Case No: C1/2014/0730

Neutral Citation Number: [2015] EWCA Civ 22
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Queen's Bench Division, Administrative Court
Mr Justice Supperstone

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/01/2015

Before :

LORD JUSTICE MOORE-BICK
(Vice President of the Court of Appeal, Civil Division)
LORD JUSTICE McCOMBE
and
LORD JUSTICE UNDERHILL

- -

Between :

	WALFORD	**Respondent**
	- and -	
	WORCESTERSHIRE COUNTY COUNCIL	**Appellant**

- -
- -

Stephen Knafler QC (instructed by **Worcestershire County Council**) for the **Appellant**
Fraser Campbell (instructed by **Baker & McKenzie LLP**) for the **Respondent**

Hearing date: 9 December 2014

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Judgment **Lord Justice Underhill :**

INTRODUCTION

1. When a local authority provides residential accommodation in a care home for someone who is unable look after themselves ("the resident") it is entitled to recover the costs from them to the extent that they are able to pay. That involves an assessment of the value of the resident's assets; but the relevant Regulations provide that in performing that assessment the authority must disregard "the value of any premises … occupied in whole or in part as their home" by the resident's partner or child or "other family member or relative who is aged 60 or over or is incapacitated" (I give the full terms of the provision below). The question raised by this appeal is whether that disregard

applies only where the premises in question are so occupied at the date that the resident goes into care or whether it can be activated at some later date.

2. In the present case Mrs Walford, the Respondent's mother, went into permanent residential care provided by Worcestershire County Council, the Appellant, in November 2006. Up to that point she had lived in a house in Stourport-on-Severn called Sunnydene, of which she was the sole owner. The Respondent, who was at that date aged 67, was not living at Sunnydene but in a rented flat in London. But it is her case that she regarded, and regards, Sunnydene as her home: she has always kept a bedroom and an office there, many of her belongings are kept there, she intends to live there when she retires, and she has paid for the maintenance of the house and garden since her father's death in 1983. On that basis she claimed that she occupied Sunnydene as her home within the meaning of the Regulations. The Council initially accepted that claim and disregarded the value of Sunnydene in assessing Mrs Walford's ability to pay; but on 12 March 2012 it wrote to the Respondent saying that it had changed its mind and was proposing a retrospective re-assessment. The Respondent objected, and there was correspondence between the Council and her solicitors; but by letter dated 11 January 2013 the Council confirmed that it would be conducting a fresh assessment of Mrs Walford's ability to pay on the basis that the value of Sunnydene should be brought into account.

3. The Claimant brought proceedings for judicial review of the Council's decision. By judgment handed down on 10 February 2014 Supperstone J quashed the decision and remitted to the Council the question of whether the value of Sunnydene should be disregarded. I will return to his reasoning in due course.

4. This is the Council's appeal against that decision. It has been represented by Mr Stephen Knafler QC. The Respondent is represented by Mr Fraser Campbell. Mr Campbell appeared before Supperstone J but Mr Knafler did not. The Secretary of State for Health intervened as an interested party below but he has taken no part in this appeal.

THE STATUTORY PROVISIONS AND THE GUIDANCE

THE ACT

5. Section 21 (1) of the National Assistance Act 1948 provides, so far as material:

> "(1) Subject to and in accordance with the provisions of this Part of this Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing—
>
> (a) residential accommodation for persons who by reason of age,

illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them;

(aa)-(b) …".

The Secretary of State has made directions making the provision of such accommodation mandatory in certain classes of case: see Circular LAC 93 (10).

6. The duty to recover the cost of accommodation provided under section 21, subject to the resident's ability to pay, is imposed by section 22, which reads:

"(1) Subject to section 26 of this Act, where a person is provided with accommodation under this Part of this Act the local authority providing the accommodation shall recover from him the amount of the payment which he is liable to make in accordance with the following provisions of this section.

