CH/0122/2015

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Decision

1. **This appeal by the claimant succeeds.** In accordance with the provisions of section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set aside the decision made by the First-tier Tribunal (Social Entitlement Chamber) sitting at Gravesend on 13th February 2014 (reference SC172/13/02251). I substitute my own decision. This is that in, respect of his claim to housing benefit made on or about 30th December 2012 and/or 1st March 2013, the claimant shall not be treated as not liable to make payments in respect of a dwelling by virtue of the provisions of regulation 9 of the Housing Benefit Regulations 2006. I refer the matter to the Sevenoaks District Council (the respondent local authority) to make a fresh decision on his claim on this basis, including the calculation and payment of any arrears.

Hearing

2. I held an oral hearing of this appeal on 7th June 2016 at Field House (London). The appellant/claimant did not attend in person but was represented by Desmond Rutledge of counsel, instructed by Coventry Law Centre. The respondent local authority was represented by Carol Clamp and Heather Gaynor, two its officials, neither of whom is legally qualified. I am grateful to all of them for their assistance.

The Relevant Housing Benefit Regulations

3. In general terms, where a person is liable to make payments in respect of the occupation of their dwelling, the housing benefit scheme creates entitlement by way of payments of benefit to that person if they satisfy a means test and certain other conditions. As one of the measures designed to limit entitlement to those who have a genuine need of it, regulation 9 of the Housing Benefit Regulations provides as follows (my underlining):

> 9(1) A person who is liable to make payments in respect of a dwelling shall be treated as if he were not so liable where –
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> …
>
> (h) he previously owned, or his partner previously owned, , the dwelling in respect of which the liability arises and less than five years have elapsed since he or … his partner ceased to own the property, save that this sub-paragraph shall not apply where he satisfies the [local] authority that he or his partner could not have continued to occupy that dwelling without relinquishing ownership;
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> …

4. In its other sub-paragraphs regulation 9(1) specifies a number of other situations where the claimant would be treated as not liable to make payments, but Mrs Clamp confirmed to me that the local authority does not suggest that this case falls within any of those other situations.

5. In relation to a dwelling in England and Wales, regulation 2(1) defines "owner" to mean (my underlining):

> "the person who, otherwise than as a mortgagee in possession, is <u>for the time being</u> entitled to dispose of the fee simple, whether or not with the consent of other joint owners".

It is clear that this definition also applies in respect of the use of the word "owned" in regulation 9(1)(h).

6. In the case of <u>R v The Housing Benefit Review Board for Sedgemoor District Council ex parte Weaden</u> 18 HLR 355 QBD Mr Justice Shiemann was considering the meaning of an earlier version of the definition. He said the following (at pages 359 to 360), which I find helpful:

> "In the search to discover whether the applicant falls within the definition of "owner" it is neither necessary nor desirable to speculate as to what a court might or might not do in the event of an application being made. Parliament cannot conceivably have intended local authorities administering the Act to go through that type of exercise.
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> Mrs Weaden occupied the dwelling as an owner as the term is commonly understood in real property law, but that is, in my judgment, of no help in construing the regulations. It is common to find differing definitions of owner for the purposes of different statutes. … Where the statute or statutory instrument has its own definition it is in my view generally dangerous to import definitions from elsewhere and to indulge in a search for the Platonic ideal of an owner is fruitless and misleading.
>
> … in my judgment, the right course for a court in these circumstances, is to concentrate on the statutory instrument that it is construing …".

