Bulletin 184 [S Hunt]

PLH *Commissioner's File: CH 4733/03*

SOCIAL SECURITY ACTS 1992-2000

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Appellant:	*[the claimant]*
Respondents:	(1) Southend-on-Sea BC (2) Secretary of State
Claim for:	Housing Benefit
Appeal Tribunal:	Southend
Tribunal Case Ref:	
Tribunal date:	28 May 2003
Reasons issued:	30 September 2003

1. This appeal by the claimant is dismissed, as in my judgment there was no material error of law in the decision of the Southend appeal tribunal consisting of the chairman Mrs S M Lane sitting alone on 28 May 2003. In that decision the tribunal rejected in its entirety the claimant's combined appeal against the rejection of three claims she had made to the respondent council for housing benefit on 26 August 1999, 4 January 2000 and 7 September 2000 respectively; and its further determination that payments totalling £2,301.40 on account of housing benefit under her first claim had been overpaid and were lawfully recoverable from her. All of the claims related to a semidetached house at 7 Brightwell Avenue, Southend on Sea, occupied at all material times from 22 July 1999 onwards by the claimant, her husband and their three minor children as their home.

2. The substantive issue between the claimant and the Council is, in summary, whether the terms on which she has been so occupying the property (purportedly as tenant of two limited companies closely connected with her, her husband, and/or members of their close family living with them) bring the case within regulation 7(1)(e) **Housing Benefit (General) Regulations** 1987, SI No. 1971 as amended, so that any legal liability she may have for the rent must be disregarded. If so she was disentitled from claiming, and it then it has to follow that the £2,301.40 in fact paid out to one of the companies was an overpayment made without entitlement.

3. This case has a most convoluted and protracted factual and procedural history, and I am indebted in particular to the Council officers who prepared the original

submission to the tribunal and supporting documents at pages 1 to 300, and to the written submission by Mr D Scholefield on behalf of the Secretary of State dated 27 May 2004 at pages 375 to 382, each of which must have involved many hours of work in piecing the story together and analysing the issues involved.

4. It is therefore disappointing to record that despite the express requests of the Commissioners' Office and a direction given by the legal officer on 19 July 2004, no response whatever has been received from or on behalf of the claimant to the submissions made by the Council and the Secretary of State in answer to her appeal. In those circumstances, the time allowed to her by the rules for further submissions on the legal issues involved having long since expired and there being no application by any party for an oral hearing on any issue, I now proceed to determine the appeal.

5. The background to the claims was fairly described by the tribunal chairman as one in which the claimant and her husband were

> **"involved in a complex of companies in which their children and themselves act in various capacities, including clerk, consultant, directors and company secretary",**

with documents showing a web of financial dealings in relation to their properties back to at least 1995. The chairman referred to certain of those transactions and added

> **"I consider from the above dealings that [the claimant] is no stranger to the manipulation of property in the interests of the family."**

Having myself been through the whole of the documentary evidence now contained in the appeal bundle extending to well over 400 pages, I am in no doubt that that conclusion by the chairman was well justified.

6. As already noted the main issue affecting the question of entitlement was whether, in respect of each of the periods for which she was claiming, the claimant was or was not caught by the anti-exploitation provisions of regulation 7(1) of the Housing Benefit Regulations which so far as material were as follows:

> **"Circumstances in which a person is to be treated is not liable to make payments in respect of a dwelling.**
>
> **7. (1) A person who is liable to make payments in respect of a dwelling should be treated as if he were not so liable where –**
>
> > **(e) subject to paragraph (1B), his liability under the agreement is to a company or a trustee of a trust of which –**
> >
> > **(i) he or his partner,**

(ii) he or his partner's close relative who resides with him, or

(iii) his or his partner's former partner

is, in the case of a company, a director or an employee, or, in the case of a trust, a trustee or a beneficiary; ...

(1B) Sub-paragraphs (e) ... of paragraph (1) shall not apply in a case where the person satisfies the appropriate authority that the liability was not intended to be a means of taking advantage of the housing benefit scheme."

7. The material facts according to the documents submitted to the tribunal were that among the properties owned by the claimant and her husband were two houses, No. 135 Elmcroft Avenue, London E11 where they lived, and 7 Brightwell Avenue, which at that time they rented out to tenants. They held 7 Brightwell Avenue as joint beneficial owners subject to a joint mortgage in favour of the Woolwich dated 12 December 1986. Whether they got housing benefit for it as landlords is not recorded.

