

R(H) 3/08

Mr P L Howell QC
Commissioner
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CH/3933/2006

Council tax benefit – dwelling – sole or main residence

The claimant owned a two bedroom, ground floor flat and his parents owned, but did not occupy, the flat above. In 2003 the claimant, who now had nine children, made an informal agreement with his parents to extend his occupation into the flat above, using the upstairs flat for sleeping accommodation and the downstairs one for general living purposes. The properties remained self-contained units valued as separate hereditaments for rating and council tax purposes: the local authority allowed council tax benefit on the first flat only. The claimant appealed and the tribunal accepted that the family occupied both properties as their home and that the claimant was liable for council tax on both properties but concluded that, as the two flats were on the valuation list as two separate units they could not be classed as a single hereditament. It held that the legislation did not provide for council tax benefit to be paid for two separate dwellings and therefore upheld the local authority's decision, holding that the main residence was flat 1 and the claimant could not therefore qualify for benefit on flat 2. The claimant appealed to the Commissioner, arguing that he occupied both flats together as one combined residence, which was his sole or main residence. The question before the Commissioner was whether (for both liability and benefit purposes alike) a person could be a "resident" in terms of section 6(5) Local Government and Finance Act 1992 in two contiguous properties, being occupied together as one combined residence, when the properties remained on the valuation list as two hereditaments and were thus taxed as two chargeable dwellings rather than a single one.

Held, allowing the appeal, that:

1. the tribunal had misdefined the issue by conflating the meaning of "dwelling" with "residence" and assuming that for the purposes of section 6 of the Local Government Finance Act 1992 the two must always and necessarily be coterminous. Following *Frost v Feltham* [1981] 1 WLR 452, "sole or main residence" is a question of fact and degree and the correct approach is to weigh up the nature and extent of the relationship between the person concerned and each of the premises at issue (paragraphs 7, 14 and 15);
2. section 131 of the Social Security Contributions and Benefits Act 1992, as amended, states that the principal condition to qualify for council tax benefit is that the claimant is liable to pay council tax in respect of a dwelling of which he is a resident, the definitions of "dwelling" and "resident" for this purpose being those given in the Local Government Finance Act 1992 in connection with council tax liability. Therefore as the claimant was liable for council tax on both flats as a resident, he similarly qualified for council tax benefit on both as a resident (*Stevens v East Hampshire DC and another* [1994] RA 73 considered) (paragraphs 2, 9, 16 and 17).

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This appeal by the claimant must be allowed, as in my judgment the Enfield appeal tribunal on 30 May 2006 (Ms P Desai, chairman, sitting alone), in an otherwise admirable decision, misdirected itself in law on the meaning of "resident" for the purposes of council tax benefit under section 131 Social Security Contributions and Benefits Act 1992 as amended, in holding that the claimant could not qualify for that benefit in respect of more than one of the two adjoining flats he was in fact residing in and occupying together with his large family as a single combined home.
2. I set the decision aside and exercise the power in paragraph 8(5)(a) Schedule 7 Child Support Pensions and Social Security Act 2000 to substitute the decision I

consider the tribunal should have given on the facts it found, namely that as he was liable in those circumstances for council tax on both flats as a “resident”, the claimant similarly qualified for council tax benefit as a “resident” of both, even though the tax was still assessed and payable in respect of them as two separate chargeable dwellings.

3. As recorded by the tribunal chairman in her very clear and well set out statement of reasons issued to the parties on 30 August 2006 at pages 37 to 39, the facts of the case are not in dispute. At all material times the claimant has been resident in a downstairs flat (flat no 1) which he has owned since he bought it some 20 years ago. This property is a two bedroom and two living room flat in a block of flats. The claimant’s household now consists of himself, his wife and their nine children. His parents own the upstairs flat, flat no 2, immediately above in the same block of flats, having bought their flat about 10 or 12 years ago and initially rented it out. They had thought of moving in there themselves but that became impossible after the claimant’s father had a stroke. After a period when it was empty, the claimant, who understandably was now finding it difficult to accommodate his large family in the downstairs flat alone, extended his occupation in 2003 to flat no 2 as well, under an informal arrangement with his parents. Nominally this was for a six-monthly tenancy at a rent of £200 per week, though in practice they have not insisted on this being paid given the other calls on his resources and in those circumstances it has very properly been made clear there is no question of the family seeking housing benefit.

