Neutral Citation Number: [2025] EWHC 51 (Admin)

Case No: AC-2024-MAN-000216

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN MANCHESTER

Thursday, 16th January 2025

Before:
FORDHAM J

- -

Between:

NATHAN ROBERTS	**Claimant**
- and -	
SECRETARY OF STATE FOR WORK AND PENSIONS	**Defendant**
- and -	
GUINNESS PARTNERSHIP TRUST LTD	**Interested Party**

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Tom Royston (instructed by Bindmans LLP) for the **Claimant**
Jack Anderson (instructed by Government Legal Department) for the **Defendant**
The **Interested Party** did not appear and was not represented

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Hearing dates: 3.12.24 & 4.12.24
Further written submissions: 11.12.24 & 16.12.24
Draft judgment: 20.12.24

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Approved Judgment

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FORDHAM J

This Judgment was handed down remotely at 10am on 16th January 2025 by circulation to the parties or their representatives by email and by release to the National Archives.

FORDHAM J:

Introduction

1. This case is about the process by which universal credit (UC) is reduced so that "diversionary" and "recoupment" payments can be made by DWP to a landlord. It is a sequel to R (Timson) v SSWP [2023] EWCA Civ 656 [2023] PTSR 1616. Timson was about the process by which employment and support allowance (ESA) was reduced so that recoupment payments could be made to utilities companies. Timson was a decision of the Court of Appeal, upholding a judgment of Cavanagh J [2022] EWHC 2392 (Admin) [2023] PTSR 85 (Timson/HC), finding SSWP's policy guidance to be unlawful. That was because DWP decision-makers were being directed to take a course which unfairly and unreasonably denied the ESA-claimant any pre-decision opportunity to make representations. Mr Royston says three things. First, that I should arrive at equivalent conclusions as to UC reductions for recoupment payments to landlords. Second, that I should arrive at equivalent conclusions as to reductions for diversionary payments to landlords. Third, that I should go further than Timson did, and find the process for these reductions unlawful by reference to A1P1 property rights protected by the Human Rights Act 1998.

Lexicon

2. Every case has its shorthand language. Judges frequently use acronyms and labels. We do this to assist flow and avoid repetition. In particular, within this judgment you will find: A1P1 (Article 1 Protocol 1); APA (alternative payment arrangement); DWP (Department for Work and Pensions); ESA (employment and support allowance); MPTL (managed payment to a landlord); SSWP (Secretary of State for Work and Pensions); TPD (third party deduction) and UC (universal credit). In order to retain and reinforce their distinct nature, I will speak of a "Diversionary-MPTL" and a "Recoupment-TPD". "Private Landlord" means a landlord in the private rental sector. "Social Landlord" means a registered social landlord in the social rental sector. The "CAP" Regulations are the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (SI 2013/380). The "DAP" Regulations are the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 (SI 2013/381). "UC-claimant" is a person receiving UC and "Claimant" is Mr Roberts whose judicial review claim I am deciding.

Bundling

3. In preparing the bundles for the hearing, Emma Varley and Eve McMullen of Bindmans Solicitors took the initiative of adding the superseding bundle page-references into the margins within pleadings and witness statements. This is of huge assistance to navigating the materials including in the Court's pre-reading. The Commercial Court Guide (July 2023) at pp.162-163 tells parties that they are each responsible for ensuring that references in their pleadings or witness statements, to documents in the hearing bundles, should be conveniently marked-up to identify where the document is now to be found. This is a commendable practice. It is welcome in the Administrative Court too.

Universal Credit (UC)

4. UC is a means-tested welfare benefit payment, governed by the Welfare Reform Act 2012. You get a monthly sum (2012 Act s.8) which can include a standard allowance (s.9), a housing component (s.11) and other components. You have a monthly payment date, within 7 days of the end of your monthly assessment period (CAP reg.47). You can be paid by direct bank transfer (CAP reg.46). You have a secure Online Journal by which you and DWP communicate, with a facility to upload and download documents. You are required to notify DWP of a relevant change in circumstances, such as a change of address, as soon as reasonably practicable "after the change occurs" (CAP reg.38(4)).

5. At the start of 2024 the Claimant was in receipt of a monthly standard allowance of £368.74, a monthly housing component of £459.64, and a further monthly component of £390.06 referable to his disabilities. On 28.12.23, he had notified DWP using the Online Journal of his new address at Brockhurst Walk, with his weekly rent of £81.05 and weekly service charge of £25.02. His UC monthly housing component of £459.64 was assessed by reference to those housing costs. His monthly assessment periods finished on 20th of the month and his monthly payment date was 7 days later on 27th of the month.

Section 5(1)(p)

6. By s.5(1)(p) of the Social Security Administration Act 1992, Parliament has empowered SSWP by regulations to make provision:

> ***for the circumstances and manner in which payments of … a benefit may be made to another person on behalf of the beneficiary for any purpose, which may be to discharge, in whole or in part, an obligation of the beneficiary or any other person.***

These five things can all be seen from this source power. (1) It is a payment of the welfare benefit. (2) It is a payment to another person. (3) It is "on behalf of" the benefits-claimant. (4) Its purpose may be to discharge an "obligation" of the benefits-claimant to a third party. (5) That third party creditor may be the person to whom the payment is made.

7. Two provisions sourced in s.5(1)(p) were central in Timson (see §§3-4). They were found in 1987 regulations and concerned fuel and water arrears. Each had as a statutory precondition that the payment of the benefit to the utility company, in respect of the debt owed to the utility company by the benefits-claimant, "would be in the interests of the family".

8. Two provisions sourced in s.5(1)(p) are central to the present case. One is about Diversionary-MPTLs in respect of ongoing housing costs. The other is about Recoupment-TPDs in respect of rent arrears. Each involves the UC-claimant's monthly income support payment being reduced. Each involves a payment direct to a landlord on the UC-claimant's "behalf". Each is triggered by criteria, whether located in statutory provisions or in policy guidance. In each case, one of those criteria is that there are two months of rent arrears. That two-month rent arrears criterion is deliberate.

Two Months of Rent Arrears

9. Two months of rent arrears is what places an assured tenant at the statutory threshold for an arrears-based eviction: see the Housing Act 1988 Sch 2 Ground 8. So, the deliberate use of a two-month rent arrears criterion for Diversionary-MPTLs and Recoupment-

TPDs reflects the idea that these measures can step in as a speedy protection in the face of a risk of eviction. Diversionary-MPTLs are intended to help stop a rent arrears debt from getting worse, by paying the housing component direct to the landlord. Recoupment-TPDs are intended to help making a rent arrears debt better, by paying part of the standard allowance of UC direct to the landlord to reduce the rent arrears. Mr Anderson for SSWP rightly says that these can be beneficent actions. They can serve to protect against eviction and homelessness.

Tenant Protection

10. When a UC monthly payment is being reduced to respond to rent arrears by making payments from DWP to a landlord, someone is being protected. But who is it? The answer is not the landlord. The answer is the UC-claimant and their family. These are not payments whose rationale lies in protecting the interests of landlords. This is not a handy rent-collection mechanism, or a handy arrears-collection mechanism, for landlords. One good reference point for this is the two-month rent arrears criteria to which I have referred. Another is CAP Regulations Sch 6 §7(4), with its statutory precondition – for a Recoupment-TPD – that the UC-claimant who owes the rent arrears still "occupies the accommodation to which the debt relates". This means that if you are the UC-claimant and you owe the rent arrears, but you have moved out of the accommodation, a Recoupment-TPD is legally impermissible. This is an express statutory feature which supports the protective idea: the Recoupment-TPD is about stepping in to help you, so that you are not evicted. It is not about stepping in to help your landlord to recover on a claimed debt. The same idea applies to the Diversionary-MPTL, where there is a CAP reg.58(1) statutory precondition of apparent necessity for protecting a beneficiary. There are other species of TPDs with different purposes: to enforce social obligations (child maintenance, fines etc) or to recover debts (social fund loans, overpayments). But Recoupment-TPDs and Diversionary-MPTLs are squarely about protection for the UC-claimant who is the tenant occupant of the landlord's accommodation.

