Neutral Citation Number: [2011] EWCA Civ 1358

Case No: C3/2011/0479

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON THE APPEAL FROM THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)
[2010] UKUT 326AA

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/11/2011

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
LADY JUSTICE BLACK
and
LORD JUSTICE KITCHIN

- -

Between :

SECRETARY OF STATE FOR WORK AND PENSIONS	**Appellant**
- and -	
MRS NEERA MOHAMMAD	**Respondent**

- -
- -

Mr David Blundell (instructed by **DWP Litigation Division**) for the **Appellant**
Mr Andrew Lane (instructed by **Wheltons Solicitors**) for the **Respondent**

Hearing date : 18th October 2011

- -

Judgment Approved by the court for handing down (subject to editorial corrections)

If this Judgment has been emailed to you it is to be treated as 'read-only'. You should send any suggested amendments as a separate Word document.

Black LJ: :

1. Mrs Mohammad ("the Respondent") applied to the Department for Work and Pensions in October 2008 for income support to cover the mortgage interest payments she was making in relation to her home ("the home"). This was refused by a letter dated 29 December 2008 on the basis that the mortgage was not used to purchase an interest in the home.

2. The Respondent appealed. Her appeal was allowed by the First Tier Tribunal (Social Entitlement Chamber) ("FTT") by a decision dated 2 October 2009. The Secretary of State for Work and Pensions ("the Secretary of State") appealed to the Upper Tribunal. On 7 September 2010, Sir Crispin Agnew of Lochnaw Bt QC ("the Upper Tribunal judge") refused the appeal, holding that the Respondent was entitled to the income support she claimed. On 6 January 2011, he granted permission for the Secretary of State to appeal to this court. So it is that we come to consider this appeal which concerns Schedule 3 of the Income Support (General) Regulations SI 1987/1967 ("ISGR").

The facts

3. The Respondent's home, where she lives with her disabled son, was originally bought in 1987 in the name of her then husband ("the husband") for £69,950. The source of the funds for the purchase is unknown. In 2002, the husband borrowed approximately £114,000 from the Woolwich Building Society which was charged against the home. The arrangement with the Woolwich involved two elements but I will refer to it simply as "the mortgage". There is no evidence as to what became of this mortgage money.

4. In 2003, the Respondent and her husband separated. Decree absolute of divorce was pronounced on 8 March 2007.

5. Following the separation, the Respondent and her son remained in the home. She began to claim income support in 2003 and has been in receipt of it at all material times thereafter. Finding herself having to meet the mortgage interest payments to the Woolwich, she sought to have her housing costs covered as part of her income support payments. That was refused in October 2005. It is accepted by counsel on her behalf that that refusal was entirely correct. The Respondent's family assisted her with the payments and enabled her to avoid the home being repossessed by the Woolwich who had begun proceedings.

6. Meanwhile, the husband's mother (Mrs Whaib) brought an action in the county court against the husband and the Respondent claiming that she, Mrs Whaib, had provided the money for the purchase of the home and that the husband held it on trust for her as beneficial owner. The husband did not resist that claim but the Respondent did. In June 2005, it was dismissed by Mr Recorder Williamson QC who declared that the property was held by the husband as absolute legal and beneficial owner. Attempts by the husband and Mrs Whaid to appeal that decision in the Court of Appeal failed.

7. On 8 March 2007, an order was made in ancillary relief proceedings between the husband and the Respondent. The preamble to the order included the following undertaking by the Respondent:

> "AND UPON the [Respondent] undertaking and agreeing with the [husband] to use her best reasonable endeavours to procure the release of [the husband] from the open plan mortgage and open plan accounts with Woolwich PLC secured against [the home] ..... and to indemnify the [husband] in relation to any liabilities arising thereunder and to accept responsibility:
>
> (i) For any liabilities relating to the charging order secured against the property relating to arrears of service charge.
>
> (ii) Able [sic] to pay all outgoings on the property including the service charge and any further arrears thereon"

The order itself (which would have become effective on the granting of decree absolute) provided, amongst other things, for the husband to transfer absolutely to the Respondent all his legal estate and beneficial interest in the home on or before 3 May 2007.

8. It did not prove easy to achieve the transfer of the home from the husband to the Respondent. It eventually took place on 15 September 2008.

9. It was impossible, however, for the Respondent to relieve the husband of his liability in relation to the Woolwich mortgage as she was unable to obtain alternative finance. She continued to discharge the payments to the Woolwich and in October 2008, following the transfer of the property into her name, she renewed her application for assistance with the interest payments by way of income support. It was this application that resulted in the refusal in December 2008 which has led to these proceedings. We are told that possession proceedings by the Woolwich in relation to the home are presently on foot but await the outcome of the Respondent's claim for assistance.