4. Since expanding into the upstairs flat, the claimant and his household have occupied and run the two together as their single combined home, using the upstairs flat as sleeping accommodation and the downstairs one for general living purposes. However no alterations to turn them physically into a single unit have been made, and they remain self-contained units constructed or adapted as, and still easily able to be turned back into, separate living accommodation. The flats are valued as separate hereditaments for rating and council tax purposes and although the claimant has had some informal contact with the valuation officer about the possibility of getting this changed, no effective steps in that direction had been taken by the time the matter came before the tribunal.

5. Section 131 of the Contributions and Benefits Act was inserted by section 103 of and Schedule 9 to the Local Government Finance Act 1992 which introduced the charging provisions for council tax. Like those provisions, section 131 makes use of special definitions of “dwelling” and “resident”, which are part of the legacy of the poll tax legislation in the now repealed Local Government Finance Act 1988. Council tax under the 1992 Act is payable in respect of “chargeable dwellings”: a “dwelling” for this purpose meaning by section 3 any property which would have been a “hereditament”, under the definition in section 115(1) of the General Rate Act 1967 had that remained in force, provided that it is not separately listed as non-domestic property or exempt; with a further express exclusion for yards, garages, storage premises etc, separate from and not forming part of a larger property which is itself a “dwelling” within the main definition.

6. “Hereditaments” under the 1967 Act were units of property liable to rating which were, or fell to be, shown as separate items in the rating valuation list: in broad effect, separately lettable units of property for which a gross and net annual value could meaningfully be calculated as the basis for the rate. Liability depended

on rateable occupation though it is clear that for this purpose property could be in a single or combined “occupation” even though comprising or including two or more separately valued hereditaments: see section 16 General Rate Act 1967.

7. For council tax, by sections 4 and 5 of the 1992 Act each hereditament which constitutes a chargeable dwelling is separately chargeable to tax according to its place in the scale of valuation bands set out in the relevant table, and the person liable to pay the tax is determined under section 6. As explained by Scott Baker J (as he then was) in *Mullaney and anor v Watford BC and anor* [1997] RA 225 at 227–8, section 6(1) and (2) Local Government Finance Act 1992 provide that a person is liable to pay the council tax thus chargeable in respect of any chargeable dwelling and any day, if on that day:

- 7.1 he is a resident of the dwelling and has a freehold interest in the whole or any part of it;
- 7.2 he is such a resident and has a leasehold interest in the whole or any part of the dwelling which is not inferior to another such interest held by another such resident;
- 7.3 he is both such a resident and a statutory or secure tenant of the whole or any part of the dwelling;
- 7.4 he is such a resident and has a contractual licence to occupy the whole or any part of the dwelling;
- 7.5 he is such a resident; or
- 7.6 he is the owner of the dwelling.

Liability applies by category in the order just recited: where there is no person answering the description in the first category, liability falls upon the person in the second category, and so on. Section 6(5) provides that “resident”, in relation to any dwelling, means an individual who has attained the age of 18 years and has his sole or main residence in the dwelling. “Sole or main residence” is a question of fact and degree in every case. In *Frost v Feltham* [1981] 1 WLR 452 at 454–455 Nourse J as he then was noted that the Concise Oxford Dictionary defined “main” as “principal” or “most important”, and held that the question was essentially one of fact and degree for the tribunal of first instance. The court or tribunal has to weigh up the nature and extent of the relationship between the person concerned and each of the premises at issue.

8. It follows from the way the categories are set out in section 6(2) that if a person is not a “resident” within the definition in relation to a particular chargeable dwelling, then the only way he can be liable to council tax in respect of that dwelling is as an “owner”. This by section 6(5) and (6) means a person who has, in respect of at least part of the dwelling, an immediate interest in possession, either freehold, or a leasehold granted for six months or more. The corollary of a person being liable to pay council tax as an owner under that head is that there is **no** “resident” of the dwelling (as if there had been, one of the earlier categories in section 6(2) would have applied); a discount of 50 per cent is then applicable under section 11 so the person is only liable for tax at half the normal rate.

