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CH/423/2006

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. These are appeals, brought with the leave of the chairman, against three decisions of the Sheffield Appeal Tribunal made on 2 November 2005. For the reasons set out below I dismiss the appeals.

Introduction

2. The three appellants are young men each of whom has learning difficulties. They share a four bedroomed house ("the Property"), the fourth bedroom being occupied by a person who provides overnight supervision and support. Each has a tenancy of his bedroom, with a right to use the shared living accommodation and common parts. The landlord is Rivendell Lake Housing Association Limited ("Rivendell"), a housing association which is not registered with the Housing Corporation which provides supported accommodation throughout the country for people with learning difficulties. By "supported accommodation" is meant accommodation in which a measure of care, support or supervision is provided to assist the occupants to cope with the practicalities of day to day living. Rivendell has a 30 year lease of the Property from Supported Living Limited ("SLL").

3. Each of the appellants requires support, in the form of practical guidance and assistance with housing related matters, in order to enable him to live reasonably independently in this manner. At least two of them also require personal care and/or supervision. It is not a term of the appellants' tenancy agreements that they be provided by Rivendell with any of the necessary care, support or supervision. That is provided by Citizenship First ("CF"), whose remuneration for doing so comes from a number of sources, primarily the local authority (Sheffield City Council), the Independent Living Fund and the appellants themselves. There is, however, a written agreement, in the nature of a joint venture agreement, between SLL, Rivendell and CF.

4. The rent payable by each of the appellants under his tenancy agreement is £238.92 per week. However, a rent officer determined that the "local reference rent" was only £45 per week and the Council, applying the version of regulation 11 of the Housing Benefit (General) Regulations, 1987 which has been in force since 2 January 1996, decided that the housing benefit payable to each of the appellants was limited to that amount of £45 per week. When that new regulation 11 was introduced a saving provision was enacted in reg. 10 of the Housing Benefit (General) Amendment Regulations 1995 ("the 1995 Regulations"). It provides that the old form of regulation 11 shall continue to apply in certain cases, one of which is that of a person **"who is liable to make payments in respect of a dwelling occupied by him as his home, which is exempt accommodation."**

5. "Exempt accommodation" is defined in reg. 10(6) of the 1995 Regulations as including accommodation which is

> **"provided by a non-metropolitan county council ..... a housing association, a registered charity or voluntary organisation where that**

body or a person acting on its behalf also provides the claimant with care, support or supervision."

6. It is common ground that Rivendell is a "voluntary organisation" for the purposes of that definition. However, the Council decided that the dwelling occupied by each of the appellants is not "exempt accommodation" because the care, support and supervision which is provided to the appellants by CF is not provided by or on behalf of Rivendell. It was contended before the Tribunal on behalf of the appellants that although support is not provided *by* Rivendell, it is provided *on behalf of* Rivendell. The Tribunal rejected that contention and so dismissed the appeals. The issue on these appeals to me is therefore whether the Tribunal erred in law in holding that support is not provided to the appellants "on [Rivendell's] behalf".

7. If the old form of regulation 11 were held to apply the effect, broadly, is that the Council could not restrict the amount of rent eligible for housing benefit unless there is suitable accommodation available to the appellants and it is reasonable to expect them to move. Unless that were found to be the case the amount payable by way of housing benefit would, as I understand it, be likely to be the full amount of the contractual rent of £238.92 per week. The difference between that and the local reference rent of £45 per week is obviously very substantial – some £10,000 per annum in respect of each of the appellants. The scheme is said to be unworkable if housing benefit is payable only at the lower rate. I am told that there are many other claimants throughout the country in a similar position and to whom this decision may therefore be of importance. For that reason I shall set out the facts in somewhat greater detail than is perhaps strictly necessary.

8. I held an oral hearing of these appeals, at which the appellants (whose representation both before the Tribunal and before me was supplied by Rivendell) were represented by Mr. Simon Ennals, a solicitor practising in Sheffield, the Council by Miss Rachel Perez of counsel, and the Secretary of State by Mr. Huw James of the Office of the Solicitor to the Department for Work and Pensions. Mr. Ennals did not represent the appellants before the Tribunal, as he was suffering from ill-health at the time. They were represented before the Tribunal by Mr. Paul Stagg of counsel.

9. The Tribunal had a substantial amount of documentation before it. It also heard evidence from 3 of the personnel who had been involved in setting up and implementing the scheme on behalf of Rivendell, and from one of the employees of CF. In a detailed and careful Statement of Reasons it made a number of findings of primary fact. It is not contended in these appeals that the Tribunal erred in law in making any of those primary findings. What is contended is that the Tribunal erred in holding that on those primary findings support was not being provided "on [Rivendell's] behalf."