8. By 1995 the claimant's husband was in financial difficulties and in 1996 he was made bankrupt. During the course of 1995, two transactions had taken place. The first was a purported transfer of 135 Elmcroft Avenue into the sole name of the claimant as trustee for their four children. That was the subject of a contract between them dated 29 June 1995 and a transfer dated 2 October 1995. The second was a transfer of 7 Brightwell Avenue into the name of a connected company, "Pangold Properties Limited" whose registered office was given as "Box No. 2, 135 Elmcroft Avenue". That was the subject of a contract dated 27 April 1995 and a transfer dated 2 November 1995. The claimant and her husband were expressed to sell as beneficial owners of the freehold, but with the sale and transfer remaining subject to the existing legal charge to the Woolwich and all liability thereunder.

9. Following the bankruptcy of the claimant's husband in 1996, the trustee in bankruptcy had proceedings on foot by 1998 to set aside at least the transfer of 135 Elmcroft Avenue, as a transaction at an undervalue or one in fraud of creditors under the Insolvency Acts. On 20 July 1998 a further company "Sunshine Properties Limited" was incorporated having its registered office at 135 Elmcroft Avenue; and on 30 July 1998 two of the claimant's sons, then aged respectively 9 and 19, were appointed directors and a third son, then 14, the company secretary of that company, all their addresses being given as 135 Elmcroft Avenue. On 25 August 1998 the claimant and her husband opened a deposit account with the Woolwich on behalf of Sunshine Estates Limited, on which they were the only authorised signatories, each described as holding the office of "Consultant" with the application incorporating what purported to be a

resolution of the company signed by their youngest son, then a few days past his 10th birthday, as chairman.

10. On 18 June 1999 the trustee in bankruptcy eventually succeeded in obtaining an order setting aside the purported transfer of 135 Elmcroft Avenue, which was thereupon vested in him for the benefit of the creditors. The claimant and her husband had to vacate and give possession of the property within 28 days of the order which was drawn up on 28 June.

11. On 22 July 1999 the claimant, her husband and their younger children left 135 Elmcroft Avenue and moved to 7 Brightwell Avenue. A tenancy agreement bearing that date (though not produced until six months later, in the following January) was entered into, between Sunshine Estates Limited as landlord and the claimant as sole tenant, for a protected shorthold tenancy for six months from 22 July 1999 and thereafter from month to month, at a weekly rent of £120.

12. Seven days after the move, on 29 July 1999, the claimant obtained an application for housing benefit from the respondent Council and submitted it on 26 August 1999 (her **first application**). The claimant entered the details of her three younger children living with her, for whom she was receiving child benefit: they included the two younger sons who were director and company secretary of Sunshine Estates Limited. She entered that company's name, at the Elmcroft Avenue address, as her landlord, though she did not supply proof of the rent she was paying as required by the form. In answer to the question "Are you or your partner related to your landlord?" she answered "No", but added "Not to landlord but to an employee or director of landlord"; which was a truthful disclosure, and may also have indicated at least some knowledge of the housing benefit rules.

13. No final decision on this claim appears to have been given by the Council pending the further information required to verify the claimant's rent and certain other details; but by 19 November 1999 a formal request for the outstanding documents was being issued while at the same time the benefit assumed to be due was assessed and direct payment to the landlord instituted, apparently on a provisional basis as a payment on account under regulation 91 of the Housing Benefit Regulations. It was further determined that the claimant's application could not be backdated for the relatively short period to the actual start of her occupation as she had not shown herself to be within the conditions for this; a point she disputed.

14. At the start of the following year, with benefit payments continuing to be made to Sunshine Estates Limited under the provisional arrangement, the claimant responded to a "review form" she had been sent automatically by the Council to apply for the renewal of her housing benefit for the further period from 7 February 2000, after what the form itself described as her present "award" ran out. This further form, received by the Council on 4 January 2000, was her **second application**. It again gave her landlord as Sunshine Estates Limited of 135 Elmcroft Avenue, and specifically disclosed that she was "related to an employee of landlord". It again gave the details of the three younger children as living with her. This time however she followed the application by producing the tenancy agreement showing her as liable for the rent, which was received by the Council on 20 January 2000.

