

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The appeal is allowed. I set aside the decision of the tribunal and substitute my own decision that the claimant is not barred from entitlement to housing benefit in respect of the letting under consideration on this appeal by reason of the provisions of regulation 7(1)(a) of the Housing Benefit (General) Regulations 1987 and I remit to the local authority the question of her entitlement to housing benefit, which is to be determined on that basis.
2. The appeal is brought with the leave of a chairman from the decision of the Bolton Appeal Tribunal given on 21 January 2004 dismissing the appeal of the claimant from a decision of the Bolton MBC that the claimant was not entitled to housing benefit from 1 December 2001 because, if there were eligible charges for housing benefit purposes the arrangement the claimant had made with the friend who provided her with accommodation could not be construed as a tenancy created on a commercial basis (see the decision notice at p.32 of the file).
3. The housing authority and the tribunal reached their respective decisions on the basis of regulation 7(1)(a) of the Housing Benefit (General) Regulations 1987, which provides that "A person who is liable to make payments in respect of a dwelling shall be treated as if he were not so liable where - (a) the tenancy or other agreement pursuant to which he occupies the dwelling is not on a commercial basis".
4. The facts are, for the most part not in dispute. The claimant had lived alone in a flat for about four years. In the latter part of 2001 she had, as the tribunal found, a nervous breakdown. She asked an old friend, if she could live with her. The friend consulted her partner, who was joint owner of their home and he agreed that she could move in temporarily until she was back on her feet in return for a rent which was fixed at £40 per week for a furnished room and bathroom plus the use of the rest of the house except for the bedroom and bathroom of her friend and her partner. Apart from the two bedrooms and bathrooms, there were two living rooms and one kitchen in the house (p.10).
5. Apparently a rent officer had been asked to fix the rent (see the foot of p.10 of the file). At any rate, there has been no suggestion that the rent was other than a proper rent for the facilities provided. There was a special term that the claimant should not use the central heating during the day, and she was provided with a calor gas heater to use instead. Cleaning and lighting were included in the rent but not counselling, care or other support (p.10).
6. The friend and her partner had not previously let out the room and did not intend to do so again after the claimant left, when it would be used for visiting family members. The claim for housing benefit was made in early January 2002, a few weeks after the claimant had moved. A proof of rent form was submitted signed by the friend. The tribunal observed in its reasons that "No rent book was produced to the local authority, but a proof of rent form was submitted to the council with the application form." I note that the application form simply states "We need to see a Tenancy agreement or official letter from you [sic] landlord showing the same information that is shown at Part 19. Alternatively

ask your Landlord to complete Part 19.” There was no written agreement, and the friend completed Part 19. As part of its reasons for dismissing the appeal the tribunal made a number of comments about the absence of a rent book to which I shall return. One of them, made twice, was that there was no rent book produced to the local authority. As the local authority never asked to see the rent book, and there was never any issue about the rent, I am unable to see how this can properly be a factor in the tribunal’s decision

7. The tribunal also commented that the rent book had not been mentioned in correspondence with the local authority. However, reading the correspondence, it appears that the terms of the agreement were accepted by the local authority and the only issue was the commerciality of the agreement, reference being made by the council to regulation 7(1). I can see nothing in this correspondence which would lead one to expect that the rent book would be mentioned in it.
8. Evidence was given at the tribunal that there was a rent book, which had subsequently been lost during a house move on the part of the friend and her partner. The tribunal found it improbable that such a valuable document, which had not been produced before, would be mislaid. The tribunal commented that a rent book showing the accumulation of the arrears of rent would have considerably assisted them in their appeal against the local authority’s decision and indeed in proceedings against the claimant for the recovery of the arrears, and observed that no such proceedings had as yet been instituted.
9. It may be that the production of the rent book might have assisted the appeal, although it does not seem to have been put to the friend, who gave evidence, that she should have appreciated that fact. Further, I am myself unclear why its production should have assisted to any significant degree. This is a case where the local authority has relied on regulation 7(1). It has thus put in issue only the commercial nature of the agreement. It has not questioned that there was a genuine agreement as alleged.
10. In CH/627/2002, now reported as R(H) 1/03, this provision was considered by Mr. Commissioner Jacobs, who said:

“15. There is limited scope for analysis of the words ‘on a commercial basis’. The authorities have milked most of what can be said, although history may prove me wrong in believing that there is little more that can usefully be added. The following principles emerge. They cover the policy, interpretation and application of the provision.

