Neutral Citation Number: [2009] EWHC 2221 (Admin)

Claim No: CO/2778/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 September 2009

Before:

SIR THAYNE FORBES
Sitting as a Judge of the High Court

Between:

THE QUEEN **on the application of S** **(By the Official Solicitor as Litigation Friend)**	**Claimant**
- and -	
(1) A SOCIAL SECURITY COMMISSIONER **(Mr Charles Turnbull)**	**Defendant**
- and -	
(2) THE SECRETARY OF STATE FOR WORK AND PENSIONS	**First Interested Party**
-and-	
(3) WALSALL METROPOLITAN BOROUGH COUNCIL	**Second Interested Party**

Stephen Knafler and **Desmond Rutledge**
(instructed by **Community Law Partnership, Solicitors**) for the Claimant
David Blundell (instructed by the **Treasury Solicitor**)
for the Secretary of State for Work and Pensions
Simon Birks (instructed by **Bhupinder Gill, Solicitor to Walsall MBC**)
for Walsall Metropolitan Borough Council

Hearing date: 18th June 2009

Approved Judgment

Sir Thayne Forbes:

1. **Introduction**. In these proceedings the Claimant seeks appropriate relief by way of judicial review of a decision of the Defendant Social Security Commissioner, Mr Charles Turnbull (hereafter "the SSC"), as he then was, dated 11th December 2007, whereby he refused the Claimant (and six other appellants) permission to appeal against a decision of a Social Security Appeal Tribunal of 23rd February 2007 relating to their housing benefit entitlement. As is usual in such cases, the SSC has not participated in these proceedings. Permission to apply for judicial review was initially refused on the papers by Mitting J on 11th June 2008, but granted by HHJ Bidder QC on 19th December 2008, following an oral hearing of the Claimant's renewed application for permission.

2. Stated shortly, this case is concerned with the proper construction of certain statutory provisions relating to housing benefit entitlement (in particular, the definition of "*exempt accommodation*"). The First Interested Party, the Secretary of State for Work and Pensions ("the Secretary of State"), is responsible for the allocation to relevant local authorities of the funds that subsidise the housing benefit scheme and also has policy responsibility for housing benefit legislation. The Second Interested Party, Walsall Metropolitan Borough Council (hereafter "Walsall") is the local authority with responsibility for the operation of the housing benefit scheme within the administrative area where, at all material times, the Claimant was accommodated (see below).

3. The central issue in these proceedings is the correct interpretation of paragraph 4 of Schedule 3 to the Housing Benefit and Council Tax Benefit (Consequential Provisions) Regulations 2006 SI No 217 ("the CP Regulations"), which provides that the "eligible rent" used to decide an award of housing benefit will not be decided by the maximum rent based on determinations made by a rent officer (as to which, see below) if it relates to "*exempt accommodation*". So far as material, paragraph 4(10) of Schedule 3 defines "*exempt accommodation*" as including accommodation which is:

> "...provided by a non-metropolitan county council ..., a housing association, a registered charity or a voluntary organisation where that body ***or a person acting on its behalf*** also provides the claimant with care, support or supervision." (Emphasis added).

4. The present case turns on the proper construction of the words "*on its behalf*" in paragraph 4(10) of Schedule 3 to the CP Regulations. However, on 19th June 2006 the SSC had decided the earlier case of *R(H) 2/07*, in which the same point of construction arose. In *R(H) 2/07*, the SSC concluded that care, support or supervision ("CSS") was only provided "*on behalf of*" a landlord within the meaning of paragraph 4(10) in circumstances where (i) the landlord was under a statutory or contractual duty to the claimant to provide CSS, (ii) the provider of the CSS in question was under a contractual duty to the landlord to provide the CSS and (iii) the provider received remuneration from the landlord for so doing. The SSC therefore proceeded to apply his reasoning in *R(H) 2/07* to the facts of this case and thus refused permission to appeal.

5. However, on behalf of the Claimant, it was Mr Knafler's central submission that CSS is provided "*on behalf of*" a landlord in circumstances, such as those that he suggested existed in the present case, where the landlord and the CSS provider enter into a "joint venture" pursuant to which accommodation and CSS is provided to a claimant who needs both. It was Mr Kafler's further submission that such an arrangement was entirely in accordance with current government policy, as expressed in the White Paper "Valuing People: A New Strategy for Learning Disability for the 21st Century" (Cm 5086) March 2001, and which is intended to promote (inter alia) the service user's independence and choice whilst living in his/her own home in the community.

6. **The Statutory Framework.** At the material time (i.e. when Walsall made its decision in August 2006 to reduce the Claimant's housing benefit: see paragraph 16 below), control of housing benefit expenditure was effected by the Housing Benefit Regulations 2006 ("the 2006 Regulations"), in particular Regulations 12, 13 and 14. In summary, those regulations broadly provided as follows:

   i) Under Regulation 14 and Schedule 2, the housing benefit authority was required to refer most housing benefit claims to rent officers, although certain types of tenancy were excluded, including (for example) the following: (a) a protected tenancy, (b) a tenancy granted by a housing action trust and (c) a tenancy granted by a registered housing association, unless the housing benefit authority considered that the dwelling in question was unreasonably large or the rent unreasonably high.

   ii) The rent officers were then required to make various determinations under the Rent Officers (Housing Benefit Functions) Order 1997, SI No. 1984: i.e. as to whether the rent was "significantly high" or "exceptionally high", as to whether either of those two figures was higher than the "local reference rent", and as to what was the "claim-related rent" (in all cases), the "local reference rent" (in some cases) and the "single room rent" (in the case of young individuals). The claimant's "eligible rent" was then established as the lowest of the last three figures.

   iii) By virtue of Regulation 12, the housing benefit authority was required to limit its payments of housing benefit by reference to a "maximum rent" figure. Pursuant to Regulation 13, the "maximum rent" figure was itself derived from the "eligible rent" as determined by the rent officer.

