JM v EASTLEIGH BOROUGH COUNCIL
[2016] UKUT 0464 (AAC)
UPPER TRIBUNAL CASE NO: CH/1815/2016

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decision of the First-tier Tribunal under reference SC203/13/03183, made on 19 October 2015 at Havant, did not involve the making of an error on a point of law.

REASONS FOR DECISION

A. History

1. This case concerns the claimant's entitlement to housing benefit and council tax benefit from and including 22 August 2011. The local authority decided with retrospective effect that he had not been entitled since that date in view of the value of his share in a property that he and his sisters had inherited from their mother. He exercised his right of appeal to the First-tier Tribunal, but without success. That tribunal's decision was set aside by the Upper Tribunal under reference *CH/1135/2014* and the case was remitted to the First-tier Tribunal for rehearing. Again, the claimant was unsuccessful and has appealed to the Upper Tribunal with the permission of the First-tier Tribunal.

B. The facts

2. The only matter of fact that is in dispute is the value to be placed on the claimant's interest in the property. The property was originally a council house. It was constructed using Reema concrete panels that were subsequently found to be defective. Local authorities were required to remedy the defects and a warranty system was established through PRC Homes Ltd to certify that the work was carried out and the property was structurally sound. The underlying purpose was, in part, to allow a purchaser to obtain a mortgage. It was bought by the claimant's parents in about 1997 for £44,500. By 2011, any certificate that had been issued had been lost and a duplicate could not be provided.

C. The legislation

3. Although this case concerns both housing benefit and council tax benefit, it is sufficient to refer to the housing benefit legislation.

4. Although housing benefit is an income-related benefit (section 123(1)(d) of the Social Security Contributions and Benefits Act 1992), a claimant's capital is relevant to entitlement. First, a person whose capital exceeds a prescribed amount is not entitled to benefit (section 134(1)). The amount is prescribed as

£16,000 by regulation 43 of the Housing Benefit Regulations 2006. Second and below that threshold, a claimant's capital over £6,000 is treated as generating income (section 136(2) and regulation 52). This case is concerned with the first of these. The valuation of capital is governed by regulation 47:

> **47 Calculation of capital in the United Kingdom**
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> Capital which a claimant possesses in the United Kingdom shall be calculated at its current market or surrender value less-
>
> (a) where there would be expenses attributable to the sale, 10 per cent; and
>
> (b) the amount of any encumbrance secured on it.

Regulation 51 deals with jointly-owned capital:

> **51 Capital jointly held**
>
> Except where a claimant possesses capital which is disregarded under regulation 49(5) (notional capital) where a claimant and one or more persons are beneficially entitled in possession to any capital asset they shall be treated as if each of them were entitled in possession to the whole beneficial interest therein in an equal share and the foregoing provisions of this Section shall apply for the purposes of calculating the amount of capital which the claimant is treated as possessing as if it were actual capital which the claimant does possess.

D. CH/1135/2014

5. Judge West allowed the previous appeal to the Upper Tribunal on the ground that the valuation must have been affected by the absence of a RPC certificate. He directed the local authority to obtain a new valuation for the benefit of the First-tier Tribunal at the rehearing. This was done.

E. The First-tier Tribunal's decision under appeal

6. The valuation provided was as follows. The current market value for the property as between a willing buyer and a willing seller in an arms' length transaction after proper marketing and with each party acting knowledgeably, prudently and without compulsion was £135,000. The realisation costs reduced this to £131,300. A one third share would be £43,766, although this was reduced to £32,000 to take account of acquiring vacant possession from a tenant holding under an assured shorthold tenancy and of legal proceedings to realise the claimant's share if his sisters were unwilling to sell.

7. The valuer did not specifically mention the cost of making the property structurally sound. The judge reasoned from the valuer's valuation and comparators that he had indeed made a deduction for that work of £49,333. The evidence before the judge was that the actual cost was £52,000, so he reduced the current market value by the difference, leaving £132,333.