(2) Subject to the following provisions of this section, the payment which a person is liable to make for any such accommodation shall be in accordance with a standard rate fixed for that accommodation by the authority managing the premises in which it is provided and that standard rate shall represent the full cost to the authority of providing that accommodation.

(3) Where a person for whom accommodation in premises managed by any local authority is provided, or proposed to be provided, under this Part of this Act satisfies the local authority that he is unable to pay therefor at the standard rate, the authority shall assess his ability to pay, and accordingly determine at what lower rate he shall be liable to pay for the accommodation:
…

(4)-(4A) …

(5) In assessing as aforesaid a person's ability to pay, a local authority shall give effect to regulations made by the Secretary of State for the purposes of this subsection …

(5A)-(8A) …"

7. Section 26 permits local authorities to discharge their duties under section 21 by making arrangements for accommodation to be provided by third-party providers. In such a case an authority is under the same obligation to recover the cost from the resident as under section 22, subject to certain immaterial modifications: see sub-sections (2)-(4AA).

THE REGULATIONS

8. The regulations made under section 22 (5) of the 1948 Act are the National Assistance (Assessment of Resources) Regulations 1992 ("the Regulations"). Part III, which consists of regulations 20-28, is headed "Treatment of Capital". Regulation 20 read (as at the material date):

> "No resident shall be assessed as unable to pay for his accommodation at the standard rate if his capital calculated in accordance with Regulation 21 exceeds £21,000."

Regulation 21 provides that:

> "(1) The capital of a resident to be taken into account shall, subject to paragraph (2), be the whole of his capital calculated in accordance with this Part and any income treated as capital under Regulation 22.
>
> (2) There shall be disregarded in the calculation of a resident's capital under paragraph (1) any capital, where applicable, specified in Schedule 4."

9. Schedule 4 duly specifies various kinds of capital which are to be disregarded. We are principally concerned with paragraph 2. The material parts read as follows:

> "(1) The value of any premises—
>
> (a) which would be disregarded under paragraph 2 or 4 (b) of Schedule 10 to the Income Support Regulations (premises acquired for occupation, and premises occupied by a former partner); or
>
> (b) occupied in whole or in part as their home by the resident's—
>
> (i) partner,
>
> (ii) other family member or relative who is aged 60 or over or is incapacitated, or
>
> (iii) child.
>
> (2) …
>
> (3) In this paragraph a reference to a child shall be construed in accordance with section 1 of the Family Law Reform Act 1987."

"Partner" is defined in regulation 2 (1) by reference to its meaning in the Income Support (General) Regulations 1987: in summary, it means a spouse or civil partner or one of a couple living together as husband and wife or civil partners. The definition of "child" in the 1987 Act which is referred to at sub-paragraph (3) is concerned with such issues as legitimacy and adoption and not with age; but it was (eventually) common ground before us that the definition of "child" in section 64 of the 1948 Act, namely "a person under the age of sixteen", applies here. I will refer to a person falling within any of heads (i)-(iii) as a "specified family member".

10. Paragraph 18 provides for the disregard of "the value of any premises occupied in whole or in part by a third party where the local authority consider it would be reasonable to disregard the value of those premises". Though the disregard is mandatory in form, its effect is to give the local authority a discretion to disregard the value of property occupied by a third party who is not a specified family member.

11. Finally, I should note regulation 25, which is headed "Notional Capital". This provides that a resident "may be treated as possessing actual capital of which he has deprived himself for the purpose of decreasing the amount that he may be liable to pay for his accommodation".

THE POWER TO CREATE A CHARGE

12. A local authority has power under section 22 of the Health and Social Services and Social Security Adjudications Act 1983 to create a charge on land belonging to a resident in respect of unpaid liabilities under section 22 of the 1948 Act. We were told that in a case where a resident owns property which is not the subject of a disregard but has no significant income it is standard practice for authorities to take such a charge, though they may choose not to seek to enforce it forthwith.