7. However, the 2006 Regulations also preserved an earlier, more generous and flexible system of housing benefit control in some transitional cases and in respect of "*exempt accommodation*". In August 2006, this system was to be found in the CP Regulations to which I have already referred in paragraph 3 above. Regulation 6 and paragraph 4 of Schedule 3 to the CP Regulations created, for the purposes of the 2006 Regulations, special versions of Regulations 12, 13 and 13ZA (hereafter "Special Regulation 12" etc.) applicable to transitional cases and cases of exempt accommodation. So far as material, I have already quoted the definition of "*exempt accommodation*" to be found in paragraph 4(10) of Schedule 3 to the CP Regulations: see paragraph 3 above.

8. Special Regulation 13 (sometimes referred to as "*old Regulation 11*") allowed the housing benefit authority to restrict the amount of rent payable where (inter alia) it

considered that the rent was "*unreasonably high ... having regard in particular to the cost of suitable alternative accommodation elsewhere*", except that, in the case of certain types of vulnerable tenant, no restriction was to be made unless "*suitable cheaper alternative accommodation is available and the authority considers that, taking into account the relevant factors, it is reasonable to expect the claimant to move from his present accommodation*".

9. **The Factual Background**. The Claimant is now aged 28. He suffers from a mild learning disability with some challenging behaviour. His capacity to understand events going on around him is poor, he has no concept of personal safety, is unable to manage his domestic circumstances and is unable to live in the community without constant CSS.

10. Prior to October 2004, the Claimant lived in a large social services-run hostel in Walsall. However, from 19th October 2004, he was accommodated at 33 Victoria Avenue, Bloxwich, Walsall ("Victoria Avenue") in supported housing that enabled him to live in the community. The premises in question were provided by Rivendell Lake Housing Association Limited ("Rivendell"), who granted him an appropriate assured tenancy and, thus, became the Claimant's landlord under the terms of that tenancy.

11. The necessary package of support to enable the Claimant to live at Victoria Avenue (i.e. the necessary CSS) was commissioned and funded through Walsall Social Services and provided by an organisation called Lifeways Community Care ("Lifeways"). The Claimant was moved to the accommodation provided by Rivendell following publication of the Government White Paper "Valuing People" which, as I have already indicated, expressed the policy aim that people with learning difficulties should have the same rights as everyone else to live in a home of their own in the community.

12. At all material times, the Claimant's total rent for Victoria Avenue was £195.27 per week, made up of £173.89 actual rent, £15.71 water rates and £5.67 service charges. The service charges were in respect of purely housing-related matters and did not include any element of CSS. Until July 2006, Walsall's Housing Benefit Department paid Rivendell the whole of the Claimant's rent as housing benefit.

13. The Claimant shared Victoria Avenue with two other men, Mr V and Mr B, who also had their own rooms there. Mr V suffered from moderate learning disability and epilepsy and has poor health and mobility. Mr B suffered from diabetes, moderate learning disability, autistic spectrum disorder and associated challenging behaviour. Like the Claimant, both Mr V and Mr B are unable to live in the community without constant CSS.

14. As I have already stated, whilst resident at Victoria Avenue, the Claimant received appropriate CSS from Lifeways, funded by Walsall, as did both Mr V and Mr B. It appears that there was no actual contractual document for the provision of CSS as between Lifeways and any of the three men. However, in addition to the tenancy agreement between the Claimant and Rivendell, there were written contracts between (i) Lifeways and Rivendell and (ii) Lifeways and Walsall (as to which, see below) that were relevant to the overall arrangement.

15. On 16th November 2004, the Claimant made an application for housing benefit to Walsall and, as a result and as already indicated, Walsall awarded housing benefit to the Claimant at the rate of £195.27 per week (i.e. for the full amount of the rent), on the basis that Victoria Avenue was "*exempt accommodation*" within the meaning of paragraph 4(10) of Schedule 3 to the CP Regulations.

16. However, as stated above, on 19th June 2006 the SSC decided *R (H) 2/07*. The landlord in that case was also Rivendell. According to the SSC (see paragraph 5 of his written decision in the present case), (i) the set-up of the supported accommodation in R(H) 2/07 was very similar to the present case and (ii) the only submission made on behalf of the claimants had been that their accommodation was "*exempt accommodation*" within the meaning of paragraph 4(10) of Schedule 3 to the CP Regulations because, in providing housing related support, the care provider was acting on behalf of Rivendell and was thus "*a person acting on its behalf*" – a submission that the SSC proceeded to reject (as to his reasons, see below).

17. On 2nd August 2006 and in the light of the decision in *R(H) 2/07*, Walsall notified the Claimant and Rivendell that it no longer accepted that Victoria Avenue qualified as "*exempt accommodation*" and that it had restricted the Claimant's housing benefit to £65 per week, a sum that was based on a rent officer's determination of the appropriate claim related/eligible rent (see above).

18. In September 2006, the Claimant and others ("the claimants") appealed against (inter alia) Walsall's decision to reduce the amount of housing benefit. On 23rd January 2007, a written submission on behalf of all the claimants was sent to the Tribunals Service in relation to those appeals. The written submission, which was prepared by Mr Simon Ennals ("Mr Ennals"), the same solicitor who had acted for the claimants in *R(H) 2/07*, contained the following statement (inter alia):

> "Following the decision in [*RH) 2/07*] it is no longer being argued that care, support and supervision is provided on behalf of the landlord. Although the landlord ... is intimately involved in all aspects of the supported housing scheme, including the monitoring of the support provider, the commissioner's ruling has prevented this argument from being pursued."