The facts

10. I take these primarily from the Tribunal's findings of fact, but for ease of understanding I add some details which are contained in the documentation and which are for that reason in my view incontrovertible. Page references are to the file relating to Stephen's appeal (CH/423/2006).

11. For some years the three appellants attended and lived (during term time) in a residential college in Grimsby catering for people with learning difficulties. They were due to leave in July 2004.

12. Stephen has Down's syndrome. He is in receipt of the highest rate of the care component and the lower rate of the mobility component of disability living allowance. An assessment by a social worker in February 2003 expressed the view that he "does not take responsibility for his own actions and despite being very able practically, he doesn't organise himself at all, and if left to his own devices would not function. He needs a clear structure and plenty of prompting in order to operate." The social worker recorded that accommodation options being considered at that time were "a supported tenancy via New Era or Mencap with support from Citizenship First."

13. Adam was assessed by a social worker in December 2003 as able to take care of all his own personal care needs. However, it was considered that he would need help to secure suitable accommodation when he returned to Sheffield, and some help dealing with his finances, paying bills etc. He is in receipt of the lower rate of the mobility component and (perhaps somewhat surprisingly in view of the social worker's assessment) the middle rate of the care component of disability living allowance.

14. Daniel has cerebral palsy, severe learning disabilities and epilepsy. His assessment by a social worker indicated that he required "support for personal care on a 1:1 basis", and that he "has difficulty comprehending information. He needs constant prompts in order to carry out personal living tasks." He is in receipt of the highest rate of the care component and the higher rate of the mobility component of disability living allowance.

15. Rivendell was established in May 2003.

16. In April 2004 a form was signed on behalf of each of the appellants applying to join the Council's housing register. By way of example, the form in respect of Stephen stated at the end: "He cannot move back to the family home as his father cannot provide the care he needs. Stephen also wants to live more independently and wants to live with 2 friends (Adam and Daniel) in Heeley (or area close by) due to work and family connections. It needs to be a 4–bed property as the 3 men will receive a care package to help them live in the house. This will be funded by social services and needs to include a bedroom for sleep-in staff."

17. The Tribunal found that "[the Council] had first nominated [CF][as the care provider] although there had been a previous working relationship with Rivendell." The Tribunal further found that the Council's social services department carried out the necessary assessments of what support and care was necessary in principle and that "CF would provide the detail of what actual care would be provided and when."

18. The Tribunal further found:

> "In June 2004 [the Council's] Social Services Department contacted Rivendell with a view to Rivendell providing accommodation for them. Mr. Leatherbarrow of Rivendell met Ms Rebecca Farrer the relevant care manager and various properties in Sheffield were inspected. She made known the requirements for the

suitable housing of the 3 claimants and provided the Social Services assessments for each of them. There were meetings with the claimants and their parents and eventually a property, suitable for the accommodation of the 3 together, was found ..."

(I would observe in passing, however, that the Tribunal's finding that it was the Council who first contacted Rivendell conflicts with an e-mail dated 10 March 2005 from Mr. Beedle of Rivendell (p.68), which stated:

> "The tenancies arose from Social Services defining the need for these 3 tenants to live in supported accommodation. CF were selected as the support provider. CF looked for a housing provider who could meet the defined housing needs assessment. We first came into contact from an inquiry from CF. We met with the tenants and the key partnership stakeholders, surveyed the market, and with agreement of all parties we leased the property.")

19. The Tribunal accepted the evidence of Mr. Leatherbarrow of Rivendell that he had worked with CF before the events material in this case and had satisfied himself then that they "met suitable standards of provision of care. ..... It is accepted that if he had not been happy with this care provider he would have reported his dissatisfaction to the Social Services Department of the Council. There are other care providers in the market." The Tribunal further found that "CF had considerable input into the decided plans and it is accepted that Rivendell also gave an intensive assessment of the life needs of the tenants."

20. On 24 August 2004 a number of transactions and events took place:

(1) SLL purchased the freehold of the Property for £215,000.

(2) SLL granted a lease of the Property to Rivendell for a term expiring on 9 October 2033. Rivendell charged that lease back to SLL.