11. This is why Mr Anderson's skeleton argument, understandably, puts "at the heart of the case":

> ***The [SSWP's] concern to ensure that there is a mechanism by which steps can swiftly be taken to address the situation in which a [UC-claimant] is in arrears of rent and at risk of eviction from their home.***

Illustrative Points which a UC-Claimant Could Make

12. It is not difficult to think of the sorts of points which you might want to get across, as a tenant, in the context of tenant-protection and avoiding eviction and homelessness, where a landlord says there are arrears which you owe as a debt. Here are examples of points you might make. You might be making them whether your landlord is a Private Landlord or a Social Landlord. You might be making them when you find yourself facing the prospect of a Diversionary-DPTL or the prospect of a Recoupment-TPD. (1) The rent has been paid. (2) The rent which is due is less than is being claimed. (3) The rent has been improperly fixed or increased. (4) The tenancy agreement is invalid. (5) The landlord is in breach of repairing obligations. (6) I am withholding rent deliberately, because the landlord is failing or refusing to act. (7) I have incurred repair costs as a result of the landlord's breach. (8) The landlord knows there is a dispute and this request cuts

across the sole leverage I have. (9) I am not at risk of eviction and homelessness because an agreement has been reached. (10) I am not at risk of eviction or homelessness because I will soon be moving to a new address. (11) But I will be at risk of homelessness if this reduction takes place as I will not be able to secure the new premises. (12) There is an agreed end date for the tenancy and this payment won't affect it. (13) There are other reasons why this is not in my interests. (14) There are reasons why, if any deduction is to be made, it should be a lower amount.

13. Illustrations of some of these sorts of points – ones which go to the question of whether there are arrears lawfully due – can be seen in Luba et al, Defending Possession Proceedings (Legal Action Group 9th ed. 2022). See eg. §3.25 (whether rent lawfully due), §3.60 (whether rent unpaid) and §3.94 (set-off and counterclaim). Mr Royston provided helpful examples and authorities.

R(IS) 14/95

14. R(IS) 14/95 features later in this judgment. It was a November 1994 decision of the social security commissioner (Mr M Rowland) on an appeal by an income support-claimant whose benefit had been reduced to allow direct payments to his landlord. The decision-maker was an adjudication officer. The deduction was a Recoupment-TPD under 1987 regulations. Allowing the income support-claimant's appeal, commissioner Rowland said this, thirty years ago:

> ***Doubtless an adjudication officer … is entitled to rely upon a bald statement from a landlord as to the amount of rent arrears where there is no dispute that there are more than eight weeks arrears. However, if a claimant submits that there are no arrears, it will often be necessary for further evidence to be obtained from the landlord. As the deductions are made for the benefit of the landlord, it is not unreasonable to expect the landlord to provide the adjudication officer with the evidence necessary to prove the case. Where there is a dispute on the arrears, a landlord cannot expect to avoid consideration of the tenant's case by asking the Department of Social Security to make deductions from benefit … The evidence provided should usually be sufficiently detailed … so that the claimant has a realistic opportunity of adducing evidence to meet the allegation. In the absence of detailed evidence from the landlord, I am unable to determine the present case in favour of the adjudication officer …***

This passage was contrasting a situation "where there is no dispute" with one where the benefits-claimant is saying "there are no arrears". It is also describing a world in which the Recoupment-TPD was made "for the benefit of the landlord", a 1994 characterisation now known to be inapt and which Mr Anderson does not support.

Diversionary-MPTLs

15. It is time to introduce Diversionary-MPTLs. CAP reg.58(1) provides as follows:

> ***58. Payment to another person on the claimant's behalf. (1) The Secretary of State may direct that universal credit be paid wholly or in part to another person on the claimant's behalf if this appears to the Secretary of State necessary to protect the interests of – (a) the claimant; (b) their partner; (c) a child or qualifying young person for whom the claimant or their partner or both are responsible; or (d) a severely disabled person, where the calculation of the award of universal credit includes, by virtue of regulation 29 of the Universal Credit Regulations, an amount in respect of the fact that the claimant has regular and substantial caring responsibilities for that severely disabled person…***

16. This reg.58(1) power is used by SSWP to make the Diversionary-MPTL. It is a "managed payment to a landlord". It diverts the ongoing housing component of UC so as to pay it direct to the landlord. It has the intended consequence of preventing rent arrears from increasing. It is a species of APA (alternative payment arrangement). Other species of APA are payments to the UC-claimant which are more frequent than monthly; and split payments in the case of partners. The reg.58 decision to set up a Diversionary-MPTL is a decision under s.8 of the Social Security Act 1998 (SSA98). It is unappealable (DAP Regulations Sch 3 §1(n)). But the UC-claimant has a statutory entitlement, within a statutory time-frame of one month, to seek a revision (SSA98 s.9) by way of full merits-reconsideration (DAP reg.5). This is known as a "review". In addition to the merits-reconsideration in responding to a requested review, the SSWP is empowered to revise the reg.58 decision at any time but only for "official error" (DAP reg.9(a)); and the SSWP can supersede the reg.58 decision (SSA98 s.10) in light of a change in circumstances (DAP reg.23).

17. The following features can be seen from the design of CAP reg.58(1). (1) This is a power and not a duty. (2) It can be exercised "wholly or in part". (3) The Diversionary-MPTL is a payment "on the claimant's behalf". (4) There is a statutory precondition of apparent necessity for protecting a beneficiary. That statutory precondition reflects the fact that a Diversionary-MPTL must be found to be in the interests of the UC-claimant (or, where relevant, another beneficiary). Otherwise, by operation of the statutory scheme, the Diversionary-MPTL cannot be set up.

18. The SSWP has issued published guidance documents, and internal guidance documents which guidance – as Mr Anderson puts it – "structures how the power will be exercised". The following features of reg.58(1) Diversionary-MPTLs have all been added through SSWP's published guidance Alternative Payments Arrangements (17.1.24) and SSWP's internal guidance Money Guidance and Alternative Payment Arrangements (3.6.24). (1) Diversionary-MPTLs are for UC-claimants who cannot manage their single monthly payments and for whom or whose family there is a risk of financial harm, acting in the UC-claimant's interests. (2) Diversionary-MPTLs are to be considered on a case-by-case basis, and based on individual circumstances. (3) There are "Tier 1" criteria under which it is "probable" and "highly likely" that a Diversionary-MPTL will be made, including where the UC-claimant owes the landlord two months' rent. (4) The Diversionary-MPTL can be requested by a landlord, who may be Social Landlord or a Private Landlord. Private and Social Landlords make requests using web-based portals. The same rent arrears-based request can ask for a reg.58(1) Diversionary-MPTL, or for a Sch 6 §7 Recoupment-TPD, or for both.

The "Without Further Investigation" Guidance

19. In relation to Social Landlords requesting Diversionary-MPTLs, the SSWP's internal guidance Money Guidance and Alternative Payment Arrangements says this:

> ***Social rented sector (SRS) landlords across England, Scotland and Wales with access to the Landlord Portal are considered to be trusted partners. Trusted Partners can request Managed Payment to Landlord APA for their tenants, whenever they identify a need and have it granted without further investigation.***

The key to this guidance is in the phrase "can … have it granted without further investigation". This policy guidance is telling decision-makers that a Social Landlord requesting a Diversionary-MPTL "can … have it granted without further investigation".

The Social Landlord only has to provide the information meeting the criteria. That would include the Social Landlord saying that two months' rent is owing. There is no "further investigation". No opportunity is afforded to the UC-claimant. SSWP's evidence includes the 'click-screen' used by the DWP decision-maker.

20. I have not needed to search far to see what that looks like. In the present case the Claimant's landlord at Brockhurst Walk was a Social Landlord who made a request through the Landlord Portal. It gave information about rent arrears. That information was relied on to set up the Diversionary-MPTL, without further investigation. Any point which the Claimant wanted to raise was treated as a matter for review.

The Post-2017 Practice

21. As the SSWP's pleaded defence and witness statement evidence told the Claimant and the Court, the position is seen as very different in relation to Private Landlords requesting Diversionary-MPTLs. I had the advantage of a first witness statement of Jackie Germain, the Policy Team Leader at DWP, dated 4.10.24. She told the Court that in 2017 the SSWP introduced a practice, which has been in use ever since. Three things were striking. First, that the description had to be corrected by letter from the Government Legal Department (GLD) dated 22.11.24. Secondly, that this practice was not known to those who were giving instructions to GLD when the Acknowledgment of Service (AOS) in this case was filed on 8.7.24. That is a particularly chilling feature, given that the AOS was resisting permission for judicial review. It means permission could have been refused by a Court being denied relevant information. Thirdly, it was unclear whether and how this practice impacted on a Recoupment-TPD if included in the same request. On that crossover point, I was given two different answers during the two-day hearing. Fourthly, the practice was nowhere described in any published policy guidance or any disclosed internal document shown to the Court. I asked how it was said to be known to decision-makers whose exercise of the power is being structured by the published and internal guidance documents. I allowed SSWP a post-hearing opportunity to provide further factual illumination, together with any necessary correction. Ms Germain's post-hearing witness statement (11.12.24) confirmed the practice and exhibited the 'click-screen' used by the DWP decision-maker.

