UPPER TRIBUNAL CASE NO: CH/0190/2018

DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 10 July 2017 at Sutton under reference SC154/15/00363) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: the claimant was not entitled to housing benefit on and from 21 July 2014.

REASONS FOR DECISION

1. This case concerns the amount of the claimant's capital and the effect, if any, that it has on her entitlement to housing benefit. In particular, it concerns the value of her share in a jointly owned property.

A. Background and the revision or supersession issue

2. On 28 July 2014, the local authority decided that the claimant was not entitled to housing benefit from and including 21 July 2014. It is not clear whether the local authority acted under its powers of revision or supersession, but that does not matter as the only issue in the case does not depend on the distinction. The basis of the decision was that the claimant had capital in excess of £16,000. At the time, it was jointly owned by the claimant and her daughter, and occupied by her daughter and son. The claimant was living in sheltered accommodation in respect of which she had made a claim for housing benefit. The daughter subsequently bought the claimant's interest in April 2016 for £40,000.

B. The first appeal to the Upper Tribunal and the husband's interest

3. The First-tier Tribunal dismissed the claimant's appeal against the local authority's decision, but I gave the claimant permission to appeal to the Upper Tribunal under reference *CH/2831/2015*. On that occasion, I set the First-tier Tribunal's decision aside on the ground that the tribunal had not dealt with the claimant's argument that her estranged husband would be entitled to a share in the property. Subsequently, the local authority uncovered evidence from the claimant dated April 2004 that her husband had sold his share in the property to the daughter for £25,000. According to the tribunal's written reasons at the rehearing, it decided that it was unlikely that the husband would have any interest in the property as he had sold his interest in 2004, he had made no contribution towards the property, and he had not been in contact with the claimant since that date. I can find no error of law in that analysis. Indeed, on the evidence it could not properly have come to any other decision. It is

unfortunate that, in its decision notice, the tribunal said the opposite. That contradiction is an error of law.

C. The valuation issue on rehearing in the First-tier Tribunal

4. Having dealt with the basis on which I had allowed the claimant's appeal to the Upper Tribunal, the First-tier Tribunal went on to allow her appeal, deciding that the valuation evidence presented by the local authority 'could not be relied upon as providing an adequate valuation of [the claimant's] interest in the property.' I gave the local authority permission to appeal to the Upper Tribunal. The claimant has responded through the CAB and the local authority has replied through Alison Meacher of counsel.

5. The tribunal did not set out its own reasons for rejecting the valuation evidence in its written reasons, although it did set out a summary in its decision notice. It relied on the argument presented by the claimant's barrister. As I am re-making this decision, I will have to look at the tribunal's reasons. First, though, I need to explain how the tribunal went wrong in law on the valuation issue.

6. The local authority has argued that the First-tier Tribunal failed to deal with the issues before it. It decided that the evidence was not sufficient to show that the claimant's interest in the property had been worth more than £16,000 (regulation 43 of the Housing Benefit Regulations 2006). That meant that the claimant was not subject to an absolute bar on entitlement to housing benefit. However, the authority has argued that the tribunal should also have decided whether the interest was worth between £6,000 and £16,000. If it were, the claimant would have been attributed with a tariff income that might have affected her entitlement (regulation 52). It is certainly possible to read the First-tier Tribunal's decision in the way that would give rise to that mistake. If that reading is correct, the tribunal went wrong in law as the local authority has argued. I prefer to read the First-tier Tribunal's differently and in a way that I think better reflects the tribunal's reasoning. On this reading, the tribunal rejected the local authority's case in support of terminating her entitlement on the ground that it had not produced reliable evidence to support its decision. In other words, it relied on the burden and standard of proof, which rested on the local authority. On this reading, the tribunal also went wrong in law. A tribunal is under a duty to make findings of fact and to resolve the case without reference to the standard and burden of proof. See the decision of the Court of Appeal in *Morris v London Iron and Steel Co Ltd* [1988] QB 493. If it had done that, the issue raised by the local authority would have been avoided. If it considered that better evidence was required, it could have specified what that was.

D. Disposal – re-making the decision

7. As the tribunal made errors of law, I set its decision aside. That leaves the issue of disposal. In my grant of permission, I invited the parties to consider whether, if I were to allow the appeal, I should remit the case for rehearing or re-make it. I have decided to re-make it and to do so on the evidence that is before

me. To anticipate my reasoning, it seems to me that the valuation evidence was as good as I have seen in a capital valuation case, and certainly sufficient to make a sound decision with sufficient precision for the purposes of this case. That evidence has to be read fairly as a whole, bearing in mind that it was written by a valuer and taking account of the substance of what he did rather than the precise terms that he used at times.

E. The husband's interest

8. As to the interest that the claimant's husband might have on divorce, I adopt the reasoning from the First-tier Tribunal's written reasons. On the evidence currently available, it is impossible to attribute any value to any interest that the husband might have. The claimant appears to have formed the impression that even after so long he could appear and demand a half share in the former matrimonial home. That is at best speculative.

F. The valuation evidence

9. Coming to the valuation evidence, the tribunal set out in its decision notice five reasons for finding that the local authority's evidence of valuation was not reliable. It is convenient to base my analysis of its reasoning around those points.

