Bulletin 190
CS Hcn.)

CH 2899 2005

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision

1. I allow this appeal. The decision of Sunderland Appeal Tribunal given on 25 May 2005 is wrong in law. I set it aside and, under paragraph 8(5)(b) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000, I make the findings of fact set out at paragraph 16 below and I give the decision which the tribunal should have given namely that:

> **The agreement pursuant to which the appellant occupies the dwelling identified in the appeal papers is on a commercial basis. Accordingly, regulation 7(1)(a) of the Housing Benefit (General) Regulations 1997 does not operate so as to disentitle the appellant from housing benefit.**

Introduction

1. This is an appeal by the claimant, who is represented by Ms Alison Ryan of Durham Welfare Rights. The respondent is Chester-le-Street District Council ("Chester-le-Street"), which is represented by their appeals officer, Ms Tiar. Chester-le-Street does not support the appeal.

2. Leave to appeal to the Commissioner was given by Mr Commissioner Rowland on 19 September 2005.

3. Neither party has requested an oral hearing of this appeal and I am satisfied that these proceedings can properly be determined without such a hearing.

Background

4. As I have decided that it is expedient for me to make fresh findings of fact, it is only necessary for me to give a brief chronology at this stage:

(a) The claimant is a man who, at the date of the claim for Housing Benefit on 24 September 2004, was 64 years old. For over four years prior to that date, he had lived at a property in County Durham ("the Property") which he shared with his landlady, Mrs S, and for which he paid a rent of £50 per week inclusive of all utilities and also of some domestic services.

(b) On 24 September 2004, he claimed Housing Benefit for the first time from Chester-le-Street. On 1 November 2004, following a request for further information, and a personal interview at which the appellant completed and signed a "resident landlord enquiry form", Chester-le-Street decided that the appellant was not entitled to the benefit he had claimed. This was because, in Chester-le-Street's view, he had a "non-commercial tenancy agreement" and, in those circumstances, regulation 7(1)(a) of the Housing Benefit Regulations treated him as if he were not liable to make payment to Mrs S in respect of his occupation of the Property.

The proceedings before the tribunal

5. The appellant appealed against that decision and, on 25 May 2005, the matter came before Sunderland Appeal Tribunal. Both the appellant and Mrs S were present at that hearing, as were Ms Ryan and Ms Tiar.

6. The tribunal refused the appeal and confirmed Chester-le-Street's decision. The statement of reasons prepared by the tribunal chairman extends barely to one side of A4 and consists of six numbered paragraphs as follows:

> **"1. On 24 September 2004 the Local Authority received an application from [the appellant] for Housing Benefit.**
>
> **2. On 1 October 2004 he was asked to attend an interview.**
>
> **3. On 21 October 2004 [the appellant] attended the interview and confirmed that he lived in [the Property] which is owned by a Mrs [S]. He paid £50 per week rent and had been doing so for some time. [The appellant] and Mrs [S] attended the hearing and [the appellant] gave oral evidence.**
>
> **4. The tribunal found that [the appellant] left his previous property in [address] on 9 June 2000. From that date he lived at [the Property] but did not initially apply for Housing Benefit because he thought that he was over the capital limit. There was an initial verbal agreement between himself and Mrs [S] that he would pay rent for *[sic]* £50 per week. There has been no change to that rent since 2000.**
>
> **5. The £50 includes everything but meals and the agreement is open-ended as to how long it would last. It was not until he applied for Pension Credit and was awarded it that he automatically got an application form for Housing Benefit. It was only when he was informed by the Local Authority that he needed a tenancy agreement that one was entered into between himself and Mrs [S]. This basically confirmed the original agreement that they had from 2000. Initially he thought he was paying money in arrears for his rent but it was accepted that he was now paying them *[sic]* in advance.**
>
> **6. The tribunal found that when this agreement was reached in 2000 it was a convenient agreement to both parties. [The appellant] needed somewhere to live and Mrs [S] needed help with her mortgage. It was an informal agreement and since then it has never been varied by either party. It is still £50 per week to cover the rent of a room, bathroom and communal use of all other rooms, heating, lighting, water rates, telephone, in fact everything except meals. The tribunal therefore cannot accept that this was done on a commercial basis. The tribunal believes that in a commercial situation the rent would have been reviewed on a regular basis and would have increased. This has not done so *[sic]* and therefore the tribunal finds that this tenancy is not on a commercial basis therefore Housing Benefit has been refused."**