22. Here is how the Post-2017 Practice was described by Ms Germain's evidence of 4.10.24, as subsequently corrected by the letter from GLD dated 22.11.24:

> ***Those living in private sector accommodation are given the opportunity to challenge the application for the direct payment within seven days if they do not have rent arrears or are engaged in a formal disrepair dispute with their landlord and are withholding rent. If they do so, the APA will not be set up and the claimant is asked to provide evidence that the rent arrears do not exist, or that a repairs dispute exists and give a good reason why the direct payment should not be put in place and have 14 days to take this action. This evidence must include copies of letters from the landlord and claimant regarding the dispute or letters from the Local Authority Housing or Environmental Health Department confirming there is an issue. If a claimant provides the evidence, a decision maker will consider whether the APA should be put in place or not. If a claimant does not provide evidence to support this statement by the agreed date or states at the outset that they cannot provide any evidence to support the dispute, then the direct payment to the landlord is set up. Because an APA will only be paid 7 days after the assessment period, where a claimant has objected within 7 days the direct payment will not be made until they have had an opportunity to object.***

SSWP's pleaded Defence dated 4.10.24 told me, and the post-hearing witness statement confirms, that this is the message that is sent to the UC-claimant via the Online Journal:

> ***We have received a request from your landlord for us to consider paying your rent direct due to being in rent arrears. If you disagree with this, or are in dispute with your landlord you must contact us within 7 days. You can call us on 0800 328 5644. You will then need to provide evidence of this to us. If you do not contact us we will pay your rent to your landlord.***

23. This tells me that the SSWP intends, and has during the last 7 years intended, to afford an opportunity for pre-decision representations from the UC-claimant, in cases of a Diversionary-MPTL. It is not necessary for the decision-maker already to be aware of a dispute, by contrast with what was said in R(IS) 14/95. This Post-2017 Practice is premised on the fact that the UC-claimant may have information to provide and points to make. It clearly indicates that practical steps can be included to allow pre-decision representations; that doing so does not undermine the beneficent purpose of speedy action to protect the UC-claimant in the context of arrears; that this is in addition to the safeguard of the post-decision review and reconsideration; and that this arrangement has been identified as appropriate in the context of Private Landlords, where the tenant's security of position may be the weaker and risk of eviction may be the greater. Somebody, in and after 2017, saw the merits of allowing pre-decision representations and information. They did not think post-decision review was the sole answer. But the Post-2017 Practice applies only if the landlord is a Private Landlord.

The Interim Practice

24. During the course of this litigation, the SSWP has stated that changes will be made to the decision-making process where a Diversionary-MPTL is requested by a Social Landlord. The Court has been told that SSWP has "committed" to introducing changes for those in the social rented sector to adopt an arrangement "substantially similar" to the Post-2017 Practice. It was originally said that this would be in place by the end of October 2024. But then the Court was told this would be by the end of 2025.

25. In the interim, the following Interim Practice has been designed. I am quoting from the GLD letter dated 22.11.24:

> ***[A]s an interim step the process has been changed as follows, to allow those living in the social rented sector to challenge a direct landlord payment. The direct payment to the landlord is set up immediately but the claimant receives a notification in their UC journal that they should make contact to challenge the direct landlord payment within seven days if they do not have rent arrears or are engaged in a formal disrepair dispute with their landlord and are withholding rent. If they do so, the APA remains in place while the claimant is asked to provide evidence that the rent arrears do not exist, or that a repairs dispute exists and give a good reason why the direct payment should not remain in place. They have 14 days to take this action. This evidence must include copies of letters from the landlord and claimant regarding the dispute or letters from the Local Authority Housing or Environmental Health Department confirming there is an issue. If a claimant provides the evidence, a decision maker will consider whether the APA should remain in place or not. If a claimant does not provide evidence to support this statement by the agreed date, or states at the outset that they cannot provide any evidence to support the dispute, then the direct payment to the landlord remains.***

26. A document dated 18.11.24 was also sent to the Claimant's solicitors. It said this:

> ***The new APA process is as follows. The new agent process inserts new instructions that tells agents that where they are creating a Social Rented Sector direct landlord payment because of rent arrears to: … send[] the claimant information in their journal telling the claimant: [a] That***

> ***we have set up a direct landlord payment [b] That they are able to challenge the direct landlord payment in the next 7 days [c] if they are not in arrears or have a disrepair dispute with the landlord [d] How they can challenge the direct landlord payment (by adding a message to their journal or contact the Department by phone) [e] That if they do not contact us, the direct landlord payment will remain in place and we will pay housing costs support to their landlord.***
>
> ***Here is a screen shot of the new content: … "We have agreed to a request from your landlord to pay your rent to them directly. You can only challenge this decision if one of the following applies to you: [i] your rent payments are up to date; [ii] you are in a disrepair dispute with your landlord. To challenge our decision, contact us using your journal or call us on 0800 328 5644. You will be asked to provide evidence of either your dispute or your rent payments. If you do not contact us, we will pay your rent to your landlord."***

This is confirmed in the post-hearing witness statement.

27. Several features of this can be noted. (1) It is a review-type mechanism where the decision is made after the Diversionary-MPTL has been set up. The initial stages are 7 days (notification) and 14 days (evidence), but with the Diversionary-MPTL taking effect. No time frame for SSWP's decision is given. Written observations sent to the Claimant's representatives and included in the Bundle – in error, I was told – suggested that somebody thought 'suspension' of the arrangement would be "ultra vires". Mr Anderson, wisely, did not rely on any such legal impediment. He asked me to put the observations, and the idea embodied in them, to one side. I do so. (2) Although in law it cannot be the case that this new interim review-type mechanism takes the place of the statutory one-month entitlement to review by full merits reconsideration, the arrangement and communication do give the impression that they are describing a sole time-frame and basis for challenge. (3) The language of "rent payments are up to date" does not seem to communicate the scope for points about arrears being lawfully due and the message posted is much more restricted than the language used in the Post-2017 Practice: "If you disagree with this, or are in dispute with your landlord".

Recoupment-TPDs

28. It is now time to introduce Recoupment-TPDs. The CAP Regulations reg.60 and Sch 6 §2(1) and §7(1)-(5) provide as follows:

> ***Reg. 60. Deductions which may be made from benefit and paid to third parties. … [D]eductions may be made from benefit and direct payments may be made to third parties on behalf of a claimant in accordance with the provisions of Schedule 6 and Schedule 7.***
>
> ***Sch 6 §2. General. (1) The Secretary of State may deduct an amount from a claimant's award of universal credit and pay that amount to a third party in accordance with the following provisions of this Schedule to discharge (in whole or part) a liability of the claimant to that third party.***
>
> ***Sch 6 §7. Rent and service charges included in rent. (1) This paragraph applies where all of the following conditions are met. (2) The first condition is that in any assessment period the claimant – (a) has an award of universal credit which includes an amount under Schedule 4 (housing costs element for renters) to the Universal Credit Regulations; or (b) occupies exempt accommodation and has an award of housing benefit under section 130 (housing benefit) of the Contributions and Benefits Act. (3) The second condition is that the claimant is in debt for any – (a) rent payments; (b) service charges which are paid with or as part of the claimant's rent. (4) The third condition is that the claimant occupies the accommodation to which the debt relates. (5) Where this paragraph applies, but subject to sub-paragraphs (6) and (7), the Secretary of State may, in such cases and circumstances as the Secretary of State may determine, deduct in relation to that assessment period an amount from the claimant's award which is no less than***

> ***10% and no more than 20% of the standard allowance and pay that amount to the person to whom the debt is owed.***

29. This Sch 6 §7 power is used by SSWP to make a Recoupment-TPD. That is a "third party deduction" from UC, to pay a landlord in respect of rent arrears, with the intended consequence of reducing those rent arrears. A precondition (Sch 6 §7(2)) is that the universal credit has a housing component. But if a Diversionary-MPTL is being set up, the Recoupment-TPD is necessarily going to be paid out of something else: ie. the remaining universal credit. The Sch 6 §7 decision to make a Recoupment-TPD is a decision under SSA98 s.8. It is appealable to the First-Tier Tribunal (SSA98 s.12), but only (DAP reg.7(2)) after the UC-claimant has pursued a revision (SSA98 s.9) by way of a merits-reconsideration (DAP reg.5). Because reconsideration is a precondition to any appeal, it is known as a "mandatory reconsideration". In addition to the merits-reconsideration in responding to a requested mandatory reconsideration, the SSWP is empowered to revise the Sch 6 §7 decision at any time but only for "official error" (DAP reg.9(a)); and the SSWP can supersede the Sch 6 §7 decision (SSA98 s.10) in light of a change in circumstances (DAP reg.23).

