/85) and held that the claimant's "gross income" for the purposes of regulation 40(1) of the 1987 Regulations was the income after the deduction of the expenses of obtaining it so that the premium was deductible and only £16.60 per month fell to be taken into account. That decision was not followed in CIS/563/91, where the Commissioner considered that the statutory context of regulation 40(1) - in particular the specific provisions in regulation 40(2) and Schedule 9 for statutory disregards - made it inappropriate to apply the approach taken in *Chief Adjudication Officer v. Hogg*, bearing in mind that the Court of Appeal had been concerned with far less detailed provisions. Were the matter one that had not been the subject of previous decisions, I might have regarded it as being arguable that so few of the paragraphs of Schedule 9 are concerned with expenses that expenses *were* deductible for the purposes of calculating "gross income" under the approach suggested in *Chief Adjudication Officer v. Hogg*, except in the few cases where Schedule 9 made specific provision. However, in *Colchester Estates (Cardiff) v. Carlton Industries Plc* [1986] Ch. 80, Nourse J. said that where there are two conflicting decisions of equal status and the earlier decision was fully considered in the later decision, the later decision should be followed unless the judge was convinced that the later decision was wrong because, for instance, some binding or persuasive authority had not been cited in either of the two cases. I accept Mr Jarvis' submission that the same approach should be applied by Commissioners and that I should follow CIS/563/91 rather than CIS/25/89 which was considered in detail in the later case and was not followed. Accordingly, the whole of the income from the TWEFS policy must be taken into account as part of the claimant's "gross income" save to the extent that any part of it may be disregarded under Schedule 9.

5. I therefore turn to the question whether the claimant can derive any assistance from either paragraph 29 or paragraph 30 of Schedule 9. The evidence shows plainly that the possibility of the claimant being unable to make payments relating to the mortgage was one reason for taking out the TWEFS policy. Even without the letter from the claimant's brokers, I would infer, from the mere fact that the policy was taken out within days of the mortgage, that there was an intention that income from the policy would be used, so far as necessary, for payments due in respect of, and in connection with, the mortgage. That, however, is not enough to bring the policy within paragraph 29. It is plain that the policy was taken out for other purposes as well. There was no formal link between it and the mortgage and the claimant has in fact used most of the income for other purposes. In those circumstances, it seems to me that paragraph 30 is relevant rather than paragraph 29 because the policy cannot be said to have been "taken out to insure against the risk of being unable maintain repayments on [the mortgage]" and I accept Mr Jarvis' submission to that effect. In other contexts there might have been some force in Mr Joyce's submission that it was enough that the need to meet payments on a mortgage was one reason among several for taking out the policy. However, here, paragraph 30 provides nearly as much help to a claimant as paragraph 29 and the practical difficulties of apportioning premiums for the purposes of paragraph 29(1)(c)(i), as Mr Joyce conceded would be necessary, suggests that paragraph 29 is concerned only with mortgage protection policies and that more general income protection policies taken out only partly to meet housing costs are to be considered under paragraph 30.

6. I accept the submissions of both parties that, if paragraph 29 does not apply, payments made by the claimant for purposes within sub-paragraphs (a) to (d) of paragraph 30(1) do fall to be disregarded under paragraph 30. The purpose of the legislation would be liable to be frustrated if too strict an approach were taken to the question whether payments were "intended to be used" for purposes within sub-paragraphs (a) to (e) or if, in a case where a claimant has a number of sources of income, it were not assumed, in the absence of clear evidence to the contrary, that payments made for purposes within sub-paragraphs (a) to (e) were made out of income intended to be used for those purposes. However, a strict approach *is* required in considering what payments may properly be regarded as having been made for purposes within sub-paragraphs (a) to (e). In the present case, there are four possible contenders: payments under the mortgage, payments in respect of the Standard Life endowment policy premiums, payments in respect of the TWEFS premiums and payments of buildings insurance premiums.

