Bulletin 155

Sivam L

CH/257/2005

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal with the leave of a tribunal chairman from the decision of an appeal tribunal held at Norwich on 19 November 2003 dismissing the claimant's appeal from a decision of the Norwich City Council that the claimant was not entitled to housing benefit in respect of a claim made on 20 December 1999 as he had not established a legally enforceable rent liability on which to calculate housing benefit entitlement. While I find that the claimant's stated grounds of appeal fail, I also find that the tribunal was in error of law in its substantive decision, which must therefore be set aside. In view of the delay which has already occurred in this case, and the amount of evidence before me, I consider that this is a case in which I should substitute my own findings for those of the tribunal.

2. I set aside the decision of the council refusing to award housing benefit, and I find that the claimant was entitled to have his claim to housing benefit received on 20 December 1999 assessed and determined by the council on the basis that he had a genuine liability to pay £40 per week rent for his home as claimed by him and that the agreement under which this liability arose was on a commercial basis. He is so entitled regardless of whether his landlord complied with the requirements of section 48(1) of the Landlord and Tenant Act 1987 ("LTA") in respect of his tenancy, although in my judgment the landlord did comply with those requirements. As there is no suggestion that there was any other reason why the claimant should not have been awarded housing benefit, I find that the claimant was entitled to housing benefit pursuant to that claim and I remit to the council the question of the amount of housing benefit to which he was so entitled and the dates between which he was so entitled.

3. I held an oral hearing of this appeal in Norwich on 13 January 2006, when the claimant appeared in person, but the council was not represented. The claimant then argued his case based on his grounds of appeal. On further consideration of the file, I concluded that, although there was no substance in the grounds of appeal put forward by the claimant, for the reasons given below, there was an issue of some general importance as to the correctness of the legal basis for the tribunal's decision. I therefore gave directions for submissions to be made by the council and by the secretary of state as to the inter-relationship of section 48 of the LTA and regulation 8(1) of the Housing Benefit (General) Regulations 1987 ("the 1987 Regulations"). I also invited submissions as to whether there was any other basis than that found by the tribunal on which the council's decision could be upheld, and I gave the claimant an opportunity to respond to the submissions which were made.

The facts

4. In 1990, Sivam L ("L") applied to Yorkshire Building Society for a mortgage advance to help him to purchase the property in respect of which this claim for housing benefit was made. (file, pp.42, 47-50). The form bears a receipt stamp from Yorkshire Building Society dated 4 October 1990. His first name of Sivam is also confirmed by

the Building Society at p.40. The claimant signed a form dated 21 August 1990 (p.42) stating that L had then been employed by him for 2 years and 5 months at a salary of £17000 per annum. He also gave the national insurance number of L. Similar information, including the national insurance number, appears at pp.47-48. At p.40, the Building Society, in a fax dated 27 July 2000, gave L's date of birth as 26 April 1956, the date which appears to have been given to it in the 1990 mortgage application (p.47).

5. On 6 December 1990 "Silvan" L was registered as proprietor of the property with title absolute subject to a charge in favour of the Yorkshire Building Society dated 5 October 1990 (pp.1E-2).

6. By an enduring power of attorney dated 23 December 1992 executed in front of a local solicitor, Sivam L gave his date of birth as 8 December 1968 (this is also the date of birth shown on his passport at p.33), and his address as the property. He appointed L-A as his attorney with general authority to act on his behalf in relation to all his property and affairs (pp.10-13). The section for completion by the attorney was also completed in the presence of the same solicitor (p.13). It appears both from a letter dated 27 May 2000 from L-A (p.177), and from an interview by a council employee with the mother of L-A (p.39) that L-A was, at least by about 1993, the wife of Sivam L.

7. There appear to have been a number of lettings of accommodation in the property in respect of which housing benefit was claimed and apparently paid. By a letter dated 27 August 1998 to the housing benefit section of the council (p.152), ostensibly from SM Builders of 66 S. Avenue London N17 it was stated that as from 1 September 1998 RK would be residing at the property, paying a weekly rent of £40 per week exclusive of heating, electricity, telephone, water and council tax. The letter identified the proprietor of SM Builders as M.M.J and gave a mobile telephone number. The signature on the letter is illegible. It was received by the council's housing department on 3 September 1998.

8. By a further letter from SM Builders to the council's housing department dated 25 September 1998 (p.153), written in relation to AN's housing benefit, it was stated that they were agents for L and confirmed that AN's tenancy agreement was signed on their behalf as agents for the landlord. The letter requested the council to note that SM Builders' address was 65 and not 66 S. Avenue. It was signed by "S.M." for SM Builders. This led to a letter dated 7 October 1998 from the Council to Leathes Prior, solicitors, confirming that the council was satisfied as a result of the letter that the agreement produced by AN was acceptable as proof of her tenancy and that it would process her claim for housing benefit (p.154). By letter to SM Builders at 65 S. Avenue (the street name being misspelt), the council then confirmed that AN's housing benefit would be paid direct to SM Builders. Entitlement appears to have been from March to July 1998 (p.155).

