



Department of Social Welfare and unfair repayment of a loan

Legislation	Ombudsmen Act 1975, Disabled Persons Community Welfare Act 1975, Frustrated Contracts Act 1944
Ombudsman	Nadja Tollemache
Case number(s)	W26536
Date	1992

Department of Social Welfare-decision to require repayment of a suspensory loan granted under the Disabled Persons Community Welfare Act

This complaint arose from a decision of the Department of Social Welfare to require repayment of a suspensory loan granted to the complainant and her husband under the Disabled Persons Community Welfare Act 1975 to effect alterations to their home due to the husband's disability.

A condition of the loan was that one fifth of the loan would be forgiven for each year the husband lived in the home with the loan being written off after five years. The loan also provided the Department with a discretion to require repayment of the unforgiven portion of the loan if any of the conditions of the loan were not met, or kept. A condition of the loan was that the loan would abate over a period of five years as long as the disabled person continued to live in the home.

In March 1990, several months after the loan was signed, the complainant and her husband sought to be released from the loan, and for recovery of the loan to be waived, on the grounds that it was necessary for the husband to move to a larger centre where specialist treatment was available to him. The Department's decision in reply was that by selling the home the conditions of the loan would be breached, because the husband would no longer be living in the home, and therefore recovery of the loan would be required to the extent that after the mortgage had been repaid the proceeds of the house sale would be applied to the loan and the remainder would be forgiven.

Several months later, and prior to the sale of the house, the husband died. However the complainant proceeded with the plan that the house be sold and this was ultimately effected.

As a consequence of the sale the Department decided to recover the unabated portion of the loan on the grounds that by his death the complainant's husband could no longer be regarded as living in the home and therefore the conditions of loan had been breached. However as a mortgage payment insurance policy had been voluntarily taken out when the house was purchased increased proceeds from the house sale were now therefore available to the Department to effect its recovery of the loan.

As the situation stood at the time of the husband's death the loan had abated by six months only. However after considering the complainant's position the department decided, in order to assist the complainant and to provide her with some financial relief, that it would reduce the repayment by an additional \$8,500 approximately, and it was at this point the complainant referred the matter to the Ombudsman.

It appeared that by requiring repayment of the loan on the grounds that the loan conditions had been breached because the complainant's husband by his death was no longer living in the home, the Department had overlooked the contractual doctrine of frustration as well as the Frustrated Contracts Act 1944. The Department however did not agree. As it is not an Ombudsman's role to establish ultimate definitions of the law but under section 22 of the Ombudsmen Act only to form a view, inter alia, that a decision etc *'appears to have been contrary to law'* and as this issue would quite possibly have needed referral for judicial decision, the Ombudsman instead considered other criteria under section 22 of the Ombudsmen Act, particularly to whether the Department's decision in respect of the loan repayment was reasonable or just in the circumstances.

In its report the Department advised that in cases such as this it needed to balance its responsibility for the expenditure of public funds with the need also to act in the interests of the individual, and that it believed that in remitting the additional sum of approximately \$8,500 from the total amount due, it had been both fair and equitable to the complainant. While the Ombudsman agreed with the Department that it had a responsibility to both the taxpayer and the individual, it seemed to the Ombudsman that, when establishing the amount of the repayment, the Department had not acted fairly and reasonably because by its decision it proposed to claim an amount from the sale proceeds greatly in excess of its original decision given prior to the husband's death about the amount it proposed to recover.

The Ombudsman formed this conclusion because the department had decided both before and after the husband's death that it would recover the loan on the grounds that the husband was no longer living in the home. In the Ombudsman's view the situations were little different because in each circumstance the Department had decided that the conditions of the loan had been breached because the husband was no longer living in the home, and therefore the husband's death and the maturing of the mortgage repayment insurance policy should not have altered the Department's original decision.

The Department considered these arguments and agreed with them. Accordingly, the Department reverted to its original decision to only recover an amount which would have been

available had the mortgage repayment not been covered by a mortgage repayment insurance policy, taken out voluntarily by the deceased to protect his wife's financial position.

The effect of this decision was that the complainant received an additional sum of approximately \$11,000 from the sale of her home which provided her with almost the full benefit of her late husband's mortgage repayment insurance policy.

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