<u>Background and Procedure</u>

7. There is no significant dispute on the facts. The claimant is a man who was born on 10th May 1960. On 4th March 1988 he bought a house (to which I shall refer as "Number 46") from the respondent local authority, where he lived with his (cohabiting) partner (referred to at places as his wife, but although she took his surname, they were not actually married). They separated in 1993, and she moved out. It has been assumed throughout that she was entitled to 50% of the equity in number 46. The Land Registry Proprietorship Register showed the claimant as the proprietor of the land with title absolute as from 4th March 1988,

8. On 4th February 1999 the claimant was arrested in respect of drug trafficking offences and was remanded in custody. On 17th January 2000 he was convicted at the

Crown Court of serious charges and was sentenced to imprisonment for nine years. On 8th January 2001 in the High Court Mr Justice Ouseley issued a restraint order under the provisions of the Drug Trafficking Act 1994. The Order was headed with the following: "DISOBEDIENCE TO THIS ORDER IS A CONTEMPT OF COURT WHICH IF YOU ARE AN INDIVIDUAL IS PUNISHABLE BY IMPRISONMENT ...". It named the claimant as the Defendant and contained the following "notice to the Defendant":

> 1. This order prohibits you from dealing with assets belonging to the defendant. The order is subject to the exceptions at the end of the order …
>
> 2. If you disobey this order you will be guilty of contempt of court and may be sent to prison or fined or your assets may be seized.

It was specifically ordered that, among other matters,

> "The defendant must not:
>
> (i) …
>
> (ii) in any way dispose of or deal with or diminish the value of any of his assets whether they are in or outside England and Wales whether in his own name or not and whether solely or jointly owned. This prohibition includes the following assets in particular:-
>
> > (a) …
> > (b) the property known as [number 46] registered at HM Land Registry [title number given] in the name of [the claimant].
> > (c) …

The specified exceptions related to the police dealing with money held by them, living and legal expenses for the claimant as notified to the Crown Prosecution Service, and money paid in or levy of distress on any goods in satisfaction or enforcement of any confiscation order.

Under the heading "Effect of this Order" was added:

> "A defendant who is ordered not to do something must not do it himself or in any other way. He must not do it through others acting on his behalf or on his instructions or with his encouragement."

9. On 12th January 2001 an inhibition was added to the Land Registry Proprietorship Register in the following terms:

> "Pursuant to a restraint order made under the Drug Trafficking Act 1994 on 8th January 2001 no disposition or other dealing by the proprietor of the land is to be registered without the consent of any prosecutor acting on behalf of the Crown or under a further order of the Court or of the registrar."

10. On 15th October 2002 and 5th March 2003 or 2004 (the information that I have is inconsistent) the Court of Appeal dismissed the claimant's appeal against conviction but allowed his appeal against sentence, which was reduced to imprisonment for six years. On 14th July 2004 the Crown Court issued a confiscation order to the claimant under the Drug Trafficking Act 1994 requiring him to pay £76,934 within six months, with two years imprisonment in default, although the amount would still remain payable. (This amount was later increased to reflect the fact that the claimant had received a legacy from his father's estate, but that does not really effect the present appeal). There was in fact a delay in enforcement because of some confusion over the appeal process. Meanwhile, on 12th November 2006 the claimant was charged with a separate offence of conspiracy to supply cocaine and was remanded in custody on this charge. On 15th November 2007, having pleaded guilty, he was sentenced by the Crown Court to imprisonment for 10 years and six months. He did not appeal against this.

11. On 29th November 2007, in the High Court, Mr Justice Collins appointed a receiver over the claimant's assets to enforce the confiscation order (sometimes referred to as an "enforcement receiver"). The schedule of property included the claimant's half share in the equity of number 46. The claimant was ordered to deliver up to the receiver forthwith possession of his assets including relevant documentation and to take such steps as may be required by the receiver to enable the receivership to be conducted and the sale of the assets to proceed. Any disobedience to the order "may be held to be in contempt of court and [you] may be imprisoned, fines or have your assets seized". The order also included the following:

> "The receiver shall have the following powers without prejudice to the existing powers vested in him by statute or otherwise:-
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> (a) Power to sell the defendant's assets,
>
> (b) …
>
> (c) Power to take possession and realise the property known as [number 46] held in the name of [the claimant] by the sale of the legal and beneficial interest therein in the name of and on behalf of the [claimant].
>
> (d) Power to execute all such documents in the name of and on behalf of the [claimant] as may be necessary to realise the property at [number 46] and to transfer or convey the legal and beneficial interest in the said property to the purchaser thereof.
>
> …