19. Mr Ennals' submission went on to contend that Rivendell did itself directly provide some housing related support to each of the claimants and that the appeal should be allowed on that basis. The hearing of the appeal took place on 23rd February 2007. Mr Ennals represented the claimants and, inter alia, called Mr Tony Leatherbarrow of Rivendell to give evidence in support of the argument put forward in the written submission. However, the Tribunal dismissed the appeals and, in the Decision Notices, stated as follows:

> "The only point in issue is whether or not the landlord provides support to the tenants so as to render the accommodation as exempt for the purposes of old Regulation 11.
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> Having considered the scheduled evidence and heard evidence and argument I am not satisfied that [Rivendell] provides care

> support or supervision so that the accommodation may be considered exempt accommodation within the meaning of the regulations."

20. Although the Claimant sought to meet the difference between his rent and the reduced £65 weekly housing benefit, by making payments totalling £2,605 to Rivendell out of his own resources, he was unable to keep it up and eventually fell into arrears. In March 2007, Rivendell brought possession proceedings against the Claimant on the basis of rent arrears and, on 2nd January 2008, obtained a possession order against him together with a money judgment for £5,080.61 in respect of the accrued rent arrears. However, the Claimant has been transferred to alternative accommodation by Walsall and/or Lifeways – first, to an address in Spring Lane, Pelsall, Walsall and then, on 1st September 2008, to a new address in Wednesbury, Walsall.

21. By letter dated 27th June 2007, the Community Law Partnership (the Claimant's current solicitors) wrote to the Tribunals Service, seeking permission to appeal against the Tribunal's decision. A legally qualified panel member refused permission on 29th June 2007.

22. On 26th July 2007, applications for permission to appeal were sent to the Commissioners' Office. The SSC directed an oral hearing of the applications, which duly took place on 6th December 2007. The claimants were represented by counsel, Mr Desmond Rutledge, who based the application for permission to appeal on the core submission that the SSC's decision in *R(H) 2/07* was wrong. The SSC rejected that submission and refused permission to appeal, giving detailed reasons for doing so in his written Notice of Determination, file number CH/2751/2007, dated 11th December 2007. It is that decision that is the subject of the challenge in these proceeding. In my view, it is both necessary and convenient at this stage to quote at some length from that Notice of Determination, as follows:

> "21. The only ground of appeal which is now relied upon is that my decision in R(H) 2/07 was wrong. More specifically, it is said (correctly) that in that decision I placed some reliance on the decision of Peter Gibson J in *Gaspet v Ellis (1985) 1 WLR 1214* when in fact, unknown to me, that case went to the Court of Appeal. The Court of Appeal upheld the first instance decision, but it is contended that the Court of Appeal's reasoning was significantly different from that of Peter Gibson J., and that the Court of Appeal's reasoning ought to have led in R(H) 2/07, and ought to have led in the cases now before me, to the conclusion that the care and support provider (in these cases Lifeways) did provide support "on Rivendell's behalf".
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> 22. One difficulty with this argument is that, because it was accepted by Mr Ennals in these cases that R(H) 2/207 meant that it could not be argued that Lifeways was providing support on behalf of Rivendell, by no means all the documents and facts which might have been material to such an argument were put before the Tribunal. For example, there were no copies of the Agreements between Rivendell and Lifeways, and no evidence as to the precise role of the social services

departments of the relevant local authorities in commissioning and contracting for the provision of care etc. by Lifeways. Contrast the detailed evidence which was before the appeal tribunal in R(H) 2/07.

23. However, it is asserted on behalf of the Claimants in these applications that the arrangement between Rivendell and Lifeways is broadly "on all fours" with that between Rivendell and Citizenship First in R(H) 2/07. I have been provided with copies of an Agreement dated 16 April 2004 between Rivendell and Lifeways and with a copy of an engrossed (in 2005) but unexecuted version of what would appear to have been intended to be a replacement agreement between the same parties. ...

24. The question for me in these applications therefore becomes, in effect, whether it is arguable that the reasoning of the Court of Appeal in *Gaspet v Ellis* leads to the conclusion that my decision in R(H) 2/07 was wrong. ...

25. I think that it is clear from my reasoning in R(H) 2/07 that I was very conscious that *Gaspet v Ellis* could not be a direct authority on the meaning of the definition of "exempt accommodation" because it related to different wording in a different statutory context. ... The same must be true of the Court of Appeal's reasoning.

26. The significant passage from the judgment of Peter Gibson J. is set out in para. 48 of R(H) 2/07. In particular he said:

> 'The phrase, "by him or on his behalf" is to my mind one very familiar in ordinary language ... I would venture to say that its ordinary and natural connotation is that the act must be done by the claimant or his agent. ... I am satisfied that [counsel for the Revenue] is correct in his submission that there must be a contractual link between the claimant and the person by whom the research is directly undertaken and the contractual link is one of agency or something akin thereto ...'

27. In my judgment, it is reasonably clear from the judgments of Kerr and Nicholls L.J. in that case that they agreed with that statement, subject only to the qualification that the relationship giving rise to the agency or something akin to it did not have to be a direct contractual one. Kerr LJ said (p. 775B):

> 'As the judge said, the phrase "on behalf of", in particular in the context of the phrase "by or on behalf of", denotes the concept of agency. This is a perfectly straightforward

> concept, even if in a context such as the present it may require a wider interpretation than agency resulting from a direct contractual relationship. Where, as here, the taxpayer company did not directly undertake the work itself, I therefore ask myself whether the work was undertaken by anyone as its agent, allowing for this wider sense in favour of the taxpayer company.'