THE GUIDANCE

13. Section 7 of the Local Authority Social Services Act 1970 provides that in the exercise of their social services functions, local authorities shall "act under the general guidance of the Secretary of State". The Secretary of State has provided guidance about the exercise by local authorities of their powers and duties under section 22 of the 1948 Act and the Regulations in the form of the "Charging for Residential Accommodation Guide" ("the Guidance"). Section 7 of the Guidance is headed "Treatment of Property". The following paragraphs are relevant.

14. Paragraph 7.003 reads:

> "Where the resident no longer occupies a dwelling as his home, its value

should still be disregarded where it is occupied in whole or in part by

- the resident's partner, former partner or civil partner (except where the resident is estranged or divorced from the partner, former partner or civil partner);
- a lone parent who is the claimant's estranged or divorced partner;
- a relative (as defined at 7.004) of the resident or member of the resident's family (as defined at 7.007) who
- is aged 60 or over, or
- is a child of the resident aged under 16, or
- is incapacitated."

That is of course little more than a paraphrase of paragraph 2, bringing in the various definitions (though the second bullet reflects the provisions of paragraph 2A, which I have not thought it necessary to quote). I set it out only because the Judge attached some significance to its wording.

15. Section 7.011 gives some guidance on the exercise of the discretion under paragraph 18 of Schedule 4. It reads:

> "Where the LA considers it reasonable to do so, they can disregard the value of premises not covered in paragraph 7.002-7.008 in which a third party lives. LAs will have to balance the use of this discretion with the need to ensure that residents with assets are not maintained at public expense. It may be reasonable for example, to disregard a dwelling's value where it is the sole residence of someone who has given up their own home in order to care for the resident, or someone who is an elderly companion of the resident, particularly if they have given up their own home. These are only examples and not exhaustive."

16. Para. 7.013 reads:

> "Where the LA has decided to disregard the value of a property, it is left to the LA to decide if and when to review that decision."

THE NEW REGULATIONS

17. I should mention for completeness that when regulations made under the Care Act 2014 – the Care and Support (Charging and Assessment of Resources) Regulations 2014 – come into force on 1 April 2015 the 1992 Regulations will cease to have effect. The new regulations deal more explicitly with the issue which has arisen in this appeal, and Mr Knafler suggested that it may be for that reason that the Secretary of State has not sought to remain involved in these proceedings. But he also told us that the correct construction of the current Regulations is still likely to be material in a number of other cases besides

this.

THE DECISION OF SUPPERSTONE J

18. There were a number of issues before Supperstone J, but I need not deal with them all here. In substance he quashed the Council's decision for two reasons.

19. First, he held that, while the Council had rightly believed that the Respondent had to establish that Sunnydene was her main home, it had wrongly believed that she could not do so unless she established that she was in "actual occupation" of it and/or that it was her "permanent residence": see paras. 55-58 and 70 (i)-(ii) of his judgment. He had earlier considered such Rent Act cases as *Beck v Scholz* [1953] 1 QB 570 and *Herbert v Byrne* [1964] 1 WLR 519, and he noted (at para. 36) that it was common ground before him that

> "… 'home' is a place to which a person has a degree of attachment both physical and emotional. It is also agreed that physical presence is neither necessary nor sufficient. What is important is the degree of occupation and the nature of the occupation. Ultimately whether a person occupies premises as their home is determined by a test which is both qualitative and quantitative."

It followed that a person could in principle "occupy" a property as his or her home even if they did not live there all the time, or even the majority of the time. The Council had not taken that approach. I need not consider this aspect of the reasoning further, since it is not challenged before us.

20. Secondly, he held, as summarised at para. 70 (iii) of his judgment, that:

> "The Defendant erred in interpreting the Regulations as requiring it only to review the position that pertained at the time the Claimant's mother went into long term care on 24 November 2006. A decision as to whether or not to grant a disregard can be reviewed whenever there is a change of circumstances. The Defendant has failed to consider whether the Claimant has occupied the house as her home since November 2006."