30. The following features can be seen from the design of CAP reg.60 and Sch 6 §§2, 7. (1) This is a power and not a duty. (2) It can be exercised in whole or in part. (3) The Recoupment-TPD is a payment "on behalf of a claimant". (4) It serves to discharge (in whole or part) a "liability" of the claimant to the landlord. (5) It requires as a statutory condition that the claimant "is in debt" for rent payments and/or service charges. (6) It requires as a further statutory precondition that the claimant "occupies" the accommodation to which the debt relates. As I have mentioned already, point (6) – as an additional precondition to point (5) – is reflective of a statutory purpose that TPD protects those imperilled with eviction.

31. Mr Anderson again describes the SSWP's published and internal guidance documents as being guidance which "structures how the power will be exercised". The following features of Sch 6 §7 Recoupment-TPDs have been added by policy guidance, through SSWP's published Guide for Landlords: Rent Arrears and Service Charges (12.9.214); SSWP's internal Deductions: Guidance (18.12.23); SSWP's internal Advice for Decision-Makers ADM Chapter D2; all read with SSWP's published guidance Alternative Payments Arrangements (17.1.24). (1) Recoupment-TPDs are last resort deductions to protect and support UC-claimants who could be at risk of homelessness. (2) They act as a safety net and are only taken when it is in the interests of the UC-claimant or their family, for example to prevent severe hardship caused by eviction and homelessness. (3) An eligibility criterion for a Recoupment-TPD is the existence of two months' rent arrears. (4) The permissible reduction of TPD is in the range of 10-20% of the standard allowance. (5) A Recoupment-TPD can be requested by a landlord, who may be Social Landlord or a Private Landlord. Private and Social Landlords make requests using web-based portals. The same rent arrears-based request can ask for a reg.58(1) Diversionary-MPTL, or for a Sch 6 §7 Recoupment-TPD, or for both.

The "Disputed Debt" Guidance

32. In relation to landlords requesting Recoupment-TPDs, the SSWP's internal guidance ADM Chapter D2 says this (DM stands for decision-maker):

> ***Liability for debt.***

> ***D2026. A debt may be disputed by the claimant. This is a factor for the DM to consider when deciding whether they are liable to pay the debt. Although the Department cannot get involved in the dispute, enquiries should be made of the third party.***
>
> ***D2027. Give the claimant the opportunity to provide evidence to support any claim that the debt is not liable to be paid.***
>
> ***D2028. Deductions should only be made where there is evidence that the claimant is liable to pay the debt. This may be provided by the creditor when a dispute has been resolved or not upheld by any independent Regulatory body…***
>
> ***Amount to be deducted.***
>
> ***D2121. Where deductions for rent arrears payments and service charge payments apply, subject to D2122 and D2124, the DM may deduct, in relation to that assessment period, an amount from the claimant's award, which is no less than 10% and no more than 20% of the standard allowance and pay that amount to the person to whom the debt is owed. [fn. CAP Regulations Sch 6 §7(5).]***
>
> ***D2122. Before the DM commences or re-commences making deductions in respect of such a debt the claimant's earned income or in the case of joint claimants, their combined earned income in relation to the previous assessment period, must not exceed the work allowance. [fn. CAP Regulations Sch 6 §7(6).]***
>
> ***D2123. Deductions should only be made where the DM is satisfied that the claimant does have arrears [fn. R(IS) 14/95.] In cases of dispute the DM should give the claimant the opportunity to provide evidence to support any claim that they do not have arrears.***

The "Disputed Debt" Guidance is seen here, at D2026 to D2028 and at D2123. It is to be noted that D2123 cites R(IS) 14/95. That is the 1994 decision which I identified at §14 above. Also to be noted is the fact that the "Disputed Debt" Guidance is expressed as equally applicable to Social Landlords and Private Landlords.

33. Ms Germain has described the "Disputed Debt" Guidance "with specific reference" to when a UC-claimant "is disputing their liability for the debt – be it via mandatory reconsideration for a TPD … or a review of an APA". Two points arise out of this. One is that the "Disputed Debt" Guidance is evidently regarded by SSWP as being applicable, in principle, to both Recoupment-TPDs and Diversionary-MPTLs. The second is that the "Disputed Debt" Guidance is linked by the SSWP to decision-making under a review of a Diversionary-MPTL or under a mandatory reconsideration of a Recoupment-TPD. That second point is a restriction which is not supported by the wording of the "Disputed Debt" Guidance, or the structure of the provision within which it appears. The first sentence of D2123 is about making the deduction. It describes a statutory precondition to the making of the deduction. It cites R(IS) 14/95 which is a case about the decision to make the deduction. If a dispute were known to the decision-maker, the "Disputed Debt" Guidance would, on the face of it, be directly applicable. Test it this way. When making a request, Social Landlords are asked by the Portal whether they have discussed the arrears with the UC-claimant. Suppose they have. Suppose they have indicated the intention to request a Recoupment-TPD. Suppose the UC-claimant posts on the Online Journal that the arrears are disputed. That would trigger the "Disputed Debt" Guidance. It would trigger the analysis in R(IS) 14/95. Mr Anderson accepted this. Wisely, he did not maintain the position that the "Disputed Debt" Guidance is confined to review or mandatory reconsideration. However, nothing in the evidence of the practice of DWP decision-makers – and the 'click-screens' which they use – appears to alert the decision-maker to the disputed debt issue described in the "Disputed Debt" Guidance.

Crossover Questions

34. There are three obvious 'crossover' questions. (1) Does the "Without Further Investigation" Guidance apply in the case of a Social Landlord who requests a Recoupment-TPD, with or without a Diversionary-MPTL? Ms Germain's post-hearing witness statement explains that it does. The Recoupment-TPD is set up on the basis of the Social Landlord's information, without any further enquiry. (2) Does the Interim Practice apply in the case of a Social Landlord who requests a Recoupment-TPD, with or without a Diversionary-MPTL? Ms Germain's post-hearing witness statement explains that it is yes in the case of a Recoupment-TPD combined with a Diversionary-MPTL; but it is no for a Recoupment-TPD standing alone. In respect of the latter, the UC-claimant has the conventional mandatory reconsideration and nothing else. (3) Does the Post-2017 Practice apply in the case of a Private Landlord who requests a Recoupment-TPD, with or without a Diversionary-MPTL. Ms Germain's post-hearing witness statement explains that it is yes in the case of a Recoupment-TPD combined with a Diversionary-MPTL; but it is no for a Recoupment-TPD standing alone. In respect of the latter, the UC-claimant has the conventional mandatory reconsideration and nothing else.

Review and Mandatory Reconsideration

35. I have explained that a UC-claimant may apply to SSWP for review of a decision to set up a Diversionary-MPTL or for mandatory reconsideration of a decision to make a Recoupment-TPD. In either case, it is governed by s.9 of SSA98 and DAP reg.5 and is a full merits reconsideration. It is not the same as the mechanism described as the Interim Practice for Diversionary-MPTLs requested by Social Landlords, with its 7 day deadline and its two grounds of objection. If a review or reconsideration succeeds, the MPTL or TPD decision is retrospectively changed with effect from the date of its implementation; so that the UC-claimant will be paid the UC that had been paid to the landlord.

36. I have not needed to search far to see what that looks like. In the present case it happened on 25.6.24. The SSWP's pleaded Defence says that "in general" decisions on mandatory reconsideration are made within 56 days (8 weeks) of the request being made. The Claimant's representatives adduced freedom of information-disclosed material which indicates a median of not less than 50 days. In Timson, the Court of Appeal discussed evidence which showed a median of 47 days (at §75). In the present case, the SSWP's 56 days would have been on 13.5.24.