Nicholls LJ said (at 777B):

> 'I agree with the judge that to be within the phrase "on behalf of" the relationship must be one of agency, or akin thereto, although I think that there need not necessarily be a direct contractual link between the claimant and the person by whom the research is directly undertaken.'

28. In saying that there need be no direct contractual link between the person undertaking the research and the claimant the Court of Appeal appears to have had in mind situations such as that where A commissions B to carry out research, and B subcontracts the work to C. In that situation C might well be carrying out the research "on behalf of" A. That was the example given by Nicholls LJ at 777D to E. In the present case, and in R(H) 2/07, there was a direct contractual link between Rivendell and the care and support provider. However, for the reasons which I gave in R(H) 2/07 that relationship was not in my judgment one of agency or anything akin to it.

29. The Claimants in this case also rely on the following passage in the judgment of Kerr LJ (at 776A-B):

> 'It is true ... that the words "on behalf of" can have a more extended meaning than agency, in the sense of "for the benefit of" or "in the interests of". But I do not think that this is the sense in the present context. It would introduce a great deal of uncertainty into the effect of the section. A close relationship between the claimant and the undertaking of the research is inherent in the language. The concept is that the research is being undertaken directly, either personally or through an agent.'

30. It is said on behalf of the Claimants that in the definition of "exempt accommodation" the word "directly" is not present, and that there is nothing in that definition that requires such a close relationship as to preclude work that is merely "for the benefit of" or "in the best interests of". It is of course perfectly true that the word "directly" is not present, as it was in the provision under consideration in *Gaspet v Ellis*. It is also true that Bingham LJ in his judgment attached considerable significance to the presence of that word. But it

does not follow from the Court of Appeal's reasoning in *Gaspet v Ellis* that where that word is absent the wider meaning referred to by Kerr LJ, and which had been in effect contended for in R(H) 2/07, must apply. For the reasons which I gave in R(H) 2/07, and in particular at paragraphs 51 and 52, the words "or a person acting on its behalf" in the definition of "exempt accommodation" do not in my judgment have that broader meaning.

31. It is further said on behalf of the Claimants that Rivendell and Lifeways were parties to a joint venture, and that it was accepted in *Gaspet v Ellis* that the research was being carried out by BP and Amoco on behalf of other members of the syndicates (i.e. the other parties to a joint venture). However, the relationship between BP and Amoco and the other members of the syndicates was clearly, so far as the carrying out of the research was concerned, one of agency; BP and Amoco were clearly carrying out the research on behalf of the other members of the syndicates.

32. Reliance was placed by Mr Rutledge on the fact that Kerr LJ said (at p. 775D):

> 'The commissioners said that "undertaking the research" refers to persons who have commissioned it, in a wide sense, i.e. without any direct contractual link as a necessary requirement. I agree with that approach. One can also say that it refers to, or any rate includes, the persons who have undertaken direct responsibility for the research and procured it to be carried out. It seems to me that, broadly speaking, those situations cover the meaning of the words "directly undertaken."'

33. Mr Rutledge submitted that Rivendell could be said to have commissioned the provision of care, support and supervision by Lifeways. I note that Kerr LJ was in that passage dealing with the meaning of "directly undertaken", rather than the meaning of "on behalf of". But in any event it does not seem to me that Rivendell can be said to have commissioned the research (*sic*) in circumstances where ... none of the care provider's remuneration came from Rivendell and where it was the social services department of the relevant council which engaged and (to a large extent) paid the care provider. I note that Clause 1 of the 2005 Agreement in the present case provides that the terms of the Agreement "shall be binding for the same period as the Support Provider's Contract continues with the Commissioning Authority ..." The "Commissioning Authority" is clearly the social services department of the relevant council.

> 34. At the end of the day, it is clear that (a) Rivendell had no statutory or contractual obligation to provide care, support or supervision which it needed to engage someone else to carry out on its behalf (b) the relevant social services departments did have the statutory obligations in that respect, and engaged the care provider to provide care, support and supervision, at an appropriate remuneration. In those circumstances, for the reasons given in R(H) 2/07, it is in my judgment clear that the care etc. was not being provided by the care provider on Rivendell's behalf, within the meaning of the definition of exempt accommodation.
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> 35. In my judgment, the most which Mr Rutledge can get out of the Court of Appeal's decision in *Gaspet v Ellis* is that, because the Court of Appeal (and in particular Bingham LJ) placed somewhat more emphasis on the presence of the word "directly" than did Peter Gibson J., the Court of Appeal's judgments are perhaps less helpful as an authority in the present case than is that of Peter Gibson J. But it does not seem to me that the Court of Appeal's decision, any more than that of Peter Gibson J., supports an argument that on the facts of R(H) 2/07 the care and support provider was providing care and support on behalf of Rivendell.
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> 36. I note that it is accepted by Mr. Rutledge and indeed positively asserted that it follows from his submissions that not only the housing related support, *but also the personal care and supervision*, was being provided on Rivendell's behalf. That submission was expressly disclaimed by Mr Ennals on behalf of the claimants in R(H) 2/07. It seems to me to be a startling proposition. Rivendell are surely in the business of providing housing, not of providing personal care and supervision.
>
> 37. ..."

