



THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case Nos.: CH/2751/2007
CH/2752/2007
CH/2753/2007
CH/2754/2007
CH/2755/2007
CH/2757/2007
CH/2758/2007

SOCIAL SECURITY COMMISSIONERS (PROCEDURE) REGULATIONS 1999

Names:

Tribunal:

Tribunal Hearing Date:

Tribunal Register Nos:

**NOTICE OF DETERMINATION OF APPLICATIONS FOR PERMISSION
TO APPEAL**

1. These are applications for permission to appeal by 7 claimants against decisions of an appeal tribunal sitting at Wolverhampton on 23 February 2007. For the reasons set out below I refuse the applications.
2. Each of the Claimants had (and in one case still has) a tenancy of a dwelling in one of four properties, one in Wolverhampton and three in Walsall. Each claimant had a tenancy of his or her bedroom in the relevant property, together with a right to

use communal living areas and the common parts. The tenancies commenced at various dates in 2004, with rents varying from £198.97 to £256.38 per week.

3. Each of the Claimants suffered from learning difficulties, and required support, care and supervision to enable him or her to live in a reasonably independent manner in the accommodation. The landlord was Rivendell Lake Housing Association Limited ("Rivendell"), a housing association which provides supported accommodation throughout the country for people with learning difficulties. Care, support and supervision was provided to each of the Claimants by Lifeways Community Care Ltd ("Lifeways"), a care provider registered as a provider of domiciliary registered care under the National Care Standards Act 2000.

4. Initially the councils in whose areas the properties are situated (Walsall Metropolitan Borough Council and Wolverhampton City Council) accepted that the full rent was eligible to be met by housing benefit, on the ground that the Claimants' dwellings were "exempt accommodation" within the meaning of what is now para. 4(1) of Schedule 3 to the Housing Benefit and Council Tax Benefit (Consequential Provisions) Regulations 2006. (For a summary of the background to and terms of the relevant legislation, see paragraphs 9 to 11 of my decision in CH/3811/2006). Under that definition, "exempt accommodation" includes 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."

5. However, on 19 June 2006 I decided R(H) 2/07. The landlord in that case was also Rivendell, although different properties and claimants were concerned. The set-up of the supported accommodation scheme in that case was, however, very similar to what appears to have been the position in the present cases. The only submission made to me on behalf of the claimants in R(H) 2/07 was that their accommodation was "exempt accommodation" because, in providing housing related support, the care provider was acting on behalf of Rivendell, and that support, although not provided by Rivendell itself, had therefore been provided by "a person acting on its behalf." I rejected that contention. It was not contended in that case that Rivendell itself provided any care, support or supervision.

6. As a result of my decision in R(H) 2/07, the Councils in the present cases made decisions, in or about June 2006, superseding the existing awards of housing benefit and reducing the level of benefit to the amount of a rent officer's determination of the claim related rent (or local reference rent if lower). The reduced amounts of housing benefit were in each case at least £100 per week lower than the previous awards.

7. In September 2006 each of the Claimants, by their appointee (an employee of Lifeways), appealed against the relevant decision reducing the amount of housing benefit.

8. On 23 January 2007 a written submission, on behalf of the Claimants, was sent to the Tribunals Service in relation to those appeals. It was prepared by Mr.

Simon Ennals of Essential Rights Legal Practice in Sheffield, the solicitor who had represented the claimants before me at the hearing in R(H) 2/07. The submission stated that "the tenants' interests throughout have been represented by [Lifeways]and also supported by [Rivendell]."

9. The submission further stated:

"Following the decision in [R(H) 2/07] it is no longer being argued that care, support and supervision is provided on behalf of the landlord. Although the landlord, as will be clear from the evidence of Mr Leatherbarrow, is intimately involved in all aspects of the supported housing scheme, including the monitoring of the support provider, the commissioner's ruling has prevented this argument being pursued."

10. However, the submission went on to contend that Rivendell did itself directly provide some housing related support to each of the Claimants, and that the appeals should be allowed on that ground. A written statement of Mr. Leatherbarrow (page 77 of the file relating to CH/2751/2007), the sole director of Rivendell, was referred to and relied upon.

11. The hearing before the Tribunal took place on 23 February 2007. The Claimants were represented by Mr. Ennals. Mr. Leatherbarrow gave oral evidence. The Tribunal dismissed the appeals. The Decision Notices, which were sent to the Claimants on that day, included the following:

"The only point in issue is whether or not the landlord provides support to the tenants so as to render the accommodation as exempt for the purposes of old Regulation 11.

Having considered the scheduled evidence and heard evidence and argument I am not satisfied that [Rivendell] provides care support or supervision so that the accommodation may be considered exempt accommodation within the meaning of the regulations."