9. Meanwhile, there appear to have been arrears on the mortgage, and the Building Society brought possession proceedings in respect of the property. The Building Society's agent's report at the hearing in Norwich County Court on 9 October 1998 (p.43) stated that before the hearing the claimant stated that he was acting as agent for

L and for the other resident in the property, AN. He produced two letters confirming this and said that he also resided in the property from time to time. According to the report, the claimant said that he and AN lodged with L, but had no written tenancy agreement. He said that he was in a position to negotiate the payment of the arrears. One of the letters referred to was dated 9 October 1998 from local solicitors who had been advising him in respect of AN's housing benefit (p.45). The other was from "Silvan" L dated 21 September 1998 and confirmed that the claimant was authorised to represent him at the hearing (p.46). The address of "Silvan" L was given as the property. The claimant also appeared at the adjourned hearing of this possession application on 20 November 1998 when a suspended possession order appears to have been made together with a money judgment against L (p.44).

10. By letter dated 10 November 1998, also apparently signed by S.M., SM Builders wrote to the council confirming that AN was a lawful lodger at the property from 11 November 1998 at a weekly exclusive rent of £45 (p.156). In January 1999 the council wrote to SM Builders at 66 S. Avenue asking for information for council tax purposes whether L was still the owner of the property (p.157). Later the same month (p.158) the council tax department spoke to the housing benefit department, were given the old telephone number for SM Builders and learned that housing benefit cheques were being sent to L care of the Yorkshire Building Society. It then wrote to L care of SM Builders at 65 S. Avenue (p.159) that the property had been classified as a house in multiple occupation and that a bill would be issued to him for council tax from 28 August 1998. There is no indication what enquiries had been made by the council which established that (as the letter stated) each tenant had a separate agreement for the property but was not liable to pay rent or a licence fee for the property as a whole. The letter also advised L that he had summonsed debts in respect of which the Magistrates Court had granted liability orders.

11. It would appear that at that stage the council was given an address for L in Malaysia, for by letter of 26 February 1999 (p.162) it wrote to him there pointing out that he had an outstanding balance of £1339.09. There is no evidence as to how the council came to get this address, but it suggests further contact with somebody acting for L. An issue was then raised by SM Builders whether the house was properly classified as in multiple occupation both by letter of 18 March 1999 (p.163) and by a telephone call from S.M. (p,164), but his contentions were rejected by the council (p.165-6).

12. The claimant had originally applied for, and been awarded, housing benefit in respect of his rent for his occupation of the property in June 1999 (pp.67-70). By letter dated 9 June 1999 (p.167), SM Builders (signature illegible) wrote to the council to confirm that, as from 10 June 1999, the claimant would be lodging at the property, a fully furnished shared house, paying a weekly rent of £40 from 10 June 1999 exclusive of all bills including council tax. The letter was written on notepaper giving the address of SM Builders as 65 S. Avenue and it or a copy was sent by the claimant to the council with his application for housing benefit in June 1999 (see p.68). For some reason which is not apparent, that award of housing benefit ended on 28 November 1999 (p.1B) and he made the new claim to housing benefit with which this appeal is concerned on 15 December 1999 (p.74).

13. Meanwhile, the local authority was pursuing its claim for arrears of council tax and at its request a summons was issued against L care of SM Builders at 65 S. Avenue (p.168). Further correspondence dated 1 November 1999 was addressed to L at the same address by the local authority concerning AN's occupation of the property (p.170), and a further letter was sent to SM Builders dated 14 February 2000 concerning the current tenants (p.171).

14. A statement dated 21 February 2000 made by RS for housing benefit purposes (p.172) indicated that he had been living in the property since about the summer of 1998, having found out about it from an advertisement in the summer of 1998. He had contacted "Melvin" about the property (this name was subsequently corrected to "Kelvin" – see p.176), and he had shown him around it. He had also agreed the rent for his room, and the way in which it should be paid, with Melvin. He described the claimant as acting as some kind of agent for Melvin as he always contacted the claimant if he needed any proof of rent for his claim (he subsequently changed this account, stating that the claimant was a good friend of the agent who spent a lot of time in Norwich visiting his girlfriend every few weeks – p.176). He had no receipts and no tenancy agreement as it was a very informal agreement. By letter of 3 March 2000, in response to the council's letter of 14 February 2000, SM Builders stated that RS had moved into the property in July 1998 and the claimant had moved there in June 1999. The letter enclosed a copy of the county court possession order, and stated that the occupants had been given notice to quit if their rent had not been brought up to date by 20 March 2000.

15. On 13 March 2000 HM Land Registry issued a copy of the register for 65 S. Avenue. This showed that the proprietor since 21 May 1984 had been M.F.M. (who had the same unusual surname as S.M.) of that address (pp.4-6). A telephone record dated 31 March 2000 indicates that somebody from Haringey Council had been to 65 S. Avenue and confirmed that there was no SM Builders there or any business. There was one Housing Benefit claim there since 1993 and the property had always been residential. The landlord they had on record was a Mr. M. Brown (p.25). Later, by letter dated 19 July 2000 (p.38) an investigations officer from Haringey Council wrote confirming that the address was a private one, and was a single house, not split into separate units. The business rates section had no record of SM Builders. The benefits claim had been from the same person since July 1994 from a single parent family who declared that they were resident at the address with their child as the only other occupant. The telephone account was in the name of that claimant and not SM Builders.