23. **The Contract between Lifeways and Walsall**. The contract between Lifeways and Walsall for the provision of CSS is dated 2nd October 2003. Its key features can be summarised as follows:

i) Lifeways contracted to maintain its registration as a domiciliary care agency and to provide CSS to any individual identified by Walsall, pursuant to a commissioning agreement in the form of an Individual Service Agreement;

ii) Lifeways contracted to provide care and support services up to specified standards; and

iii) Lifeways was required to implement Walsall's goals of (a) giving service users a choice of where, and with whom, they live, (b) promoting the community involvement of the service user, (c) separating housing from care provision wherever possible, and (iv) giving service users choice over who provides their care and support (see the annexed Service Specification).

24. **The Agreement between Rivendell and Lifeways.** The written agreement between Rivendell and Lifeways is dated 16th April 2004 and is headed "*Management Agreement Care Provider Relationship*". The following is a summary of its main features:

i) The preamble states that Rivendell is a non-profit making voluntary body formed to provide housing for vulnerable people, that Lifeways is registered as a provider of domiciliary care under the National Care Standards Act 2000 and that it is the intention of the parties to provide accommodation "*in a supportive environment for persons with learning disabilities (the Scheme)*".

ii) The function of Rivendell under the agreement was to acquire suitable property, to let it to tenants proposed by Lifeways and to attend to all housing-related matters.

iii) The essential function of Lifeways under the agreement was to select appropriate tenants and, thereafter, to provide the tenants with appropriate levels of CSS in accordance with a care plan and pursuant to a contract with a commissioning body (i.e. the relevant local authority, in this case Walsall): see, in particular, Lifeways' specified responsibilities as set out in paragraph 5.2 of the agreement.

25. It is to be noted that it is said that the 2004 agreement was replaced by a 2005 agreement, which the parties did not sign but nevertheless treated as representing the agreement between them (see paragraph 23 of the SSC's written Notice of Determination, quoted above). Hereafter, I shall refer to the Agreement between Rivendell and Lifeways as "the 2004/2005 Agreement".

26. In all material respects, the 2005 agreement is very similar to the 2004 one, except that it is headed "*Partnership Agreement Support Provider Relationship*" and, in paragraph 2 of the Preamble, expressly states that Lifeways "*will provide all necessary care, support and supervision services ... for all tenants of the Property* ***on behalf of*** [*Rivendell*]", emphasis added. On behalf of the Claimant, Mr Knafler made it clear that it was not suggested that this clause is determinative – because, as he rightly accepted, either the arrangement satisfied the statutory criteria or it did not. However, he did suggest that it threw some light on what the parties intended.

27. **The Parties' Submissions.** In addition to Gaspet v Ellis (1985) 1 WLR 1214, Mr Knafler referred to cases such as R v Portus ex parte Federated Clerks' Union of Australia (1949) 79 CLR 428, R (Cherwell) DC v First Secretary of State (2005) 1 WLR 1128, R v Toohey ex parte Attorney General (1979-80) 145 CLR 374 and R v O'Loughlin (1988) 3 All ER 431 (see paragraphs 31 to 33.5 of his written skeleton argument), in which the meaning of the words "on behalf of" have been considered by the courts. He submitted that it was clear from those cases that the precise meaning of the words "on behalf of" will depend on their context and that the courts have ascribed a wide range of meanings to them, from the narrow principle of legal agency at the one extreme of the spectrum to the broader concept of "for the benefit of" at the other.

28. On behalf of the Secretary of State, Mr Blundell did not disagree with the general thrust of Mr Knafler's submissions on this aspect of the matter, nor did Mr Birks on

behalf of Walsall. However, both stressed that, whilst the courts have on occasions adopted a broad interpretation of the phrase, they have on others applied a narrow interpretation where this has been supported by the statutory context (e.g. as in *Gaspet v Ellis*). In effect, it was common ground between the parties that the key principles to be derived from the various cases in which the words "*on behalf of*" have been considered are as follows: (i) the phrase "*on behalf of*" does not have a fixed meaning, it is not a term of art; (ii) the phrase is capable of bearing a wide range of meanings; and (iii) it will take its meaning in any particular case from its statutory context.

29. Mr Knafler submitted that the 2004/2005 Agreement between Rivendell and Lifeways was contractual in nature and supported by valuable consideration. I accept that submission and did not understand either Mr Blundell or Mr Birks to advance any argument to the contrary. However, the significance of this contract and its relevance to the issues in this case are entirely different matters, as will become apparent.

30. It was Mr Knafler's submission that it was clear from the terms of the 2004/2005 Agreement that Rivendell and Lifeways had thereby entered into a form of "partnership" or "joint venture", in the sense that each was dependent on provision made by the other as part of an overall package for the provision of care and accommodation for vulnerable persons under a single "scheme" ("the Scheme") that was specifically devised for such a purpose. In support of that submission, Mr Knafler contended that (a) Rivendell would not be able to provide accommodation to persons such as the Claimant, unless those persons were receiving adequate CSS, (b) Lifeways would not be able to provide CSS to persons such as the Claimant unless they had adequate accommodation in the community, (c) without the involvement of the other organisation, neither Rivendell nor Lifeways would receive funding from (respectively) the housing benefit authority or the social services authority and (d) under the terms of the 2004/2005 Agreement, Rivendell owed contractual obligations to Lifeways to provide certain accommodation-related services and Lifeways owed freestanding contractual obligations to Rivendell to provide CSS to the tenant (Mr Knafler also pointed out and stressed that these obligations were not coextensive with those owed by Lifeways to Walsall: see, for example, paragraph 5.2.7 of the 2004/2005 Agreement).