37. Review and mandatory reconsideration are central to SSWP's substantive defence of this claim. Ms Germain says this:

> ***The decision to apply a TPD for rent arrears without first seeking representations is because the intent of deducting a third-party debt is to quickly help support claimants from accruing further rent arrears, avoid a debt spiral and, ultimately, the risk of eviction. If a claimant successfully challenges the application of the rent arrears deduction via a mandatory reconsideration, the claimant will have the deduction refunded in full to them by the department. The SSWP also seeks to ensure that the system for handling third party deductions is administratively workable, proportionate and efficient having regard to the number of requests that need to be processed.***

The Facts

38. I turn to the facts. I have alluded to aspects of them already. The Claimant is entitled to UC. I know a little about him from the papers. He has a law degree. He worked in a police control room from 2020 to 2023. His witness statement describes his physical and mental impairments. On 28.12.23 he notified DWP of his new address at Brockhurst Walk where there would be a weekly rent of £81.05 and a weekly service charge of £25.02. He was in receipt of the monthly standard allowance of £368.74, his component of £390.06 referable to his disabilities and a housing component of £459.64. His monthly assessment periods finished on 20th of the month and his monthly payment date was on 27th of the month. Uncontroversial deductions were already in place of £29 and £18.44 relating to advance payment of benefit. He received his monthly payments on 27.1.24 and 27.2.24.

39. Then on Saturday 16.3.24 at 09:38, two entries were uploaded by DWP to the Claimant's Online Journal. The first was headed "we agreed to pay your rent or service charge arrears from your universal credit". There was a notification document describing a Recoupment-TPD, so as to make a payment to the Interested Party (GPTL) in respect of the Claimant's rent arrears, the details of which would follow in due course. The second entry was headed "changes to your universal credit payment". There was a notification document describing a Diversionary-MPTL, so as to make ongoing rent payments direct to GPTL of the housing component of £459.64. That meant no housing component and that the Recoupment-TPD would take effect as a deduction to his standard allowance and disability-related component. The notifications told the Claimant that he could seek a review and a mandatory reconsideration.

40. On Sunday 17.3.24 at 19:51, the Claimant uploaded a detailed response. It was headed "application for mandatory reconsideration". He said "you have agreed (certainly not with me) to make deductions from my UC to make direct payments to my current landlord"; "you have done this without any consultation with me"; "It is a basic tenet of benefit law that any decision affecting a claimant's benefit must be communicated to him BEFORE a deduction decision is applied"; that "had [this] been complied with, the DWP would have discovered that I am in a genuine rent dispute with the landlord (Guinness)", of which "Guinness are aware"; that "nothing is owed to Guinness"; that "any application by them to deduct or have direct payments to any rent account" is "rejected on that basis"; and finally that he had considered "the Guidance" and "the law".

41. On Monday 18.3.24 DWP uploaded a message to say they wished to speak to the Claimant in order to raise a mandatory reconsideration. He replied that day to say he had no access to a phone and that he had made his request for a mandatory reconsideration in the journal. On Friday 22.3.24 he uploaded another message: referring to his electronic request for mandatory reconsideration; giving details of concerns as to data protection breaches between DWP and GPTL; making reference to the "unlawful" decision to make deductions; and referring to the "alleged arrears".

42. The monthly payment date for UC came on Wednesday 27.3.24. The Claimant's housing component of £459.64 had been removed. A sum of £44.74 had been deducted towards rent arrears. Mr Anderson explained that, when account is taken of the uncontroversial deductions, this was a calculation at the level of the full 20%. These figures were set out in electronic documents. The Claimant received £666. DWP had removed £504.38. The Claimant uploaded an entry to the journal at 07:42 saying that this was "unlawful", had

been done "despite my instruction not to do so", and "despite my request for mandatory reconsideration" and that a letter before claim would follow to GLD, as it did on 28.3.24.

43. The letter before claim said the Claimant "had received no contact whatsoever from the Secretary of State or [GPTL] that any application had been made, the contents of such application or the reasons for the making of [it], nor did I receive any other notice of any kind from Secretary of State that an application had been made and why, [n]or was I given any opportunity whatsoever to challenge the application process prior to a decision having been made by the Secretary of State to make any deductions." He set out his response, describing the "genuine rent dispute" and that "nothing is owed to Guinness". He said that "not only do I feel capable of managing my own Universal Credit (despite my disabilities) but it is clearly arbitrary and an abuse of process to permit such an application without first consulting with me (the claimant)" and that DWP "has caused me unwanted distress on the top of already dire circumstances". It ended by recording that "I am in dispute with the landlord".

44. In the main body of his letter before claim, the Claimant set out these grounds of proposed challenge:

> ***The Law. I will assert to the High Court the following grounds … Illegality. The decision taken by the Secretary of State made on the 16th of March 2024 is unlawful as a matter of public law as the decision maker had failed to provide me with any opportunity to challenge or review the landlord's application or its contents, under the scheme, prior to making his or her decision as per the Secretary of State for Education and Science v Tameside MBC [1977] AC 1014 … Illegality. The guidance issued by the Secretary of State is unlawful as nowhere in the guidance does it offer the claimant (or affected person) the right to request a part in the decision-making process before a decision is made on deductions under the scheme as per R (Timson) -v- Secretary of State for Work and Pensions [2023] EWCA Civ 656… The details of the action that the defendant is expected to take. The defendant is requested to cease forthwith any deduction made to the Guinness Partnership Limited. The defendant is requested to refund any deduction already taken from my Universal Credit…***

45. Here is what had happened at DWP's end of things. On Friday 15.3.24, as a Social Landlord with access to the Portal, GPTL had uploaded a single request asking DWP for two things: one was a Diversionary-MPTL in respect of ongoing rent; the other was a Recoupment-TPD in respect of rent arrears. Within the request was this information from TPL, prompted by the Portal system: (a) that there were rent arrears of £959.88, being equivalent to 2.7 months; (b) that the reason for the request was history of rent arrears; (c) that no, the request had not been discussed with the UC-claimant; and (d) that yes, GPTL was a Social Landlord. A decision-maker within DWP then went through the practice of generating an on-screen "To-Do" and following the computer prompts. The decision-maker recorded the following: that yes, a Tier 1 Diversionary-MPTL criterion was met (ie. 2 months' rent arrears); that yes, the Diversionary-MPTL was accordingly agreed; that yes, a request had also been received to recover the arrears (ie. by means of a Recoupment-TPD); and yes, that the Recoupment-TPD criterion was also met (ie. rent arrears of two months or more). Following the prompts, the decision-maker set up the Diversionary-MPTL and the Recoupment- TPD. All of this was recorded by the decision-maker on the computer To-Do.

46. Here is what had happened at the Claimant's end of things. He was in a dispute with GPTL about the habitability of the property at Brockhurst Walk. He had first raised his concerns with GPTL on 21.12.23. The dispute had not been resolved and he had sent GPTL a letter before claim on 28.2.24. On 12.3.24 the dispute had still not been resolved,

but he and GPTL had mutually agreed that the tenancy in respect of Brockhurst Walk would formally come to an end on 7.4.24.

47. Having moved out of Brockhurst Walk, the Claimant on 31.3.24 notified DWP, by entry to the Online Journal, that his address had now changed and he was temporarily homeless. The computer immediately responded with two notifications to the Online Journal updating his details and recording that DWP's action of DAP reg.23 cessation in respect of the Recoupment-TPD and the Diversionary-MPTL. In the case of the Recoupment-TPD it was because the statutory precondition of residence at the accommodation (CAP Regulations Sch 6 §7(4)) was now known to DWP not to be met. In the case of the Diversionary-MPTL it was because the Claimant had notified moving out.

48. The other key events were as follows. On 18.4.24 the Claimant commenced county court proceedings against GPTL in respect of his dispute about habitability and alleged rent arrears. On 27.4.24 the Claimant received his monthly UC payment. There was now no Recoupment-TPD deduction. There was also no housing component, because the Claimant was currently homeless. On 2.5.24 DWP responded to a right of access request, and provided documents recording the decision-making which had taken place on 16.3.24. By mid-May 2024 the 56 days to which SSWP has referred, for generally dealing with a request for mandatory reconsideration, had passed. On 24.5.24 the Claimant's solicitors wrote a letter before claim. On 7.6.24 DWP messaged on the Online Journal to say that review and reconsideration were being escalated. On 13.6.24 judicial review proceedings were commenced. On 18.6.24 DWP messaged on the Online Journal to say that review and reconsideration were refused. Having then received the judicial review bundle, on 25.6.24 DWP messaged on the Online Journal to say that the decisions of 16.3.24 were being reversed for official error, and the deductions repaid in full.