7. So far as payments under the mortgage with Portman Building Society are concerned, matters are slightly complicated by the manner in which the building society required payments to be made under their "annual revision of payments" system. At the beginning of each year, the amount of the payments to be made monthly for the 12 months from February was calculated by reference to the prevailing interest rates. The claimant was thereafter expected to make payments at that rate irrespective of changes in the interests rates during the 12 month period. The payments actually made by him were credited to his mortgage account but the amounts debited from the account reflected the actual interest rate as it fluctuated throughout the year. Thus, if the claimant actually paid throughout the year the amounts demanded but the interest rates varied, the account showed either an overpayment or a shortfall. When there was a shortfall, the claimant would not be regarded as being in arrears but the shortfall would be reflected in the calculation of the following year's payment. Equally, any overpayment would also be reflected in the calculation of the following year's

payment. Of course, the amount the claimant had to pay the building society each month was the difference between the amounts calculated by the building society at the beginning of the year and the amount paid by the Benefits Agency out of his income support. The amount met through income support (i.e., the amount of relevant "housing costs" included in his "applicable amount") was the interest on the proportion of the loans attributable to the purchase of the house or certain improvements, calculated by reference to a notional interest rate applied nationally irrespective of the particular rates charged by individual building societies and banks. The effect of paragraph 30(1)(a) and (b) of Schedule 9 is that, for the purpose of calculating the claimant's gross income, there must be deducted from his income from the TWEFS policies the difference between the amount he was "due" to pay (and did pay) the Portman Building Society by virtue of the calculation made at the beginning of the year (rather than the amount actually debited from his account - see CIS/636/92, upheld in the Court of Appeal in *Brain v. Chief Adjudication Officer*, 2 December 1993) and the amount of mortgage interest taken into account as "housing costs", to the extent that he actually made up that difference.

8. In practice, this is rather simpler to operate than the last paragraph might suggest. If the claimant were to notify the Benefits Agency at the beginning of each year of the amount he will be due to pay from February and he were to undertake to pay out of his TWEFS income the sum by which that amount exceeded the amount allowed as mortgage interest within his housing costs or to notify the Benefits Agency if he did not do so, the Secretary of State could allow the appropriate disregard when calculating his benefits and could easily adjust it each time the standard interest rate was changed. If the claimant failed to pay the appropriate amount, the consequent overpayment would almost certainly then be recoverable. The Benefits Agency could check what payment had been made by looking at the annual statement of the claimant's mortgage account. Equally, as the Benefits Agency presumably informs the claimant each time his housing costs and the direct payments to the building society are adjusted, following changes in the notional interest rates, it would not be difficult for the claimant to know whether he should make a cash payment to the building society to supplement the payments he was making by way of standing order so as to comply with the undertaking to the Benefits Agency.

9. From 12 April 1996 (the beginning of the period to which my decisions relates) until February 1999, the amount of the TWEFS income to be disregarded as mortgage payments can be ascertained fairly easily from the documents before me. I understand that the claimant made substantial payments to the building society from his own income when he first claimed benefit, which may be because there was a dispute as to his entitlement or may be because not much mortgage interest would have been included in his "applicable amount" for the first few weeks of his claim. However, he then in fact made few payments until February 1998 when he commenced payments by standing order, the first being credited on 4 March 1998. There were actually two mortgage accounts and the amounts paid by the claimant on them from 12 April 1996 to 31 January 1999 were as follows:-

period	mortgage 1	mortgage 2	total
12.4.96 to 31.1.97	£30	£85	£115
1.2.97 to 31.1.98	£158.04	£141	£299.04
1.2.98 to 31.1.99	11 x £33	11 x £44	£847

In the first two of those periods, the amounts paid were less than the amounts by which the sums due to the building society exceeded the sums paid by the Benefits Agency and so the whole of the amounts paid were deductible. However, in the third period, the sum due was 12 x (£121.77 + £198.01) = £3,837.36 and the total sum paid by the Benefits Agency was £1,072.26 + £2,008.42 = £3,080.68. The difference was only £756.68 and so, of the £847 paid by the claimant out of his TWEFS income, only £756.68 was deductible as having been "a contribution towards [a] payment *due* on a loan ...." (unless the Secretary of State considers it right to attribute the excess to the following year). I leave to the Secretary of State the calculation of the amounts that may be disregarded from 1 February 1999 onwards.