31. It was Mr Knafler's contention that, pursuant to the terms of the 2004/2005 Agreement, the provision of CSS by Lifeways was therefore complementary to the provision of accommodation by Rivendell and was one that was therefore in the interests of Rivendell and for the benefit of Rivendell. Mr Knafler submitted that, on any view, Rivendell and Lifeways were engaged in a "joint venture" such that the services of each were essential to the success of the Scheme. He also submitted that, in reality, Lifeways operated as a representative of or was "akin" to an agent of the joint venture and/or the Scheme and, thus, of Rivendell.

32. Mr Knafler then referred to the immediate statutory context of the CP Regulations, the Social Security Advisory Committee's ("the SSAC") Command Paper 2902 recommendations with regard to the draft Housing Benefit (General) Amendment Regulations 1995 ("the 1995 Regulations": which were, in all material respects, the original version of the CP Regulations) and the Secretary of State's response, that resulted in a partial implementation of those recommendations and the introduction of "*exempt accommodation*" (see paragraphs 35 to 47 of his written skeleton argument). Mr Knafler submitted that it was clear that the purpose of the exemption provision in

the 1995 Regulations/CP Regulations was to exempt from the new housing benefit restrictions accommodation that was provided by specified not-for-profit bodies that "*catered for*" persons who received CSS, as contrasted with accommodation provided by specified not-for-profit bodies that met "*ordinary housing needs*" (see also paragraph 7 of HB/CTB Circular A22/2008). It was thus Mr Knafler's submission that the expression "*on its behalf*" in paragraph 4(10) of Schedule 3 to the CP Regulations was intended to distinguish between accommodation provided by specified not-for-profit agencies that "*catered for*" or was "*involved with*" persons who required CSS and accommodation that did not; and that the phrase should be construed accordingly.

33. Mr Knafler therefore submitted that, properly construed in its statutory context, the expression "*on behalf of*" in paragraph 4(10) of Schedule 3 to the CP Regulations should be given a wide meaning, such as "*for the benefit of*" or "*in the interests of*", as envisaged by Kerr LJ in his judgment in *Gaspet v Ellis* (at 776A-B). He submitted that, having regard to the nature of the "joint venture" between Rivendell and Lifeways, as embodied in the terms of the 2004/2005 Agreement and explained above, Lifeways' provision of CSS to the Claimant was "*for the benefit of*" or "*in the interests of*" Rivendell and was thus provided "*on behalf of*" Rivendell within the meaning of paragraph 4(10) of Schedule 3. It was therefore Mr Knafler's submission that the Claimant's accommodation at Victoria Avenue was "*exempt accommodation*" within the meaning of the CP Regulations and that the SSC had erred in concluding otherwise when refusing permission to appeal.

34. Mr Blundell (supported by Mr Birks) submitted that Mr Knafler's arguments fundamentally distorted the nature of the relationship between the various parties in this case. He contended that the primary focus of the legislation is on the provision of CSS by the accommodation provider or by another body acting "*on its behalf*" in the sense of "*in its place*" or "*instead of*" (what became referred to as "the narrow construction"). Mr Blundell suggested that Mr Knafler's interpretation renders the clear link created by the legislation essentially meaningless and submitted that the Secretary of State's position and interpretation is supported by the legislative history of the provision, the policy background and the case-law on the meaning of "*on its behalf*" and similar phrases.

35. It was therefore Mr Blundell's submission (supported by Mr Birks) that, in the present case, for the accommodation at Victoria Avenue to have qualified as exempt accommodation, the necessary CSS would have needed to be provided by Rivendell or, if that were not the case, by another body acting in Rivendell's place. He submitted (correctly, in my view) that, in this case, the essential framework for the provision of accommodation and CSS to the Claimant was (i) the agreement between Walsall and Lifeways for the provision of CSS and (ii) the assured tenancy agreement between Rivendell and the Claimant, whereby he was provided with the necessary accommodation. Mr Blundell stressed that it was important to note that the 2004/2005 Agreement between Lifeways and Rivendell did not form part of that essential framework.

36. Mr Blundell submitted (again correctly, in my view) that the legislation plainly envisages the care provider providing CSS in circumstances where the accommodation provider would otherwise have been required to do so. Mr Blundell stressed that there is no question in the present case of Rivendell being required to

provide any CSS to the Claimant if Lifeways either could not or was for any reason unable to do so. Mr Blundell stressed that, in those circumstances, it would have been for Walsall (who was under the statutory duty to provide the CSS) to engage a different care provider in order to discharge its statutory duty. Mr Blundell submitted (correctly, in my view) that Mr Knafler's arguments ignored this reality.

37. I have come to the firm conclusion that Mr Blundell's submissions are correct. Rivendell was never, at any stage, required or expected to provide the Claimant with any CSS whatsoever. In this case, the starting point with regard to the provision of CSS to the Claimant is Walsall's statutory duty to provide the necessary CSS pursuant to section 2 of the Chronically Sick and Disabled Persons Act 1970 ("the 1970 Act"), a duty that Walsall discharged (at all material times) by way of its agreement with Lifeways. As a result, Lifeways was under a contractual duty to Walsall to provide the CSS to the Claimant that Walsall would otherwise have had to deliver. Furthermore, as Mr Blundell pointed out, the agreement between Walsall and Lifeways came into existence before Rivendell was involved with the Claimant and continued after it had ceased to provide accommodation to him. I agree with Mr Blundell that the agreement between Walsall and Lifeways, whereby CSS was provided to the Claimant, was entirely independent of Rivendell's role in the Claimant's life and was not dependent in any way upon it.