The law

7. The tribunal's statement of reasons does not make even a passing reference to the law that it had to apply. So far as is relevant, that law is as follows:

(a) Section 130 of the Social Security Contributions and Benefits Act 1992 states:

> **Housing Benefit**
>
> **130.—(1) A person is entitled to Housing Benefit if—**
>
> **(a) he is liable to make payments in respect of a dwelling in Great Britain which he occupies as his home; ..."**

(b) Regulation 7 of the Housing Benefit (General) Regulations 1987 ("the Housing Benefit Regulations") states:

> **"Circumstances in which a person is to be treated as not liable to make payment in respect of a dwelling.**
>
> **7.—(1) A person who is liable to make payment in respect of a dwelling shall be treated as if he were not so liable where—**
>
> **(a) the tenancy or other agreement pursuant to which he occupies the dwelling is not on a commercial basis.**
>
> **(b)-(l) ...**
>
> **1(A) In determining whether a tenancy or other agreement pursuant to which a person occupies a dwelling is not on a commercial basis regard shall be had inter alia to whether the terms upon which the person occupies the dwelling includes terms which are not enforceable at law."**

8. At least in cases that give rise to a dispute, whether or not an agreement is on a commercial basis is unlikely to be a straightforward issue and, unfortunately, the Commissioners have not been able to achieve unanimity on the approach that should be adopted by tribunals when tackling that issue.

9. One possible approach, advocated by Mr Commissioner Angus in *CH/2329/2003*, and on which the appellant's representative relies in her submission to the Commissioner is to say that:

> **"The arrangement between the owner of a property and the occupier will be other than commercial only if it confers no benefit on the owner which is proportionate to the benefit conferred on the occupier."**

By contrast, Mr Commissioner Henty in *CH/663/2003* took the view that:

> **"Not only does the term 'on a commercial basis' connote a financially justifiable relationship, but also, as important, some generality as to who may take the benefit and not merely an arrangement exclusively, as in the circumstances of this case, set up for the particular benefit of a particular claimant."**

10. A third line of authority can be found in *R(H) 1/03*. In that decision Mr Commissioner Jacobs recommended the following approach (I quote from the headnote):

> **"2. the proper approach for an appeal tribunal was to investigate and determine the facts material to the issue and then determine as a question of "compound fact" whether as a matter of the proper use of language the arrangement was not on a commercial basis, applying the principles established by the authorities....**
>
> **3. in applying those principles ... the tribunal must not reason by analogy from the reported cases and must consider the individual facts of each case in the context of all the others"**

11. I accept that the level of return for the owner of a property is a factor that is relevant to the issue of whether an agreement is on a commercial basis. So, too, is whether the agreement as a whole is personal to the particular claimant. I also accept that, depending on the individual circumstances of the case, those factors may sometimes determine that issue. However, with respect to Mr Angus and to Mr Henty, I do not consider them the only relevant factors and I propose to follow the approach set out in *R(H) 1/03*. I do so because:

(a) a reported decision such as *R(H) 1/03* commands the assent of at least the majority of commissioners and is therefore to be given more weight than an unreported one (see *R(I) 12/75(T)*); and

(b) the approach taken in *R(H) 1/03* is, in my judgment, supported by the decision of the Court of Appeal in *Campbell and Others v. South Northamptonshire District Council and Secretary of State for Work and Pensions* [2004] EWCA Civ. 409, (reported as *R(H) 8/04*). (See in particular paragraphs 6, 13, 56 and 60 of the Court of Appeal's judgment.)

(c) I find it difficult to reconcile the approach taken by the Commissioner in *CH/2329/2003* with the requirement in regulation 7(1A) to have regard to whether the terms upon which the person occupies the dwelling includes terms which are not enforceable at law. If one approaches the question on the basis that, as a matter of law, an agreement will be commercial unless it confers no proportionate benefit on the owner then I see no scope for attaching any significant weight to the presence or absence of unenforceable terms. (That objection does not apply to *CH/663/2003*. On the approach taken in that appeal, the presence of unenforceable terms would be evidence that the agreement lacked "generality as to who may take the benefit").

Did the tribunal err in law?