16. As to the general policy of the provision scheme.

16.1. The purpose of the provision is to prevent abuse of the housing benefit. It excludes from entitlement a category of cases which by their very nature are capable of being an abuse of the housing benefit scheme.

16.2. It must be construed and applied consistently with that purpose. But decision-makers must take great care not to exclude claimants whose arrangements are both genuine and necessary.

16.3. The provision excludes the truly personal arrangement that is presented as a legal agreement or liability.

- 16.4. The burden is not on the claimant to show that the arrangement was on a commercial basis.
17. As to the interpretation of the provision:
 - 17.1. 'Commercial' is an ordinary English word that does not need to be defined.
 - 17.2. Whether an arrangement is not on a commercial basis is a question of fact.
 - 17.3. It is necessary to consider not only the amount payable for the dwelling, but all the terms of the arrangement.
18. As to the application of the provision:
 - 18.1. Bad faith is not a necessary ingredient.
 - 18.2. The whole nature of the arrangement must be considered. That includes all the terms and the whole relationship between the parties so far as it concerns the occupation of the dwelling.
 - 18.3. The amount payable is not the only consideration.
 - 18.4. An arrangement may still not be on a commercial basis despite the presence of a financial element that is more than minimal.
 - 18.5. A long-term stable relationship between the parties does not necessarily show there was not a commercial basis. Nor does friendship.
 - 18.6. The test that must be applied is one of dominant purpose of the arrangement. The issue is: is the tribunal satisfied on the balance of probabilities that the principal basis on which the arrangement was made was not a commercial one?
 - 18.7. In appropriate circumstances, it is necessary to consider: (a) the owner's need for rent; (b) the claimant's need for accommodation; and (c) the history of previous arrangements between the parties."
10. Mr. Commissioner Jacobs went on to make it clear that while tribunals ought to consider the facts of cases in order to gain a feel for the sorts of arrangements that are and are not 'on a commercial basis', they should not reason by analogy from the facts of reported cases. It was for the facts of each case to be considered as a whole. The proper approach for an appeal tribunal is, he stated, "(a) to investigate and determine the facts material to the issue; and then (b) determine whether as a matter of the proper use of language the arrangement was not on a commercial basis; applying in doing so (c) the principles established by the authorities."
11. As the tribunal's decision on the question is one of fact, it cannot be set aside just because the commissioner might have come to a different view. It is only if the tribunal made an error of law in coming to its decision that the decision can be set aside on appeal. There will, of course, as Mr. Commissioner Jacobs pointed out, be an error of law if the tribunal misdirected itself in law, failed to investigate sufficiently or did not make adequate

findings of constituent fact, or if it came to a conclusion to which no tribunal properly instructed could properly have come to.

12. In CH/716/2002, paragraph 11, Mr. Commissioner Jacobs stated that the obvious policy underlying regulation 7(1) was “to identify cases in which there is a risk of abuse of the housing benefit scheme.” He went on

“The categories may be drawn in a way that can produce rough justice. No doubt, that was based on a policy decision to err on the side of protection for the scheme rather than fairness in an individual case. However, given that the categories can produce rough justice, it is appropriate to give them the narrowest interpretation that is consistent with the policy of protecting the scheme.”

13. In CH/296/2004, Mr. Commissioner Jacobs considered an arrangement by which a father, who was in need of money, and owned a property which included a self-contained flat, let the flat to his autistic son, who needed sheltered accommodation and care. He made the following observations about this letting:

“18. ... I would have expected a local authority to accept the arrangement as on a commercial basis if the landlord were someone other than the claimant’s father. The only feature of the case that might cause concern is the amount of support that is given to the claimant. But there is nothing necessarily incompatible between a commercial arrangement and a caring or support arrangement between the landlord and the tenant. That is shown by paragraph 1 of Schedule 1 to the Housing Benefit (General) Regulations 1987. This contains a list of ineligible service charges. Paragraph 1(f) lists

‘charges in respect of general counselling or of any other support services regardless whoever provides those services’.

If the charge is ineligible, no housing benefit is payable in respect of it. But the claimant is not otherwise automatically barred from entitlement to housing benefit. That shows that the provision of support in any form is potentially compatible with an arrangement for occupation being on a commercial basis. The point is made even clearer by the exception to paragraph 1(f) which provides that service charges are eligible if they are for services provided to a tenant in supported accommodation by the landlord personally or someone on the landlord’s behalf.