16. Meanwhile, by letter dated 21 March 2000 the local authority rejected the claimant's claim for housing benefit because it was unable to verify the landlord's agent. The letter relied on section 48 of the Landlord and Tenant Act 1987.

17. The next recorded event is that LA appears to have intervened by her letter to the council of 27 May 2000 (p.177) concerning council tax, copied to SM Builders and the claimant. She enclosed a copy of her passport and her power of attorney to act for her husband. The letter confirmed that Mr. M. of SM Builders, 65 S. Avenue, London N17 was the authorised agent for the property. By letter of 27 June 2000, the local authority wrote to L in Malaysia asking him to confirm whether he was the owner of the property and in his absence the firm of agents acting on his behalf, where they

could be contacted and whom to contact (p.178). This produced a faxed response from L in Malaysia confirming that he was the owner of the property, enclosing a copy of his passport and stating that he could be reached at the address he gave in Malaysia or through Mrs HJ, whose address and telephone number in Norwich he gave (pp.179-180).

18. Meanwhile the local authority's revenue services continued to pursue L for unpaid council tax c/o 65 S. Avenue (p.182, where S is again misspelt) and at the end of November a statutory demand was served on L through Mrs. HJ, who undertook to draw the demand to his attention.

19. By letter dated 20 June 2000 SM Builders again wrote to the local authority confirming that AA was to be an occupier of the property, at £40 per week exclusive, from 20 June 2000.

20. The record of an interview with Mrs. HJ on 25 July 2000 (p39) reveals that Mrs. HJ is the mother of L-A and mother in law of L, who she confirmed was born in December 1968. She stated that he had not been in the country for years. She had never had anything to do with the property, but knew it was let and looked after by somebody in London.

The procedural history

21. This case has had an unusual and lengthy procedural history. The claim to benefit was made on 15 December 1999. The initial decision is stated to have been made under regulation 10 of the 1987 Regulations, although no copy of this decision is on the file. According to paragraph 4 of the summary of facts in the written submissions to the tribunal, it was determined that the claimant had not established a legally enforceable rent liability on which to calculate housing benefit entitlement. A review of this determination was carried out on 9 May 2000 (file, pp.18-19). The reason given there for the determination was that

> "The Landlord and Tenant Act 1987 (Section 48)(1) of part VI) states that a person must be able to contact their landlord. As your alleged landlord is not contactable, we have determined that you do not have an enforceable rent liability and therefore you are not entitled to Housing Benefit."

This reason was wrong on two counts. Section 48(1) of the LTA does not state that a person must be able to contact their landlord and it is plain from the correspondence to which I have referred that the council itself had repeatedly contacted the landlord both at the S. Avenue address and elsewhere.

22. The claimant then requested a further review by a Review Board. The review was heard on 27 July 2000 and the decision of the Review Board confirming the decision that housing benefit was not payable was communicated to the claimant by letter dated 8 August 2000. The claimant then applied for judicial review of the decision of the review board and on 31 July 2001 Moses J made an order (119-122) quashing the decision of the review board and remitting the appeal to an appeal tribunal. The basis of this order is to be found in paragraph 68 of the judgment of Moses J (p.112) where he concluded that the claimant was entitled to determination of his entitlement by an

independent tribunal and that the case should be remitted to an appeal tribunal pursuant to regulation 4(3) of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) (Transitional and Savings) Regulations 2001.

23. There then appears to have been a delay while the council considered and possibly pursued for a time an appeal against that decision, but by May 2002 the council had prepared its submissions for the tribunal hearing (p.1). It appears from p.124 that at that stage the claimant was requesting that the transcript of the judgment of Moses J should be omitted from the bundle to be put before the tribunal and by a decision dated 7 June 2002 a chairman directed that this was a matter for the tribunal hearing the appeal.

24. By a further letter dated 22 January 2003 the claimant then challenged the jurisdiction of the Appeals Service to hear the appeal, a surprising challenge, and a hopeless one, given the decision of Moses J, but one which he persisted with until shortly before the oral hearing before me. It would seem from p.127 that the appeal had been listed to be heard on 18 February 2003, but on 3 February 2003 it appears to have been postponed at the request of a chairman. Another chairman then rejected the challenge to the tribunal's jurisdiction in a direction dated 10 February 2003 and directed that the hearing was to be listed for a full day before a district chairman (p.128).

25. A further challenge to the jurisdiction of the tribunal followed together with a further complaint about the inclusion in the bundle of the transcript of the decision of Moses J, which included a short observation by Moses J on the apparent merits of the claimant's case, which had not be argued before him. A further judicial review application was also threatened. Further correspondence followed. By letter of 7 April 2003 (p.135) a district chairman advised the claimant to take the jurisdictional point as a preliminary issue before the tribunal, warning that if the tribunal determined that it had jurisdiction it could proceed on the day to determine the substantive issues in the appeal. The claimant responded by letter of 8 April 2003 (p.130) by requesting a separate hearing at least 7 days before the appeal hearing to determine the two issues as to jurisdiction and the inclusion of Moses J's judgment in the bundle. The hearing was fixed for 28 April 2003.