(3) SLL, Rivendell and CF entered into a tripartite agreement ("the Agreement"), which recited that the intention of the parties in making it was "to provide accommodation in a supportive environment for persons with learning disabilities ("the Scheme")". (It is a slightly unsatisfactory feature of this case that the version of the Agreement which was in evidence before the Tribunal was not the one which was signed on 24 August 2004, but (see p.104) a revised version signed on or about 23 December 2004 (i.e. after the date of the decision under appeal to the Tribunal). However, the Tribunal appears not to have noticed this, and no point in relation to it was taken before me. I therefore propose to proceed on the footing, as the Tribunal in effect did, that the version signed on 24 August was not significantly different from the version which was in evidence). The Agreement was drafted so as to be capable of operating in relation to a number of properties, and contained provision for additional properties to be added so as to fall within its provisions, and for properties to be withdrawn from the scope of the provisions. It defines the "Purchasing Authority" as "the relevant Social Services Department or Health Authority." The Agreement contains the following material provisions:

(a) It is to last for a period of 10 years, with the possibility of extension.

(b) In the event of a material breach of the Agreement which either is incapable of remedy, or is not remedied within 2 months of service of a notice by the aggrieved party calling for it to be remedied, the aggrieved party can terminate the Agreement. (Clause 6).

(c) CF is entitled to give notice requiring a property to be withdrawn from the Scheme. In that event SLL must notify CF whether it wishes to sell its interest in that property. If it does, and if the net proceeds of that sale are less than the purchase price plus the cost of fitting out works etc., CF must pay the amount of that shortfall to SLL. CF is entitled to credit against any such liability for any surplus made on sales of other properties which have been withdrawn from the Scheme at its request.

(d) Clause 5.1 provides that "[Rivendell] will be responsible for the following:". The matters then set out are, as the Tribunal observed, essentially matters of a housing management nature, such as the assessing and collection of rent and service charges. However, I note that clause 5.1.5 lists among these matters the responsibility for "providing advice and assistance to [CF] and tenants in relation to welfare benefits." Further, in the definition clause the term "Service Split Contract" is defined as meaning "the agreement or other arrangements between [Rivendell] and [CF] in relation to the organisation and provision of certain ancillary property or support services for the benefit of the tenants and/or the Properties." No copy of any such agreement was in evidence before the Tribunal (or was put before me).

(e) Clause 5.2 provides that "[CF] will be responsible for: .....

5.2.1 providing all necessary care, support and supervision (in accordance with best professional practice) for all tenants of the Property, on behalf of the Association;

5.2.2 ensuring that vacancies at the Property will be allocated and filled according to the tenant selection criteria set out in Schedule 3 hereto;

[5.2.3 to 5.2.7 contain further obligations in relation to the selection and welfare of the tenants of properties];

5.2.8 employing and providing suitably qualified and sufficient staff to ensure that any support agreed with the formal assessment approved by the Purchasing Authority can be given to tenants;

5.2.9 consulting with [Rivendell] or its duly appointed Agent when undertaking the tasks set out in clauses 5.3.3 to 5.3.8 [clearly intended to be a reference to 5.2.3. to 5.2.8] ....."

(f) Clause 14.1 provides that CF is responsible for selecting suitable potential tenants, and by Schedule 3 "CF, in conjunction with the relevant Local Authority, will propose potential tenants, who are vulnerable people, for consideration by [Rivendell] The persons proposed should have the necessary social and personal skills to manage their accommodation, with the available support. .....[Rivendell] will have the right to reject any nominee put forward by [CF], if that person is not considered to be a suitable tenant for the Scheme."

(g) By Clause 11.1(b) CF is required to compensate Rivendell for any rental voids in excess of 12 months in duration.

(h) By Clause 15 Rivendell agrees not to terminate a tenancy agreement other than for a serious breach and then only after consulting CF and taking into account its views.

(4) A "service plan" was drawn up by the Council's social services department in relation to each of the 3 appellants, showing how many hours' care and support he required. (The copies in evidence are of revised plans drawn up on 13 June 2005, but it is apparent from p.100 that those were to replace plans originally drawn up on 24 August 2004). A document was also prepared showing the combined effect of those three plans in relation to the support and care which needed to be provided at the Property.

(5) Each of the appellants applied for housing benefit.

21. On 2 September 2004 each of the appellants entered into an assured tenancy agreement with Rivendell, by which he was granted a weekly tenancy of his room, commencing on 6 September 2004. The tenancy agreement contained obligations on the part of the landlord usual in such an agreement. It did not contain any obligation on the part of Rivendell to provide any personal care, supervision or support to the tenant.

22. Those tenancy agreements were subsequently replaced with versions signed on 18 April 2005. These contained an addition on the first page as follows: "**Specific condition of the tenancy:** It is a specific condition of the tenancies being let, that care and support are being provided to the tenant by an approved domiciliary care provider, and that [Rivendell] as the landlord are responsible for procuring this care in accordance with the Local Authority." The Tribunal concluded, rightly, that it should ignore the replacement versions as they were executed after the decisions under appeal to the Tribunal.