8. The judge expressly made no findings on the claimant's evidence that he had sold one quarter of his share to one of his sisters and that they had valued his total share at £20,000 between them. The valuation and sale are suspicious in that they reduce the claimant's share, on his valuation, to just under the £16,000 threshold. That aside, the claimant's word without more could not stand against the expert valuation.

F. The appeal to the Upper Tribunal

9. The claimant's grounds are essentially challenges to the tribunal's findings of fact. That is not sufficient for me to allow the appeal. I can only set aside the tribunal's decision if I find 'that the making of the decision concerned involved the making of an error on a point of law' (section 12(1) of the Tribunals, Courts and Enforcement Act 2007). The First-tier Tribunal nonetheless gave permission to appeal, saying;

> The question for the Upper Tribunal is whether an unreasonable refusal by a joint tenant to sell the property in question results in a zero capital assessment on the basis that the value cannot be realised and further whether this must also result in a zero capital notional assessment on the basis that the value share is worthless unless it can be realised.

10. I have read the commentary on regulation 51 in CPAG's *Housing Benefit and Council Tax Reduction Legislation* (28th edition 2015/2016). It is, I think, rather too pessimistic about the possibility of placing a value on a part share when the joint owner does not wish to sell. Since the decisions cited, the Commissioners and subsequently the Judges of the Upper Tribunal have, through their experience of cases, become aware of markets that exist for investors in such shares. The commentary also overlooks the decision of the Court of Appeal in *Wilkinson v Chief Adjudication Officer*, reported as *R(IS) 1/01*. That case concerned the equivalent provisions in the income support legislation. Judge West dealt with that case in *CH/1135/2014*. The facts of *Wilkinson* were similar to this case. The claimant's mother left her house to her children, the claimant and her brother. Her brother came from Australia to live in it with his son. The issue was the value of the claimant's share. She argued it was worthless as there was no market for her share and she could not realise it. The Court considered how the Trusts of Land and Appointment of Trustees Act 1996 applied. Mummery LJ explained:

> I am unconvinced by these arguments that there was any legal error in the approach adopted by the tribunal and the Commissioner. I have no doubt that Mrs. Wilkinson could have obtained an order for the sale of the house with vacant possession if Mr. Brian Thomas was unwilling to buy her share from her at its market value or refused to agree to such a sale. Mrs. Wilkinson's share in the house came to her as an inheritance on her mother's death. It was a gift by Mrs. Thomas jointly to her two children in equal shares. It was an absolute gift in the sense that there was no

> restriction or superadded purpose expressed in the will. This was not a case like *Palfrey* where property was acquired by joint owners for a collateral purpose, such as accommodation for both joint owners, and that purpose would be defeated if one of those acquiring the property were to insist on a sale while that purpose was still subsisting. In such a case there is, as Hobhouse LJ said "nothing obscure or abstruse in the conclusion that the amount of capital which the applicant's joint possession of that dwelling house represents may fall, for the time being, to be quantified in a nominal amount."
>
> On the contrary this is a case where an order for sale would give effect to the testamentary purpose of Mrs. Thomas in leaving the house to both of her children for the benefit of both of them equally. Mr. Brian Thomas's share in the house and his rights in the house were no greater than those of Mrs. Wilkinson, either before or after he went into occupation. If he wished to remain in occupation of the house he could only justly do so on payment to Mrs. Wilkinson of the value of her share or at least payment to her of a market rent. If he were not able or willing to do that a sale with vacant possession was inevitable if the terms of Mrs. Thomas's will, which in law must be treated as her final binding wishes (see Halsbury's, Laws Vol 50, para. 393), were to be carried into effect.