10. The tribunal's first reason was:

> a. The District Valuer proceeds on the erroneous assumption that [the claimant] is a tenant in common despite having been expressly instructed that she is a joint tenant.

11. Assuming that the claimant and her husband were joint tenants, when he sold his share to their daughter that tenancy was severed and the claimant and her daughter held as tenants in common. That is because the sale of a joint tenant's interest is incompatible with the continued existence of a joint tenancy and inevitably leads to its severance (*Williams v Hensman* (1861) 70 ER 862 at 868). Even if by some means the claimant and her daughter did hold as joint tenants, the valuer would have had to treat them as tenants in common because that is the only way that it is possible to value the claimant's interest. The claimant's interest had to be valued in accordance with regulation 51. This provides that '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'. This only applies when the claimant is a joint tenant and not as a tenant in common (*Hourigan v Secretary of State for Work and Pensions* reported as *R(IS) 4/03*). Assuming for the moment that the claimant was a joint tenant, the effect of the regulation is to 'sever the unity of interest and to treat the claimant as if he were entitled to an equal share with the other or others of the whole beneficial interest' (Auld LJ in *Hourigan* at [32]). This accords with *Williams v Hensman*, since valuation is based on an asset's current market value (regulation 47), which assumes a sale, which would be incompatible with the continued existence of, and inevitably sever, the joint tenancy. So, one way or the other, the valuer had to value the claimant's interest on the basis that she had a severable interest.

12. The tribunal's second reason was:

> b. He incorrectly defines [the claimant's] interest in the property as a '50% beneficial interest in the freehold'.

13. The valuer was required to value the claimant's interest. Regulation 51 provides that the beneficial owners are treated as entitled in possession in equal shares. It is true that the value did refer to 50% interests and used a 50% calculation as part of his reasoning. But nowhere in either of the alternative bases for valuation that he provided did he simply value the property and then take half of that figure. This evidence was not written by a lawyer and has to be read by reference to its substance. It is not appropriate to isolate the particular choice of language.

14. The tribunal's third reason was:

> c. He does not properly address the issue that [the claimant's] daughter as joint tenant was entitled to occupy the whole of the property and was occupying her home at the material time, and the impact that this position has upon the value of [the claimant's] interest in the property.

15. This is not correct. The valuer recorded that the claimant's daughter and son were living in the property, and he took account of both the possibility of the claimant's daughter buying her interest, which actually happened, and the possibility of the need for an application to the court under the Trusts of Land and Appointment of Trustees Act 1996. It seems that, as counsel once put it to me, the valuer has 'dotted every t and crossed every i' on this point.

16. The tribunal's fourth reason was:

> d. His misunderstanding of the legal position is demonstrated by him identifying a potential market for 'reversionary interest' in the property, as [the claimant] does not have such an interest.

17. Reversionary interests in property are successive over time. This case concerns interests that are concurrent in time. The valuer provided evidence of sale of reversionary interests because this is the form of interest that is regularly purchased when an investor buys an interest without the possibility of immediate possession. It is not an indication that the valuer misunderstood the nature of the claimant's interest.

18. The tribunal's fifth reason was:

> e. He does not provide evidence of the existence of a local market for [the claimant's] actual interest in the property.

19. I do not understand why there has to be a local market. There is a market for investment in interests that do not allow immediate exclusive possession. That may not be widely known among claimants, but it has been referred to in a number of Upper Tribunal decisions. It may not be easy to produce evidence of that market, but its existence is not in doubt.

20. Accordingly, I reject the criticisms of the valuer's evidence and find that it is sufficiently reliable to use as a basis for valuing the claimant's interest in the property.

G. Valuation – a margin of error

21. Given the factors that can influence a buyer in a real market, the complete accuracy of a valuation can never be guaranteed. In this case, the valuer offered two figures for the claimant's share - £54,000 and £57,000. Even the lower figure is more than three times the capital threshold of £16,000. I have taken into account that it highly unlikely that the valuer's methodology, which he set out in detail, would produce a figure that was so wildly wrong.

H. Valuation – the subsequent sale

22. I have not taken any account of the later sale to the claimant's daughter for £40,000.

I. Capital disregard – a late issue

23. The claimant's representative has raised for the first time that the claimant's interest should be disregarded on the basis that she was taking reasonable steps to dispose of the premises (paragraph 26 of Schedule 6). I am not going to allow her to raise the issue at this stage. She had had the benefit of advice from the CAB in the course of this case and was represented by counsel before the First-tier Tribunal. This case has been running now for just a few days short of four years since the local authority made its decision. The issue of a disregard could have been raised sooner. Moreover, the evidence now relied shows that the claimant's daughter had tried to obtain a mortgage to buy out the claimant's interest. Even if I accept for the sake of argument that that was the practical equivalent of the claimant disposing of the premises, I do not consider that the claimant's chances of success are sufficient to override all other considerations so that the only fair approach is to allow the issue to be raised at this late stage.

Signed on original
on 10 July 2018

Edward Jacobs
Upper Tribunal Judge