Housing costs under the income support scheme

10. The income support scheme derives initially from s 123 Social Security Contributions and Benefits Act 1992. In s 124 of that Act, we find the concept of "the applicable amount" by reference to which a person's income support is calculated. To discover what the applicable amount is in any given case, one must go to ISGR paragraph 17 where one can see that amongst the items that are added together to arrive at a person's applicable amount are:

> "(e) 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."

11. Thus one arrives at Schedule 3 ISGR which has been the focus of this appeal.

12. So far as is material, paragraph 1 of Schedule 3 reads:

> **"1. Housing Costs**

(1) Subject to the following provisions of this Schedule, the housing costs applicable to a claimant are those costs—

(a) which he or, where he is a member of a family, he or any member of that family is, in accordance with paragraph 2, liable to meet in respect of the dwelling occupied as the home which he or any other member of his family is treated as occupying, and

(b) which qualify under paragraphs 15 to 17.

(2) In this Schedule—

"housing costs" means those costs to which sub-paragraph (1) refers; ....."

13. Paragraph 2(1) reads:

"2. Circumstances in which a person is liable to meet housing costs

(1) A person is liable to meet housing costs where—

(a) the liability falls upon him or his partner but not where the liability is to a member of the same household as the person on whom the liability falls;

(b) because the person liable to meet the housing costs is not meeting them, the claimant has to meet those costs in order to continue to live in the dwelling occupied as the home and it is reasonable in all the circumstances to treat the claimant as liable to meet those costs;

(c) he in practice shares the housing costs with other members of the household none of whom are close relatives either of the claimant or his partner, and

(i) one or more of those members is liable to meet those costs, and

(ii) it is reasonable in the circumstances to treat him as sharing responsibility."

14. The next port of call, although numerically illogical, is paragraph 15 of the Schedule, followed by paragraph 4. So far as is material, these paragraphs read:

"15. Loans on residential property

(1) A loan qualifies under this paragraph where the loan was taken out to defray monies applied for any of the following purposes—

(a) acquiring an interest in the dwelling occupied as the home; or

(b) paying off another loan to the extent that the other loan would have qualified under head (a) above had the loan not been paid off.

(2) For the purposes of this paragraph, references to a loan include also a reference to money borrowed under a hire purchase agreement for any purpose specified in heads (a) and (b) of sub-paragraph (1) above.

(3) Where a loan is applied only in part for the purposes specified in heads (a) and (b) of sub-paragraph (1), only that portion of the loan which is applied for that purpose shall qualify under this paragraph."

"4. Housing costs not met

(1) .....

(2) Subject to the following provisions of this paragraph, loans which, apart from this paragraph, qualify under paragraph 15 shall not so qualify where the loan was incurred during the relevant period and was incurred—

(a) after 1st October 1995,

(3)....

(4) The "relevant period" for the purposes of this paragraph is any period during which the person to whom the loan was made—

(a) is entitled to income support or income-related employment and support allowance, or

(b) is living as a member of a family one of whom is entitled to income support or income-related employment and support allowance,

together with any linked period, that is to say a period falling between two such periods of entitlement to income support [or income-related employment and support allowance] separated by not more than 26 weeks.....

(6) Where the loan to which sub-paragraph (2) refers has been applied—

(a) for paying off an earlier loan, and that earlier loan qualified under paragraph 15 during the relevant period; or

(b) to finance the purchase of a property where an earlier loan, which qualified under paragraph 15 or 16 during the relevant period in respect of another property, is paid off (in whole or in part) with monies received from the sale of that property;

then the amount of the loan to which sub-paragraph (2) applies is the amount (if any) by which the new loan exceeds the earlier loan....."

I have included paragraph 4(6) not because it is directly in point in this appeal but because it features in one of the authorities upon which the Respondent places reliance and to which I will come in due course.

15. The scheme that emerges from Schedule 3 (so far as is relevant to this case) is as follows. Expenses will only be housing costs which can be covered by income support if two requirements are satisfied. The first requirement is that the claimant is liable to meet the mortgage interest payments or other housing costs (see paragraph 17 ISGR and Schedule 3 paragraph 1(1)(a)). The circumstances in which a claimant is liable are set out in paragraph 2. As the Secretary of State concedes that the Respondent is "liable to meet" the mortgage interest payments, no more need be said about this requirement.

16. The second requirement (see Schedule 3 paragraph 1(1)(b)) is that the costs qualify under Schedule 3 paragraphs 15 to 17. Of these paragraphs, the only possible candidate here is paragraph 15 and this is where the debate has centred. The Respondent argues that her assumption of liability for the mortgage repayments at the time of the ancillary relief order/transfer of the home to her amounts to her taking out a loan to acquire an interest in the property and thus falls within paragraph 15. The Secretary of State's case is that that requirement is not satisfied and that the Upper Tribunal failed to take that into account (or indeed to consider paragraph 15 at all) in finding for the Respondent.