38. I also agree with Mr Blundell that there was nothing in the tenancy agreement between Rivendell and the Claimant (which regulated the direct contractual relationship between the Claimant and Rivendell) which went beyond what would ordinarily be expected to be provided for in such an agreement. As Mr Blundell observed, there was no sense in which Lifeways contributed to this landlord/tenant relationship or was in any way necessary to enable Rivendell to provide the accommodation in question. I agree with Mr Blundell's observation that, whilst it is the case that the Claimant required the provision of CSS in addition to accommodation, the provision of CSS was not a necessary prerequisite before the accommodation could be provided. The provision of accommodation was an entirely distinct requirement for which, following the Claimant's departure from his former local authority hostel accommodation, separate provision was duly made with Rivendell.

39. I therefore agree with Mr Blundell's submission that Rivendell's involvement was thus not in any way necessary in order to enable Walsall to discharge its statutory obligation to provide the Claimant with CSS pursuant to section 2 of the 1970 Act, nor was it required in order to enable Lifeways to provide the CSS or any part of it. Whilst the "joint venture" 2004/2005 Agreement between Rivendell and Lifeways may have provided some clarity to each organisation on where the respective boundaries of their responsibilities lay, I accept Mr Blundell's submission that it was not that agreement that enabled each party to deliver its particular services to the Claimant. Once Walsall's agreement with Lifeways was in place, the latter body could fulfil the Claimant's CSS requirements; and once the assured tenancy agreement was in place with Rivendell, the Claimant's accommodation needs could be met. I agree with Mr Blundell's observation that, in truth, the legal effect of the 2004/2005 Agreement was and is very limited.

40. In my view, therefore, on a proper analysis, Rivendell did not derive any clear and distinct benefit from the provision of CSS by Lifeways, such as would bring it within

the scope of paragraph 4(10) of Schedule 3 to the CP Regulations. If Lifeways had not provided those services, Walsall would have been obliged either to provide them directly or to engage another third party CSS provider to do so. In truth, the benefit of the provision of CSS by Lifeways was only felt by the Claimant (as the recipient of those services) and Walsall (as the authority whose statutory duty to provide those services was thereby discharged). I agree with Mr Blundell's observation that the relationship between Rivendell and Lifeways (as encapsulated in the terms of the 2004/2005 Agreement) was not one where Lifeways' provision of CSS to the Claimant provided any real benefit or obviated any disbenefit to Rivendell. I also agree that, for those reasons, the essential contractual framework between the parties, when properly analysed, clearly demonstrates that Lifeways was not providing CSS "*on behalf of*" Rivendell within the meaning of paragraph 4(10) of Schedule 3. As it seems to me, that is so even if (contrary to my concluded view of the matter) that phrase is to be given something of the sort of wider meaning for which Mr Knafler contended.

41. In any event, I agree with Mr Blundell's submission that, when considered in its statutory context, it is clear that the narrow construction should be applied to phrase "*on behalf of*" in paragraph 4(10); i.e. that it should be construed as meaning "*in its place*" or "*instead of*" (see paragraph 34 above). I accept that support for that interpretation of the phrase in question is to be found in the legislative history of that provision, together with the consistent policy framework that has existed since 1996 as an aid to its interpretation: see Mr David Jones' witness statement, paragraphs 18 to 31 of the Secretary of State's detailed grounds of defence and paragraphs 23 to 39 of Mr Blundell's written skeleton argument.

42. Thus, for example, paragraph 9(2) of the Secretary of State's response to the SSAC's recommendations with regard to the draft 1995 Regulations was in the following terms:

> "(2) Non-profit making accommodation managed by housing associations and charities should be exempt from the proposed restriction.
>
> The Government accepts this recommendation in part. However, the Government is mindful to ensure that private landlords are not disadvantaged compared with housing associations. We will exempt from the new proposals the following accommodation:
>
> Hostel accommodation for people without a fixed way of life which is funded under Schedule 5 of the Supplementary Benefits Act.
>
> Accommodation provided by housing associations, registered charities or voluntary organisations where case, support or supervision is provided by, or on behalf of, the provider to residents.
>
> However, not all accommodation managed by housing associations or charities is catering for people requiring care or

> support. Housing Association property is already treated advantageously for Housing Benefit purposes, and the Government considers that there is no reason to introduce further special treatment for Housing Association or other property that meets ordinary housing needs."

43. I agree with Mr Blundell that it is clear from this passage in the Secretary of State's responses that the regulations were to be redrafted (so far as material) to the effect that a prerequisite to exemption would be that the organisation providing the accommodation in question should also provide CSS, or that another body should provide those services on its behalf. In my view it was clearly the Secretary of State's intention that the proposed legislative amendments were to exempt accommodation providers who actually did provide support services, or who entered into arrangements with other organisations to provide those services in their place. What was envisaged was that, whichever arrangement was in fact made, it would be the accommodation provider who had the *ultimate* responsibility for providing the CSS.

44. As Mr Blundell observed, by his foregoing response, the Secretary of State made it clear that attention would need to be focused on the *role* of the accommodation provider in the provision of the CSS. I therefore accept Mr Blundell's submission that sub-paragraph (2) of the Secretary of State's response to the SSAC's recommendation clearly emphasises that, for the accommodation in question to qualify as exempt, the various bodies there identified had also to provide CSS to their residents or, if not, that another organisation had to provide it in their place. In my view, this is entirely consistent with the narrow construction of the phrase "*on its behalf*", as submitted by Mr Blundell, and at odds with the interpretation for which Mr Knafler contended. Furthermore, I accept that this interpretation of the phrase in question is reflected in the contemporary ministerial guidance: see paragraphs 20, 22 and 24 of Circular HB/CTB A7/96, quoted in paragraph 27 of the Secretary of State's detailed grounds of defence.