19. On that basis, what is the significance of the fact that the landlord is the tenant’s father?

20. The first difference is that there is a personal, family relationship between the landlord and tenant. But there is nothing necessarily incompatible in a commercial arrangement being made between parent and adult child. Mr Mitton referred me to the decision of the Tribunal of Commissioners in *R(IS) 11/98* at paragraph 8, where the Tribunal quoted with approval from *CIS/195/1991* in which the Commissioner had commented on the likelihood of an arrangement between close family members being on a commercial basis. The claimant’s father pointed to the wider context of the passage. There is, though, a more fundamental answer to Mr Mitton’s point. The Commissioner was only commenting on likelihood. That is a factor that is relevant to evaluating the evidence. But it has no precedent value. It leaves open the possibility that in any particular case the unlikely may have occurred. The Commissioner’s comment implicitly recognises that possibility. See also *R(H) 1/03*, paragraph 18(5).

21. A family relationship may be indicative that an arrangement is not on a commercial basis. It is a factor to be taken into account. But it is not decisive. In this case, there is evidence that the claimant's father needed additional income and that the best method of helping the claimant is to allow him to function as independently as possible with appropriate support. Those two factors point towards a commercial arrangement rather than one that is not.
22. The claimant's father told me that he needed to maximise his income. That suggests that he would seek to let the accommodation to someone else if his son was not there. On that evidence, the claimant is not a unique tenant for the accommodation. But it would not make any difference if the claimant were the only person to whom his father would let the accommodation. An arrangement may be commercial even if the landlord would not let to anyone other than the tenant. Assume that I am sent abroad by my employer. I do not want my home damaged while I am away. But I know and trust a friend who is looking for temporary accommodation. I let the house to my friend. That arrangement could be commercial, even though I would not let my home to anyone else.
23. The second difference is that the nature of the care and support provided to the claimant by his father will naturally by reason of their relationship be of a different quality from that which a stranger could provide. But, as I have explained, that is not incompatible with a commercial relationship. The service charge provisions recognise that.
24. The third difference is that the motivation will be different. The claimant's father told me that he was motivated by financial considerations to arrange his accommodation as he did. I have no reason to doubt that. But I am sure that he also was concerned to ensure that his son was properly housed and supported. Even if that was his sole motivation and purpose, it would not necessarily prevent the arrangement being on a commercial basis. Quite the opposite, the evidence shows that supported independent living is the preferred way of enabling someone with the claimant's disabilities to live as full a life as possible.
25. The fourth difference is that the dynamics of the relationship between landlord and tenant are different as a result of their personal relationship. This is most likely to be reflected in decisions about the amount and payment of rent, and about the enforcement of obligations and eviction. More leeway is naturally to be expected than would be tolerated by a landlord whose sole concern was profit.
26. The tribunal expressly made no finding on eviction. I can understand why. I was impressed by the evidence from the claimant's father when I asked him if he would evict his son. The difficulty of the choice was immediately apparent from his demeanour and what he had to say. Clearly, he does not want to evict his son. I can understand that he does not want to consider this possibility or acknowledge it, even to himself. I can understand that he would want to postpone thinking about it until the appeal process is complete. In the end, I suspect that the question of eviction is an artificial one. The claimant has income from benefits and from wages. He can afford to pay, and is paying, something towards rent and that amount is significant. His father may decide that reducing the contractual rent to the amount his son can afford is preferable to evicting his son. That would be bowing to reality. It would not mean that the arrangement was not commercial. Rackman is not the only model of a commercial landlord. There are many landlords who are prepared to accept the rent that can be obtained rather than insist on the full contractual rent and others who are prepared to be patient while the claim and appeal process is in process.
27. Left to my own devices, I would have decided that the arrangement between the claimant and his father was on a commercial basis. However, I have to remind myself that that is not enough to show that the tribunal, which came to the opposite conclusion, went wrong in law. I

have re-read the tribunal's decision with that in mind. It emphasised the intimate and personal aspects of the arrangement. I have come to the conclusion that in doing so, the tribunal overemphasised the care and support aspects of the arrangement. It did not refer to, and as far as I can see was not referred to, the service charge provisions which show that that aspect of an arrangement is not necessarily incompatible with it being on a commercial basis."