23. The Tribunal found, (and the contrary was not contended on behalf of the appellants before the Tribunal) that Rivendell has not itself (i.e. through its officers, employees or agents) provided any care, support or supervision to the appellants. The care, support and supervision is provided by CF.

24. The Tribunal found that "CF received payment for their services from a number of sources i.e. from the claimants/tenants themselves (supported in at least 2 cases in

substantial part by the Independent Living Fund) plus money from their families and, essentially, social services."

25. It further found that "supervision, on a daily practical basis", of CF's work, was carried out by the Council's Social Services Department, by means of monthly reviews at CF's offices, which Rivendell did not attend. Notes of those meetings were circulated to the Council, CF, the appellants and their families, but not to Rivendell. However, it found that "Mr. Leatherbarrow [of Rivendell] has been in regular contact with Mr. Sheardown [of CF] to view their work."

26. The Tribunal accepted that "under the tripartite agreement CF could have been dismissed as the care provider for Rivendell. The consequence of that in the judgment of the Tribunal would be that another provider would have to be arranged by [the Council's] Social Services Department". It later found that "if CF's contract for care was to be terminated that could possibly be done by Rivendell under the tripartite agreement and it is also accepted that that could be carried out by Social Services." In this connection the Tribunal further said:

> "The position was posed as to what would happen if there was a disagreement, i.e. Rivendell were not satisfied with CF but Social Services were. The evidence was that Rivendell would instruct Social Services that they had not met the obligations under the agreement and that Rivendell could no longer provide the accommodation. If that happened CF could continue to care for the claimants/tenants but not on behalf of Rivendell. That would be impractical bearing in mind the lease of the property in favour of Rivendell."

The overall effect of the Tribunal's findings in this respect is somewhat unclear. The indented passage immediately above appears to represent merely a summary of the evidence given on behalf of Rivendell, rather than the Tribunal's conclusions on the basis of that (and the other) evidence. In my judgment the position under the Agreement was that if CF failed to provide care, support or supervision in a satisfactory manner, and failed to remedy that breach pursuant to a notice given by Rivendell, Rivendell could determine the Agreement under Clause 6. I think that Rivendell might then in practice be able to prevent CF continuing to provide care etc., because it could probably revoke CF's licence to use the fourth bedroom. The co-operation of Rivendell and the Council (and indeed the appellants) would then in practice be necessary in relation to the engagement of a substitute care provider.

27. On 19 November 2004 the rent officer determined that the local reference rent in respect of the premises let to each of the appellants under their tenancies was £45 per week. On 26 November 2004 the decisions under appeal to the Tribunal were made. These were that the premises comprised in each of the appellants' tenancies were not "exempt accommodation" within the meaning of reg. 10(6) of the 1995 Regulations (set out in paragraph 5 above), and therefore that the housing benefit payable to each appellant was limited to the amount of £45 per week.

The Tribunal's conclusion

28. Having set out its findings of fact, the Tribunal continued as follows:

"On the basis of all these findings, the Tribunal finds that care, support and supervision was provided by CF for and on behalf of Sheffield City Council Social Services Department and not by Rivendell.

Counsel for the tenants/claimants urged the Tribunal to take a broader view of the legislation urging that Rivendell have provided the accommodation and if CF did not provide the care, support and supervision then it was clear that Rivendell would have to do that.

The Tribunal was asked to bear in mind the purpose of the legislation, i.e. the preservation of the old form of Regulation 11 in the case of "exempt accommodation".

The spirit of the legislation, it was suggested, was that special cases such as these should not fall into the limitations imposed by the new Regulation 11 which in this case limited the rent to £45.00 each. There was a clear distinction to be drawn between ordinary tenants and the tenants/claimants in this case.

However the matter was addressed, Social Services would play a most significant part in the funding of the care, support and supervision.

The Tribunal weighed these issues in the balance but preferred the "narrower view" identified by Counsel for the tenants/claimants and on the basis of the facts found above, and bearing in mind the balance of probabilities, the Tribunal dismisses the appeals."

The appellants' contentions in these appeals

29. It is convenient to set out the following parts of Mr. Ennals' skeleton argument:

"3.1 While Rivendell do not provide the bulk of the care and support themselves, they are in the business of providing a supported housing package, in which both the housing and the care are vital. The scheme could not exist and would not work without the provision of the care. Although Rivendell primarily provide the housing element themselves, they see themselves as ultimately responsible for the provision of the care as well, in that if it were to stop for any reason Rivendell would consider themselves responsible for ensuring that an alternative source of provision was found.