26. Then, by letter of 25 April 2005 (p.137) a firm of solicitors acting for the claimant urgently requested an adjournment. They had been instructed on 10 April and had obtained counsel's opinion. They requested time to advise the claimant and file evidence on his behalf.

27. At the hearing on 28 April, it appeared that the claimant was seeking legal funding because of the complexity of the issues. The chairman hearing the appeal decided that if the Legal Services Commission decided that this was a special case deserving funding of representation before the tribunal then the claimant ought to have that opportunity, but gave directions as to the basis on which the adjournment would be given (p.140). Following those directions notice was given by the claimant's solicitors of three preliminary issues to be determined (pp.142-145). Two of the issues were as to the exclusion of Moses J's judgment and of the decision of the council's Review Board. The third related to the existence of a Mr. M. and of L. The claimant's solicitors also forwarded by letter of 3 June a bundle of documents on which the

claimant wished to rely (pp.146-188), and indicated that the claimant may also file further evidence from S.M. and from L.

28. The hearing of the appeal was refixed for 19 November 2003, a whole day being again allocated.

29. By letter dated 31 October 2003 the Legal Services Commission wrote to the Appeals Service that the claimant had applied unsuccessfully for legal funding for his appeal, but that he had appealed against the refusal of funding. The letter explained that a decision may not have been reached on his funding appeal by 19 November and that the letter had been written at the request of the claimant who may wish to seek an adjournment until the funding decision had been reviewed.

30. This seems to have been treated as a request for postponement and by a decision dated 4 November 2003 a district chairman decided that the appeal should not be postponed. By letter dated 11 November 2003 the claimant then requested a postponement on the ground that his father was critically ill in Carlisle Infirmary and he would therefore be unable to attend the hearing. A clerk to the tribunal then replied by letter dated 13 November 2003 stating that

> "The request for a postponement has been refused. The Chairman has stated that he has not been given enough information to consider the postponement request at this stage. Please could you forward a further request to our office containing the necessary information. The Tribunal on the day will consider your request along with any additional documents that may be forthcoming. The tribunal will hear your appeal at 10.00 on 19/11/2003 at Norwich Appeals Service as planned.
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> The tribunal can decide the appeal even if you are not at the hearing. As you have asked for an oral hearing, you may consider it is important you are there."

31. On 18 November 2003 the claimant then faxed to the Appeals Service in Nottingham a handwritten note from a doctor in the Cumberland Infirmary in Carlisle certifying that the claimant's father had been admitted to the medical ward in the Infirmary on 24 September 2003 and was still an in patient. The note was accompanied by a cover sheet stating that it was from the claimant, and giving in large print Norwich fax and telephone numbers. The same telephone number, together with a date of 01/01/1999 appeared in small print at the top of both pages. The fax was forwarded to Norwich where it was put before the chairman hearing the appeal on 19 November 2003. The claimant's solicitors did not attend that hearing, apparently because there was no legal funding in place to pay for them to do so.

32. The tribunal rejected the application for a postponement of the hearing, referring to the Norwich numbers on both pages of the fax and observing that in the light of the claimant's apparent presence in Norwich the chairman could identify no reason why he had failed to attend the hearing that day. Given the history of the matter and delays that had taken place and the prejudice to others whose appeals had been delayed he decided to proceed. He went on to reject the two preliminary points taken in writing on behalf of the claimant relating to the exclusion of the transcripts of the decision of the Review Board and the judgment of Moses J. He then considered the case on its

merits and dismissed the appeal for reasons which I shall examine when I turn to the substance of the case.

33. The claimant then sought, with the assistance of his solicitors, to set aside the decision of the tribunal and obtain an order for a rehearing from a tribunal chairman on the ground that it was just to do so. The chairman who had heard the appeal refused to set aside his decision despite evidence that the claimant had indeed sent the fax from Carlisle. That decision in turn was the subject of successful judicial review proceedings brought by the claimant, and was set aside and the application to set aside the decision was reconsidered by the regional chairman. He decided on 25 July 2005, having considered all the matters then put forward by the claimant, not to set the decision aside, despite accepting the claimant's evidence that he was indeed in Carlisle at the relevant time with his sick father (file, pp.249-253).

34. The claimant sought leave to appeal on three grounds, failure to adjourn, improper inclusion of evidence and want of jurisdiction, none of which related to the merits of the decision. The regional chairman gave leave to appeal in December 2004 after a delay of 9 months due to the Appeal Service losing the file and an apparent lack of co-operation on the part of the claimant in helping the Appeals Service to make up a duplicate. After December 2004 there was a further delay while awaiting the outcome of the judicial review proceedings and the subsequent rehearing of the claimant's application to set aside the tribunal's decision.