The Fairness of this Decision-Making Process

49. I turn to the central question in this case: the fairness of the decision-making process. I will later deal with all the reasons which combine to make it the right and appropriate question to ask and answer. A good place to start is with an authoritative statement of the rationale of procedural fairness at common law. In R (Osborn) v Justice Secretary [2013] UKSC 61 [2014] AC 1115, Lord Reed (at §97) identified within:

> ***the rationale of procedural fairness at common law … both the instrumental value of enabling persons to participate in decision-making when they may be able to contribute relevant information or to test other information before the decision-maker, and the ethical value of allowing persons to participate in decision-making which concerns them and is liable to have a significant effect on their rights or interests, where they may have something to say which is relevant to the decision to be taken.***

50. The question is whether the minimum standards of procedural fairness on which the common law insists require that a UC-claimant must be (a) informed that a landlord is requesting a Diversionary-MPTL or a Recoupment-TPD or both and (b) given an opportunity to make a response before any change to their UC takes effect. The answer is yes. These minimum standards of procedural fairness apply whether the requesting landlord is a Private Landlord or a Social Landlord. They apply whether it is a request for a Diversionary-MPTL or a Recoupment-TPD or both. This reflects the instrumental value and the ethical value.

51. Here are the case-specific, context-specific reasons why I have arrived at my answer. First, there are real-world impacts and implications, including the implications of making an incorrect decision. The real-world implications of UC, in the context of those who are known to rely on it, mean it can reasonably be expected to be a real and significant impact for a UC-claimant not to receive 10-20% of their standard allowance because of a Recoupment-TPD; or not to receive their housing component because of a Diversionary-MPTL. Added to which, these consequences stand to come as a surprise. Nobody is required to have warned or notified the UC-claimant until the decision has been made. The notification comes shortly before implementation. Added to which, there is the very significant impact of a decision being made if it proves to have been incorrect, because it is in ignorance of some piece of information which could have made a difference.

52. Secondly, there is the prospect – in principle – of the UC-claimant making a relevant contribution. Ask this question: what do the following five things all have in common? (1) The statutory scheme. (2) The framework of policy guidance. (3) SSWP's own practices including the Post-2017 Practice and now the Interim Practice. (4) The mechanisms of review and reconsideration on which SSWP places reliance. (5) R(IS) 14/95. The answer is this. They all have in common the clear recognition that the UC-claimant may well have something to contribute to the decision that could in principle make a difference. If it mattered, I would find that there is a "real possibility" in every case that a UC-claimant would have information relevant to the decision, in light of the statutory and policy guidance criteria. It being recognised that the UC-claimant may have something to contribute, the decision-maker may be deprived by the process of information which could be about: (a) whether the rent is payable (b) whether it has been paid (c) whether there is some related dispute (d) whether a statutory precondition or policy guidance criterion is unmet (e) whether holding off or deferring may for some identifiable reason be in the UC-claimant's actual best interests (f) whether there is or is not in fact a risk of eviction (g) whether the UC-claimant has plans to leave the accommodation (h) something else. I listed some points at §12 above.

53. Thirdly, there is the identifiable protected Interest. The statutory scheme, the framework of policy guidance and the SSWP's own practices all reflect a clear recognition that the decisions to make and implement a Diversionary-MPTL and a Recoupment-TPD are designed to protect the interests of the UC-claimant. Not the landlord. Yet, when a landlord makes a request, it is the UC-claimant who is then unnotified and unheard until the decision is made and implemented. Except under the Post-2017 Practice. This is an exclusion, and a disempowerment, of the very person sought to be protected. It is inconsistent with the ethical value, where the person's rights and interests are supposed to be central.

54. Fourthly, there is the logic of the known dispute. The framework of policy guidance recognises that once there is known to be a dispute – the scenario in R(IS) 14/95 reflected in the "Disputed Debt" Guidance – it is recognised that a decision should not be made, without further fair and informed consideration. Indeed, that is because the existence of the liability is a central statutory precondition for the making of the decision, traced back to the primary legislation source power. The vice is this. The decision-maker has a visibility gap as to whether or not there is indeed a dispute. Nobody asks the tenant. Nobody even asks the landlord. The clear unfairness lies in the UC-claimant's inability to inform the decision-maker of the very dispute which would then unmistakeably require fair investigation if only it were known.

55. Fifthly, there is practical achievability, with legitimate aims intact. This is an online environment of weblinks and Portals and Online Journals. Where documents are uploaded and downloaded. The means are readily to hand to receive information and prompt a requesting landlord. But so too are the means readily to hand, to receive information and prompt an objecting UC-claimant. There is no convincing case as to why an opportunity for the UC-claimant to be heard is unachievable without undermining the protective purpose of speedy intervention in an arrears context. The Post-2017 Practice in relation to Private Landlords, two months of rent arrears and Diversionary-MPTLs makes that an impossible justification. Unlike certain other contexts, there is no identifiable objective involving an urgency or other reason for excluding an pre-decision engagement stage. There is nothing which makes a pre-decision notification harmful or even unsatisfactory.

56. Sixthly, there is the imbalance. The decision-making process allows information to be elicited unilaterally from someone – a landlord – with an interest which may not align with the interests of the UC-claimant; giving one side of a story; the protection of whose interests are not the rationale of the payment they will receive. They are likely to be an organisation in an unequal relationship with the UC-claimant. It is quite right to hear from them; but it is unfair to hear exclusively from them. Indeed, in the context of a disrepair dispute, where withholding rent may be the only leverage which a tenant has, SSWP may very well be unwittingly and unknowingly cutting across a protection. There is another imbalance. There is no convincing differentiation between Diversionary-MPTLs and Recoupment-TPDs. The legislation and policy guidance framework treats (a) rent arrears and (b) the interests of the UC-claimant as centrally significant features in the case of each of these measures. Each response is triggered by arrears. They are both payments in respect of liabilities, made on behalf of the UC-claimant. They can be applied for together and it makes sense that they would be applied for, and considered, together. It is odd for a decision-maker to be satisfied as to rent arrears and interests, in respect of one of these measures, if those very same issues require to be addressed with a fuller process for the other measure.

57. Seventhly, there is the problem that deferred-consideration cannot secure fairness. Fairness is not achieved by deferral to a post-decision and post-implementation review or reconsideration. All of the following have taken place: the fact of the diversion and/or deduction; the real-world impact; the risk of the impact being based on an incorrect decision; the surprise; the disempowerment; and the skewing of any unknown position regarding disrepair and the withholding of rent. The SSWP puts forward a general timeframe of 56 days for a decision on review or reconsideration. Even if that is achieved, it is likely to mean at least two monthly UC payments will have been reduced and, on the logic, incorrectly reduced. The impacts will have been felt as historical facts.

The Policy Guidance is Unlawful

58. What follows from this conclusion about a procedurally unfair process is that there is unlawful policy guidance. The legal analysis is as follows:

    (1) The policy guidance amounts to directions to decision-makers. It purports comprehensively to state the relevant legal position. It directs decision-makers that it is unnecessary to give UC-claimants an opportunity to make representations before making a Diversionary-MPTL at the request of a Social Landlord, and before making a Recoupment-TPD at the request of a Social or Private Landlord.

If this process is incompatible with the common law duty of fairness, it follows that the policy guidance is unlawful. Rightly, none of this was in dispute.

(2) Because this process is incompatible with the common law duty of fairness, it follows that the policy guidance is unlawful. In order for this statutorily-conferred administrative power to be exercised in a manner which is fair, in the light of all aspects of the context of the decision including the statutory scheme, fairness requires that the UC-claimant as a person who may be adversely affected by the decision should have an opportunity to make representations on their own behalf before the decision is taken. This is one of those situations where, before the statutory power is exercised, the person who foreseeably would be significantly detrimentally affected should be given advance opportunity to make representations. This is necessary to do so to ensure fairness, it being clear that the statutory procedure is insufficient.

(3) The statutory provisions do not expressly or impliedly provide otherwise. The additional steps would not frustrate the apparent purpose of the legislation. The circumstances in which the power is exercised do not render the step impossible, impractical or pointless. On the contrary, it would demonstrably be practicable to set up and operate a system to offer UC-claimants the opportunity to make representations; as has been the SSWP's intention since 2017 for Diversionary-MPTLs and Social Landlord requests.