The reasoning underlying that holding is very short. At para. 53 the Judge recorded the Council's evidence that the Regulations "only permitted it to conduct a review of the original decision of whether or not to disregard property at the time that the resident went into residential care". At para. 54 he said:

> "In my view there is no basis for limiting the power of review to the circumstances prevailing at the time of the original assessment. I accept the submissions made on behalf of the Secretary of State and the Claimant that a decision whether or not to disregard property can be reviewed whenever there is a change in circumstances. The opening words of section 7.003 of [the Guidance] require the focus of the inquiry to be on the present, not the past, position."

As there appears, the submission which Supperstone J accepted was made not only by the Respondent but by the Secretary of State as intervener. We were told that this came as a surprise to the Council, since in the past the Department's advice to local authorities and others, available on its website, was that the disregard in paragraph 2 (1) (b) applied only to cases where the property "continued to be" occupied by a specified family member, i.e. where it had been so occupied at the point when the resident went into care: the Secretary of State's position at the hearing thus represented a *volte-face*. But, whether or not that is a justified criticism, it does not concern this Court: whatever position interested parties may have adopted from time to time, the only question for us is which construction is correct.

THE PARTIES' SUBMISSIONS

21. The Council does not, as I have said, challenge Supperstone J's conclusion that it erred in treating as decisive the fact that the Respondent was not in actual occupation of, or permanently resident at, Sunnydene at the relevant date; and it accordingly accepts that the issue of whether she occupied it as her home has to be re-determined. But it does challenge his decision about the date as at which that issue should be judged: it contends that the determination has to be made as at the date that Mrs Walford went into care. I am bound to say that it is far from clear to me whether on the facts of this case this is an issue of any practical significance: I have not detected in the facts presented to us any substantial change in the Respondent's use of Sunnydene between 2006 and 2012 (or indeed 2014). But the issue is no doubt important in principle, and we have to decide it.

22. It is convenient to start with the Respondent's case. It can be summarised as follows:

(1) The foundation for Mr Campbell's submissions is that the question of a resident's ability to pay for accommodation provided under section 21 cannot have been intended to be determined once for all at the moment that he or she goes into care. On the contrary, in principle it requires to be considered on a continuing basis in relation to every period in respect of which liability under section 22 accrues. No doubt in practice an assessment will be made at the start and only re-visited when there is reason to believe that circumstances affecting the resident's ability to pay may have changed; but that does not affect the principle that the question falls to

be determined from time to time.

(2) Since the question whether property belonging to the resident falls within the scope of the disregard is an element in that assessment, there is no warrant for treating it differently from other elements and determining it on a once-for-all basis. "Occupied" must mean occupied at the material date; and the material date is that at which liability, subject to the resident's ability to pay, accrues. Thus if the property starts to be occupied, as their home, by a specified family member at some date after the resident has gone into care, the disregard should bite as from that date.

(3) That is Mr Campbell's submission as a matter of pure construction, but he sought to reinforce it by submitting that if the position were otherwise it could produce results which the Secretary of State could not have intended. He postulated the case of a relative occupying the property who was a few days short of their sixtieth birthday when the resident went into care. It would, he submitted, be arbitrary and unfair if the value of the property in such a case continued to be taken into account, even after they turned sixty, when it would have been disregarded had the resident gone into care a week later. Indeed it would produce perverse incentives: relatives might try to keep a person at home even if they needed residential care, in order to allow a crucial birthday to be passed.