3.2 The tribunal accepted that the scheme in question was a partnership between Rivendell, Social Services, and the support provider, CF. It accepted that Rivendell was intimately involved in the setting up of the scheme from the start, and worked closely with Social Services in planning the details of the scheme to meet the needs of the three appellants, and in the selection of CF as the most appropriate specialist care provider. The [Agreement] made clear the partnership arrangement, and specified that CF was to provide support on behalf of Rivendell. The tribunal accepted that under this arrangement CF could have been dismissed as the care provider for Rivendell, resulting in Social Services having to arrange an alternative provider. While it found that Rivendell did not directly supervise the work of CF in its provision of support to the individual tenants, it did accept

that Rivendell had an ongoing oversight of the work of CF by way of regular monthly meetings between the directors of both organisations under the [Agreement].

3.3 The local authority, and to some extent the Tribunal, attached great significance to the fact that Rivendell do not pay CF to provide the support on their behalf, and conclude from this that the provision of care is not on behalf of Rivendell, but on behalf of Social Services. It was argued to the Tribunal, and I now suggest to the Commissioner, that this involves an unnecessarily narrow interpretation of the term "on behalf of". **I suggest that the tribunal should have adopted a wider interpretation, in which accommodation is "exempt accommodation" where a landlord is participating in arrangements for the provision of supported accommodation in a situation where, if the care provider did not provide the care, the landlord would have to ensure it was received from another source. The tribunal should take a purposive approach to the interpretation of the legislation.**

3.4 I suggest that there is no logical distinction between the two following situations:

(1) A social services authority or SP Administering Authority engages organisation A to provide accommodation and care to claimants with special needs. Organisation A sub-contracts the provision of care to Organisation B.

(2) A social services authority or SP Administering Authority makes a joint arrangement with Organisation A for the provision of accommodation and with Organisation B for the provision of care to claimants with identical special needs.

On the Tribunal's interpretation the accommodation is "exempt" in situation (1) but not in situation (2). There is, however, in both situations the same compelling case for exemption from the rent officer regime, since the special needs of the claimants require specialist accommodation. In many supported schemes, that started prior to April 2003 under the THB scheme, under the "narrow" approach above, they were "exempt accommodation" prior to April 2003, but no longer so after April 2003. The only practical difference was that from April 2003 the government funds to pay for the support costs were paid directly to the support provider, instead of being paid via the landlord."

Analysis and conclusions

30. In my judgment Tribunal was right to hold, on the facts found by it, that the care, support and supervision provided by CF to the appellants was not being provided by "a person acting on [Rivendell's] behalf" within the meaning of regulation 10(6) of the 1995 Regulations.

31. The facts of central relevance to that conclusion are in my judgment the following. First, Rivendell was not under any contractual obligation to the appellants to provide them with care, support or supervision, neither was it under any statutory obligation to do so. The absence of any contractual obligation is evident from the terms of the tenancy

agreements (at any rate in their original form – see para. 22 above). It was not suggested before the Tribunal (or before me) that Rivendell had any statutory obligation to do so. The statutory obligations would appear to have been on the Council: counsel for the Council referred me, for example, to the duty on a local authority under s. 2(1) of the Chronically Sick and Disabled Persons Act 1970 to make arrangements, where necessary, for the provision of practical assistance in his home to a person falling within s.29(1) of the National Assistance Act 1948, which includes persons aged 18 and over "who are substantially and permanently handicapped by illness, injury or congenital deformity." Rivendell was not, therefore, under any contractual or other obligation to provide care, support or supervision which it needed to find someone else to perform on its behalf.

32. Secondly, CF did not provide the care, support and supervision pursuant to a contract under which Rivendell engaged CF to do so, and CF received no remuneration from Rivendell for doing so. It is true that the Tribunal did not expressly find that the Council engaged CF to do so, but it did find that it was the Council who had first nominated CF, that the Council could terminate CF's contract to provide care, that CF's remuneration came from a number of sources, including the Council, but not including Rivendell, and that if CF were dismissed as the care provider "another provider would have to be arranged by [the Council]." (In addition, I draw attention to the definition in the Agreement of "the Purchasing Authority" as "the relevant Social Services Department or Health Authority"). Those findings were in my judgment tantamount to a finding that it was the Council, not Rivendell, which engaged CF to provide the care etc. I of course recognise that Clause 5.2.1 of the Agreement provided that CF should be "responsible for" providing all necessary care, support and supervision for the tenants "on behalf of" Rivendell. If CF were to fail to do so that would no doubt constitute a breach by CF of the Agreement (as well as being a breach of the contracts which must have been existed between CF and the Council and between CF and the appellants). But the Agreement was in my judgment in the nature of a joint venture agreement in which each of the three joint venture partners agreed, as principal, to play its defined part: it was not *in substance* an agreement in which Rivendell engaged CF to perform services for it or on its behalf. The words "on behalf of [Rivendell]" at the end of clause 5.2.1 of the Agreement were in my judgment wholly at variance with the reality of the situation, and the Tribunal was right to attribute no significance to them.