17. Before narrowing the focus to paragraph 15 itself, it is necessary to look at paragraphs 15 to 17 as a whole because that reveals how this set of paragraphs is designed to work. I have not reproduced paragraphs 16 and 17 here because they are not directly relevant but each has a heading like the heading "*Loans on residential property*" which precedes paragraph 15. Paragraph 16 is headed "*Loans for repairs and improvements to the dwelling occupied as the home*" and paragraph 17 is headed "*Other housing costs*". It is apparent therefore that the headings to paragraphs 15 to 17 operate as a list of the types of expenditure that qualify for the purposes of paragraph 1(1)(b), namely property related loans of two types and "other housing costs". The body of each paragraph sets out the detailed conditions that have to be satisfied by a particular loan or item of cost for it to qualify.

18. Whilst the mortgage in this case could, in theory, be a "loan on residential property", in practice it will only qualify under paragraph 15 if it was "taken out to defray monies applied" for the purpose of acquiring an interest in the home (paragraph 15(1)(a)) or for the purpose of paying off another loan to the extent that the other loan would have qualified under paragraph 15(1)(a) had the loan not been paid off (paragraph 15(1)(b)). It must also avoid the pitfall contained in Schedule 3 paragraph

4 which excludes certain costs which would otherwise qualify. As material to this case, paragraph 4 provides that a loan which would otherwise qualify under paragraph 15 "shall not so qualify where the loan was incurred during the relevant period" (paragraph 4(2)). The "relevant period" is any period during which the person to whom the loan was made is entitled to income support (paragraph 4(4)). Here, therefore, the relevant period is the period commencing with the date in 2003 when the Respondent began to receive income support.

19. To recap, therefore, the two questions are whether the loan "was taken out" to acquire an interest in the home or to pay off another loan that was taken out for that purpose and whether it "was incurred" before 2003.

20. The Secretary of State says that this mortgage was not taken out to defray monies applied to acquire an interest in the home or to pay off a loan taken out for that purpose and therefore does not satisfy paragraph 15(1). If the words "taken out" are given their most obvious meaning, that is correct. It is common ground that the original loan, taken out in 2002 by the husband, was **not** taken out to acquire an interest in the home. The husband had already owned the property for 15 years by then and there is no evidence that he took out the loan to pay off any existing borrowing.

21. However, counsel for the Respondent submits that the words "taken out" should be read to include "taken over" and that she can be said to have "taken over" the husband's loan as a result of the ancillary relief proceedings and/or the consequent transfer of the home into her name, notwithstanding that the loan itself remains in the husband's name. She assumed liability for the loan at that time for the purpose of acquiring an interest in the home and therefore, so the argument goes, the loan was taken out for a qualifying purpose within paragraph 15(1).

22. Counsel for the Secretary of State responds that "taken out" cannot be read in this way but that even if it could, the loan falls foul of paragraph 4. If it was taken out at around the time of the ancillary relief order, then it was "incurred" during a period when the Respondent was claiming income support and does not qualify under paragraph 15 because of paragraph 4(2).

23. The Respondent does not accept that. Her counsel argues that the loan was "incurred" when the husband took it out in 2002 and therefore before she became entitled to income support. As is evident, this argument requires a separation of the concepts of "incurring" a loan (in paragraph 4) and "taking out" a loan (in paragraph 15). Counsel relies on the different terminology in the paragraph 4 and paragraph 15 as supporting this interpretation. He accepts that the two concepts normally coincide and that a loan is usually incurred and taken out at one and the same time but argues that that need not always the case. He also draws our attention to the fact that in certain circumstances (set out in paragraphs 4(8) to (11)) a claimant's housing costs will be met on income support notwithstanding that the loan has been taken out during the relevant period and submits that the outcome for which he contends does not therefore involve a concept which is totally alien to the Regulations.

24. There is little even tangentially relevant authority on any of the issues that arise for our determination but the Respondent does seek to rely on *AH v Secretary of State for Work and Pensions* [2010] UKUT 353 (AC). That case concerned paragraph 4(6) (see

above) which permits the refinancing of a loan during the relevant period, only excluding the amount (if any) by which the new loan exceeds the earlier one. The husband and wife had decided to purchase a property which they were renting as a home. It was purchased in the husband's sole name with a mortgage for £34,500. Subsequently, the couple separated and the husband borrowed a further £30,000 against the property, without the wife's agreement, to enable him to buy another property with his new partner. He ceased meeting the mortgage repayments. The wife obtained a new loan for £73,200 from which the original building society was repaid £64,619 and the property was transferred into the wife's name. The wife was claiming income support when the loan was taken out and the property transferred to her. When she sought thereafter to have her housing costs covered by income support, her claim was refused. The apparent obstacle in her way was paragraph 4(2). However, the Upper Tribunal decided that, in so far as the initial £34,500 loan was concerned, she came within the exception contained in paragraph 4(6).