15. That was five days after she had been sent another letter by the Council on 15 January 2000 referring to her failure to supply the information previously requested on her earlier claim, and saying

> **"Your claim is therefore incomplete and will not be determined. This means you will not get help with your rent or Council tax. If you still wish to apply for benefit, you must provide the evidence and information previously requested. You must provide original documents. ... Your claim will then be considered from the date I receive all the information, and not from the date the original application form was submitted unless you are able to give a good reason for the delay in supplying the information at the first request."**

16. Two days after that she was sent a further intimation that her housing benefit entitlement had been withdrawn from 23 August 1999, that the total benefit paid out from 30 August 1999 to 16 January 2000 amounting to £2,301.40 had accordingly been overpaid and recovery was being considered, though the landlord would be contacted in the first instance. The claimant disputed those decisions too and asked for a review.

17. On 28 March 2000 a further decision was issued to the claimant referring both to the review for the periods from 22 July and 30 August 1999 and the further application received on 4 January 2000. The letter recorded that

> **"Upon further investigation, housing/council tax benefit will not be awarded under regulation 7(1)(e) as I do not consider you are liable to pay rent in respect of 7 Brightwell Avenue as you reside with a close relative who is an employee/director of the company you rent your property from. Your claim for housing/council tax benefit will remain cancelled from the original award date of 30 August 1999 and as a consequence an overpayment of housing benefit has been made ... totalling £2301.40. In light of the new factors now brought into question, if you wish to request a review of my latest decision you should complete and return the enclosed form within six weeks of the date of this letter giving your reasons why you believe my decision to be wrong."**

18. That invitation was taken up by the claimant who in her request for a further review dated 15 April 2000 maintained that the company was a separate corporate body created by Act of Parliament and could not be related to her. She continued:

> **"3. By residing with a close relative who is an employee of the company does not exempt me from paying rent to the said landlord company.**
>
> **4. Your interpretation of regulation 7(1)(e) appears to have been extended unilaterally and your contention that I am not liable to pay rent for my abode under the terms of my tenancy agreement is misconceived."**

It is notable that the claimant does not there dispute that she was in fact residing with a close relative who was an employee of the landlord company: rather, she took issue with the Council's interpretation of regulation 7(1)(e) on how this affected her entitlement.

19. However, within a week of her receiving the Council's decision letter of 28 March 2000, a further company connected with the claimant and her husband had been incorporated, on 5 April 2000 in the name "Touchline Properties Limited" with a registered address at 9 Hermon Hill, London E18 where the registered office of Sunshine Estates Limited had also been moved shortly before. This time no member of the claimant's close family was named as a director or officer of the company. The sole director was named as "Azad Partnership" also of 96 Hermon Hill, and the company secretary as "Montgomery Associates" of the same address.

20. Shortly after this, by what was described as a "Business property sale agreement" dated 18 May 2000, Sunshine Estates Limited as beneficial owner agreed to sell to Touchline Properties Limited its entire interest in 7 Brightwell Avenue for the total purchase price of £1, subject to the tenancy agreement to the claimant (**"including the transfer and assignment in favour of the purchaser of all rent arrears due and owing by [the claimant] to the vendor"**) and also to the existing charges including the original mortgage by the claimant and her husband to the Woolwich which remained unaltered and on foot.

21. On 13 June 2000 Touchline Properties Limited was registered as sole proprietor of 7 Brightwell Avenue with title absolute, subject to those charges, and to a new one also created on 18 May 2000 and registered on 13 June 2000 in favour of "Barons Finance Limited". This was another connected company with its registered office at 96 Hermon Hill, of which the claimant's eldest son was a director and to which her husband was recorded in a certificate signed by that son as providing "clerical services on a part-time basis" continuously from 20 June 2000.

22. On 4 July 2000 the claimant and her husband opened a further deposit account with the Woolwich in the name of Touchline Properties Limited, giving its registered address as 7 Brightwell Avenue and naming themselves as the only two signatories on the company's account. The application form signed by both of them said that they each held the office of "Manager" of the company and incorporated a supporting board resolution with an illegible signature of the unidentified chairman.