33. In summary, therefore, given the absence of any contractual or other obligation on the part of Rivendell to provide the care etc., and given that Rivendell did not engage or instruct CF to provide it, it cannot in my judgment possibly be said that in providing the care, support and supervision CF were "acting on [Rivendell's] behalf", within the meaning of that expression in regulation 10(6) of the 1995 Regulations.

34. The "wide" interpretation of the words "acting on its behalf" which is contended for on behalf of the appellants (see the passage from para. 3.3 of Mr. Ennals' skeleton argument set out in bold in para. 28 above) is that it applies where a landlord "is participating in arrangements for the provision of supported accommodation in a situation where, if the care provider did not provide the care, the landlord would have to seek to ensure that it was received from another source."

35. It is, I think, self-evident that unless the care etc is provided the scheme would not work, because the appellants (or at any rate the two more disabled of them) would not be able to live together in the house. It is not, however, self-evident that if CF ceased to provide the care, *Rivendell* would in practice have to seek to ensure that it was received from another source, and the Tribunal made no finding to that effect. Indeed, it expressly found (see para. 26 above) that another provider would have to be arranged *by the Council*. I am not sure that a finding that Rivendell would have had to seek to ensure that care was received from another source would have been realistic, because the Council appears to have statutory obligations to provide the necessary care etc, and in reality it would therefore appear to be the Council who would seek to find a substitute for CF. It is, however, clearly the case that in practice Rivendell's consent to the identity of the new provider would be necessary.

36. In my judgment the fact that the provision of the care etc. *benefits* Rivendell in the sense that without it the scheme would not be viable does not mean that the care is provided by CF "on [Rivendell's] behalf" within the meaning of regulation 10(6). That is in my judgment so even if it be assumed that if CF ceased to provide it Rivendell would in practice wish to take steps to ensure that it was provided from some other source. Care which is provided by B to C is not provided "on behalf of" A, within the sense of regulation 10(6), merely because the provision of it results in some incidental, or even intended, benefit to A. There must in my judgment be some respect in which B acts *for* A, either because A would otherwise be legally obliged to provide the care or because A has engaged B to provide it for him. In other words, I would agree with the Tribunal in rejecting the "wide" interpretation contended for in the grounds of appeal.

37. Mr. Ennals' argument does not rely solely on the alleged fact that, if CF ceased providing the support, Rivendell would in practice be compelled to seek to ensure that it was provided by someone else. He relies in addition on the facts referred to in para. 3.2 of his skeleton argument. I do not think that all those facts can be derived from the Tribunal's findings of fact. The additional facts, expressly found by the Tribunal or which I would infer from its findings, on which the appellants can rely are:

> (a) That Rivendell at some stage "gave an intensive assessment of the life needs of the tenants."
>
> (b) That Rivendell had previously worked with CF and that its approval of CF as the care provider was in effect necessary because in order for the scheme to work Rivendell had to make the Property available.
>
> (c) That CF and Rivendell were parties to the Agreement in which, in particular, CF agreed to provide all necessary care, support and supervision "on behalf of [Rivendell]."
>
> (d) That Riverdell had been in regular contact with CF to "view their work". I would add that, although the Tribunal made no express finding to this effect, Rivendell must in practice have satisfied itself from time to time that the obligations under the tenancies as to use of the Property were being performed in a reasonably satisfactory manner – e.g. that the Property was being kept in reasonable repair and condition. This would necessarily have involved some

degree of monitoring of certain at least of the elements of the support being provided by CF.

(e) That if CF failed to provide care etc in breach of the Agreement, and failed to remedy that breach after notice, Rivendell could determine the Agreement, and that in practice Rivendell might well then be able to prevent CF continuing to provide care. The co-operation of Rivendell and the Council would be necessary in relation to the engagement of a substitute provider.

38. In my judgment, however, for the reasons set out in paragraphs 31 and 32 above, the additional facts referred to in the previous paragraph can make no difference. They do not, even when taken together with the fact that the scheme will not work unless care is provided by someone, and even on the assumption that Rivendell would in practice have to ensure the engagement of a substitute provider if CF for any reason failed to provide the care, mean that the support which CF provides is being provided "on [Rivendell's] behalf" within the meaning of the definition of "exempt accommodation."

