THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE JUDGE OF THE UPPER TRIBUNAL

The appeal is **allowed**. The decision of the tribunal given at Dunfermline on 25 August 2017 is set aside. The case is referred to the First-tier Tribunal (Social Entitlement Chamber) for rehearing before a differently constituted tribunal in accordance with the directions set out at the end of this decision.

REASONS FOR DECISION

1. This is an appeal about housing benefit ("**HB**"). It is about entitlement when a person has sold their home but continues to reside there as a tenant. On 8 March 2017 the appellant (the "**claimant**") submitted a HB claim to Fife Council (the "**Council**"). On 9 March 2017 the Council decided that the claimant was not eligible for HB. The claimant appealed to the First-tier Tribunal (the "**tribunal**"). On 25 August 2017 the tribunal upheld the Council's decision and refused the appeal. The claimant appeals against that decision.

2. The claimant, who was born on 2 August 1947, is 71. He worked until he was 68, when he was prevented from continuing to do so by a knee condition. Until February 2017 the claimant owned a house which was subject to a mortgage. The claimant's only income was his state pension (and subsequently he has been found entitled to state pension credit) and he had no other assets. From his income he paid approximately £115 per month for an interest-only mortgage payment. The mortgage was due to mature in 2021. At that time, because the claimant had been paying off only interest, it would be necessary for him to pay off the principal sum lent to him, which according to the mortgage company would have been £52,020 (around the original sum borrowed). He would not have been in a position to pay off the mortgage, assuming his current circumstances continued. Instead, he sold off the property to a friend for £55,000, and an agreement was reached that he would remain there as tenant for £350 a month. The claimant used most of the purchase price to redeem the mortgage, and was left with a small capital sum of £2899.66. There is nothing in the evidence suggesting he has assets other than this capital sum. Before he sold the house, he had been given advice by a Council employee that he would be able to claim housing benefit. He would have waited until the maturity date in 2021 to sell his property if he had been told he was not eligible for HB, since without HB the effect of selling the house was effectively to triple his monthly outgoing on housing, which he could not afford. However, when he submitted a HB claim, HB was refused by the Council due to the application of Regulation 9(1)(h) of the Housing

Benefit (Persons who have attained the qualifying age for State Pension Credit) Regulations 2006 (the "**Regulations**").

3. The claimant appealed to the Upper Tribunal on 5 April 2018 on the basis that there had been an error of law in the tribunal's decision. The ground of appeal centred on the tribunal having failed properly to consider the claimant's income figure. As a result, it had wrongly concluded that the claimant could afford to pay his mortgage. If the tribunal had properly taken into account this evidence it would have found the exception in Regulation 9(1)(h) of the Regulations applied.

4. Permission to appeal was granted by a judge of the First-tier Tribunal because it was arguable that the tribunal had erred in law by taking an unduly restrictive approach to the application of the discretionary powers in the relevant Regulations, and had failed adequately to consider and explain the consequences for the claimant if his mortgage ran to full term when he would be unlikely to have the resources to repay it. On 7 June 2018 the Council made a submission indicating that it did not support the appeal. The Council accepted that the claimant would have found it difficult to live in the property past 2021. But that was four years away at the time the claimant sold his house. On 11 July 2018 the Secretary of State for Work and Pensions ("**SSWP**"), who had been joined as a party, made a submission supporting the Council's position that the decision was not erroneous in law and providing copies of Circular HB/CTB A5/2009. The SSWP submitted that an immediate threat to continued occupation was required to satisfy the exception, and there was no such threat. A further submission dated 10 August 2018 was received from the claimant's representative, which maintained the position.

5. None of the parties have requested an oral hearing, and I am satisfied that I can fairly determine this appeal on the papers.