23. Mr Knafler accepted much of Mr Campbell's submissions. In particular, he accepted element (1) – that is, that the issue of ability to pay falls to be determined on a continuing basis. He also accepted that it follows that local authorities are entitled, indeed obliged, to keep under review whether a property which has initially fallen within the scope of a disregard under paragraph 2 (1) (b) of Schedule 4 continues to do so: to take an obvious example, a disregard will cease to apply if a specified family member dies or moves out of the property. But, crucially, he submitted that it does not follow that that approach should apply so as to activate a disregard which is not applicable at the point at which the resident goes into care. He contended that in this context the term "occupied" naturally connotes that the property in question should have been occupied by a protected person at that point. If it were otherwise a care home resident in the situation of Mrs Walford who, as is not at all untypical, had little or no income but owned a property of substantial value could at any date – may be years after they had first gone into care – arrange for a relative aged over 60 to move into the property and activate the disregard, thus terminating the drain on the family's wealth by bringing to an end the liability to pay for his or her accommodation. It could not, Mr Knafler submitted, have been the intention of the Secretary of State to allow the disregard to be opportunistically exploited in this way. He sought to add some dramatic colouring to that submission by conjuring up the image of a cash-poor resident who owned a portfolio of residential properties but also had a bevy of elderly relatives who were happy to co-operate in preserving the family wealth at the expense of the public purse by moving into those properties; but in truth his point is sufficiently made by referring to the straightforward

case of a single property.

24. Mr Campbell responded that it was unjustifiable to adopt what he described as a "ratchet" approach, under which the test of occupation by a specified family member fell to be applied on a once-for-all basis for the purpose of applying the disregard but could be reviewed on a continuing basis for the purpose of disapplying it. He also urged us to ignore the spectre of widespread avoidance of the kind described by Mr Knafler. He pointed out that if a resident or his or her family wished to arrange their affairs so as to attract the operation of the disregard the opportunity existed to do so even if the Council's construction were correct. All that it would be necessary to do would be to ensure that the family member in question moved in before the date at which the resident went into care. That would usually be achievable, since a move into care is more often than not predictable and planned for well in advance. He accepted that there would be cases where the opportunity for a specified family member to move in only arose after the resident had gone into care – for example, where the move into care occurred unexpectedly or where the prospective occupier had not yet reached 60; but that did not affect his essential point, which was that avoidance was possible on either interpretation.

DISCUSSION AND CONCLUSION

25. The starting-point must be to identify what was the purpose of the Secretary of State, as maker of the Regulations, in providing for the disregard in question. The only purpose that I can see – and none other was suggested – is that she wished to protect family members in the specified classes from the risk of losing their homes as a result of the value of the property being brought into account. That follows from the facts (a) that the disregard is only attracted by occupation of the property "as their home" and (b) that the feature uniting the three specified classes is that they are persons who may reasonably be regarded as having a special interest in living, as family members, in a home belonging to the resident – those in classes (i) and (iii) because they typically have the same home as their partner or parent, and those in class (ii) because (presumably) of the vulnerability associated with age or incapacity. It is true that bringing the value of the property into account in assessing the resident's ability to pay would not in itself prevent a specified family member from occupying it as his or her home. But it would plainly put such occupation at risk. If the resident had no other income, the inclusion of the property as an asset would typically lead to the creation of a charge in favour of the authority (see para. 12 above), and although authorities might not choose to seek possession forthwith in every case there would be nothing to prevent them from doing so. And, quite apart from any enforcement powers, if there were unpaid charges a responsible family member might feel obliged to allow the property to be sold or let in order to prevent the resident falling into debt.

26. If that is the purpose of the disregard, it seems to me that, of its nature, it can only apply to persons who occupy the property in question at the time that the resident goes into care (being the point at which the liability that threatens their occupation arises). I have

no difficulty in understanding why the Secretary of State would wish to protect the positions of family members against losing their current homes; but I can see no reason why she would be concerned about family members who might at some point in the future have the opportunity to make the property their home. Such a person might perhaps have a disappointed expectation if, if and when that opportunity arose, the property was subject to a charge securing increasing liabilities which might eventually lead to their being dispossessed; but that is fundamentally different from having their occupation of their existing home jeopardised. It is not so much a matter of preventing cynical "avoidance" of the kind suggested by Mr Knafler: if the Secretary of State's purpose were indeed to protect the interests of specified family members who wished to occupy a resident's property some time after he or she had gone into care, the resident's motive in permitting such occupation would be irrelevant. It is, rather, that I can see no reason to suppose that she had any such purpose in the first place. That conclusion is reinforced by the fact that in most, if not all, cases the family members in classes (i) and (iii) will have been occupying the property in question at the time that the resident goes into care – typically, even if not quite universally, partners live with their partners and children live with their parents; and that suggests that the Secretary of State made the same assumption in relation to class (ii).