14. The facts in the present case are not in dispute. Most are set out in the findings of fact by the tribunal, except that the tribunal has misstated the relevant dates, which were between December 2001 and October 2002, and not between December 2002 and October 2003. In addition, I note that it is not suggested that the rent charged was not a commercial rent, and indeed it is stated by the claimant in her application for benefit at p.10 of the file that she had asked the rent officer for a rent figure before moving in. The claimant had also claimed housing benefit in respect of her previous address from another housing authority, and appears to have received it until she moved out on 1 December 2001 (file, pp.2, 16).
15. It is clear from the decisions I have cited that there is nothing necessarily incompatible with an arrangement being on a commercial basis that it is made between friends. Indeed flat or house sharing arrangements are frequently made between friends, when the owner of the flat or house wants either company or financial help towards the costs of the property. Further, it does not prevent the arrangement from being commercial that the landlord would not let to anybody but the tenant, or that the nature of the care and support provided to the claimant by the friend will be of a different quality to that which a stranger would provide. Indeed, as Mr. Commissioner Jacobs points out, the service charge provisions recognise that the provision of support in any form is potentially compatible with an arrangement for occupation being on a commercial basis.
16. As I have indicated, the finding of the tribunal that the arrangement in the present case was not on a commercial basis is a finding of fact. I can only set it aside if error of law can be shown. However, there do appear to me to be errors of law in the reasoning of the tribunal as follows:
 - (1) The tribunal found that it was unusual in a formal arrangement when a room is let on a commercial basis for no part of the house to be preserved for the sole use of the owners apart from their own bathroom and bedroom. There was no evidence as to this and I do not consider it is something of which the tribunal can take judicial notice. Indeed I very much doubt it to be the case, especially in a relatively small house where it is only the kitchen and two living rooms which are shared.
 - (2) The tribunal's grounds for finding improbable the explanation given by the friend for the non-production of the rent book are unsatisfactory for the reasons given in paragraphs 6 to 8 above. The tribunal also comments that the claimant produced no evidence of the making of payments. I can find nothing in the record of the proceedings to indicate that she was asked for such evidence, nor, if she was asked, is there any record of her response, or any explanation what further evidence the tribunal was looking for in the absence of a rent book. The claimant's own evidence, and that of her friend, that payments were made, if they were made, would be sufficient evidence. In the absence of a rent book, the only other evidence there might be would be in bank statements or cheque stubs if rent was paid by cheque. There is no indication of any question being addressed to this issue. In any event, given the

financial straits in which the tribunal found the claimant to be, and the failure of the local authority to pay housing benefit, it would be no surprise if no payments were made.

- (3) As in CH/296/2004, in my judgment the tribunal overemphasised the care and support aspects of the relationship, and did not refer to, and was not itself referred to, the service charge provisions in paragraph 1 of schedule 1 to the Housing Benefit (General) Regulations 1987 set out in the passage quoted from CH/296/2004.
 - (4) The tribunal concludes that "This was clearly not a commercial or business arrangement". That is not the test.
 - (5) The tribunal has made no reference to the fact that the rent appears to have been at a commercial rate, given that this point was not put in issue and there is reference to an application having been made to have the rent being fixed by the rent officer.
17. In all the circumstances, I have concluded that the tribunal erred in law in its reasons for its decision. I therefore set the decision aside.
 18. I consider that I have sufficient facts before me to enable me to substitute my own decision. The claimant was leaving other rented accommodation in respect of which she was receiving housing benefit from another local authority. She was leaving that other accommodation because it was unsuitable because of the problems she was having with neighbours, because of the health problems she was suffering as a result and because of financial problems coping on her own. She therefore needed other accommodation, and whatever accommodation she found, it would seem that she would be entitled to have her rent met out of housing benefit. There was therefore nothing artificial about the arrangement she made with her friend and her partner in the sense that it was a device to enable her to received housing benefit.
 19. Further, there was a genuine agreement by which the claimant paid a commercial rate of rent and her rights were defined and limited. There was another use for the room she occupied and the friend, and more particularly the friend's partner, who did not know the claimant well, were obviously concerned about the loss of that use. While they were sympathetic to the claimant, they wanted a commercial return for the room. I see no reason to disbelieve them that without that return, they, and in particular the friend's partner, would ultimately want the room back. That is not inconsistent with their being willing to wait until the question of housing benefit was sorted.
 20. While I have no doubt that the friend and her partner would not have contemplated letting the room to anybody else, and only considered letting it to the claimant to assist her in difficult times, in my judgment the letting was on a commercial basis even though the motivation for it was largely non-commercial. Just as a letting at a commercial rent to a stranger does not become non-commercial just because the landlord's real motivation is that s/he wants company at home, so too a letting here to a friend where the rent is commercial and the terms are clearly defined is a letting on a commercial basis, absent any ulterior motive, even though the purpose is to help the friend in difficult times.

21. The appeal is allowed and I give the decision set out in paragraph 1 above.

**(Signed) Michael Mark
Deputy Commissioner**

8 June 2004