23. On 11 August 2000 the Council sent a further letter recording the terms of its internal review decision to confirm the previous refusal of housing benefit in respect of 7 Brightwell Avenue, referring to Housing Benefit Regulation 7(1)(e) and saying

> **"I understand that one of your sons who resides with you is a director of Sunshine Estates and also of Reddy Corporation, the company which has a registered charge in the property and another son, who also resides with you, is the company secretary of Reddy Corporation. I therefore consider, under the terms of the above regulation, that you should be treated as not liable to make payments in respect of 7 Brightwell Avenue, and housing benefit will not be awarded .... If you disagree with the decision, you have the right of a further review ..."**

24. The claimant did exercise her right to require a review by a request form signed on 7 September 2000. On the same day she submitted a further application for housing benefit (the **third application**). This fresh application similarly gave the names of her three younger children as living with her, and differed from the previous ones in that she also gave the name of her husband as living with her and stated her landlord to be Touchline Properties Limited, answering an unqualified No to the question whether she or her partner was related to the landlord. It was followed shortly after by a letter from Touchline Properties Limited to the Council saying **"We write to confirm that we are the owners of 7 Brightwell Avenue"** and that the purchase had included an assignment of all arrears of rent owing on the property. Details of the rent and arrears were then given, showing that the total of £2,301.40 received by way of housing benefit was the *only* money that had ever been received on the property under the claimant's tenancy from 22 July 1999. The letter, which was signed "for Manager" with the same illegible signature as the document the claimant and her husband had submitted to the Woolwich, concluded **"We are due to serve to notice to seek possession of the property in due course as a result of the mounting arrears"**, though there is no evidence to confirm that as a genuine threat, and none to show that any such steps were ever taken, either then or when the alleged arrears became even more substantial as the claimant continued to pay no rent.

25. The following month, on 2 October 2000, the Council issued a further letter giving the first clear indication to the claimant that the overpaid benefit for the period 30 August 1999 to 16 January 2000 was considered to be legally recoverable from her,

giving her a form and a time limit to respond if she disagreed and notifying her of the possibility of a further review after that under the procedure then in force; concluding **"If after 6 weeks I have not heard from you, an account of £2301.40 will be sent to you"**.

26. On 13 February 2001 a further letter was issued formally rejecting the claimant's third claim made on 7 September 2000, on the stated grounds that

> **"It has come to my attention that you have had a mortgage on this property since 12 December 1986 and that you are the authorised signatories on the bank account for Touchline Properties Limited the current registered proprietor and your "landlord". Under these circumstances you do not have a liability to pay rent at this property."**

A further letter was issued on 16 February 2001 advising the claimant of her right to request an internal review of that decision. In the meantime a Review Board had sat on 29 January 2001 and confirmed the rejection of the first and second claims on both substantive and procedural grounds, expressly recording that the separate issue of the overpayment was not the subject of the appeal thus determined by the Board.

27. On 14 March 2001 a further letter was issued confirming the rejection of the third claim on internal review, and on 12 April 2001 the claimant exercised her right to request a further review by the Review Board of that decision. Simultaneously she was applying for judicial review of the Review Board's confirmation of rejection of her first two claims. As regards the question of overpayment it appears no formal reference to a Review Board had been made, but it is implicit in what subsequently took place that the Council had adhered to its decision that she was liable for the overpayment since by a letter dated 1 June 2001 she had referred to correspondence seeking to recover the overpaid benefit from her, and was making what was accepted by the Council (rightly in my view) as a formal request to appeal against the decision making her liable to pay.

28. Following the judicial review proceedings which were unsuccessful, the Council's Review Board nevertheless decided at a further session on 27 June 2001 that it would be just to set aside its own previous decision of 29 January 2001 on the merits of the first two claims, and directed that a rehearing of the substantive case should be undertaken. That session took place only a few days before 2 July 2001, which was the date on which the new tribunal appeal jurisdiction in housing benefit cases under the **Child Support, Pensions and Social Security Act 2000** came into effect.

29. Thus it was that the rehearing of the claimant's appeals against the rejection of her first two claims, plus the appeal she had requested against the rejection of her third claim, plus the appeal she had requested against the determination that the overpayment

under the first claim should be recoverable from her, were all referred by the Council to the appeal tribunal instead of the now defunct Review Board, and all came in due course before the tribunal for effective hearing on 28 May 2003. When the appeal papers were first passed to the tribunal in September 2001 the claimant had completed a return to the tribunal dated 19 September 2001 indicating that she did not want an oral hearing of her appeal, but a hearing on the papers. The further lapse of time before the effective hearing was able to take place was largely attributable to the appeal being struck out during 2002 because the claimant failed to comply in time with a chairman's directions to give particulars of alleged human rights breaches on which she was relying. Eventually after she had belatedly provided a further submission, and made a further application for judicial review, the proceedings were reinstated and listed for hearing; the hearing date of 28 May 2003 being duly notified to her in advance.

