Income Support - capital disregarded - self-build project

Commissioner's File: CIS 8475/95 (*35/96)
Mr Commissioner Howell QC
21 May 1996

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992
SOCIAL SECURITY ADMINISTRATION ACT 1992
APPEAL FROM DECISION OF APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Claim for: Income Support
Appeal Tribunal: Plymouth SSAT

[ORAL HEARING]

1. The decision of the social security appeal tribunal given on 3 July 1995 on this claim for income support was in my judgment erroneous in point of law, because the tribunal omitted to deal with one material issue of fact which emerged in the course of the hearing before them. I set their decision aside and give the decision I consider appropriate in the light of the facts they found, supplemented by my own findings.

2. The appeal was brought by the adjudication officer against the tribunal decision awarding the claimant income support from 6 January 1995 on the ground that his capital resources were below the prescribed limit. The main issue is whether they were right in holding that a sum of £35,000 attributable to the proceeds of sale of his former home and held in a bank deposit at the date of his claim, fell to be disregarded under para 3 of schedule 10, Income Support (General) Regulations 1987 SI 1967.

3. I held an oral hearing of the appeal at which Miss Juliet Hartridge of the DSS Solicitor's Department appeared for the adjudication officer. The claimant appeared and was represented by Mr Vincent Wiltson of Devon Welfare Rights Unit. I am grateful to all three of them for their help on the points of law and fact discussed at the hearing.

4. The claimant is now aged 36 and is married with three young children. Until June 1994 he and his wife owned their own house, but then sold it as they planned to move to Torquay where he was working. Unhappily, in the autumn of 1994 they were told (after selling the house) that his job in Torquay would not be lasting beyond the end of the year. Without employment he could not get a mortgage and it quickly became obvious that they could not afford to move there at all. He was unable to find other work, and claimed income support in early January 1995. He and his family were then living in rented accommodation in the same neighbourhood as their old house. As he made clear in the claim form, they still had the £35,000 sale money from it on deposit; and planned to use this to acquire another home as soon as they could.

5. It being out of the question to buy a suitable house in Torquay for £35,000, the claimant and his wife decided to buy a small plot of land in their old neighbourhood and put a bungalow on it. Prices were cheaper there and this provided an affordable way of getting a new home without a mortgage. By the date of his income support claim, they had found a suitable plot with an old building on it and obtained planning permission to take it down and replace it with a bungalow. The claimant had also arranged with a local builder to do those parts of the work he was unable to manage himself (he is a qualified plumber). In response to a supplementary list of questions from the department the claimant explained on 5 February 1995 (T32) that he was by then in course of purchasing the land, the documents were in the hands of his solicitor and the purchase was

going through. He had also accepted a quote from the builder for the construction of the new property in accordance with detailed estimates which he enclosed.

6. By para 3 of sch 10 to the income support regulations cited above, there is to be excluded from the reckoning of a claimant's capital assets under reg. 46(2):

> "3. Any sum directly attributable to the proceeds of sale of any premises formerly occupied by the claimant as his home which is to be used for the purchase of other premises intended for such occupation within 26 weeks of the date of sale or such longer period as is reasonable in the circumstances to enable the claimant to complete the purchase."

7. The claimant sought to have the £35,000 sale money from his previous house disregarded in calculating his capital for income support, on the ground that it would all be needed to pay for the new home and he had it earmarked for that purpose, so that it fell within the exclusion. The adjudication officer however rejected the claim on the ground that the claimant had more than £8,000 of capital which could not be disregarded under para 3. His reason was that the claimant was not purchasing his new home. In his words (page 41):

> "The crucial word is "purchase". Your circumstances are rather different. Instead of purchasing a home (buying a house/bungalow/flat) you are building a home. Building a home is not mentioned in our Regulations and therefore the monies being used for that purpose cannot be disregarded."

8. The claimant appealed, on the ground succinctly set on his behalf by his Citizens Advice Bureau in their letter at page T43, that if indeed the matter of "building" a house was not mentioned in the regulations he was still purchasing both the materials and the labour to construct his house, so that what he was doing did amount to a "purchase". This approach to the meaning of the regulation was accepted and adopted by the tribunal, which on 3 July 1995 allowed the claimant's appeal and held that income support was payable to him from 6 January 1995.