12. In March 2007 Rivendell brought possession proceedings against each of the Claimants on the basis of arrears of rent. The arrears had of course arisen owing to the reduction in the amount of housing benefit being paid.

13. On 22 May 2007 new solicitors for the Claimants, namely the Community Law Partnership, Birmingham, wrote to the Appeals Service requesting a Statement of Reasons and giving some explanation of why that application was some 2 months out of time. On 30 May 2007 a legally qualified panel member refused to extend the time for requesting a Statement of Reasons. The result of that was that there is no Statement of Reasons in relation to these appeals.

14. By letter dated 27 June 2007 the Community Law Partnership wrote to the Tribunals Service seeking permission to appeal against the Tribunal's decision. That was refused by a legally qualified panel member on 29 June 2007.

15. On 26 July 2007 applications for permission to appeal were sent to the

Commissioners' Office.

16. I directed an oral hearing of the applications, which took place on 6 December 2007. The Claimants were represented by Mr Desmond Rutledge of counsel.

17. I was told by Mr Rutledge that only one of the Claimants is in fact still in possession under her tenancy.

18. The fact that there was no Statement of Reasons meant that the legally qualified panel member was bound to reject the applications for leave to appeal: reg. 58(1) of the Statement of Reasons. However, I have jurisdiction to accept the applications for consideration, notwithstanding the absence of a Statement of Reasons, "for special reasons": see reg. 9(3) of the Social Security Commissioners (Procedure) Regulations 1999 and CS/1952/2001.

19. I accept the explanations which have been given on behalf of the Claimants as to why no Statement of Reasons was sought within the required time. I consider that there are special reasons for accepting the applications.

20. However, the fact that there is no Statement of Reasons means that it is in practice impossible for the Claimants to argue that the Tribunal erred in law in reaching its conclusion, on the only point argued before it, that Rivendell did not itself provide care, support or supervision to the Claimants.

21. The only ground of appeal which is now relied upon is that my decision in R(H) 2/07 was wrong. More specifically, it is said (correctly) that in that decision I placed some reliance on the decision of Peter Gibson J. in *Gaspet v Ellis* [1985] 1 WLR 1214 when in fact, unknown to me, that case went to the Court of Appeal. The Court of Appeal upheld the first instance decision, but it is contended that the Court of Appeal's reasoning was significantly different from that of Peter Gibson J., and that the Court of Appeal's reasoning ought to have led in R(H) 2/07, and ought to have led in the cases now before me, to the conclusion that the care and support provider (in these cases Lifeways) did provide support "on Rivendell's behalf".

22. One difficulty with this argument is that, because it was accepted by Mr. Ennals in these cases that R(H) 2/07 meant that it could not be argued that Lifeways was providing support on behalf of Rivendell, by no means all the documents and facts which might have been material to such an argument were put before the Tribunal. For example, there were no copies of the Agreements between Rivendell and Lifeways, and no evidence as to the precise role of the social services departments of the relevant local authorities in commissioning and contracting for the provision of care etc. by Lifeways. Contrast the detailed evidence which was before the appeal tribunal in R(H) 2/07.

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

not clear whether the latter was ever executed, but the solicitors now acting for the Claimants have been told by a solicitor acting for Rivendell that from a date in 2005 dealings between Rivendell and Lifeways were on the basis of the 2005 Agreement. The Agreement of 2004 is in materially the same terms as the tripartite Agreement which I referred to in para. 20(3) of my decision in R(H) 2/07, save that there is no third party equivalent to SLL. The 2005 Agreement, although somewhat different in structure, does not appear to me to be in materially different terms.

24. The question for me in these applications therefore becomes, in effect, whether it is arguable that the reasoning of the Court of Appeal in *Gaspert v Ellis* leads to the conclusion that my decision in R(H) 2/07 was wrong. The origin of my unawareness, when deciding R(H) 2/07, of the fact that *Gaspert v Ellis* went to the Court of Appeal is that the reference to that case was obtained from the entries in Stroud's Judicial Dictionary under the heading "on behalf", which even in the latest (7th) edition (2006) refers only to the first instance decision.

25. I think that it is clear from my reasoning in R(H) 2/07 that I was very conscious that *Gaspert v Ellis* could not be direct authority on the meaning of the definition of "exempt accommodation", because it related to different wording in a different statutory context. (I said in para. 46 merely that I derived "some support" for my conclusions from *Gaspert v Ellis*). The same must be true in relation to the Court of Appeal's reasoning.