39. A strong indication against Mr. Ennals' argument is in my judgment that, if it were right, it would appear to have the consequence that not only the strictly housing related support, but also the personal care and supervision, is being provided by CF "on [Rivendell's] behalf." The scheme would not work unless the appellants (or at any rate the two more seriously disabled of them) receive not only housing related support but also personal care and supervision. Clause 5.2.1 of the Agreement provides that CF will be responsible for "all necessary care, support and supervision." Yet Mr. Ennals shrank from the suggestion that personal care and supervision (as opposed to housing-related support) were being provided on behalf of Rivendell.

40. It is contended in para. 3.4 of Mr. Ennals' skeleton argument that there is "no logical distinction" between the two situations there set out. However, in relation to the question whether the care is provided by B "on behalf of" A, within the meaning of regulation 10(6), there is in my judgment a crucial distinction between those two situations. In the first A undertakes a contractual obligation to provide the care, and engages B to provide it for him, whereas in the second neither of those factors is present. It is said by Mr. Ennals that in the second situation "there is still the same compelling case for exemption from the rent officer regime, since the special needs of the claimants require specialist accommodation." However, that argument cannot justify giving the words "acting on its behalf" a meaning which they cannot reasonably bear. Further, as Miss Perez in effect submitted, it seems to me that that argument proves too much. If the intention had been that the old form of regulation 11 should apply whenever "the special needs of the tenants require specialist accommodation", "exempt accommodation" could have been defined by reference simply to the nature of the landlord and the needs of the occupants of it. In other words, the requirement that the care etc. be provided by or on behalf of the landlord could have been omitted. However, that is not how the legislation was drafted.

41. Mr. Ennals placed substantial reliance on the history of the way in which strictly housing related support provided to tenants in "supported accommodation" has been financed. Until April 2003 it was financed through housing benefit. As I understand it, from 1997 this was under a transitional scheme (known as "transitional housing

benefit") under which service charges attributable to housing related support provided to tenants of "supported accommodation" (but not other accommodation) continued to be eligible for housing benefit. The type of service charges which so qualified were set out in Schedule 1B to the 1987 Regulations (headed "service charges for claimants in supported accommodation"). They included, for example, charges in respect of time spent in the provision of general counselling or other support which assists the claimant with maintaining the security of the dwelling he occupies as his home, and of counselling which is directed at assisting the claimant with compliance with those terms in his tenancy agreement concerned with matters such as nuisance and rental liability. They did not of course include charges for providing personal care generally.

42. The definition of "supported accommodation" which applied for this purpose was in para. 7 of Schedule 1 to the 1987 Regulations. As amended down to 1 April 2002 that definition had three limbs, the first and second of which were the same as the two limbs of the definition of "exempt accommodation" in regulation 11. (However, possibly significantly, there was a third limb which did not require the accommodation to be provided by a particular type of landlord and did not require the support etc to be provided by or on behalf of the landlord).

43. From April 2003, however, this transitional scheme was discontinued and service charges attributable to housing related support provided to tenants ceased to be eligible for housing benefit. Thus, para. 1(f) of Schedule 1 to the 1987 Regulations now lists the following among ineligible charges: "charges in respect of general counselling or of any other support services whoever provides those services."

44. Mr. Ennals' skeleton argument in this appeal contains the following explanation as to the financing of such support since April 2003

> "From April 2003 the THB [i.e. transitional housing benefit] Scheme was discontinued, and it was replaced by a new system of "Supporting People" (SP) administered by a SP Administering Authority – effectively a partnership between social services, probation and housing authorities. These SP Administering Authorities distribute the SP funds allocated by central government, based on the schemes that previously had been approved for THB, and other funding streams. A key difference since April 2003, and one which goes to the heart of the issue in this appeal, is that in general the SP Administering Authorities, and social services departments for schemes not funded via SP, tend to channel the funds for the support costs directly to the support provider, rather than contracting with the landlord who then sub-contracts with the support provider. This is in great part due to a policy development derived from the White Paper "Valuing People" in 2001, which sought to promote the maximum degree of independence for people with learning disabilities. It was considered desirable to separate the provision of housing from the provision of care, partly so that relations with the provider of one did not necessarily impact on relations with the provider of the other."

45. Miss Perez pointed out that no evidence as to the change in the method of finance of housing related support was relied on before the Tribunal. However, assuming that what Mr. Ennals says is factually correct, in my judgment it does not assist the appellants. It

may well be that the change has made it less likely in practice that accommodation will be "exempt accommodation", but it cannot justify giving the relevant limb of that definition in regulation 10(6) a meaning which it will not in my judgment reasonably bear.