9. The basis of the tribunal's decision was that "the purchase of other premises intended for such occupation" included as a matter of common sense "not only premises in all its widest possible meaning, but also land and the property to be built on that land. Thus, for example, if the claimant had purchased a property which was in the course of erection, or indeed was intended to be erected, and had to use the proceeds of sale in that way, plainly this would be covered by [paragraph] 3 and that would have been the intention of Parliament. It was only by chance that in fact the claimant chose to buy the land separately from the premises......the ordinary sense [of the words used] included a property or premises, either in existence or in the course of construction, or indeed intended to be constructed, as a result of the transaction referred to."

10. Although not recorded in the tribunal's findings it is common ground, and I so find, that the claimant had completed the purchase of the plot of land some two months before the tribunal hearing. At that time it had on it an old wooden bungalow which had been used for holiday lets but was not suitable for permanent occupation, although some drainage and other services existed which could be reused. By the date of the tribunal hearing, the claimant had used £23,000 from his deposit in purchasing the land with planning permission. He had also bought some materials and paid for a digger to clear the site, and had about £10,000 of the original sale proceeds still in hand for further materials and labour. Thus at the date of the tribunal hearing, over two thirds of the original sale proceeds were no longer represented by a "sum" which might qualify under para 3 but by the site itself or the work in progress on it. However the tribunal based their decision solely on the "purchase" issue and did not deal with any differences the use of the money might make under sch. 10; partly no doubt because these were not drawn to their attention in the adjudication officer's written or oral submissions.

11. In this appeal brought with the leave of the tribunal chairman granted on 22 August 1995, the adjudication officer says that the tribunal's decision must on any footing be wrong. As regards the period from May 1995 when the claimant completed the purchase of the land, the value of the land itself could not be

disregarded under para 3 because it no longer constituted a sum of money. In addition the land by itself was not capable of being occupied as the claimant's home. Nor could para 3 apply at all to the cash held on deposit either before or after the land purchase in May 1995. The various elements of the project could not be lumped together and described as a "purchase", and the land by itself was not "premises" which means here a dwelling for occupation and not a building site. Neither the money nor the assets into which the claimant was converting it could therefore qualify for exclusion under sch 10: only when the project was completed and the claimant had moved in would he finally have an asset which would fall to be disregarded, as a "dwelling occupied as the home" under para 1.

12. In the course of oral argument Miss Hartridge added a further point which had not been taken in front of the tribunal, that the words in para 3 "which is to be used" require something more than a mere subjective intention to use the sale proceeds of a previous house towards buying another. She suggested that para 3 could apply to money held against a new purchase only when this was already the subject of a legal obligation or something very close to it, such as a firm commitment subject to contract, and drew attention to the difference in wording from para 2 where "which he intends to occupy" showed that if the draftsman meant a mere intention he said so.

13. In response the claimant says that the meaning of "purchase" was the only point raised by the adjudication officer before the tribunal so that they should not be faulted for concentrating on this issue alone. Even had the other issues been raised, they should, he says, have made no difference. Not only were the tribunal right in giving a broad meaning to the word "purchase", but if a distinction had to be made between the sale proceeds when represented by cash and when reinvested in the new project, the land or other property so acquired could easily qualify as "premises acquired for occupation" under para 2 of sch.10, consistently with the decision in case CIS/687/92. In that case the Commissioner was concerned with para 7(3) of sch. 3 and mortgage interest for housing costs. He held that although a piece of land without any building on it could never itself constitute a home, it was quite possible for a person to acquire a home in two stages instead of one by first acquiring the land and then arranging for a home to be built on it: see para 7 of the decision. In such a case all the costs connected with the acquisition of the site and the subsequent building work thus counted as money applied for the purpose of acquiring an interest in the dwelling occupied as the home. As for the meaning of "is to be used", the claimant says whatever these words are to be construed to mean they must include a case such as his, where there was not only (1) an intention on his part as firm as there could be, but also (2) a specific project already under way or all set to begin, and (3) one sole purpose, to provide him with a home for occupation by himself and his family as quickly as it could be done.