27. Accordingly I believe that it would be in keeping with the legislative purpose if paragraph 2 (1) of Schedule 4 were read so that the scope of the disregard extended only to properties occupied by specified family members at the time that the resident first goes into care. I believe that the statutory language is consistent with such a reading and does not require any words to be read in. The use of the past participle "occupied" does not assist: it may raise the question "occupied at what date ?" but it does not answer it. I see the force of the argument which particularly appeals to McCombe LJ – that is, that, if the assessment of ability to pay falls to be made from time to time, every element in the assessment should be tested on that basis. But that is not axiomatically so, and I believe that in the present case that argument must yield to the construction based on what I believe to be the legislative purpose.

28. As for Mr Campbell's point that the Council's construction could sometimes produce arbitrary results (see para. 22 (3) above), the short answer is that that is inevitable in any case where a statute provides for a cut-off by reference to a specified date or age. But it is in any event necessary to bear in mind paragraph 18 (see para. 10 above). In a case of the kind postulated by Mr Campbell an authority would have the power to disregard the value of the property notwithstanding that the family member in question had not yet reached 60; and if the date was indeed only missed by a short time they might have a very strong case, particularly if they had lived there for many years.

29. I therefore believe that when the question of whether the disregard under paragraph 2 (1) (b) applies in relation to Sunnydene is re-determined by the Council it should consider the Respondent's claim to be occupying it as her home only as at the date when Mrs Walford first went into care; and the Judge was, with respect, wrong to hold otherwise. I

would allow the appeal accordingly.

Lord Justice McCombe: 30. I am most grateful to Underhill LJ for his most careful exposition of the facts of this case, of the statutory and regulatory provisions and of the narrow issue that divides the parties. I regret to say, however, that I have come to a different conclusion from him and I would dismiss this appeal.

31. In short, I accept Mr Campbell's submission that the Council's case is inconsistent with the statutory language. The Regulations require to be disregarded as part of a resident's capital the value of any premises "occupied in whole or in part as their home" by three classes of person. They say nothing express about the timeframe of such occupation. This has to be gathered from the statutory scheme as a whole. However, for the Council's contention to be correct it is necessary, in my view, to read paragraph 2(1)(b) of Schedule 4 to the Regulations as if it said that the disregard applied to premises "occupied in whole or in part as their home, *and having been so occupied since before the resident entered care*, by the resident's…(ii) other family member or relative who is aged 60 or over or is incapacitated…" (or words to that effect). The paragraph does not say that; its words are clear and, for my part, I do not consider that resort to any perceived purposive construction of the provision compels a different reading.

32. It is common ground that the resident's means, as to both capital and income, are required to be assessed from time to time: see paragraphs 22 and 23 of Underhill LJ's judgment. Accordingly, in my view, the natural time to decide whether or not any particular disregard applies is at the time that any such assessment is made. Without the additional words, it seems to me that the question of the status of any occupant of relevant premises should, therefore, be determined at that stage. Nothing daunted in presenting its present submission, the Council accepts (and indeed asserts) that where premises were occupied by a qualifying relative at the date that the resident entered care and were thus disregarded on an initial assessment, such premises would not be disregarded, on a subsequent assessment, if the relative had moved out in the interim. On the wording of the Regulation that we are considering, I find that difficult to accept.

33. There are many possible anomalies arising out of the rival contentions as to the meaning of this regulation. However, I find it particularly anomalous, for example, that a premises would not be disregarded if they were suitably occupied by a "hale and hearty" relative (under 60) at the date the resident went into care, but would still not be disregarded (save in the exercise of residual discretion) if that relative became "incapacitated" subsequently. An "incapacitated" family member is a qualifying occupier in the very same sub-paragraph of the regulation into which Mrs Walford claims to fall.