The claimant's grounds of appeal

35. At the oral hearing of this appeal in Norwich, two of those grounds were not pursued before me, nor were they pursued in the claimant's skeleton argument, and I can deal with them shortly. I see no reason why the Review Board decision and the judgment of Moses J should not have been included in the file before the tribunal. The judgment of Moses J was indeed relevant to show that the issue of jurisdiction had been canvassed before him and to show the reasons why he concluded that the matter had to be referred to the appeal tribunal. The fact that he was at first sight unimpressed with the claimant's case on the merits, on which he had plainly heard no argument, is not something that a tribunal needs to be protected from knowing. Tribunals are used to weighing evidence and I see nothing to suggest that this tribunal might have given or did give any weight to that observation. Indeed the tribunal's reasons expressly describe the judge's comments as irrelevant. So too, tribunals are used to dealing with appeals from decisions which have been reviewed, and upheld with reasons, by the body making them, whether that be a council in housing benefit cases or the benefits agency in other cases.

36. The principal ground of appeal put forward by the claimant is that the tribunal erred in law in finding that he was in Norwich when in fact he was in Carlisle but had failed to reset his fax machine to show this. He also drew attention to the fact that the date at the top of both fax pages was plainly incorrect, which he said ought to have alerted the tribunal to the fact that the telephone and fax numbers could not be relied on to show that he was in Norwich when he sent the fax.

37. It is true that an astute chairman with knowledge of the way that fax machines are programmed to operate might have concluded that, in the light of the incorrect date,

the telephone and fax numbers also could not be relied on as showing where the claimant was when the fax was sent. However, I consider that, on the very limited evidence before it, the tribunal was entitled to conclude that he was apparently in Norwich. Indeed, in my view, on that very limited evidence, even if the tribunal had concluded that the claimant might in fact be in Carlisle, an adjournment ought to have been refused. The only evidence before it was that the claimant's father had been an in patient in the hospital since 24 September 2003. There was nothing to indicate why the claimant needed to be there on 19 November 2003, and given that this appeal had first been fixed for a date in February 2003, that it had then come on for a full day's hearing in April 2003 only to be adjourned, and that it related to a decision which was by then nearly 4 years old, it appears to me that the tribunal was right to proceed.

38. The claimant, in his skeleton argument and in oral argument before me, has relied on a great deal of additional information as to why he felt he needed to be with his father. None of that information was before the tribunal, which cannot be in error of law for failing to take account of information which it did not have. As was pointed out in *Teinaz v. Wandsworth LBC*, [2002] EWCA 1040, per Gibson LJ, in a passage cited by the claimant in his skeleton argument, "the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment". Here the claimant failed to discharge that onus. The claimant also relied on errors in the findings of the chairman when he first applied for the decision to be set aside. However, errors on that occasion cannot affect the correctness of the original decision based on the evidence then before the tribunal. The later decision is irrelevant and was in any event set aside by judicial review.

39. The claimant also relied on a decision of Neuberger J in *RJ Fox v. Graham Group plc* (The Times, 3 August 2001). However, as Neuberger J pointed out, that was the first time an adjournment had been sought, and the grounds there suggested, unlike the present case, that the claimant was unable to attend.

40. Finally, the claimant complained that having sent the fax to Nottingham, he had telephoned to ensure that he had provided what he had been asked to provide by the chairman, and had not been told that anything else was required. He contended that the tribunal service was supposed to be a litigant friendly service which would help parties acting in person who did not understand what was required. He also pointed out that he was under considerable stress because of the serious illnesses of both his parents.

41. I have every sympathy for the claimant who was plainly in a very difficult position, and under a lot of pressure, because of his parents' illnesses. However, I do not consider that he could reasonably expect that the person answering the telephone to tell him exactly what information he ought to supply in support of his application for an adjournment. He knew he had to explain why he needed an adjournment, and in my judgment he ought to have appreciated that that involved his explaining why he had to be in Carlisle on the day in question. Simply to say that it was because his father was in hospital (having been there for nearly two months) was patently inadequate.

The merits

42. The claimant has not put forward any argument that the tribunal was in error of law in its conclusions on the merits. Nevertheless, having read the tribunal's findings, I have considered whether there was any error of law in that respect. The tribunal held that, for reasons which were set out, none of the evidence to show a liability for rent met the requirements of regulation 73(1) of the 1987 Regulations and that he had no jurisdiction over the local authority's refusal to accept it because the Schedule to the regulations excluded from his jurisdiction regulation 73. He also found that the inconsistencies which he identified in the documents supplied to the local authority forced him to the conclusion that all of the documents had to be treated as suspect and not meeting the provisions of regulation 73(1).

43. He noted that the express decision of the local authority was that the claimant had not established liability to pay rent in accordance with regulation 10 upon the basis that he had not shown that in accordance with section 48(2) of the LTA that the landlord had an address for service in the United Kingdom and in consequence the liability to pay rent was not enforceable. The claimant had alleged that the agent was Mr. M. of SM Builders, the address of which was given as either 65 or 66 S. Avenue London N17. The tribunal therefore dealt with that point as well, holding that on the evidence SM Builders were not acting as agents for the landlord.