14. I accept Miss Hartridge's submission on behalf of the adjudication officer that the tribunal erred in law in pronouncing the claimant entitled to income support continuously from the date of his claim down to the date of their own decision, without making any findings of fact about his having reinvested part of the cash in buying the land and starting the work. This emerged in the course of the evidence and made it necessary for the tribunal, whether or not given the assistance they were entitled to expect from the adjudication officer's representative, to consider whether it made any difference to the issues they had to decide. For the reasons given by the adjudication officer, it raised further material issues. The tribunal therefore erred in law by failing to address all relevant questions, make and record adequate findings of fact and give adequate reasons for their decision as required by reg 25 Social Security (Adjudication) Regulations 1986 SI 2218. For those reasons I set their decision.

15. I consider it expedient to make the necessary additional findings of fact based on the documents before me and what I was told at the appeal hearing. They are not in dispute. In addition to the findings recorded in para 10 above, I find that the purchase of the land had been under way since the start of 1995 when planning permission had been obtained and was completed in May 1995 for the

sum of £23,000. The land itself already had a building on it which had been used for occupation, but the claimant's project for which he had full planning permission was to demolish and rebuild so as to provide himself with a new bungalow for permanent occupation. In May 1995 he had already paid for some materials and digging work but still had £10,000 of the original sale proceeds in hand for materials and labour which was used as the project went on. No doubt more had been used by the date of the tribunal hearing and it has I think all been used up as work has proceeded. The claimant told me at the appeal hearing that the major part of the work is now complete. He intends to move in as soon as his new house is ready for occupation, he estimates in a couple of months.

16. In calculating his capital for income support, the claimant can only have the cash sale proceeds of his previous house, the land he bought in May 1995, or anything built or being built on it disregarded if they fit into one or other of the express exclusions in schedule 10 to the income support regulations. I bear in mind the observations of the Court of Appeal on this schedule in Chief Adjudication Officer and Another v. Palfrey and Ors (unrep. CA 8 February 1995) where two of their Lordships confessed themselves unable to discern any rational purpose in the bits of the schedule they had to construe, so that a purely literal construction had to be adopted. For my part however I think that it is possible to see a basic intention behind paras 1-4 and 25-28. They are all concerned with cases where claimants have or have had, or are in the process of acquiring, valuable assets, but these consist of or represent their own homes; and for various reasons it is unfair or unrealistic to expect the value to be treated in the same way as disposable cash to use for day to day living.

17. Hence such value is excluded from what is reckonable as capital for income support, in various ways depending on the facts. The primary exclusion is the "dwelling occupied as the home" (no more than one for each claimant) under para 1. Paras 2, 27 and 28 deal with situations where a claimant has acquired or is acquiring "premises", not yet occupied as the claimant's home but intended to be. The value of such "premises" is left out of account in calculating capital assets, for six months or longer if reasonable in the circumstances. Paras 3, 25 and 26 deal with converse situations where a claimant is in the throes of the property market or the conveyancing system: disposing or trying to dispose of property but not yet having managed to do so, or with cash in hand between disposing of one home and acquiring another. In such cases too, six months or longer is allowed without the value of the property having to be brought into account as capital for income support.

18. These provisions in my judgment imply recognition of the transitional difficulties people experience in changing homes and the often slow processes of the property market. They also embody a principle that capital money tied up in providing a home or needed for the purpose is different from the ordinary savings a person should expect to have to realise and turn into cash before being given public assistance. The value of the home needs to be treated differently, since there is no advantage to claimants or anyone else in forcing them to become homeless or treating as cash an asset they cannot be expected to sell. Para 4 extends the same principle to property owned by a claimant but occupied in whole or part by an elderly or incapacitated relative, or a former partner from whom the claimant is neither estranged nor divorced.