Governing law

Regulation 9(1)(h)

6. The appeal turns on the correct interpretation and application of Regulation 9(1)(h) of the Regulations, which is in the same terms as Regulation 9(1)(h) of the Housing Benefit Regulations 2006. A condition of entitlement to HB is that a claimant is liable to make payments in respect of a dwelling (Section 130 of the Social Security Contributions and Benefits Act 1992). Regulation 8 of the Regulations contains further provisions governing whether a person is liable to make payments in respect of a dwelling. Regulation 9 of the Regulations contains a list of situations in which people are to be treated as not liable to make payments in respect of a dwelling, which will have the effect that they do not qualify for HB. Regulation 9(1)(h) provides:

> "(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, as the case may be, his partner, ceased to own the property, **save that this sub-paragraph shall not apply where he satisfies the appropriate authority that he or his partner could not have continued to occupy that dwelling without relinquishing ownership**". (bold added)

7. This case is essentially about the proper meaning of the words set out in bold (the "**exception**"). Regulation 9(1)(h) as a whole is an anti-avoidance provision. The mischief it aims to prevent is people getting local authorities to pay for their housing costs by setting up arrangements whereby they sell their home, but stay living in it paying rent so they qualify for HB, when this was not necessary. The purpose of the words in bold within Regulation 9(1)(h) is to carve out a limited exception to avoid injustice. The exception covers a situation where a claimant or his partner could only stay in their own home if they gave up ownership. In some circumstances they may still qualify for HB even where they have sold their home but remain there as tenants to the new owner.

8. The meaning of the words "could not have continued to occupy…without relinquishing ownership" in the exception in Regulation 9(1)(h) has been considered in a number of cases, from which I extrapolate the following principles:

   8.1 The words "could not have continued to occupy" do not mean absolute impossibility. (R(H) 6/07 paragraph 15)
   8.2 The test is one of practical compulsion, having regard to the circumstances of a particular claimant. Practical compulsion is not legal compulsion. (CH/3853/2001)
   8.3 A relevant consideration is whether there were any realistic alternatives open to the claimant, such as finding work, or raising money in a different way, for example using other assets or through other available benefits (CH/3853/2001 and CH/3571/2008). Since it is for a claimant to make out their case on the exception, a claimant who does not address what steps have been taken to explore alternatives does so at his peril (CH/3571/2008 paragraph 10).
   8.4 The practical compulsion to sell may come from a mortgage company, but need not necessarily do so. Practical compulsion may arise in other ways. For example, in *PJ v Dover DC* [2010] UKUT 354 (AAC), practical compulsion was found to exist where selling and leasing back was the only way of being able to continue to trade and avoiding bankruptcy. "It would not be sound policy to require a claimant to run up a large amount of debt to a mortgage company where s/he has a ready solution to the problem"; 29th Edition of Findlay's Housing Benefit and Council Tax Reduction legislation p288.
   8.5 Whether or not a person "could not have continued to occupy…without relinquishing ownership" depends on the circumstances of a particular case. In other words, each case turns on its own merits.

9. Circular HB/CTB A5/2009 (the "**Circular**") provided by the SSWP was issued by the Department of Work and Pensions. It sought to clarify the impact of entering into a sale and rent back agreement on a person's eligibility for HB, in response to concerns about people being refused HB. It says in Appendix A:

> "Where a person is genuinely unable to remain in their home without selling and renting it back, help is available with the rent charged through HB".

Other parts of this Circular refer to the test of practical compulsion and the need to look at whether there were alternatives (for example help with homeowner housing costs including mortgage payments from benefits such as income support and state pension credit). Paragraph 8 of this Circular gives a list of situations in which HB was denied, saying "In each case the crucial point was that there were alternative options to sale available". This Circular is not law, and I have applied the test set out in Regulation 9(1)(h) when determining this case rather than its terms. Nevertheless it is helpful general guidance for people planning to enter into sale and rent back arrangements.

Applicable amount

10. Before considering whether the tribunal erred in law in its application of Regulation 9(1)(h), I should address the law governing a subsidiary argument on behalf of the claimant. The claimant submits, among other things, that the tribunal paid insufficient attention to the actual level of the claimant's income, and in particular that his income was lower than the 'relevant applicable amount'. The law governing the applicable amount is to be found primarily in Regulation 22 and Schedule 3 of the Regulations. The basic assumption is that when a single claimant aged over 65 has income over £168.70 a week (or a higher sum if they are eligible for premiums) they do not need help with housing costs, as that should be enough to live on (Schedule 3 Part 1). But if the income is lower, then they may qualify for HB for the difference. A short explanation of applicable amount in the context of housing benefit is given in *London Borough of Camden v NW & Secretary of State for Work and Pensions (HB)* [2011] UKUT 262 (AAC).