44. Regulation 73 of the 1987 Regulations requires a person who makes a claim to furnish, with certain exceptions, such certificates, documents, information and evidence in connection with the claim, or any question arising out of it, as may be reasonably required by the appropriate authority in order to determine that person's entitlement to housing benefit. The tribunal pointed out that it had no jurisdiction to hear an appeal from a decision of the local authority under regulation 73. However, this was not an appeal from a decision under regulation 73. The council had obtained information under regulation 73 and had then gone on to make a decision as to the claimant's entitlement to housing benefit on the basis of the information before it. Indeed, as was subsequently held in R(H) 3/05, it was obliged to go on to make such a decision. That decision was appealable. The tribunal was therefore in error of law in its conclusion that this was an appeal from a decision under regulation 73 in respect of which the tribunal had no jurisdiction.

45. Under regulation 10 of the 1987 Regulations, housing benefit is payable in respect of prescribed payments "which a person is liable to make in respect of the dwelling which he occupies as his home". "Liable" for this purpose clearly means legally liable.

46. The local authority decided (p.18) that as the claimant's alleged landlord was not contactable, the claimant did not have an enforceable rent liability and therefore was not entitled to housing benefit. This was said to be because section 48(1) of the LTA stated that a person must be able to contact their landlord.

47. In fact section 48(1) provides that a landlord "shall by notice furnish the tenant with an address in England and Wales at which notices (including notices in proceedings) may be served on him by the tenant". Section 48(2) goes on to provide that "where the landlord... fails to comply with subsection (1) any rent ... otherwise due from the

tenant to the landlord shall ... be treated for all purposes as not being due from the tenant to the landlord at any time before the landlord does comply with that sub-section".

48. It is not strictly correct to state that the landlord has to be contactable at that address. All that is required is that the landlord should provide an address in England and Wales where notices can be served. If he chooses to provide an address with which he has no contact, or an address with which he ceases subsequently to have any contact, that is still an address which he has provided at which notices can be served, and section 48(1) is satisfied.

49. Further, it was held by the Court of Appeal, in *Drew Morgan v. Hamid Zadeh* (1999), 26 EG 156; 32 HLR 316, that a notice satisfied the requirements even if it did not expressly state that the address in the notice was one at which notices could be served. Any document giving the name and address of the landlord without qualification was a sufficient notice for this purpose. Indeed, provided that the name of the landlord is known, it appears to me that the document need only provide the address.

50. Finally, it is necessary to note that the failure to give a notice does not mean that the landlord loses the right to his rent. The rent is treated as not being due until the landlord complies with the sub-section. Once the defect is remedied the rent for the whole period is legally payable (*Dallhold Estates v. Lindsey Trading Properties*, [1994] 1EGLR 93, at p.97)..

51. The tribunal concluded that inconsistencies which he identified forced him to the conclusion that "all of the documents supplied to the local authority must be treated as suspect and not meeting the provisions of regulation 73(1)." He found that "the state of the evidence does not satisfy me that the alleged foreign based landlord has as his agent in the United Kingdom a [M.] operating as SM Builders formerly of 66 [S.] Avenue and more recently number 65. The only person who appears to have taken an active part in the administration of [the property where the claimant was living] is [the claimant] but he does not claim to be the landlord's agent." This plainly incorrect as the correspondence between the council and SM Builders demonstrates.

52. The tribunal had previously stated that "Ironically on my view of the law if [the claimant] had been acting as his foreign based landlord's agent I could see no reason why he should be denied benefit but that is not how the appeal has been prosecuted." This seems to indicate that the tribunal did after all accept that the claimant was renting the property from L but that the address of SM Builders was not a genuine address for service. I find some difficulty in reconciling this finding with the finding that all the documents were suspect.

53. Section 48 of the LTA is not concerned with who is acting as the landlord's agent but with whether an address for service in England and Wales (not the whole of the United Kingdom) was given by the landlord to the claimant. What the tribunal appears to have called into question is whether any genuine letting or lodging agreement had been proved to exist under which rent was payable at the rate alleged. Yet his decision appears to have turned on the question whether an address for service had been provided by L. In view of the tribunal's observation that if the claimant had asserted

that he was the agent he would have been entitled to benefit, this appears to have depended on whether SM Builders was proved to exist and to carry on business from 65 S. Avenue.

54. In my judgment, in this respect also the tribunal was in error of law. If the claimant had been provided by the landlord with the address of 65 S. Avenue as the address for service, it is irrelevant whether SM Builders existed or operated from that address, although I note in any event that letters sent to that address by the local authority were dealt with ostensibly on behalf of L by somebody using the name of SM Builders.