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

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

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

"As the judge said, the phrase "on behalf of", in particular in the context of the phrase "by or on behalf of", denotes the concept of agency. This is a perfectly straightforward concept, even if in a context such as the present it may require a wider interpretation than agency resulting from a direct contractual relationship. Where, as here, the taxpayer company did not directly undertake the work itself, I therefore ask myself whether the work was undertaken by anyone as its agent, allowing for this wider sense in favour of the taxpayer company"

Nicholls LJ said (at 777B):

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

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

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

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

30. It is said on behalf of the Claimants that in the definition of "exempt accommodation" the word "directly" is not present, and that there is nothing in that definition that requires such a close relationship as to preclude work that is merely "for the benefit of" or "in the interests of". It is of course perfectly true that the word "directly" is not present, as it was in the provision under consideration in *Gaspert v Ellis*. It is also true that Bingham LJ in his judgment attached considerable significance to the presence of that word. But it does not follow from the Court of Appeal's reasoning in *Gaspert v Ellis* that where that word is absent the wider meaning referred to by Kerr LJ, and which had been in effect contended for in R(H) 2/07, must apply. For the reasons which I gave in R(H) 2/07, and in particular at paragraphs 51 and 52, the words "or a person acting on its behalf" in the definition of "exempt accommodation" do not in my judgment have that broader meaning.

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

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

"The commissioners said that "undertaking the research" refers to persons who have commissioned it, in a wide sense, i.e. without any direct contractual

link as a necessary requirement. I agree with that approach. One can also say that it refers to, or any rate includes, the persons who have undertaken direct responsibility for the research and procured it to be carried out. It seems to me that, broadly speaking, those situations cover the meaning of the words "directly undertaken".

33. Mr. Rutledge submitted that Rivendell could be said to have commissioned the provision of care, support and supervision by Lifeways. I note that Kerr LJ was in that passage dealing with the meaning of "directly undertaken", rather than the meaning of "on behalf of". But in any event it does not seem to me that Rivendell can be said to have commissioned the research in circumstances where (see para. 32 of R(H) 2/07) none of the care provider's remuneration came from Rivendell and where it was the social services department of the relevant council which engaged and (to a large extent) paid the care provider. I note that Clause 1 of the 2005 Agreement in the present case provides that the terms of the Agreement "shall be binding for the same period as the Support Provider's Contract continues with the Commissioning Authority ..." The "Commissioning Authority" is clearly the social services department of the relevant council.

34. At the end of the day, it is clear that (a) Rivendell had no statutory or contractual obligation to provide care, support or supervision which it needed to engage someone else to carry out on its behalf (b) the relevant social services departments did have statutory obligations in that respect, and engaged the care provider to provide care, support and supervision, at an appropriate remuneration. In those circumstances, for the reasons given in R(H) 2/07, it is in my judgment clear that the care etc. was not being provided by the care provider on Rivendell's behalf, within the meaning of the definition of exempt accommodation.

35. In my judgment the most which Mr Rutledge can get out of the Court of Appeal's decision in *Gaspert v Ellis* is that, because the Court of Appeal (and in particular Bingham LJ) placed somewhat more emphasis on the presence of the word "directly" than did Peter Gibson J., the Court of Appeal's judgments are perhaps less helpful as an authority in the present case than is that of Peter Gibson J. But it does not seem to me that the Court of Appeal's decision, any more than that of Peter Gibson J., supports an argument that on the facts of R(H) 2/07 the care and support provider was providing care and support on behalf of Rivendell.

36. I note that it is accepted by Mr. Rutledge and indeed positively asserted that it follows from his submissions that not only the housing related support, *but also the personal care and supervision*, was being provided on Rivendell's behalf. That submission was expressly disclaimed by Mr Ennals on behalf of the claimants in R(H) 2/07. It seems to me to be a startling proposition. Rivendell are surely in the business of providing housing, not of providing personal care and supervision.

37. Even if the Court of Appeal's reasoning in *Gaspert v Ellis* led to the view that my decision in R(H) 2/07 was wrong, I doubt whether the Tribunal's decision in the present case could be said to have been wrong in law in circumstances where it was conceded before it that R(H) 2/07 meant that the care etc. was not provided on Rivendell's behalf. By s. 12(8)(a) of the Social Security Act 1998 an appeal tribunal need not consider any issue not raised by the appeal.

38. I have considered whether I should grant permission to appeal so that, in the interests of clarity of the law, there can be a full decision (by me or another Commissioner), taking into account the Court of Appeal's decision in *Gaspert v Ellis*, as opposed to merely a determination on an application for leave to appeal. However, it is in my view sufficiently clear that the reasoning of the Court of Appeal does not affect my reasoning in R(H) 2/07. Further, if there were to be any further decision by a Commissioner (or a higher Court), it would be preferable that it be on the basis of full findings of fact, which are not available in the present case, owing to the concession which was made before the Tribunal.

Charles Turnbull
Commissioner
11 December 2007