45. I also agree with Mr Blundell that a close analysis of the statutory words themselves demonstrates, beyond any real argument, that the narrow construction is correct. The full wording of the relevant part of paragraph 4(10) of Schedule 3 is "*where that body or a person acting on its behalf also provides the claimant with care, support or supervision.*" In my view, applied to the factual circumstances of this case, the words "*that body*" plainly refer to the landlord, Rivendell. The primary focus must, therefore, be on whether the second organisation (here, Lifeways) is providing care, support or supervision which "*that body*" (i.e. Rivendell) would otherwise be providing to the Claimant. In other words, the crucial question is whether Lifeways is providing CSS *in place of* Rivendell (i.e. the narrow construction).

46. Furthermore, the use of the word "*also*" in the statutory wording is significant. It indicates that either the landlord provides both housing and CSS, or, that the care provider operates in place of the landlord, since it is the landlord who would otherwise "*also*" be providing such services.

47. In my view, the statutory wording points to an interpretation of the phrase "*on its behalf*" which focuses on the provision of services by one body in place of another. It does not extend to the sort of generalised and consequential benefits for the landlord that formed the basis of Mr Knafler's submissions. As the statutory wording and

legislative and policy history make clear, only those specified organisations that have the ultimate responsibility for the provision of CSS qualify for the exemption. In the present case, Rivendell held no such ultimate responsibility, nor does it claim that it did. That being the case, the accommodation provided to the Claimant by Rivendell did not qualify for exemption and the SSC was right to so conclude.

48. Finally, I should mention that, after the completion of oral submissions, the parties sent further written submissions with regard to a recent decision of the SSC, now acting as a Judge of the Upper Tribunal (Administrative Appeals Chamber), in *Chorley BC v IT (2009) UKUT 107 (AAC)* ("*Chorley*"). In that case, the local authority was Lancashire County Council ("LCC"), the landlord was Care Housing Association Ltd ("Care Housing") and CSS was provided by Dawaking Ltd ("Dawaking") on behalf of LCC. The SSC found that the accommodation in question was "*exempt accommodation*". However, the reason was not because the CSS provided by Dawaking was being provided on behalf of the landlord, Care Housing – in line with his earlier rulings, the SSC found that it was not. Rather, it was because the facts as found by the SSC demonstrated that Care Housing actually provided some housing related support at a level that was more than minimal and that, accordingly, the accommodation qualified as "*exempt accommodation*" within the meaning of paragraph 4(10) of Schedule 3 to the CP Regulations.

49. Mr Knafler drew attention to and relied heavily upon the SSC's "postscript" to his judgment in Chorley, as follows:

> "K. POSTSCRIPT
>
> 101. It seems absurd that the very important question whether the rent eligible for housing benefit is limited to that assessed by a rent officer should depend on whether the landlord can be said to provide some degree of support. It is difficult to see why a landlord which provides no support should be in a different position from one which provides some, albeit not very much support. The factors which may render supported housing more expensive (e.g. the need for a room to accommodate an overnight carer), and so justify the absence of the usual restriction on the rent, are present whether the support is provided by the landlord or by some other person or body. In addition, if I am adopting the right approach to resolving the issue whether the landlord provides support, it will often be necessary to investigate the landlord's activities in considerable detail, which absorbs an enormous amount of the parties' time and money, and judicial time, and even then there is at the end of the day room for difference of opinion as to the correct outcome. It cannot be sensible to have that as the test unless no more practicable one can be found."

50. Mr Knafler submitted that the SSC's postscript identified and highlighted an obvious absurdity in the regulations if the narrow construction is applied to the definition of "*exempt accommodation*". He contended that the presumption should be against the Secretary of State having advanced such an "absurd policy" when enacting the relevant statutory provisions. It was therefore his submission that, in line with his

submissions summarised in paragraphs 32 and 33 above, the Secretary of State should be presumed to have been seeking to advance the practical policy of exempting specified non-profit making bodies that provided accommodation that "*catered for*" persons requiring CSS, in the sense that CSS was provided by the landlord or by another body in conjunction with the landlord, as part of a package, of a type that existed at the time the regulations were enacted and that has become increasingly familiar as the result of central government encouragement.

51. However, I agree with Mr Blundell that it is important to note that in his postscript the SSC did not purport to express any views with regard to the proper construction of the relevant statutory provisions. He is expressing a view about the consequences of the legislation, given the current reality of accommodation and CSS provision. Importantly, the SSC does not suggest that his decisions in *R(H) 2/07* and the present case were wrongly decided.

52. As the Secretary of State has already acknowledged (in the witness statement of Mr David Jones), the present reality of service provision has moved on from the time when the relevant legislation was first introduced and the present form of service provision was not envisaged at that time. I am not persuaded that there was anything "absurd" about the policy that resulted in the relevant legislative provisions (as interpreted by me) at the time they were enacted. Whilst it has now been accepted that in some (but by no means all) cases this has created difficulties, I accept that this is a matter that the Secretary of State is currently examining and that there may need to be a policy and/or legislative development as a result. However, as Mr Blundell observed, that is a matter that needs to be carefully considered and taken forward on the basis of proper evidence. That is a proper function of the Secretary of State and not a matter for the Court.

53. Accordingly, I am satisfied that there is nothing in the SSC's postscript to his judgment in *Chorley* which calls into question the conclusions that I have reached with regard to the proper interpretation of the expression "*on its behalf*" in paragraph 4(10) of Schedule 3 to the CP Regulations.

54. **Conclusion**. For all the foregoing reasons, I have come to the firm conclusion that the accommodation provided by Rivendell to the Claimant was not exempt accommodation within the meaning of paragraph 4(10) of Schedule 3 to the CP Regulations and that, therefore, the SSC was right to refuse permission to appeal. This application must therefore be and is hereby dismissed.