46. I think that some support for my above conclusions as to the meaning of regulation 10(6) is to be derived from *Gaspet v. Ellis* [1985] 1 WLR 1214. The facts of that case were that S Ltd. was a member of an oil and gas exploration syndicate, the agreement relating to which provided that the exploration work was to be carried out by one member of the syndicate (the operator) on behalf of the other members. The costs, expenses, rewards and benefits accruing from the exploration operations were to be shared by the syndicate members in proportion to their participating interests. The taxpayer company was a member of the same group as S Ltd and entered into an "illustrative agreement" with S Ltd. whereby it was to bear the share of the costs of the expenditure incurred by the operator for which S Ltd was responsible in return for taking the benefit of all S Ltd's share of any petroleum won from the exploration. The issue in the case was whether the taxpayer company was entitled to capital allowances in respect of the part of the expenses which it paid pursuant to the illustrative agreement which represented research costs. Under s.91(1) of the Capital Allowances Act 1968 capital allowances were available

> "where a person – (a) while carrying on a trade, incurs expenditure of a capital nature on scientific research related to that trade and directly undertaken by him or on his behalf."

47. Counsel for the taxpayer company contended that the words "on his behalf" meant in their statutory context "in the interests of" or "for the benefit of" the claimant. On behalf of the Revenue it was contended that the phrase "by him or on his behalf" meant "by the claimant or the claimant's agent or representative"; in other words, the Revenue contended that there had to be a legal relationship between the claimant and the person by whom the scientific research was directly undertaken.

48. Peter Gibson J. held that the research undertaken by the operator was not carried out "on behalf of" the taxpayer, but on behalf of the other members of the syndicate, including S Ltd. He said that there was no finding (by the special commissioners) of agency, nor could there be, because the illustrative agreement made it clear that S Ltd's functions in relation to the exploration licence were preserved and its obligations to the other members of the syndicate were preserved. He said:

> "The phrase "by him or on his behalf" is to my mind one very familiar in ordinary language. One is required to see by whom the relevant act is done. It is accepted on both sides that one reads in "by another person" in front of "on his behalf". I would venture to say that its ordinary and natural connotation is that the act must be done by the claimant or his agent. [Counsel for the taxpayer] drew attention to the definition in the *Shorter Oxford English dictionary* of the wording "behalf" and to the fact that one of the meanings given for the phrase "on behalf of" is "in the interest of" to which the editors have added in parenthesis "(with the notion of interposition)". That to my mind connotes representation rather than indicating a meaning equal to "for the benefit of". ..... the point is a short one and

it seems to me ..... that the statutory language requires more than a consideration of where the benefit goes. 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. .....I am clear that the person by whom the work is undertaken must be responsible to the claimant and in its ordinary significance the relationship is one of agency."

49. Miss Perez produced to me the definition of "on behalf of" in the current edition (the fifth edition, published in 2002) of the *Shorter Oxford English Dictionary*, which is as follows:

> "a As the agent or representative of (another); in the name of.
>
> b On the part of, proceeding from.
>
> c In the interest or for the benefit of (another person, a cause, etc); for the sake of"

50. It might be argued that the wide meaning for which the appellants contend in this appeal is equivalent to the third meaning given in the Shorter OED (which, perhaps interestingly, no longer contains the qualification "with the notion of interposition" which was present in the edition which was cited to Peter Gibson J., and on which words he placed some reliance as connoting representation). It would further appear that the words "for the benefit of" may have been added to the third meaning since the edition which was cited to Peter Gibson J.

51. However, I remind myself that the phrase in reg. 10(6) which falls to be applied is "where *that body [i.e. the landlord] or a person acting on its behalf* also provides the claimant with care, support or supervision". In my judgment that clearly connotes that the care must be provided either *by* the landlord or a person acting in some sense *for* him i.e. with the notion of some form of interposition referred to in the previous edition of the *Shorter OED.* It is in my judgment clearly not sufficient that the provision of the care benefits the landlord, even if that benefit is intended.

52. In the present case there is of course a contractual link between CF and Rivendell, in that they are parties to the Agreement. However, the relationship was certainly not that of agency or, in my judgment, anything akin to it. It may well be that, in the context of the definition of "exempt accommodation" in reg. 10(6), it is not necessary that the care provider should be acting strictly as agent for the landlord, in the sense that the actions of the care provider can be regarded as the actions of the landlord. But, for the reasons which I have given, it is in my judgment at least necessary that the landlord should have engaged the care provider to provide the care for him. As I have said above, that was not the nature of the relationship between Rivendell and CF under the tripartite agreement. They were in the nature of joint venture partners, with CF having been engaged and being remunerated by others, and with Rivendell having no contractual or other obligation to provide care which it needed to engage CF to carry out on its behalf.

(signed on the original) **Charles Turnbull**
Commissioner
19 June 2006