25. Counsel for the Respondent points to the fact that the wife's loan in *AH* had been taken out during the relevant period but still qualified for income support. That is correct but does not advance his case because the reason for the decision was paragraph 4(6). In contrast to the wife in *AH*, the Respondent cannot bring herself within the terms of that sub-paragraph and I cannot find in *AH* anything which extends beyond the confines of paragraph 4(6) to provide support for the Respondent's argument.

26. Counsel also refers us to the case of *CIS/762/1994*. There a matrimonial home had been purchased in the joint names of the claimant and her husband with a mortgage, also in joint names, for £43,200. The marriage broke up. The claimant sought to have the property transferred into her sole name but the bank would not agree unless the arrears on the mortgage were discharged. The wife took out a fresh loan from the bank for £52,313 which was used to pay off both the original mortgage and the arrears. Her claim to have the entire housing costs of the new mortgage met was resisted on the basis that paying off arrears was not acquiring an interest in the house. The Commissioner rejected that argument on the basis that the transaction must be looked at as a whole and the consideration for the transfer of the house into the claimant's sole name included the release of the husband from all liability under the mortgage, both principal and arrears. The new mortgage was applied for the purposes of acquiring an interest in the property (i.e. the husband's interest) and paying off another loan (i.e. the original loan).

27. The Respondent's skeleton argument says of this decision:

> "19. The crucial part of the ratio is the fact that where the claimant was acquiring an interest in the subject property, it does not so much matter as to how the figures are made up or what they are based upon, but rather the fact that an interest is being acquired is crucial and thus the scenario comes within paragraph 15(1)(a) of Schedule 3 to the Regulations.
>
> 20. And so here, the Respondent was acquiring an interest in the Property by reason of her taking over responsibility for a loan and as such it does not matter that this loan was not taken

out for a purpose which would ordinarily fall outside the relevant purposes of paragraph 15."

28. It is submitted that "the only difference" is that the Respondent here has not actually re-mortgaged to clear her husband's liability. It is, however, a difference that I view as significant in that the claimant in *CIS/762/1994* had undoubtedly taken out a loan within the meaning of paragraph 15(1). Furthermore, another vital difference is that the claimant in that case was not on income support when the loan was obtained and the house transferred to her so, unlike the Respondent, had no paragraph 4 problems. All in all, I am afraid that I do not derive from the authority the support that the Respondent would wish.

29. Accordingly it seems to me that the focus has to be on the facts of this case and the wording of the Regulations and that there is little assistance to be drawn from elsewhere in the exercise in interpretation that we have to perform.

30. When the Respondent assumed responsibility for the payments to the building society by her undertaking in the ancillary relief proceedings and/or when in due course the home was transferred into her name, she did not in my view take out a loan or even take over a loan. I appreciate that the Respondent is counted as "liable" to meet the mortgage costs for the purposes of the ISGR but that "liability" is an extended version of liability which it is quite clear from Schedule 3 paragraph 2(1) does not coincide with the legal liability for the debt. The loan has in fact remained the husband's loan throughout. As far as the building society is concerned, it is the husband who is liable to them in relation to it. If the Respondent defaults on the mortgage payments, her liability is to the husband by virtue of the indemnity provision in the ancillary relief undertaking, not to the building society. Therefore, the Respondent has neither taken out nor taken over a loan, in my view. It follows that even if the concept of taking out a loan were to be given the wider meaning that Mr Lane contends for, which I would see as an unacceptable extension, the Respondent could not satisfy paragraph 15(1). The only loan that has been taken out in relation to the home is the husband's loan in 2002 and that was not taken out to acquire an interest in the property.

31. Furthermore I cannot accept that where there is one loan as there is here, it can be said to be "taken out" for paragraph 15(1) at a different time from when it was "incurred" for paragraph 4(2). It would have put the matter nicely beyond question had the draftsman used the same phraseology at these two points in the Regulation but I do not consider that the different choice of words connotes a deliberate separation of the two concepts. The obvious interpretation is that the loan is taken out/incurred at the same time and, in my view, it is the correct interpretation. It means that if the Respondent had succeeded in establishing that she had taken out the loan at the time of the ancillary relief proceedings and thus apparently satisfying paragraph 15(1), she would necessarily have incurred it whilst she was on income support and paragraph 4(2) would have disqualified her from benefit.

32. Accordingly, in my view the Secretary of State is correct that the Upper Tribunal wrongly overlooked paragraph 15 in finding for the Respondent and I would allow this appeal which would have the effect of restoring the December 2008 refusal to include the Respondent's mortgage interest payments as part of her income support.

Kitchin LJ:

33. I agree.

The President of the Queen's Bench Division:

34. I also agree.