12. Following the approach in *R(H) 1/03*, the tribunal's stated reasons for her decision are insufficient. That decision is based on one, or possibly two, factors. The first factor, which carried most weight with the tribunal, was the fact that the "rent" had not increased between June 2000 and November 2004. The second was the (possible) implication that the "rent" of £50 per week to cover a bedroom, bathroom, the use of the living areas and kitchen and all utilities other than meals was uncommercially low.

13. I am prepared to accept those factors as tending to show that the agreement was not commercial. But they were not the only relevant factors. They were not even the only factors relied upon by Chester-le-Street. Some of the other relevant factors tended to show that the agreement was a commercial one. The tribunal should have made findings on all those

"constituent facts" and explained as best she could why she considered those that tended to show the absence of commerciality outweighed those that tended to point the other way.

14. In particular, the tribunal has failed to pay any regard to whether the terms upon which the appellant occupies the Property include terms which are not enforceable at law. That failure is a separate error of law. Regulation 7(1A) of the Housing Benefit Regulations requires the tribunal to have regard to that factor in every case in which the commerciality of an agreement is in question. The weight to be attached to the factor is a matter for the tribunal and will vary from case to case. But the factor has been identified by the legislator as one to which decision makers must have some regard and tribunals are not permitted simply to ignore it. Had the tribunal had regard to the presence or absence of unenforceable terms in this case she would, I think, have been forced to conclude that all the terms of the appellant's agreement were enforceable at law. As appears at paragraph 19(a) below, I view that factor as pointing strongly towards the commerciality of the appellant's agreement. If she had considered it, the tribunal would have been entitled to weigh the factor differently. But she was not entitled not to weigh it at all.

The Commissioner's findings of fact.

15. Having set aside the tribunal's decision, it is expedient for me to make further findings of fact and to substitute my own decision in this case. I am able to take that course because, although there is disagreement as to how those facts should be interpreted, the facts themselves are largely uncontroversial,. In particular, there is no suggestion that the appellant or Mrs S were seeking to mislead the local authority or the tribunal. The appellant's evidence has been broadly accepted, but Chester-le-Street and the tribunal took the view that that evidence showed the appellant's agreement with Mrs S to be uncommercial. For the reasons set out at paragraphs 17-31 below, I take a different view.

16. I find the following facts on a balance of probabilities. The evidence on which those findings are based can be found in the claim form, the resident landlord enquiry form and the notes in the Record of Proceedings of the appellant's oral evidence to the tribunal:

(a) The appellant was born in August 1940.

(b) Before June 2000, he was self-employed and lived at combined business and residential premises in Old Ponsham.

(c) On 9 June 2000, shortly before his 60th birthday, the appellant sold his business and, because his home formed part of the premises from which that business was conducted, had to find somewhere else to live.

(d) The Property is a detached house comprising four bedrooms, a living room, a kitchen, two bathrooms, three lavatories and two other rooms. It is owned by Mrs S. Whether or not her husband is a co-owner is not relevant to this decision.

(e) The Property is subject to a mortgage.

(f) On a date that I am unable to identify with precision, but which was before the appellant sold his business, Mrs S and her husband separated. The husband left the Property. Mrs S continued to live in the Property and to meet the financial commitments arising in connection with it, including the mortgage, on her own. She experienced financial difficulties in doing so.

(g) The appellant is a family friend of Mrs S.

(h) Mrs S, realising that the appellant needed somewhere to live and that she needed an increase in her income, suggested that the appellant should come to live at the Property in return for a payment that would assist her in meeting her financial commitments. The arrangement was originally meant to be temporary but proved to be convenient to both parties and therefore continued.

(i) Throughout the period between 9 June 2000 and 18 October 2004, the appellant occupied the Property under an agreement that had been concluded by word of mouth between him and Mrs S. The papers refer to that agreement as a "tenancy". However, the evidence shows that it was a licence for the appellant to share the Property with Mrs S.

(j) The terms of that licence were as follows:

(i) the appellant occupies a bedroom and has 'almost exclusive use' of a bathroom and lavatory. He shares the rest of the house, other than the remaining three bedrooms, with Mrs S.