And Potter LJ agreed:

> Like Mummery LJ, I am not persuaded by that reasoning. It is based upon the assumption that Mrs. Wilkinson would not in practice be able to offer the house for sale with vacant possession save with the consent of her brother; that such consent would not be forthcoming; and that, since the brother had an arguable basis for resisting a sale under s. 30 of the 1925 Act, or more recently under s. 14 of the 1996 Act, the timescale of the litigation necessary to obtain an order for sale would mean that the house was in practice unmarketable.
>
> So far as regulation 49 is concerned, it has not been in dispute that the exercise of assessing Mrs. Wilkinson's capital available to be taken into account (being capital not excluded by the "disregards" in regulation 46) required the valuation of her half-share at its current market value; see the effect of regulation 52 and the decision in *Chief Adjudication Officer v. Palfrey* [R(IS) 26/95]. Equally, as it seems to me, in the case of a claimant entitled to a half-share in a dwelling house and/or its proceeds of sale, the proper starting point for the valuation of the claimant's share is half the market value of the house with vacant possession, the value of the half-interest being discounted in respect of any factors materially affecting the ability of the claimant to market the dwelling house offering vacant possession at completion, thus realising the full amount of the claimant's interest.

> In this case, the right of Mrs. Wilkinson as a beneficial part-owner, to require a sale of the house in order to realise her interest, coupled with her power *qua* executrix to effect such a sale with vacant possession, were in practice unobstructed by the presence of her brother throughout the period between 20 September 1995 (when probate was obtained) until January 1997, when the brother became free to leave Australia and take up residence. There was no evidence before the Commissioner that, had Mrs. Wilkinson put the house on the market with vacant possession, her brother would or could have taken any steps to resist such a sale on the grounds of his (or indeed his mother's) wish that he should occupy the house. Had he offered resistance so that, in practice, the proposed sale was delayed pending the resolution of s. 30 proceedings, I can see no reason why Mrs. Wilkinson would not have been protected by regulation 46(2) so as to exclude the value of her half interest from the assessment of her capital under the regulations. However, that is strictly by the way. Once the brother was in possession, it is again not clear that he would have taken **active** steps to resist proceedings by Mrs. Wilkinson or the executors for an order for sale with vacant possession in order to realise Mrs. Wilkinson's half interest. Had he done so, however, I agree with the assessment of the Commissioner that there were no good grounds upon which he could resist the sale. It certainly cannot be said that the Commissioner erred in so assessing the position. That being so, while any valuation of Mrs. Wilkinson's half share for the purpose of her weekly payment of benefit might **in principle** have required some discount on the basis that s. 30 proceedings might be necessary before the interest could be realised, such discount would be of an insubstantial nature. Certainly there is no reason to suppose that the market value of her half interest would have been reduced to a lesser amount than £8,000.

11. The local authority has argued before me that the similarities between this case and *Wilkinson* are such that I should take the same approach. I accept that agree with what Judge West said:

> 13. Although the claimant says that one or other of his sisters is unwilling to sell the property, in my judgment even if that contention were borne out on the facts, the property would in all likelihood be sold by order of the court on an application under s.14 of the Trusts of Land and Appointment of Trustees Act 1996. I am satisfied that the claimant could obtain an order for the sale of the property with vacant possession if one or other or both of his sisters were unwilling to buy his share from him at its market value or refused to agree to such a sale. The shares in the property came to them as an inheritance on their mother's death. It was a gift by their mother jointly to her three children in equal shares. It was an absolute gift in the sense that there is no evidence that there was any restriction or superadded purpose expressed in the will.

I have corrected some obvious typos in that passage.

12. In reply to the local authority's submission, the claimant has argued that his sisters are not being unreasonable as they cannot obtain a mortgage or afford the necessary repairs. The claimant concludes that he has been subject to corporate bullying and cost cutting by the law.

13. As to the financial problems, the claimant's argument misses the point. The valuation took account of the amount that a buyer would have to spend on the property to make it structurally sound. The difficulties that the claimant and his sisters would face are beside the point. The question is the value of the claimant's share, which depends on whether it could be realised, not on whether his sister could buy him out.

14. As to the bullying and cost cutting, I reject that argument. There is no evidence to support it. What the evidence shows is that the local authority applied the legislation, which it is under a duty to do. Ensuring that public money is only spent as authorised by law is neither cost cutting nor bullying.

15. I come finally to the questions posed by the First-tier Tribunal in giving permission to appeal: see paragraph 9. The answer is that there is no general answer, as the answer depends on the circumstances of the particular case. In this case, the answer is: no.

Signed on original
on 18 October 2016

Edward Jacobs
Upper Tribunal Judge