30. On 8 May 2003 a request was received from the Southend CAB on behalf of the claimant asking for the hearing to be postponed but that was declined the following day. Nothing further was heard until the morning of the hearing itself, when a letter from the claimant with an annexed bundle of documents was faxed to the the Tribunal Service central office in Nottingham, saying she was not able to attend the hearing for family reasons and she understood that her request for an adjournment had been rejected. Contrary to what the claimant later alleged, that letter did *not* make any further application for an adjournment, but said simply that **"as you have decided to proceed in my absence I request you to take the enclosed documents into consideration"**. An officer of the Tribunal Service telephoned through to Southend but by that time the hearing was already under way, there having been no appearance by or on behalf of the claimant despite some extra time having been allowed after that fixed for the start of the hearing. By that time it was too late for the documents to be transmitted to the tribunal for the hearing itself, but they were forwarded to the chairman and taken into account by her in the full statement of reasons she later issued for the decision.

31. A preliminary question quite rightly addressed in the submissions following the procedural directions of the Legal Officer given on 16 April 2004 was whether all four issues were properly before the tribunal for decision. Neither the claimant herself nor the Council has disputed this, and I agree with the analysis of Mr Scholefield on behalf of the Secretary of State that there can be no doubt that the appeals against the three decisions on entitlement were properly within the tribunal's jurisdiction and duly before it for decision on 28 May 2003; the previous decision of the Review Board having been set aside and the jurisdiction to determine outstanding Review Board appeals

having been transferred to the appeal tribunal under the transitional provisions from 2 July 2001.

32. As the submission also correctly points out, the factual position about the determination making the overpaid benefit recoverable from the claimant is less clear, in particular because the claimant was submitting numerous applications for review and/or appeal without the particular decisions to which they related always being clearly identifiable from the file. Nevertheless it does appear from the sequence of events outlined above that there had been a clear intimation to her by at any rate 2 October 2000 of the Council's determination that the £2,301.40 was recoverable from her; and on the balance of probabilities I find that she did sufficiently indicate her wish to dispute this and avail herself of any rights of review available to her. It further seems probable that the internal review on the overpayment issue did not proceed immediately, given the ongoing dispute about the underlying questions of entitlement: and the Review Board's decision of 5 March 2001 supports the inference that a formal decision from the Council on the overpayment issue was still outstanding. However by 1 June 2001 the claimant was complaining of recovery action being threatened against her, and by her letter of that date she formally indicated her wish to appeal against whatever decision had been taken to make her liable to pay: page 244. I am satisfied that it was quite proper for the Council to accept that letter as a valid notice of appeal against the decision of 2 October 2000, which had been left unrevised by any subsequent internal review; and as that appeal had not of course been determined by any Review Board by the time the jurisdiction transferred to the appeal tribunal at the start of the following month, it was quite properly placed before the appeal tribunal along with the three entitlement issues.

33. The claimant's grounds of appeal in her notice of appeal dated 5 December 2003 at page 343 are first that the tribunal's proceedings and decision were unfair in that her letter and annexed documents received at the tribunal central office in Nottingham on the morning of the hearing were not considered at the hearing itself, and that a previous written submission she had made dated 5 November 2002 by way of response to the requirement to set out her case on alleged human rights breaches **"may not have been fully considered"**. Moreover the tribunal had erred in concluding that she must have been in the country when her faxed letter and documents were forwarded at the time of the hearing, since in fact this had been done on her behalf and she was already abroad.

34. I am not satisfied that there is any ground in law in any of these points for setting the tribunal's decision aside. All the human rights arguments put forward by the

claimant were in fact considered by the tribunal and dealt with, so far as relevant, in paragraph 30 of the chairman's statement of reasons issued on 30 September 2003 at pages 324 to 328. The submissions of 5 November 2002 were before the tribunal (pages 308 to 310) and largely consist of complaints about the conduct of the Council: I am not satisfied there was anything in them material to the issues the tribunal had to decide that it wrongly omitted to take into account or deal with. The contemporaneous record of proceedings and statement of reasons show clearly that the tribunal chairman did properly address whether she ought to go ahead with the hearing when the claimant failed to turn up or be represented, despite the advance warning she had been given and the previous refusal of a postponement. The exercise of procedural discretion involved in that decision to proceed as recorded in paragraph 1 of her statement of reasons is quite unimpeachable on the material before the tribunal. Nor can I see any arguable injustice to the claimant in the procedure adopted over the additional documents, which the chairman did in fact consider and take into account before giving her fully reasoned decision, determining for the reasons she explained that they made no difference to the outcome of the case. I therefore reject all the claimant's arguments that the tribunal's proceedings were unfair so as to require its decision on any material issue to be set aside.