19. Against this background, I have to consider first whether the tribunal were right to read "the purchase of other premises" so as to include acquiring land and having a house built on it; second whether "premises" in paras 2-3 can include land which at the time of its acquisition does not have on it the completed dwelling the claimant intends to occupy as his home; third whether the words "which is to be used" in para 3 make it necessary to show more than that the claimant intends to use the money in question to provide himself with another home; and fourth, if any of this claimant's assets are to be disregarded under sch 10, what counts as a "reasonable" period in his circumstances.

20. I can no reason to restrict the expression "the purchase of other premises" in para 3 to cases where the purchase is achieved by a single transaction of buying land with a completed house ready for immediate occupation already sitting on it. For my part I agree with the view of the tribunal that this

expression should be construed as a whole and given a reasonably wide meaning, to include the outlay of money to acquire a home for occupation by the claimant and his family as part of a single plan whether this takes place all at once, or separately in two or more stages. Thus land may be acquired with a house already built on it; or acquired and a ready made portable home delivered and put up on it; or acquired with a house still being put up or about to be put up on it by the seller; or acquired and a builder separately engaged by the purchaser to put up a house on it for him; or acquired and a house put up on it by the purchaser himself, using his own labour and buying in materials or subcontracting separate parts of the project.

21. All of these ways of laying out money to acquire a home are in my judgment within the scope of "the purchase of other premises" under para 3. All seem to be equally within the basic aim of disregarding the value of capital from one home which is temporarily in transit and waiting to be used to provide another. Parliament cannot have intended that a person such as the claimant engaged on the admirable project of building his own home at modest cost should not qualify to have his "house capital" disregarded, while an unemployed futures trader with all his money in a lavish home can sell and have the whole sum disregarded while he reinvests it in another mansion, just because the mansion is already built and the claimant's bungalow is not. Miss Hartridge did not suggest that there was any legislative purpose that might be served by such a distinction.

22. In my judgment therefore, the claimant's project of buying land and putting up a house on it with the proceeds of sale of his previous home counts as using those proceeds for "the purchase of other premises intended for occupation by the claimant as his home" under para 3 of schedule 10. I am happy to find that this is consistent with the approach adopted by the Commissioner in case CIS/687/92 at para 7. I confirm the decision of the tribunal that the adjudication officer was wrong to reject the claim on the ground that claimant's project did not amount to a "purchase" within para 3.

23. However para 3 only applies to sums of money, as the present adjudication officer and Miss Hartridge are right in my view to point out. So although the money the claimant applied in purchasing the land in May 1995 was and remained "directly attributable" to the proceeds of sale of his previous home, it was no longer a "sum" within para 3 after the land had been bought. I therefore have to go on to consider whether the plot of land itself can qualify for separate exclusion after May 1995 under para 2 of sch 10. This provides that the calculation of capital is to disregard:

> "2. Any premises acquired for occupation by the claimant which he intends to occupy as his home within 26 weeks of the date of acquisition or such longer period as is reasonable in the circumstances to enable the claimant to obtain possession and commence occupation of the premises."

The argument here is whether the land can count as "premises" before the house on it is built, or finished ready for occupation.

24. Again in my judgment it would be too narrow a construction to say that where a claimant is providing himself with a home by acquiring land and building or having a house built on it, the land itself cannot count as "premises acquired for occupation" because what the claimant intends to live in is the house, not just the land underneath it. As noted by Lord Wilberforce in Maunsell v. Olins [1975] AC 373 at 386, the word "premises" is a very general word which has a wide range of possible meanings and it has to be looked at in its particular context to see what types of property are intended to be included. Unusually, as observed by Cross J as he then was in Bracey v. Read [1963] 1 Ch 88, it is a word whose strict legal meaning is much wider than its popular one. Legally it can (but does not have to) include everything capable of being the subject matter of a demise or grant in a lease or conveyance, including not only buildings but also all kinds of real property and even incorporeal rights such as easements.

25. I was referred to the Commissioner's decision in case CIS/767/93 where the meaning of the word in para 4 of this schedule was considered. I respectfully agree with him that in each of the first four paragraphs the word "premises" must bear a similar meaning and be restricted to the kind of property which

someone has occupied or could occupy as their home. As he held in that case, this includes by implication not only the habitable rooms in a building but also property within the same curtilage such as a garden, garage or outbuildings: cf. reg 2 of the income support regulations. It necessarily also includes the land on which this all stands. It does not include other property such as farm land which is not part of the home or its immediate surroundings and can quite well be disposed of separately without affecting the occupation of the home (ibid); nor separate unbuilt on land that cannot be used for residential purposes: CIS/673/93 para 3.