34. I also accept Mr Campbell's submission that the whole focus of the means assessment provisions is upon the means of the resident from time to time. Obviously, means may fluctuate, and sometimes dramatically so. Section 22 of the Act focuses upon present

ability or inability to pay. Regulation 9 requires a resident's income to be "calculated" on a weekly basis. Regulation 23 provides for capital to be calculated "at its current market or surrender value". A lottery win would greatly affect income in one direction and uninsured damage to a property would affect capital in another. A qualifying relative moving out of premises is taken into account but, according to the Council, an otherwise qualifying relative moving in is not. I see no reason to apply such an anomalous variation to the principle that means are to be assessed from time to time.

35. The contrary argument depends upon identifying a perceived purpose behind the legislation which requires the regulatory language to be read other than in what I take to be its natural sense. The purpose suggested is that the disregard is to protect identified classes of family members from "losing" their homes. With respect, I do not agree with Underhill LJ that this is the only possible purpose or that no other was suggested. Clearly, it might be one purpose. However, for my part, I do not see the need to identify the qualifying classes so narrowly. It could equally be the statutory purpose to enable those classes (also potentially vulnerable) who fall into the qualification more or less promptly after the resident goes into care, e.g. the elderly sibling of the resident passing 60 or (even more compellingly) the relative of whatever age who becomes incapacitated after that date. Each such person is potentially vulnerable and I see no reason for thinking that one or other of these classes, either the broader or the narrower, is more targeted by the present regulatory language than another. Certainly, I do not see that we are compelled to identify the narrow purpose in a regulation designed to facilitate the assessment of a resident's means from time to time.

36. I agree that, as a matter of policy, the Minister making such Regulations might want to specify only those in occupation at the date the resident goes into care (and that is what has been done in the new 2014 Regulations), but I do not see that the language of the Regulations with which we are concerned compels the identification of that purpose without the insertion of words of the type to which I have referred above.

37. Each side, in the impressive arguments advanced before us, was able to point to anomalies or discrepancies which might occur upon the other side's construction of the Regulations. Some were more fanciful in their likely occurrence than others. However, I did not find these of particular assistance in seeking to identify the meaning of the ordinary words used in this paragraph of the Schedule to the Regulations. In the end, I return to where I began in this short judgment, namely all accept that the Act and the Regulations require assessment of means from time, I see no reason why, in this one feature of such assessment, the requirement is to fix on an historic date rather than upon the date of the assessment, in the absence of regulatory words so indicating.

38. In my judgment, the Council's argument requires an impermissible and unnecessary re-writing of the regulation. For this reason, which I have endeavoured to amplify above, I would dismiss the appeal.

Lord Justice Moore-Bick:

39. The background to this appeal and the legislative provisions on which it turns are set out fully in the judgment of Underhill LJ, whose account I gratefully adopt. I find myself in agreement with him, but since McCombe LJ has reached a different conclusion, I shall state my reasons briefly in my own words.

40. Section 22 of the National Assistance Act 1948 imposes on local authorities an obligation to recover from a person to whom it provides residential home accommodation because of age, illness or other disability ("a resident") payment for that accommodation calculated in accordance with the National Assistance (Assessment of Resources) Regulations 1992 ("the Regulations"). The effect of regulations 20 and 21 is that, for the purposes of assessing the amount which a resident must pay for his accommodation, the whole of his capital is to be taken into account apart from that which is to be disregarded under schedule 4. Since a resident is liable to pay for his accommodation from the moment he enters it, the Regulations necessarily contemplate that an assessment of his capital will be made as soon as reasonably practicable after he moves into the accommodation.