10. As regards the premiums paid to Standard Life in respect of the endowment policies, Mr Jarvis submitted that the amount of those premiums was deductible under paragraph 30(1)(c), relying on reasoning in CIS/642/92. The deputy Commissioner there held that, where an endowment policy was assigned to a lender as collateral security for a loan of capital, payments of premiums on the policy were payments "due on a loan attributable to the payment of capital" and so could be deducted under paragraph 29(1)(b) of Schedule 9 from income from a mortgage protection policy. In the present case, I am not concerned with a mortgage protection policy but the same reasoning must apply in relation to paragraph 30(1)(c). That approach is more favourable to the claimant than the one I took in the last sentence of paragraph 18 of CIS/13059/96, but as the issue was given more consideration in CIS/642/92 and as I was not referred to that earlier case, the approach to precedent taken in *Colchester Estates* is not applicable and I am not obliged to follow my own decision even though it was the later of the two. Furthermore, as the Secretary of State is content to accept the approach taken in CIS/642/92 even though it is more favourable to this claimant and to other claimants, I will follow that decision rather than my own and accept the Secretary of State's submission without considering the issue further.

11. There is then the question whether the amount of the premiums of the TWEFS policy can be disregarded under paragraph 30 of Schedule 9. Plainly, if that policy had been "an insurance policy taken out to insure against the risk of being unable to maintain repayments on [the mortgage]", the amount of the premiums could have been disregarded under paragraph 29(1)(c)(i). However, I have already decided that it was not such a policy and it must follow that the amount of the premiums cannot be disregarded under paragraph 30(1)(d)(i) either. That latter provision applies only where a claimant has both a mortgage protection policy and, say, a permanent health insurance policy, and meets the premiums of the former out of the income of the latter.

12. That is not to say that I do not consider that there is some force in the claimant's argument that the legislation appears to discourage a person in receipt of income support from continuing to pay premiums on a policy the advantage of which accrues ultimately to the Secretary of State, because the income produced by the policy reduces the amount of income support payable, and that it is unfair that he should not be able to recoup the cost of the premiums. On the other hand, the continued payment of the premiums also ensures that the claimant will have that income in the future and the present claimant may well have continued paying the premiums because he realised that, as his children grow up and leave home and his "applicable amount" is reduced, the income from the policy will give him a better standard of living than he would have on income support. Perhaps there is an argument

for having half the amount of premiums of an income protection policy disregarded from the income produced by the policy - just as half of occupational pension contributions are disregarded from earnings - but that is a matter for legislation and I cannot apply any such disregard in the present case.

13. It was not submitted to me that the amount of premiums for buildings insurance were deductible, but I note that the claimant did raise that question at an early stage in these proceedings. It seems to me that the amount of such premiums actually paid are deductible under paragraph 30(1)(d)(ii) of Schedule 9.

14. I allow the claimant's appeal. I set aside the decision of the Plymouth social security appeal tribunal dated 11 September 1997 and give the decision they should have given. From 12 April 1996 the claimant is entitled to have disregarded from his income from the TWEFS policy the amount in respect of mortgage payments calculated as I have indicated in paragraphs 7 and 9 above, an amount equal to the premiums he has paid to Standard Life on his endowment policies and an amount in respect of buildings insurance premiums he has actually paid. I leave to the Secretary of State the calculation of the exact amount of the arrears due in consequence of my decision and the claimant must provide the relevant office of the Department of Social Security with the necessary evidence. If there is any dispute about the amount of arrears, it should be referred to me or to another Commissioner.

M. ROWLAND
Commissioner
7 June 2000