35. On each of the appeals relating to entitlement, those material issues amounted to one simple question of fact on which the tribunal had to be satisfied on the balance of probabilities under regulation 7(1)(e), namely whether the claimant or a close relative living with her at the material time was a director or employee of the company landlord; plus one more difficult issue of fact on which it was for the claimant to satisfy the tribunal under regulation 7(1B), namely that even though the threshold condition about connection with the company landlord was met, nevertheless the purported liability for rent was not intended to be a means of taking advantage of the housing benefit scheme.

36. In relation to the first two appeals where Sunshine Estates Limited was stated to be the landlord, there can be no doubt that the tribunal chairman was correct to answer the first question in the affirmative, in view of the admitted presence on the board of that company of the claimant's 10-year old son who was living with her: the claimant could not and did not argue in this context that his appointment as a director should be treated as ineffective. In relation to the third claim, where the landlord was stated to be Touchline Properties Limited following the switch to it for the nominal consideration of a pound, the tribunal chairman was again in my view justified in finding that the threshold condition was met, in that the claimant and her husband having represented

themselves as "Managers" of this company could properly be inferred on the balance of probabilities to be employees. She said:

> **"27. By the time of this claim, Brightwell Avenue had been transferred to Touchline Limited ... of whom [the claimant and her husband] are listed as managers in a document from the Woolwich ... That document also shows that they are authorised to operate its account. No explanation has been offered for the transfer of the property from Pangold to Sunshine to Touchline.**
>
> **28. I consider that a manager is an employee. The appellant has not provided credible evidence to displace the ordinary assumption that this is the case, arising from the content of the document signed with the Woolwich. The appellant and her husband are caught by regulation 7(1)(e)."**

37. That finding of fact was in my judgment justified and correct even applying a stricter meaning of the term "employee" than that referred to by the chairman earlier in her statement of reasons at paragraph 14, where she had been prepared to hold that even the status of "consultant" was sufficient to constitute the claimant and her husband employees of Sunshine Estates Limited: a conclusion that was not necessary for her decision in view of the undisputed presence of the claimant's 10-year old son as a director of that company in any event. I agree on the basic question of interpretation with the submission on behalf of the Secretary of State that the term "employee" has to be understood in the absence of any more extended definition as a person with some form of contract of service or an office holder, though such a contract may easily be implied in a context such as the close involvement of the claimant and her husband with their family companies. It is for consideration whether the term "director" in regulation 7(1)(e) may need extending to include the concept of a "shadow director" which it does not ordinarily do (cf section 741 **Companies Act 1985**), but for the present I need do no more than confirm the correctness of the tribunal chairman's finding that the claimant and/or her husband were properly to be inferred to be "employees" of Touchline Properties Limited, applying the stricter meaning. If and so far as necessary, I make my own finding of fact to that effect on the documentary material before me.

38. In my judgment, the tribunal chairman was also justified in finding as she did that the claimant had not discharged the burden of establishing under regulation 7(1B) that any liability she had for rent to either of the connected companies was not intended to be a means of taking advantage of the housing benefit scheme. The facts outlined above provide ample grounds for the inference that the creation of the tenancy between the claimant and the connected company Sunshine Estates Limited in July 1999, and the apparent transfer of the entire alleged liability to another connected company Touchstone Properties Limited for the nominal consideration of £1 shortly after it had been made clear that the entitlement was disallowed because of the presence of a

close relative on the face of the first company's records as a director, were done with a view to obtaining the housing benefit from the respondent which the claimant persistently sought from the time she and her family first moved into the property. That housing benefit was, as is all too apparent, the *only* real money at any stage sought or intended to be obtained by either of the companies; as neither took any steps to enforce any liability for rent against the claimant nor did she pay them so much as a penny towards it herself.