(ii) in return for the use and occupation of those rooms, he pays a licence fee of £50 per week. That fee is paid 20 weeks in advance (i.e. in advance instalments of £1,000). I accept that, on page 17, the appellant states that the rent is paid in arrears but, as the tribunal noted on at paragraph 5 of the statement, that was incorrect and the payments are made in advance. The parties agreed that the appellant would pay on that basis because it was the basis on which he had paid rent at his former home and he found it convenient to continue to do so: no doubt Mrs S also found it convenient to be paid 20 weeks in advance.

(iii) the licence fee also includes a contribution towards water charges, fuel for heating, lighting, hot water and cooking, laundry, cleaning, gardening and parking facilities for the appellant's car. There are no separate service charges.

(iv) the licence fee does not include provision of meals. However, the position in practice is that whilst the appellant purchases his own food (or pays extra money to Mrs S for her to buy it for him), Mrs S normally cooks his evening meal for him.

(v) the appellant is not permitted to keep any pets at the Property.

(k) That licence contains no terms which are not enforceable at law.

(l) The licence fee has not been increased since the appellant moved to the Property in June 2000.

(m) During that period, the appellant has paid the licence fee and has not been in arrears. As explained at paragraph 16(j)(ii) above, the appellant's statement to the contrary on page 17 is an error.

(n) Mrs S had not previously shared her house with a lodger. However, if the appellant had not been prepared to move into the Property and pay a licence fee, it is more likely than not that, at that time, she would have had to find someone else who was prepared to do so. Her financial circumstances did not permit her to continue to live in the Property on her own.

In this respect, I note Chester-le-Street's submission that, when interviewed, the appellant said that it was only a "possibility" that Mrs S would take in another lodger, if he were to leave. I attach little weight to that statement because the appellant's answer must inevitably have been speculative. If Chester-le-Street wanted to know what Mrs S would do in those circumstances, they should have asked her, not the appellant.

In any event, the question fails to address the correct legal test, namely whether the *agreement* between the parties was on a commercial basis. In a case, such as this, where there is no evidence that the agreement has been varied, that question has to be answered by considering the nature of the agreement at the time it was made. Of course, evidence of what has actually happened since that time can help to establish the nature of the agreement, particularly in a case where that agreement was not in writing. But I do not see how what Mrs S might or might not do in hypothetical circumstances in the future can have any relevance to that issue, particularly when more than four years have passed and her financial position may have changed.

(o) With the possible exception of the provision for payment of the licence fee 20 weeks in advance (which few potential lodgers could afford and to which even fewer would be prepared to agree) the terms of the licence would have been the same irrespective of the identity of the lodger. In particular, Mrs S would have provided the same services (i.e., cooking an evening meal and doing the laundry) for another lodger as she did for the appellant.

I acknowledge that Chester-le-Street take the view that this is improbable but, in my judgment, it is not. The essence of an agreement for board and lodging accommodation is that the landlord provides food and other services that would not be provided as part of an agreement for, say, the letting of an unfurnished flat. Moreover, for Mrs S to have done the appellant's laundry together with hers would have had the advantages of saving cost and ensuring that neither was wanting to use the machine at the same time as the other. Those advantages would be the same irrespective of the identity of the lodger.

(p) When the appellant first moved to the Property, Mrs S took advice from an independent financial advisor. She was advised that:

(i) it was not necessary for her to inform her mortgagee that the appellant was lodging with her. That advice was given because Mrs S would herself be remaining in the Property and because the appellant's use and occupation of the Property would not require physical alteration to it.

(ii) that the licence fee payable by the appellant to Mrs S would not be liable to income tax because it fell within the terms of the Inland Revenue's 'Rent-a-Room Scheme'.

(iii) that she should "establish a tenancy agreement" and check the terms of her household insurance.

(q) Based on the advice she received, Mrs S did not inform her mortgagees that the appellant was lodging with her.

(r) If, as was almost certainly the case, the advice to 'establish a tenancy agreement' was meant to recommend that the appellant and Mrs S should reduce their agreement to writing, that advice was not followed until 18 October 2004 when the document that appears on page 19 of the papers was signed.