41. Ownership of a dwelling house, whether freehold or leasehold, usually represents a substantial asset and would therefore fall to be taken into account when assessing a resident's capital. However, the effect of regulation 21(2) in conjunction with paragraph 2(1)(b) of schedule 4 is that the value of any premises occupied in whole or in part as their home by the resident's partner, other family member or relative who is aged 60 or over or is incapacitated, or by one of the resident's children is to be disregarded. Paragraph 2(1)(b) does not specify the date on which premises must be occupied by one of the specified persons in order for their value to be disregarded. Accordingly, on one possible interpretation of the statutory language the criterion would be satisfied, and the value of the premises fall to be disregarded, if a qualified person entered into occupation at any time after the resident himself had gone into accommodation. Another possible interpretation, however, is that the legislation applies only to premises which were occupied by a qualified person as his home at the time when the resident entered accommodation. In my view the choice between these two alternative interpretations depends on correctly identifying the purpose of the legislation.

42. In my view the language of paragraph 2(1)(b) points clearly to an intention to protect certain vulnerable people against the risk of losing their homes as a result of the resident's having to go into residential accommodation. A number of common situations in which protection of that kind is required for social and humanitarian reasons come to mind. For example, if one member of a couple, who happens to be the sole owner of the house in which they live together, is obliged by reasons of age or infirmity to go into residential accommodation, it would be harsh for the other to be at risk of losing his or her home simply because the value of the property had to be realised to pay for that accommodation. Other examples come to mind. It is not uncommon, for example, for an adult child (often a daughter) to make her home with an elderly parent in order to act as a

carer. She may have no legal or beneficial interest in the property and would be at risk of losing her home if its value were included in the parent's capital. That would seem unduly harsh if the daughter were herself aged over 60 or incapacitated and so not well-placed to find somewhere else to live. Although the circumstances are likely to arise less frequently, a child whose only remaining parent was forced to go into residential accommodation through illness or disability might be in the same danger of losing her home which she could otherwise continue to occupy while being cared for by a relative. It is worth noting that paragraph 2A provides protection for the home of a former partner if it is still occupied by him or her as a lone parent.

43. Considerations of the same kind do not apply in cases where a partner, other family member or child already has a home at the time the resident goes into accommodation. Although circumstances may subsequently arise in which such a person would like to make the resident's house his or her home, there is an essential difference in the fact that the departure of the resident and the potential realisation of the premises to pay the cost of accommodation would not be an immediate cause of the loss of an existing home. Of course, it is possible to postulate circumstances in which a family member or relative aged over 60 might be in need of a house and might therefore wish to move into the house vacated by the resident, but the intrinsic distinction between the two cases provides a justification for treating them differently. Regulations of the kind under consideration frequently require lines to be drawn which under some circumstances may appear to cause hardship.

44. I do not think that examples of the circumstances in which, if construed broadly, the regulations could be manipulated by the resident, with or without the assistance of unscrupulous members of the family, in order to preserve for his or others' benefit the capital value of the property are of great assistance, any more than I derive mush assistance from examples of ways in which they may work hardship if the narrower construction is preferred. Neither in my view point strongly in favour of the conclusion which they were produced to support. In the end I think the right course is to identify the purpose of the legislation by reference to its wording, particularly that of paragraph 2. In my view that purpose is to protect the home of a qualifying person who is living in the premises at the time the resident goes into accommodation for as long as it remains that person's home.

45. I accept that further assessments of the resident's capital will have to be made at intervals, if only because the value of many capital assets can be expected to fluctuate over the course of time. I also accept that if, say, the resident's former partner ceases to occupy the premises as his or her home at some later date their value will have to be brought into account at that stage. That, however, does not point in favour of the conclusion that at some time after the resident has gone into accommodation and the value of the premises have been included in an assessment of his capital, a qualifying person who has not previously occupied the premises as his or her home, may, with the resident's consent, take up occupation for the first time and thereby cause them to be taken out of account.

There is no reason why the legislature should have intended to create a windfall benefit of that kind.

46. For those reasons, insofar as the judge held that the date at which the occupation of the premises by a qualifying person falls to be judged could be a date later than that on which the resident went into accommodation, I think he was wrong. I would therefore allow the appeal.