39. The tribunal chairman's overall conclusion was that there was here an intention to take advantage of the housing benefit scheme, as she put it "in the sense of abuse". She noted that the appellant, her husband, their young sons, Sunshine Estates, two further corporations in which they were involved that had loaned money, and later Touchline, were all part of a web of companies in which the claimant and her husband through their two young children nominally must on balance play an active role. Given the extensive involvement of the claimant and her husband for whose benefit the companies appeared to operate, the chairman concluded she was not persuaded that there was no element of abuse. She therefore found that the regulation 7(1B) defence had not been established in relation to the purported liability to Sunshine Estates; and further found separately in relation to the purported liability to Touchline Properties that:

> **"29. For the reasons given ... I consider that the appellant has not shown that the liability was not created to take advantage of the housing benefit scheme: [the claimant and her husband] were managers of Touchline, operated its accounts and were the mortgagors in a transaction for which there is no obvious explanation. In these circumstances, I cannot see how there is other than an abuse."**

40. In my judgment, there was evidence before the tribunal chairman from which she could properly draw those conclusions, and it cannot be said to be unreasonable or an error of law for her to have decided that the regulation 7(1B) defence was not made out on the balance of probabilities. For those reasons, her decision to reject each of the three appeals on entitlement was correct and unaffected by any material error of law, since her reasoning and findings of fact on the effect of regulation 7(1)(e) apply equally to all three claims. In addition, as she further found, there had been a failure by the claimant to provide the required information to establish entitlement under the first claim within a reasonable time or at all, so that her decision that the conditions for entitlement under that claim were not met was additionally right for that reason.

41. I would add that for my own part I would have been prepared to confirm the refusal of benefit entitlement under each of the three claims in point on the additional ground that they fell within the express terms of regulation 7(1)(h) excluding purported

rent liabilities on property previously owned by the claimant or his or her partner. The claimant and her husband had previously owned and themselves rented out 7 Brightwell Avenue, and would plainly have been unable to bring themselves within the limited terms of the exempting condition that they "could not have continued to occupy that dwelling without relinquishing ownership". I acknowledge that in case CH 0716/02 another Commissioner was prepared to construe the main part of regulation 7(1)(h) as if limited to cases where the exempting condition could operate, but that interpretation is I think open to question: I have to say I think the more natural one placed on the same wording by the same Commissioner in case CH 3616/03 (after the insertion of an additional condition limiting the operation of the paragraph from 21 May 2001 to a five-year period) is to be preferred under both forms of the paragraph.

42. For those reasons I am not persuaded there was any error in law in the tribunal chairman's decision on any of the three appeals relating to entitlement.

43. That leaves the tribunal's decision on the question of whether the overpayment of £2,301.40 had been rightly determined by the Council to be legally recoverable from the claimant notwithstanding that the payments themselves appear to have been made direct to her connected company. In paragraphs 9 to 11 of her statement of reasons the tribunal chairman correctly pointed out that the payments in question fell within the definition of "overpayment" in regulation 98 of the Housing Benefit Regulations as an amount which had been paid by way of housing benefit (including any amount paid on account under regulation 91) to which there was in fact no entitlement under the regulations. She continued:

> **"10. Under regulation 99, the overpayment is recoverable unless it was caused by an official error to which the claimant did not contribute. I do not see how it could be argued that any official error was involved in creating this overpayment. Moreover, even if one could be constructed, the appellant was manifestly in a position to realise that it was an overpayment. She did not provide the relevant information, and as will be seen from my findings in relation to the other issues under appeal, she has behaved in a way that obscured important matters affecting her entitlement to benefit throughout.**
>
> **11. The appellant considers that the overpayment should be recovered from the landlord. This is a matter of discretion over which the tribunal has jurisdiction. The circumstances of this case are such that it is plain that the discretion to recover from the appellant has been properly exercised ... The appellant and her husband are, on balance, in control of the financial affairs of these companies."**

She accordingly confirmed the authority's decision that the full amount was lawfully recoverable from the claimant herself.

44. That in my judgment was a correct decision in terms of the legislation and the relevant law. So far as any discretionary exercise of judgment by the local authority over the institution of proceedings against the claimant for the overpayment was concerned the chairman correctly directed herself to whether the discretion had been properly exercised (cf. R(**H**) **3/04**), and concluded that it had. There was plainly material before her to justify that conclusion and no ground on which either it or the authority's decision to use such powers as were available to it could be held erroneous in law.