55. Finally, and most fundamentally, I have come to the conclusion that the tribunal was in error of law in its conclusion that the failure, if there was a failure, to supply an address in accordance with section 48(1) of the LTA meant that the claimant was not entitled to housing benefit. Regulation 10 of the 1987 Regulations required that the rent must be a payment which the claimant is liable to make, but does not say that that it has to be made at a particular time. Indeed, regulation 6(2) provided in certain circumstances for a claimant to be treated as liable to pay an amount for which liability only arises after the period in respect of which it is payable. Section 48(2) of the LTA does not provide that a tenant is discharged from liability to pay rent if the necessary address is not provided, only that payment of the rent for which he remains liable is not due until the address is provided. This does not seem to me to be significantly different for these purposes from a tenant whose rent is payable monthly in arrears.

56. Further, if a claimant was only liable to pay rent once it was immediately due and payable, and, as could easily occur, a significant period of time had elapsed before the address was provided by the landlord, then at the point in time at which the address was provided the claimant could become liable for many hundreds or thousands of pounds in respect of his past occupation of his home. By that time, he may not even be occupying the property as his home, so that he would not be entitled to housing benefit, or, for some other reason, he may no longer be entitled to housing benefit.

57. There may also be occasions when the opposite might be true – the claimant may not have been entitled to housing benefit earlier, or may not even have been occupying the property as his home earlier, but have become entitled to housing benefit or started to occupy the property as his home before the rent became due.

58. The secretary of state has submitted that where a landlord has failed to provide the requisite notice under section 48(1) of the LTA, then the claimant is not liable to pay rent for housing benefit purposes, but that if notice was subsequently served and it was due then other regulations within the 1987 Regulations may allow the entitlement to be retrospective. Those regulations are not identified except that reference is made to regulation 72 of the 1987 Regulations which allowed for information to be provided later without affecting the effective date of the claim.

59. The problem with that submission is that it is not just a question of providing information. If the secretary of state is right that there was no liability until the notice was served, then there was no entitlement to housing benefit until then. No rent was payable until then, and no claim could validly have been made in respect of the period

before the notice was served because there was then no liability with the meaning of the 1987 Regulations as construed by the secretary of state.

60. Section 48 of the LTA is a provision for the protection of tenants. Housing benefit is also provided for the benefit of legitimate tenants. The practical effect of the construction put forward by the secretary of state would be to the serious detriment of tenants in that it would deprive those otherwise entitled to housing benefit of that benefit because of a default by their landlords, leaving them with a substantial liability accruing at a time when they may not be entitled to benefit or when the benefit may not be sufficient to cover the liability.

61. Against this, if a tenant is paid benefit when the rent is not immediately payable, and may never become payable in the unlikely event that no notice is ever served, the tenant could in theory acquire a windfall. This is, of course, not unheard of even where rent is immediately due. Tenants who are liable to pay rent immediately do not always do so, but acquire a benefit in practice because they spend the housing benefit elsewhere and it is not worth the landlord's time and money to try to recover the rent from the tenant.

62. In the end I have come to the clear conclusion that a tenant is liable to pay rent even though the time when payment is due is postponed by section 48 of the LTA and that that liability is a sufficient liability to result in his being liable to pay the rent for the purposes of the 1987 Regulations.

Other issues raised by the tribunal

63. The tribunal drew attention to two discrepancies – that between the names "Sivam" and "Silvan" and that between the 1956 birth date stated in the application form sent to the Building Society and the 1968 birth date which appears in the passport of L and which is also given by his mother-in-law and elsewhere. The tribunal stated that "Although taken individually they may appear as simple errors but the cumulative effect of these glitches is to suggest otherwise." In fact, as I have already pointed out, the name given in the application form to the Building Society was "Sivam" and there is no explanation for the name "Silvan" in the property register other than that it was a mistake. In this context I note that the tribunal has himself managed twice to mis-spell "Sivam" as "Sivan" in the decision.

64. The discrepancy in the birth date is not explained at present, and I was told by the claimant that neither he nor L had any explanation for it. However, I am not at present clear as to its significance. It is plain that everybody, including the local authority and his mother-in-law, understands Sivam L to be the owner of the property, and there is no evidence of any other person claiming title to it. It is also plain that he has been acting as the owner and that the claimant regards him as the owner. All the evidence indicates that all the letting or lodging agreements relating to the property which are in evidence were entered into on his behalf and that at his request the rent was to be paid into the mortgage account, and it is he whom the council pursued for council tax arrears.

65. It appears to me therefore that on the evidence before me, Sivam L is the owner of the property and that variations on his first name are just that, and do not indicate the involvement of any other person.

66. The lettings to AN and to RS both appear to have been arm's length transactions, and the rents appear similar to that said to be charged to the claimant. On the face of it therefore, the transaction with the claimant is capable of being a commercial one.

67. It is plain that between 1998 and 2000 the local authority corresponded with SM Builders at 65 S. Avenue in relation to the property. At least some of their letters to that address received replies from somebody signing on behalf of SM Builders who claimed to be acting on behalf of L (eg, pp.163, 164). It seems clear therefore that there was a connection between L and that address and SM Builders. The fact that Haringey Council had no record of any SM Builders operating from that address does not alter the fact that letters addressed to SM Builders at that address were received and responded to. The apparent presence of an S. M. at that address (the same surname as the registered proprietor) acting on behalf of SM Builders may suggest that the information that Haringey Council had as to their benefit claimant at that address may have been incomplete, but it is not unheard of for somebody to run a business from their home without permission or to allow their home to be used as a postal address for somebody who did not live there or work from there.