> "HB is a means tested benefit. Put simply, entitlement is normally determined by calculating, in accordance with the HB Regulations, a person's "applicable amount" and then comparing the figure arrived at with his income. Again, calculated in accordance with the regulations. If his applicable amount exceeds his income the balance is payable by way of HB. Of course, it will often be a lot more complicated than that … Various other amounts, called "premiums", may also have to be taken into account"

11. In the circumstances of this case, I am not convinced that the applicable amount takes the claimant much further. The claimant was receiving state

pension and a very small other pension, which together were only just under the level of the personal allowance element of the applicable amount. He is also entitled to state pension credit, which appears likely to have the effect of increasing his income to just over the applicable amount (unless premiums apply which is unclear from the papers). I accept that the claimant's low income was a relevant factor, particularly as it applied to difficulty keeping up with mortgage interest payments and the practical impossibility of saving up a capital sum for impending mortgage redemption. But I am not clear how bringing in the concept of the applicable amount advances the claimant's case in relation to the applicability of Regulation 9(1)(h). However, given the conclusions I have reached below, it is not necessary for me to consider this matter any further because it will be subsumed within the rehearing of the case, so I do not do so.

Discussion

12. The question for the tribunal was whether the exception within Regulation 9(1)(h) applied, because it was not in dispute that the claimant had sold his house and rented it back within the previous 5 years. The test the tribunal had to apply was that set out in the statutory wording: whether the claimant could not have continued to occupy without relinquishing ownership. I reject the SSWP's submission that the exception could only be met if there was an immediate threat to continued occupation. That is not what Regulation 9(1)(h) says, and it is not what the cases interpreting it say. I have considered the income support case (CIS/14/93) relied on by the SSWP to support her contention. This case interpreted a provision in a now amended Schedule to the Income Support (General) Regulations 1987. The provision concerned apportionment of responsibility for expenditure relating to housing costs and the words interpreted were: "has to meet those costs in order to continue to live in the dwelling occupied as the home". However, the context, as well as the statutory wording, are different from Regulation 9(1)(h). For example, reliance is placed on the word 'has to' as support for an interpretation of an 'immediate' threat being required (paragraph 14). But that wording is not in Regulation 9(1)(h). I prefer the analysis in paragraph 8 above, taken from cases directly on Regulation 9, which seems to me more in keeping with the purpose of the exception and, indeed, the government guidance contained in the Circular set out in paragraph 9 above.

13. I do not consider that it is necessary to decide how far off the threat of losing occupation is for the claimant to fall within the exception. Since the legislature was quite happy in the earlier part of Regulation 9(1)(h) to set out a time limit (disposals in the last five years), it could easily have been more specific in the exception. But there are no time limits mentioned, or words such as 'immediate'. In my view this is was to leave room for Regulation 9(1)(h) to be applied in accordance with its intention, and the mischief sought to be addressed. The terms of the exception are sufficiently wide so its application can depend on the particular circumstances of a case, having regard to the purpose of the provisions. No doubt the more distant the

compulsion, the harder it may be to satisfy the exception, if that is the only operative factor. After all, the further off something is, the more time there is for other alternatives to crop up. But that is not to say it is impossible in all cases. In my view, it is not the law that people have to wait until there is an emergency or immediate threat before it can be found that there is practical compulsion. People should not be penalised for sensible planning when, put colloquially, the writing is on the wall, if they are not involved in avoidance. In *Simms v Registrar of Probates* [1900] AC 323 at 335, Lord Hobhouse stated "Where there are two meanings, each adequately satisfying the meaning (of a statute), and great harshness is produced by one of them, that has a legitimate influence in inclining the mind to the other….it is more probable that the legislature should have used the word in that interpretation which least offends our sense of justice". It seems to me that great hardship could potentially be caused by adopting the narrow interpretation suggested by the SSWP, if people facing genuine problems with continued ownership were excluded from HB. But it is not necessary to adopt such a restrictive interpretation as suggested by the SSWP to give effect to the wording in Regulation 9(1)(h). Practical compulsion leading to a person being unable to continue to occupy without relinquishing ownership is sufficient. In difficult cases, tribunals may be assisted by bearing in mind the mischief that Regulation 9(1)(h) aims to prevent, set out in paragraph 7 above. Where there is a genuine and serious problem with continued occupation without a sale and no real alternatives, then the circumstances may disclose practical compulsion. It is worth reiterating the wording of the Circular referred to above, "Where a person is genuinely unable to remain in their home without selling and renting it back, help is available with the rent charged through HB".