26. In my judgment it is entirely consistent with the decisions in those cases that "premises acquired for occupation" and "other premises intended for such occupation" in paras 2 and 3 include both the land itself and the buildings erected or intended to be erected on it, so long as together they add up to what the claimant intends to occupy as his home, with the inclusions permitted by reg 2 or by implication. The plot bought by this claimant can perfectly well be described in the popular sense as "premises acquired for occupation" by him, given that this was the precise purpose for which he acquired it. His whole project consisted of acquiring the land and occupying it, by putting a bungalow on it and living in the bungalow as his home. This in my judgment is good enough to bring the land within the scope of para 2 from the moment he acquired it and for so long as it was still meaningful to regard the land as a separate asset as the building work progressed. To hold otherwise would involve the absurdity of people buying houses on a new housing development being treated differently according to whether their particular house was already finished, only partly built or not yet started when they acquired the beneficial ownership of the plot they had chosen. Again Miss Hartridge was unable to point to any likely purpose in making such irrational distinctions.

27. I therefore hold that for the period after the claimant acquired the plot in May 1995 and while the project continued uncomplete, the land he bought, together with the various building materials becoming part of the realty on incorporation into his partly completed bungalow, were all "premises acquired for occupation by the claimant".

28. In view of my conclusions on the first two questions, I now have to consider whether the £35,000 held on deposit at the date of claim, and the £10,000 (or the reducing balance) from May 1995 onwards, satisfied the condition in para 3 that they were sums "to be used" for what I have held was the purchase of other premises intended for occupation by the claimant as his home. In my judgment Miss Hartridge was right in pointing to the difference between the wording "to be used" in para 3 and the tests of intended occupation in for example paras 2, 27 and 28. It seems to me that the claimant has to demonstrate something more than just a genuine intention on his part to use the money from his old house to acquire a new one. Otherwise there would be the absurd result that the out of work millionaire could insist on the whole sale proceeds of his lavish home being disregarded for at least 6 months by saying that he planned to buy another equally lavish one as soon as he found one he liked: even though not in any way committed to do so, and easily able to buy a perfectly satisfactory home at once for less with the balance released for living expenses to take him off income support.

29. I therefore accept Miss Hartridge's submission that the words "is to be used" in para 3 require an element of practical certainty as well as subjective intent. It would be unusual for any sum of money to be set aside or earmarked sufficiently to be impressed with a trust to use it only for the purchase of another home, and para 3 is not in my judgment restricted to cases where there is a binding legal obligation. Nevertheless the claimant must in my view be able to demonstrate at the time relevant for his claim a practical commitment to a purchase that is bound in the normal course of events to involve using the money he is keeping aside for the purpose. Such a commitment can be demonstrated for example by a binding contract for purchase which is not yet completed, or by a firm commitment (e.g. an agreement "subject to contract") in circumstances where the tribunal is satisfied the money could not reasonably be expected to be withdrawn from the project and used for other purposes such as living expenses

instead.

30. In the present case, the tribunal do appear to have been satisfied that the sum held on deposit by the claimant at the date of his claim was "to be used" by him for the purposes of acquiring his new home and for nothing else. Having regard to the fact that he had already obtained planning permission, placed the purchase in the hands of his solicitors and accepted a specific builders' quote, it seems to me that there was evidence on which they could properly have reached this conclusion. I do not therefore think it right to disturb it, especially as the adjudication officer at no stage thought it necessary to raise any question about it on the facts himself. I emphasise that this depends on the particular and somewhat exceptional circumstances of this case and is not to detract from a generally strict interpretation of "is to be used" as indicated in the last two paragraphs. On this basis, I hold that the original sale proceeds of £35,000 between the date of claim and May 1995, and the reducing balance of £10,000 after that date, were sums directly attributable to the proceeds of sale of the claimant's former home which were to be used for the purchase of other premises intended for occupation as his home. They therefore fell to be disregarded under para 3 along with the land itself under para 2, subject only to the final question which the tribunal did not consider at all, of how the time limits of 26 weeks or longer under paras 2-3 should apply to the case.