9. The principal condition to qualify for council tax benefit under the amended section 131 Social Security Contributions and Benefits Act 1992 for any day is that the person concerned is for that day **liable** to pay council tax in respect of a **dwelling**

of which he is a **resident**. For this purpose “dwelling” and “resident” have the meanings already described in the Local Government Finance Act 1992, replacing any other definition in the social security legislation. Although the determination of liability to council tax is itself outside the jurisdiction of the tribunals with which I am concerned, it follows from the use of the same definitions of these two expressions that liability to council tax as a resident of any particular chargeable dwelling, and qualification for council tax benefit as a resident of that same dwelling, must go hand in hand: they depend on the same questions, under the same legislation. If a person is a resident of a chargeable dwelling so as to be liable for the council tax on it, then he must also meet the condition of being a resident of that dwelling so as to qualify for council tax benefit. If he is not a resident of that dwelling within the terms of the definition, then he cannot meet the condition to qualify for council tax benefit but neither can he be liable as a resident for the tax itself. His only potential liability in that case could be as owner, if he had a sufficient interest and no one was resident in the dwelling; if so he could not qualify for council tax benefit since it is not a benefit for non-resident owners, but he would get the 50 per cent discount on his liability under section 11 Local Government Finance Act 1992.

10. Reverting to the facts of the present case, the chairman recorded in paragraph 10 of her statement of reasons that there was no dispute that the claimant and his family occupy both properties as “their home”. On the facts found she was in my view clearly right to refer to it as “their home” in the singular. What is shown here, and accepted on the facts, is a single combined occupation of the two flats together as one home for this large family on a continuous full-time basis, not as two homes between which they move from time to time. In the ordinary non-technical use of the term, they “reside” in the two of them together simultaneously; even though to operate them as a single family “residence” in this sense is no doubt rather less convenient than if they were physically opened up together with an interconnecting door and internal stairway, instead of as they are, contiguous one above the other, but with the common stairway in the block having to be used to go up and down between the ground floor flat and the one immediately above.

11. The tribunal chairman then went on to record that there was equally no dispute that the claimant was liable to pay council tax in respect of both flats 1 and 2. As already noted, there has never been any dispute over the claimant’s liability for council tax as a resident of flat no 1, or that he correspondingly qualifies for council tax benefit in respect of that flat on the same basis. In noting that it was “not disputed” that he was also liable to pay council tax in respect of flat no 2 the chairman recorded, though she did not advert to, an apparent inconsistency on the part of the council: in that as the council tax bill in respect of flat no 2 at page 26 of the appeal papers shows, the liability appears to have been imposed on the claimant and his wife in the normal way as residents. The full band C charge for flat no 2 as a separate chargeable dwelling is shown as payable by the two of them by instalments, without discount, and without any suggestion that (or how) liability is being imposed on them in respect of a property in which they are not resident.

12. Although the question of liability was not of course directly before her, the tribunal chairman should in my judgment have addressed this seeming inconsistency on the council’s part in apparently charging the claimant the full council tax liability of a resident in respect of flat no 2, but at the same time denying that he met the same condition of being a “resident” of the same flat for benefit purposes in respect of that

liability. To do so would have focused attention on the true question at issue, which is whether (for both liability and benefit purposes alike) a person can be a “resident” in terms of section 6(5) Local Government Finance Act 1992 in two contiguous properties in fact being occupied and used together as one combined residence, when they remain separately listed on the valuation list as two hereditaments and thus taxed as two chargeable dwellings rather than a single one.

13. Instead, the chairman in my judgment misdefined the issue for herself by saying as she expressly did in the following sentence in paragraph 10 that “The issue is whether flats 1 and 2 could be classed as a single hereditament for the council tax purposes”, and then concluding that as they were not and were still on the valuation list as separate units, that was the end of the matter so far as qualifying for council tax benefit in respect of a second one was concerned. She concluded, in paragraph 11:

“There is no provision in the council tax benefit legislation to allow for benefit to be paid for two separate dwellings even if a person occupies both of them. If a potentially liable person has more than one home then the local authority must decide which one is his/her main residence”.

On that footing, she confirmed the decision of the authority that the claimant’s “main residence” remained in, and was confined to, flat no 1 and he could not therefore qualify for council tax benefit in respect of flat no 2.