14. Turning to the tribunal's statement of reasons, I find that the tribunal erred in law essentially in the ways identified by the tribunal judge granting permission. The tribunal erred in its interpretation and application of the exception within Regulation 9(1)(h), and failed to provide adequate reasons for its decision. The tribunal placed too much emphasis on the absence of evidence of repossession by the mortgage company (e.g. at paragraph 21). But, as set out in paragraph 8.4 above, it is not essential that a mortgage company is seeking to repossess. The test is practical compulsion, which may be met even if there is no mortgage company seeking to repossess, depending on the circumstances. The tribunal also failed properly to consider whether the combination of difficulties the claimant faced resulted in practical compulsion. The evidence disclosed that there were issues not only with meeting the mortgage redemption sum, but also ongoing mortgage interest payments. The tribunal failed adequately to explain why keeping up with the interest repayments (in the light of the claimant's low income, his evidence of needing help from family members to pay, and some evidence of arrears in the past), and the undisputed inability to pay off the redemption debt in 2021, did not together give rise to practical compulsion. The tribunal also did not properly deal with alternatives. It had accepted that the claimant could not work, so income from work did not provide a feasible alternative. Further,

there appeared to be no evidence before the tribunal that the claimant owned any other assets prior to sale, so use of other assets was not a viable alternative. The tribunal did not explain why continued ownership was a practical alternative, given the claimant's age, infirmity, low income and lack of assets, and possible consequences of finding himself homeless at the time of mortgage redemption in 2021. Equally, the tribunal made no findings about one potential relevant alternative arising on the papers, being whether housing costs might have been met through other benefits, when papers before the tribunal (p60-65) showed that for at least some of the time in the past the DSS had been meeting part of the mortgage interest.

15. It is therefore appropriate that I set the decision aside. I do not consider that I am in a position to substitute a decision. This is partly because there are submissions of a factual nature contained in the submission dated 10 August 2018 for the claimant, and it is not clear the extent that all of these were before the tribunal. There are also factual elements of the case about which I am unsure. For example, what was the basis for the purchase price of £55,000 and what if anything does that have to say about avoidance? What is the position in relation to availability of other DSS benefits to pay off mortgage interest or to increase income, and would there have been DSS help available for paying off the ultimate redemption figure, for the purposes of considering realistic alternatives? It is appropriate that the case is remitted to a newly constituted First-tier Tribunal, to find relevant facts and then apply the legal tests set out in the reasons above.

DIRECTIONS

1. **The case is to be reconsidered at an oral hearing. The members of the First-tier Tribunal who are chosen to reconsider the case are not to be the same as those who made the decision which has been set aside. The new First-tier Tribunal should have regard in particular to paragraphs 6-8 and 12-14 of the reasons above when re-determining the case.**

2. **The second respondent is to send to the relevant HMCTS office, within one month of the issue of this decision, a submission addressing which, if any, benefits the claimant would have been entitled to which would have paid his mortgage interest or mortgage redemption figure after February 2017.**

3. **Parties may provide any further evidence upon which they wish to rely before the First-tier Tribunal to the relevant HMCTS office, the deadline for doing so being one month from the date of issue of this decision notice. The claimant is reminded that it is for him to show that he falls within the exception within Regulation 9(1)(h) of the Regulations, and this is an opportunity for him to ensure all relevant evidence is before the tribunal. Parties may also provide written submissions to the tribunal on the application of the test in Regulation 9(1)(h) in all the circumstances of this case.**

4. **The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. It will not be limited to the evidence and submissions before the previous tribunal. It will consider all aspects of the case entirely afresh and it may reach the same or a different conclusion to the previous tribunal.**

These Directions may be supplemented by later directions by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

(Signed)
A I Poole QC
Judge of the Upper Tribunal
Date: 18 September 2018