12. On 19th March 2010 the appropriate forms were completed to transfer the ownership of number 46 to a purchaser who is in fact the claimant's son (although the purchaser did not live at number 46 during any relevant period). The transferor is shown as the claimant "acting by" the enforcement receiver. The space for the signature shows that the document is to be signed both by the claimant and the enforcement receiver, although the copy that I have seen (page 141 of the Upper Tribunal file) was signed only by the receiver. The Land Registry Proprietorship

Register shows the transfer as having taken place on 24th March 2010. On 29th November 2010 the High Court ordered the discharge from office of the receiver because the claimant's assets had been realised and the confiscation order satisfied in full on 30th June 2010.

13. In March 2012 the claimant was released from prison and initially lived elsewhere but on 21st December 2012 he moved back into number 46, signing an assured shorthold tenancy agreement with the son who was now the owner. On 30th December 2012 and 1st March 2013 he claimed housing benefit in respect of this tenancy. On 22nd April 2013 the respondent local authority refused to award benefit and on 30th April 2013 the claimant appealed to the First-tier Tribunal against that decision. The First-tier Tribunal finally considered the matter on 13th February 2014 and confirmed the decision of the local authority. On 28th November 2014 a judge of the First-tier Tribunal refused the claimant permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal. He now appeals by my permission given on 9th March 2015. On 9th October 2015 I directed that there be an oral hearing of the appeal, and this took place on 7th June 2016. The local authority opposes the appeal and supports the decision of the First-tier Tribunal. It is unfortunate that because of various delays it is now well over three years since the creation of the tenancy and the claim for benefit was made.

The First-tier Tribunal

14. The First-tier Tribunal found that the claimant "was the registered legal owner" of number 46 until 24th March 2010. This was less than five years prior to the claim for housing benefit and therefore, on the basis of the provisions of regulation 9(1)(h) he was not entitled to housing benefit. The First-tier Tribunal's decision and statement of reasons made no reference to the definition of "owner" in regulation 2(1).

Arguments and Conclusions

15. Mr Rutledge took me through the relevant provisions of the main legislation relating to real property and registered land, and the legislative background to the restraint and confiscation orders but it is not necessary for me to recount any of that here. It is clear that the fee simple in number 46 was included in the High Court restraint order, the Land Registry inhibition and the High Court's appointment of a receiver to enforce the Crown Court confiscation order.

16. Mr Rutledge also referred to a number of authorities where similar issues had come up, for example in relation to the calculation of capital and what was included as assets for the purposes of a restraint order. I do not need to go through these in this decision because there can be no doubt that the claimant's interest in number 46 was covered by the restraint order.

17. The local authority argued that if the claimant could have satisfied the confiscation order from other resources, then the Land Registry inhibition would have been removed and the property (number 46) would be his. It also relied on the fact that the transfer was in the claimant's name.

18. However, the key point in this case is the definition in regulation 1(2). The "owner" is the person who for the time being is entitled to dispose of the fee simple. It is absolutely clear that from the time of issue of the restraint order by Mr Justice Ouseley in the High Court on 8th January 2001 this was not the claimant, and there would have been severe legal consequences had he attempted to dispose of the fee simple. What might have happened had the facts been other than they were is not relevant. Neither the local authority nor the First-tier Tribunal ever got to grips with the implications for this case of the definition in regulation 1(2).

19. The claimant did not in fact sign the transfer, nor was there any need for him to do so. As detailed above, the terms of the appointment of the enforcement receiver by Mr Justice Collins, in the High Court on 29th November 2007 gave the receiver all the necessary powers.

20. For the above reasons I find that the decision of the First-tier Tribunal was made in error of law. The claimant did not own number 46 within the meaning of the regulations as from 8th January 2001 because he could not (lawfully) dispose of the fee simple, and therefore when he claimed housing benefit at the end of 2012 in respect of his tenancy of number 46 he had not owned the premises or property within the previous five years. Accordingly, this appeal by the claimant succeeds.

H. Levenson
Judge of the Upper Tribunal

9th June 2016