Timson

59. Both Counsel made sustained submissions about Timson. Mr Anderson reserved his position for higher judicial altitude on whether Timson was correctly decided. That case was about the process by which Recoupment-TPDs were made in relation to ESA, for payments to be made to utilities companies. What Timson decided was that SSWP's policy guidance to decision-makers was a species of unlawful policy guidance because: (a) it directed decision-makers that it was unnecessary to give ESA-claimants an opportunity to make representations before making Recoupment-TPDs (Timson §34) and allowed decision-makers to make Recoupment-TPDs without doing so (§§48-49); and (b) which process was incompatible with the common law duty of fairness (§66), the right of post-decision mandatory reconsideration being insufficient to achieve fairness (§§24, 75), as well as being a breach of the Tameside duty of reasonable enquiry (§76). Timson involved a suite of published and internal policy guidance which amounted to directions to decision-makers (§10); a finding of a real possibility in every case (§26) that an ESA-claimant would have information about the best-interests question which was a statutory precondition (§§3-5) and reflected in the policy guidance (§§14-15); and an unassailable finding that it would be practicable to set up and operate a system to give ESA-claimants an opportunity to make representations before making Recoupment-TPDs (§§28, 40).

60. I agree with Mr Anderson that there is no justification for simply reading-across the analysis in Timson to the present case. He rightly emphasised the intensely context-specific nature of duties of procedural fairness and reasonable enquiry. He rightly emphasised that in Timson: (a) there was nothing equivalent to a Diversionary-MPTL; (b) there were statutory preconditions that the utility (water and fuel) Recoupment-TPDs must be in the interests of the ESA-claimant (Timson §§3-5); (c) the remoteness of any disconnection from water or fuel, still less eviction (§§16-17); and (d) although the

question whether "a debt has been accrued" was mentioned (§25), the reference to information about indebtedness mentioned by the High Court (Timson/HC §212) did not feature in the Court of Appeal and was not a central focus of the analysis. Timson is not a home run, or even necessarily first-base. The present case must be decided in its own context and circumstances. That is what I have done.

61. Timson nevertheless stands as an obviously convenient source from which to derive the following legal principles:

(1) The A46iii species of unlawfulness. This derives from R (A) v SSHD [2021] UKSC 37 [2021] 1 WLR 3931 at §46iii. It is the type of case where policy guidance may be found to be unlawful, because a public authority decides to promulgate policy guidance which (a) purports comprehensively to state the relevant legal position but (b) fails to do so by reason of specific misstatement or misleading omission: see Timson §31. The policy guidance in Timson was this species of unlawfulness (see §35). So is the policy guidance in the present case.

(2) The Doody formulation. This derives from R v SSHD ex p Doody [1994] 1 AC 531. It is the statement making these 6 points: (i) that there is a presumption that a statutorily-conferred administrative power will be exercised in a manner which is fair; (ii) that the standards of fairness are not immutable and may change, generally and case-specifically, with the passage of time; (iii) that what fairness demands is dependent on all aspects of the context of the decision; (iv) that the statutory scheme, as to language and systemic-shape, is an essential feature of the context; (v) that fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on their own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both; and (vi) that very often a disclosed gist of the case which the individual has to meet will in fairness be necessary: see Timson §54. It was applied in Bank Mellat v HM Treasury [2013] UKSC 39 [2014] AC 700 at §30. It was applicable in Timson (see §64). It is applicable here.

(3) The Wiseman proposition. This derives from Wiseman v Borneman [1971] AC 297 at 308. It is the statement that the courts have a power to supplement procedure laid down in legislation: (a) where it is necessary to do so to ensure fairness; (b) where it is clear that the statutory procedure is insufficient; and (c) where requiring additional steps would not frustrate the apparent purpose of the legislation: see Timson §§63-64. It was applied in Bank Mellat at §36 and in Timson at §75. It is applicable here.

(4) The Bank Mellat guidance. This derives from Bank Mellat at §179. It is the statement that, before a statutory power is exercised, a person who foreseeably would be significantly detrimentally affected should be given advance opportunity to make representations, unless the statutory provisions expressly or impliedly provide otherwise or the circumstances in which the power is exercised render this impossible, impractical or pointless. See Timson §57. It was endorsed in R (Balajigari) v SSHD [2019] EWCA Civ 673 [2019] 1 WLR 4647 at §60: see Timson §60. It was described in Timson (at §§61-64) as a reformulation addressing the "either/or" seen in Doody point (v), consistently Lord Sumption's majority

judgment in Bank Mellat, with its application of the Wiseman proposition. It is helpful guidance here too.

(5) The Tameside duty. This derives from Environment Secretary v Tameside MBC [1977] AC 1014 at 1065. The general principles are seen in Balajigari at §70: (i) the decision-maker's obligation is to take such steps to inform themselves as are reasonable; (ii) subject to reasonableness, it is for the public body and not the court to decide upon the manner and intensity of inquiry to be undertaken; (iii) the court should not intervene merely because it considers that further inquiries would have been sensible or desirable; (iv) the court needs to be satisfied that no reasonable authority, possessed of the material that was before the decision-maker, could suppose that the inquiries they had made were sufficient; (v) the principle that the decision-maker must call to their own attention considerations relevant to their decision, which in practice may require them to consult outside bodies with particular knowledge or involvement, does not spring from a duty of procedural fairness but rather from the decision-maker's duty so to inform themselves as to arrive at a reasonable conclusion; (vi) the wider the discretion conferred, the more important it must be that the decision-maker has all the relevant material to enable them properly to exercise it. In Timson, this was the duty of SSWP to determine reasonably what enquiries should be made prior to imposing a Recoupment-TPD; raising the question whether it was unreasonable to determine that an enquiry to ascertain the views of the ESA-claimant was not required: see §12iii.

62. So, Timson is a working illustration of the A46iii species of unlawful policy guidance; and of a contextual-application of procedural unfairness and reasonable enquiry. But, as Mr Anderson rightly submits, the present case must be analysed by reference to its own particular features. That is what I have done.

Amendment

63. Mr Anderson resisted my granting permission to amend the judicial review grounds. What happened was this. The pleaded grounds (13.6.24) raised four grounds of unlawfulness of the decision (27.3.24) and five grounds of unlawfulness of the policy guidance. The unfairness of the process, as a ground of challenge to the policy guidance, focused on Diversionary-MPTL. Other grounds related to both Diversionary-MPTLs and Recoupment-TPDs. SSWP's pleaded defence and Ms Germain's witness statement addressed both Diversionary-MPTLs and Recoupment-TPDs. After the reversal decision (25.6.24), amended judicial review grounds (12.7.24) dropped the challenge to the decision, except in relation to A1P1 violation. Then amended judicial review grounds (7.11.24) made clear that the unfairness of the process, as a ground of challenge to the policy guidance, focused on both Diversionary-MPTLs and Recoupment-TPDs. This was not a new feature of the case. It did not involve any surprise or unfairness. Both species had been addressed. It would have been artificial to consider one without the other. Fair warning was given. There was no prejudice. Consideration in the round is in the interests of justice and the public interest. This does not undermine appropriate procedural rigour; it illustrates room for appropriate procedural flexibility. I grant permission to amend.

Inapt Academic Claim

64. Mr Anderson submitted as follows. This claim became academic on 25.6.24, when the review and mandatory reconsideration decision overturned the original decision of

16.3.24 to set up the Discretionary-MPTL and Recoupment-TPD and refunded the sums deducted in full. That means there was no longer a case to be decided which would directly affect the "inter se" rights and obligations of the parties to the claim, so that it became inappropriate to pursue the claim. No public interest justification for entertaining the claim arose from eliciting any historic declaration or acknowledgment of a wrong. No exceptional circumstances justified proceeding to substantive determination and in fact the present claim was an unsuitable vehicle given the unsatisfactory post-decision handling of what should have been a speedier review and mandatory reconsideration. Added to which, the SSWP has committed to aligning by the end of 2025 Social Landlord Diversionary-MPTLs with the Post-2017 Practice for Private Landlord requests, with the Interim Practice applying in the meantime. Insofar as the position is considered in terms of standing and HRA victim-status, both were lost after 25.6.24.

65. I was unable to accept these submissions. The species of systemic-illegality is one endorsed by A46iii. The Claimant was directly impacted. His is a perfect test case. This sort of issue will only ever be decided by a Court if the Court is willing to hear a case where it is "water under the bridge". The merits review and reconsideration will necessarily either have failed or succeeded. But the issue is about making room to hear representations before making or implementing the decision in the first place. As to the legal analysis, the handling of the post-decision review and reconsideration is really nothing to the point. The SSWP says review and reconsideration should be within a median of 8 weeks (56 days). If that target had been met, that would have been mid-May 2024. I can readily posit the impugned decisions being reversed then. The deduction was on 27.3.24. The next monthly payment date was 27.4.24. The case is about representations prior to implementation of the Diversionary-MPTL and Recoupment-TPD. The Claimant spotted the point instantly, and made it clearly on 17.3.24, before implementation of the decision 12 days later. He had, and retains, his sufficient interest in the matter to which the claim relates. He has, and retains, his victim status so far as any human rights violation is concerned; with a declaration as just satisfaction for any violation where none has been acknowledged. There is a strong public interest in his claim being decided on its legal merits. If he is to lose, it should be because he is wrong in law. Nor because he belatedly had the benefit reimbursed. None of this turns on the fact – though it is true – that he remains a UC-claimant susceptible to Diversionary-MPTL and Recoupment-TPD in future. None of it turns on the fact – though it is true – that this came before me as a rolled-up hearing, with all the substantive arguments prepared and advanced.