45. The legal officer's direction of 16 April 2004 however quite rightly raised the issue of whether the authority did have power at the relevant time to determine that the overpayment should be recoverable from the claimant when it had been made to the company rather than her. At that time (all determinations in this case must have taken place before 1 October 2001) the provisions affecting this under the legislation were that by section 75 **Social Security Administration Act 1992**:

> **"75. (1) Except where regulations otherwise provide, any amount of housing benefit paid in excess of entitlement may be recovered ... by the authority which paid the benefit. ...**
>
> **(3) An amount recoverable under this section is in all cases recoverable from the person to whom it was paid; but, in such circumstances as may be prescribed, it may also be recovered from such other person as may be prescribed."**

and by regulation 101 of the Housing Benefit regulations:

> **"Person from whom recovery may be sought**
>
> **101. - (1) Subject to paragraph (2)** ***[not material]*** **a recoverable overpayment shall be recoverable from either –**
>
> > **(a) where the overpayment was in consequence of a misrepresentation or failure to disclose a material fact (in either case whether fraudulent or otherwise) by or on behalf of the claimant or any other person to whom a payment of housing benefit may be made, the person who misrepresented or failed to disclose that material fact; or**
> >
> > **(b) in any case, the claimant or the person to whom the overpayment was made."**

46. In my judgment the wording of regulation 101(1)(b) set out above is sufficient to permit recovery to be sought against the claimant concerned without proof that he or she had been involved in a misrepresentation or non-disclosure, and notwithstanding that the benefit was actually paid to someone else. The present case provides an example where it is entirely rational for recoverability from the claimant herself to have been contemplated under section 75(3) and I regret that I do not on reflection agree with the more restrictive interpretation of regulation 101(1)(b) favoured

obiter by two members of the Tribunal of Commissioners in case CH 5216/01, **R(H) 3/04**, paragraph 72: the circumstances prescribed in relation to her under section 75(3) being that she made the claim leading to the overpayment, with the prescription of such a person "in any case" expressly authorised under section 189(4) of the 1992 Act. Further and in any event, it is clear from the documents and other material before the tribunal and before me that although the claimant did truthfully disclose in her first housing benefit application form that she was related to an employee or director of the landlord company, she did not go further and explain the nature of the relationship or, crucially, disclose the highly material fact of the directorship of her 10-year old son who was living with her at all material times. I consider it right to infer that if *that* disclosure had been made to the Council at the outset it would have become apparent that there was no entitlement to benefit by virtue of regulation 7(1)(e), and that the payments would not, in that event have been made: and insofar as necessary I so find. On that basis, even though the non-disclosure was an innocent one, there could be no doubt that recovery was authorised in any event from the claimant herself under regulation 101(1)(a).

47. It follows in my judgment that the tribunal's decision to confirm that the overpaid benefit was legally recoverable from the claimant is similarly not open to be set aside as incorrect in law.

48. The claimant's further grounds of appeal are stated as follows:

> **"3. There is a serious conflict of laws between the Companies Act as it is implemented in a commercial court in contrast with the housing benefit regulations which both the local authority and the tribunal have followed. This has deprived me of a fair trial by an independent and impartial tribunal contrary to the Human Rights Convention.**
>
> **4. The housing benefit regulations as followed by the tribunal may well be incompatible with the Human Rights Convention because it discriminates against a person whose relative is involved with a corporate entity."**

49. In my judgment, there is nothing in either of those two points. There is in reality no "conflict" between the general and undisputed rule that a properly incorporated limited company is in law a separate legal entity from the individuals who incorporate it or control or are connected with it, and the existence of special express provisions such as those in regulation 7(1)(e) which acknowledge that separation of legal personality, but seek to deal with its *consequences* by preventing it from being manipulated so as to undermine the purpose of the housing benefit legislation itself. Those provisions appear to me to have been perfectly properly applied in this case by the tribunal in a fair and impartial manner, fully complying with the requirements of Article 6 of the Convention. There is no ground for suggesting that the provisions of regulation 7(1)(e) themselves

infringe any relevant provision of the Convention, nor do I consider it arguable that their effect in blocking benefit claims in cases of potential avoidance or abuse amounts to "discrimination" contrary to Article 14 against persons who have chosen to make such arrangements but are unable to show an innocent non-abusive reason for having done so.

50. Having considered the entirety of the papers before me I am not satisfied that on these or any other grounds the decision of the tribunal ought to be set aside as erroneous in law, and accordingly this appeal is dismissed on all points.

(Signed)

P L Howell
Commissioner
5 October 2004