68. Whatever suspicions may be held about SM Builders, in my judgment that does not mean that they did not exist or that they were unconnected with L or that the writers of the various letters in their name did not have authority from L to give that address as L's address for service in England and Wales. The question remains whether the claimant's landlord did furnish him (before the date of the decision under appeal) with that address as the address at which notices may be served on him. This question is only relevant if I am wrong as to my conclusion that for housing benefit purposes it does not matter whether the rent is immediately due so long as there is a legal liability to pay it. Before me, the claimant confirmed that the only document which he had to prove his tenancy was a copy of the letter of 9 June 1999 to the local authority at p.167. He also confirmed that he did not know whose signature appeared on that letter, and that SM Builders were used only for major works to the property and as a representative for the local authority to contact.

69. It appears to me to be unlikely that the claimant would have contemplated serving any documents on L at the S. Avenue address because he was in direct contact with him. However, he knew that the formal arrangements relating to tenancies came from SM Builders at 65 S. Avenue, and I am satisfied that if he had decided to leave the property and had given written notice of this to SM Builders at that address, that notice would have been properly served on L. The letter dated 9 June 1999 was addressed to the council but was sent to the claimant to enable him to use it to obtain housing benefit. He therefore received the letter, and while in his case it was something of a formality, I am satisfied that in all the circumstances that letter when received by him was sufficient to comply with the requirements of section 48 of the LTA.

70. It follows that the decision of the tribunal must be set aside as in error of law. It also follows that unless there are other grounds which disentitle the claimant to succeed, he

was entitled to housing benefit regardless of whether a sufficient notice was served under section 48(1) of the LTA. The question arises whether there are any such grounds.

Has any other reason been shown why the claimant is not entitled to benefit

71. The first question, and one which troubled the Council's review board when the matter was before it in July and August 2000, was whether there was a binding agreement at all between the claimant and L for him to occupy the property with the other tenants at a rent of £40 per week. Despite the doubts which have been expressed as to the existence of L, for the reasons given, I find that he did exist and did own the property occupied by the claimant. I can see no reason why he should have allowed the claimant to live there rent free or why he should not have agreed to the terms which the claimant says he agreed to. I also see no reason to question that somebody at 65 S. Avenue, and also the claimant, had authority from L to act on his behalf and that there was an agreement that the claimant could occupy the property as claimed at £40 per week. No doubt the intention was that the rent would come from housing benefit, but there is nothing unusual in that and nothing to suggest that there was no real agreement or that any agreement was not on a commercial basis. I find that there was a genuine agreement which was not a sham.

72. In my judgment, no other reason has been shown why the claimant is not entitled to benefit. There is no suggestion that he was not living in the property, occupying it or part of it as his home. He was paying much the same rent as most of the other tenants who appear to have been arm's length tenants and there is no evidence to suggest that he occupied any more of the property than they did or had any more benefits from his rent than they did. The evidence of his connections with L does not prevent the tenancy or other agreement pursuant to which he occupied the premises from being on a commercial basis, and I can find no evidence that it was not on a commercial basis.

73. The fact that the claimant, who had known L for many years, was also responsible for collecting the rent from the other tenants and ensuring that it was paid directly to L's mortgage account does not appear surprising to me, given that L was living abroad and his other agent was in London. The Review Board, whose reasoning the council has sought to rely upon, considered that it is possible for somebody to have far too great a connection with the registered proprietor than is consistent with somebody who is under an arm's length obligation to make a payment to him. There is no reason at all why two people who are closely connected should not agree at arm's length that one could live at the other's property in exchange for rent. There are many cases where that has happened and the agreement has been held to be a genuine legally binding agreement on a commercial basis (see e.g. CH/4854/2003, para.11; CH/296/2004 and CH/1097/2004). The onus is on the council to show on the balance of probabilities that it was not on a commercial basis. The council has relied essentially on what it considered to be the claimant's aggressive attitude to questioning and his failure to produce the London agent. However, it has not pointed to any non-commercial element of the agreement. It made commercial sense for L to want to let rooms in his property and for the claimant to want to live there. If he received some small rebate in the rent for collecting and dealing with the rent of others and for helping to look after the property, that was a sensible commercial arrangement. There is nothing to suggest

that the rent was artificially high or that the claimant was not living at the premises or that the arrangement was a sham.

74. The absence of any conventional letting documentation is readily explained by the relationship of the parties to the agreement. It is not unusual for conventional letting documentation not to exist and provided a genuine agreement on a commercial basis can be established without it, the claimant is entitled to benefit, as in this case.

75. In my judgment, on the balance of probabilities there was a legally binding agreement between the claimant and L as alleged by the claimant and it has not been established that the agreement was not on a commercial basis.

Conclusion

76. The claimant is entitled to housing benefit and I make the order set out in paragraph 1 above.

(signed on the original) **Michael Mark**
Deputy Commissioner
17 July 2006