Tameside and A1P1

66. Mr Royston had two further ways of putting the unlawfulness. Each was premised on the policy guidance amounting to directions to decision-makers, purporting comprehensively to state the relevant legal position, and directing decision-makers that it is unnecessary to give UC-claimants an opportunity to make representations before making a Recoupment-TPD or a Social Landlord Diversionary-MPTL. I have accepted that premise. Mr Royston says that the unlawfulness lies in the process being a breach of the Tameside duty of reasonable enquiry and a violation of A1P1 property rights. In Timson, the procedural fairness argument succeeded; the Tameside argument also succeeded; but the A1P1 argument failed. In Balajigari, the procedural fairness argument succeeded, but the Tameside argument failed. In Bank Mellat the procedural fairness argument succeeded; and the A1P1 argument was left open (see §49).

67. So far as A1P1 is concerned, no claim has been made based on any positive procedural obligation. Sometimes, Convention rights are found to involve implied procedural obligations. Here, the duty to hear representations is located in two places. One is the requirement of a "fair balance", which was an unresolved distinct argument in Bank Mellat: see 729D. The other is that participation in decision-making is an aspect to interferences being lawful, because law must be accessible. I think that second point is flawed. Accessibility is about the "law" being clear and accessible. A question could arise if, for example, decision-making criteria were unpublished. But in my judgment it has little to do with participation in the decision-making. As it happens, the accessibility argument failed in the High Court in Timson/HC at §257. So did the "fair balance" argument: at §261.

68. Here is how I see the interrelationship between the three relevant principles:

    (1) The duty of procedural fairness begins and ends with the interests of the person affected by the decision. This is what Balajigari called the duty of procedural fairness to the affected individual. They are affected, unheard and disempowered. True, one strand of the instrumental value of procedural fairness is about promoting decision-making being properly informed. True also, there is some room for process-latitude on the part of the public authority decision-maker, when it is asking the question "what process shall I choose as appropriate?": see Doody at 560H-561A. But there is no room for latitude when asking: "what process is compatible with legal standards of fairness?" Those standards are objective. They are famously "hard-edged".

    (2) The duty of Tameside enquiry begins and ends with the decision-maker designing an enquiry which leaves it reasonably adequately informed. That overlaps with one strand of instrumental procedural fairness. But, as was explained in Balajigari, the duty of reasonably sufficient enquiry "does not spring from" a duty of procedural fairness to the affected individual, but rather from the decision-maker's duty so to inform themselves as to arrive at a reasonable conclusion. Here, there is regarded to be considerable room for an enquiry-latitude on the part of the decision-maker, when it is asking the question: "what enquiry is appropriate?" Legal standards of reasonable enquiry are objective. But they are not hard-edged. They have a built-in latitude. The reasonableness principle governs.

    (3) The A1P1 duty to strike a fair balance begins and ends with the overall scheme. One strand may be about process; another may be about being properly informed; and there will be other strands. This is about the design of the scheme and there is an undoubted design-latitude on the part of the decision-maker, when it asks itself "what system is appropriate?" Proportionality and fair balance are standards which are objective. But they are not hard-edged. They have a built-in latitude.

69. In my judgment, there are two points. The first is that in the present case the Tameside enquiry and fair balance points are parasitic on the procedural fairness point succeeding. There is no room, if the procedural fairness point failed, for Tameside or A1P1 then to succeed. If the system is not procedurally unfair, that is curtains for the other ways of putting the point. The second is that it does not follow, if the procedural fairness point succeeds, that Tameside or A1P1 must succeed. I confess that it is challenging – indeed counterintuitive – to think of this "unfair process" as nevertheless being a "reasonable enquiry" or striking a "fair" balance. Put another way, if the balance struck is "fair" and

the enquiry designed is "reasonable", can the process really fall short of minimum standards of procedural fairness? I think it can. It could in Balajigari, where Tameside failed and A1P1 did not feature. It could in Bank Mellat, where A1P1 was unresolved and Tameside did not feature.

70. The answers I give are these. As to Tameside enquiry, the process is procedurally unfair and therefore unlawful, but it does not separately constitute an unreasonable enquiry, having regard to the latitude afforded to the SSWP in the test of reasonable enquiry and the distinct focus of the question. I do not say that it was independently unreasonable, to make Diversionary-MPTLs and Recoupment-TPDs and then review them. But I do say that it was undoubtedly unfair. And that was because of unfairness to the affected individual, which brings in all facets of procedural unfairness, but which is not the focus of Tameside. As to A1P1 "fair" balance, the process is procedurally unfair and therefore unlawful. But it does not separately constitute an A1P1 failure to strike a fair balance, having regard to the special latitude afforded in the test of fair balance and the distinct focus of that question. I do not that it was independently disproportionate, to make Diversionary-MPTLs and Recoupment-TPDs and then review them. But I do say it was undoubtedly unfair. To be completely candid, if principles of procedural fairness did not exist or were precluded, I would not exclude that possibility that the common law process-hybrid of Tameside enquiry might call in some contexts for a more exacting approach. That may be a call which only the appellate courts could answer. Happily, no such problem arises. Overall, I am content that procedural fairness should have done the heavy lifting in this case, as it often has in public law, and that is the basis on which I decide the case.

Endnotes

71. There are two endnotes to this judgment. The first is that Mr Royston submitted in his oral reply that, correctly analysed, the review decision of 25.6.24 really gives the game away so far as concerns the procedural unfairness of the process. Under the DAP Regulations, that decision was overturning the original decision for "official error". And the error of approach which was relied on was that the Claimant was not given the chance to make representations. That, says Mr Royston, is the SSWP acknowledging the very unfairness which is at the heart of the case. I have not allowed this argument to influence the analysis. It came late in the day. My analysis of procedural unfairness does not turn on what a decision-maker thought on 25.6.24. The second is that one strand of the thinking on procedural fairness is about "confirmation bias", as a reason why representations should precede a decision. In the present case and context, I have focused on the need for an opportunity to make representations to a decision-maker who considers the merits prior to the "implementation" of any reduction in UC. That is what would satisfy minimum standards of procedural fairness. It is necessary. But, in my judgment, it would also be sufficient.

Conclusions

72. Here are my answers to the six issues in the parties' agreed list of issues (CPR 54PDA §14.7). (1) No, permission/relief should not be refused on the basis that the claim is academic. (2) No, permission/relief should not be refused on the basis that the Claimant lacks standing. (3) No, permission should not be refused on the basis that the claim is unarguable. (4) Yes, permission should be granted to amend the grounds for judicial review. (5) No, it is not lawful for the Defendant to direct her decision makers that it is

unnecessary to give UC-claimants an opportunity to make representations before making payments to landlords under CAP reg.58 and/or Sch.6 because doing so causes procedural unfairness. (6) No, the same conclusion does not apply by reason of a Tameside unlawful failure to investigate or a breach of Convention rights. And so I will grant permission for judicial review and allow the claim.

Consequentials

73. The parties were agreed, in light of the contents of this judgment received in draft, as to the terms of the appropriate Order. I am satisfied as to its appropriateness and drafting. The Order I make is as follows: (1) The Claimant's 7 November 2024 applications to amend his statement of case, file a reply and file additional evidence are granted. (2) Permission is granted to apply for judicial review. (3) The claim for judicial review is allowed. (4) The Defendant shall pay the Claimant's reasonable costs of the claim on the standard basis to be assessed if not agreed. Pursuant to CPR 44.2(8), the Defendant shall make a payment on account of those costs, within 14 days of being served with a schedule of costs, in the sum of 60% of that schedule. (5) There shall be a detailed assessment of the Claimant's publicly funded costs in accordance with the Civil Legal Aid (Costs) Regulations 2013. (6) The Court declares that:

> ***The Defendant's policy of directing her decision makers that it is unnecessary to give Universal Credit claimants an opportunity to make representations before making payments to landlords under reg.58 and/or Sch.6 Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 is unlawful, because it is procedurally unfair.***