14. In my judgment that was a mistaken approach as a matter of law as it wrongly conflates the meaning of “dwelling” with “residence” and assumes without justification that for the purposes of section 6 the two must always and necessarily be coterminous. Although the question of what is a person’s “sole or main residence” is always a question of fact and degree for the tribunal of first instance to determine on the evidence, there is a material difference between the kind of case (such as *Mullaney*, cited above) where a person is dividing his or her time between two distinct homes and a decision has to be made on which is the “main” one, and the rather rarer case such as this, where a person is occupying contiguous premises as a single combined home though they comprise what are still listed as two or more hereditaments and thus two or more “chargeable dwellings”. The tribunal wrongly overlooked that difference (note the apparently unconscious slide from “their home” in one paragraph to “more than one home” in the next) and on those grounds I set the decision aside as materially erroneous in law.

15. The findings of fact made by the chairman are very clear and undisputed, and I can conveniently substitute the decision I am satisfied she should have given on them. The logical possibilities on the facts thus found are that by occupying both flats together as a single home the claimant is “resident”, in the sense of having his sole or main residence in terms of section 6(5), in (a) both flats together; (b) flat 1 alone; (c) flat 2 alone; or (d) neither. In my judgment the first of those possibilities, that the claimant is occupying both flats together as one combined residence which is his sole or main residence, accords best with the practical reality and coincides with the way he appears to have been treated for the purposes of the council tax liability itself.

16. I therefore accept the submission of his representative Mr M Posen that this is the one to be adopted, and that there is no need to accept the contrary argument, well expressed in the submission on behalf of the council by its appeals officer Ms L

Robinson, that “an individual cannot be solely or mainly resident in more than one dwelling simultaneously and that these terms are inherently singular”. True it is that a person can only have one “sole or main” **residence**, but I do not think it follows that this always has to be identified with one single “chargeable dwelling” within the aggregate premises being occupied, if the actual facts are otherwise. Given the nature of the occupation found by the tribunal, it does not seem to me to accord with reality or to be required by anything in the legislation to treat the claimant as having his residence only in one of his two flats, ignoring the fact that he is also residing in the other; and to try and decide whether the bedrooms or the living rooms form the “main” residence within a single home would be meaningless and futile. Nor would it be right to construe “sole or main residence **in** the dwelling” so narrowly as to mean “within the confines of that dwelling alone”. That would give the absurd result that for tax and benefit purposes alike he would fail to count as a “resident” of **either** of the chargeable dwellings he is actually occupying as his home.

17. I am strengthened in these conclusions by the way somewhat similar facts are approached in *Stevens v East Hampshire DC and anor* [1994] RA 73, a case on the poll tax legislation depending on the same test of a “sole or main residence”. The chargepayer here occupied three separate leasehold flats in the same building, two being contiguous and linked, and the third separate, three floors up in the same block. The High Court held that the registration officer and tribunal had not erred by treating the two contiguous flats as the chargepayer’s sole or main residence, with the third (which he used for his hobby of bookbinding and as an occasional spare bedroom) not counting as part of the sole or main residence and therefore being subject to a separate standard charge. In his judgment at pages 76–77, Latham J said the appropriate concept in this type of situation was to determine whether or not in truth any individual parts of property can be said in aggregate to form the sole or main residence of any individual, and the only way to answer that was for the tribunal to look at the use being made of the various flats. It being clear that the main living area was the two linked flats, the tribunal had to decide whether the use being made of the third was sufficiently connected with the use being made of the others to make it in truth part of the same residence. He continued:

“That approach appears to me to be a common sense and sensible approach to the requirements of the statute. It appears as though there have been a number of decisions of tribunals in which that approach has indeed been applied. For example, in the case that has been provided for me involving a Mrs Cox, who was living in effect in two flats one above the other connected by stairs, the question which the tribunal asked was whether or not they were being occupied together. The flat upstairs was being used as bedroom accommodation and the flat downstairs as living accommodation. The tribunal came to the conclusion that the two flats were being occupied together as her residence. That seems to me to accord with the requirements of the Act.”

18. The same approach must apply for council tax, and the circumstances described in the passage just quoted appear to be similar in essential respects to those of this present claimant as found by the tribunal. He too is living in effect in two flats one above the other connected by stairs, and in my judgment the correct conclusion is that the two flats are being occupied together as his sole or main residence. Accordingly in my judgment he was right not to dispute his liability for council tax

as a resident of both flats, and his right to claim council tax benefit as a resident of both cannot be disputed either.

19. For those reasons I allow this appeal and substitute the decision set out above.