31. Because of the way the two paragraphs are worded, the time limits are different and may have to be applied separately. They need however to be viewed in the context of the general purpose of the first four paragraphs as I have sought to identify it, and the other similar time limits of 26 weeks or longer under paras 25 to 28. These appear to support the idea of a general intention that 26 weeks is a reasonable period to obtain possession of a new dwelling, make it fit for occupation and move in, or to take steps to dispose of real property or reorganise one's legal affairs following the break-up of a marriage or a joint home. Anything longer than 26 weeks has to be justified in the circumstances as reasonable for the particular purpose, but it is plainly contemplated that there will be circumstances in which a longer period is reasonably required; and the decision on what is reasonable in a particular case is left to the practical judgment and good sense of the tribunal.

32. If it is right, as in my judgment it is, that a self-build operation is within the proper scope of the provisions of paras 2 and 3 for disregarding capital pending occupation of a new home, then it necessarily follows that a somewhat longer period may be accepted as reasonable to complete such a project than the few months or so it normally takes to arrange and complete the purchase of an existing house and move in. Accordingly, in my judgment, in such cases a period of something more like 12 months than six, from the purchase of the land and the breaking of the ground until occupation can commence at the completion of the project, may readily be accepted as reasonable.

33. So far as the present claimant is concerned, I also take into account that some delay may have been imposed on his timetable by the initial rejection of his claim, the adjudication officer appealing against the tribunal decision in his favour, and the Secretary of State suspending payment of any benefit despite the tribunal's decision that he was entitled to it. All this must have added considerably to the uncertainties, and made progress with the project more difficult.

34. In those circumstances, I hold that the claimant is entitled to have the land itself and the bungalow being built on it for his own occupation disregarded under para 2 of sch. 10 from the date of acquisition of the land until 6 July 1996. This is 18 months from the date of his original claim and something over 12 months from the date he actually bought the land and was ready to proceed with the building work. In my view on the basis of what I was told, he will then have been allowed a reasonable period in the circumstances to complete the project and commence occupation, even if some work such as decorations still remains to be finished off.

35. As regards the cash sums on deposit, para 3 requires that they are to be used for the purchase within 26 weeks of the date of sale of his former house or such longer period as is reasonable in the circumstances to enable the claimant

to complete the purchase. It is clear therefore that the period starts to run whether the claimant is receiving income support at the time or not, and the claimant here had sold his old house in mid-1994, 6 months before he lost his job and made his claim. Again I would regard the facts of this case as exceptional, but I consider it reasonable not to have committed himself to a new purchase before the end of 1994, when his employment came to an end as he had been warned in the autumn. By the start of January 1995 when he made his claim, he had already put together a feasible project for providing himself and his family with a new home in their altered circumstances, obtained planning permission, done detailed costings and accepted a quote from the builder.
36. For similar reasons to those I have given above, it seems to me that a period ending 18 months from the date of his claim can in the circumstances be accepted as reasonable to complete his family's new home. I emphasise that such a long period after the sale of a former home requires quite exceptional circumstances to justify it. The sum of £35,000 held on deposit between the claim and May 1995, and the reducing sum of £10,000 held from that date onwards, are in the circumstances of this case to be disregarded under para 3 of sch. 10 until the expiry of 18 months from the date of claim, that is until 6 July 1996.

37. For the reasons I have tried to set out above, the appeal by the adjudication officer against the tribunal decision of 3 July 1995 is allowed. I exercise the power under s.23(7)(a) Social Security Administration Act 1992 to make the findings of fact recorded above and to substitute my own decision, which is that the proceeds of sale of the claimant's former home, and the land and property into which he has put those proceeds so as to provide himself with a new home, are to be disregarded under reg 46 in calculating his capital for income support purposes down to 6 July 1996.

(Signed)
P L Howell
Commissioner
21 May 1996