(s) That document was produced in response to two letters from Chester-le-Street to the appellant. The first letter was dated 1 October 2004 (page 14) and, so far as relevant, was in the following terms:

> **"You have indicated on your application form that you rent your property from Mrs [S] and that she is resident in the property with you.**
>
> **I will need you to come into the Civic Centre to have an interview to discuss the terms of your tenancy. This will enable me to make a decision as to whether Housing Benefit can be paid.**
>
> **You will need to provide a tenancy agreement signed by you and your landlord, this will need to show the amount of rent paid and a breakdown of what is included and amounts i.e. how much is for water rates etc."**

The second letter was dated 19 October 2004 (page 15) and repeated the paragraphs quoted above, with the addition of the following words in bold type:

> **"If you do not contact us by 2nd November 2004, your claim will be treated as being withdrawn" (original emphasis)**

(I mention in passing that Chester-le-Street had no power to treat a claim for benefit that had been validly made as withdrawn—see *R(H) 3/05*.)

Was the agreement commercial?

17. Given those facts, the following factors tend to suggest that the agreement between Mrs S and the appellant is a commercial one:

(a) the licence agreement creates a genuine, legally enforceable, liability for the appellant to pay Mrs S a licence fee at the agreed rate for his use and occupation of the Property;

(b) that agreement contains no terms which are not enforceable at law;

(c) the agreement provides for the payment of the licence fee a considerable time in advance;

(d) the appellant has actually paid that licence fee punctually and in full even though he has never received housing benefit to assist with those payments;

(e) the circumstances surrounding the formation of the licence show that its dominant purpose was to provide the appellant with somewhere to live and Mrs S with an income from the Property;

(f) the fact that, as I find, Mrs S needed to take in a lodger if she was to continue to live in the Property and would have had to find someone else to lodge with her if the appellant had not been prepared to do so;

(g) the fact that, as I find, the terms of the licence would have been substantially the same irrespective of the identity of the lodger;

(h) the fact that Mrs S took financial advice at the commencement of the licence.

18. The following factors may tend to suggest that the agreement between Mrs S and the appellant is **not** a commercial one:

(a) Mrs S and the appellant were friends before the agreement was made.

(b) there was no written agreement between the parties, despite the fact that Mrs S was advised to enter into such an agreement. The written agreement at page 19 only came into existence because the parties were prompted to enter into it by the enquiries from Chester-le-Street following the appellant's claim for benefit;

(c) the implication from the tribunal's decision that the licence fee of £50 per week may have been on the low side even in June 2000 and the fact that it has not increased since then;

(d) Mrs S did not tell her mortgagees that she had taken in a lodger;

19. I regard the factors that suggest the agreement is commercial as outweighing those that suggest the contrary. In particular:

(a) I attach considerable weight to the fact that the agreement contains no terms which are not enforceable at law. I do so because that is a factor to which Parliament has specifically directed my attention and because, in the circumstances of this case, I regard it as tending to show that the licence was not merely a personal arrangement between friends;

(b) I also regard the factors identified at paragraphs 17(d) - (g) above as being of particular weight;

(c) I attach little weight to the fact that the licence creates a genuine liability to pay for the appellant's use and occupation of the Property. This is because the opening words of regulation 7 assume the existence of such a liability. In other words, if there were no legal liability to pay rent, regulation 7 would not apply in the first place. It is clear from that

context that regulation 7(1)(a) contemplates an agreement that is not commercial even though it creates such a liability.

20. By contrast I regard most of the factors listed under paragraph 18 above as being of little or no weight. My reasons are as follows.

(a) Friendship between the parties

21. I attach little weight to this factor. This is for the reasons given by Sedley J (as he then was) in *R. v. Poole Borough Council ex parte Ross* (1995) 28 Housing Law Reports 351 at 358-359.

(b) The absence of a written agreement

22. There is no single model of a commercial agreement for the occupation of a dwelling and one would expect a lady offering board and lodging in her own home to a single lodger to require fewer formalities than the landlord of a number of unfurnished flats or houses let out on assured shorthold tenancies. It is common for board and lodging agreements to be concluded by word of mouth and there is no legal reason why a written agreement is required in such cases.

23. Chester-le-Street relies in part on the fact that Mrs S's financial adviser told her to have the agreement put in writing and that she failed to do so. But many people do not take the advice of their professional advisers. That is so irrespective of the quality of the advice and of whether it concerns a commercial matter or a personal one. In any event, the test is not whether Mrs S is a commercial landlord but whether her agreement with the appellant was on a commercial basis and I regard Mrs S's failure to follow advice as having little bearing on that issue.

24. Chester-le-Street does not base its decision on the absence of a written tenancy agreement because, as it says in its submission to the Commissioner, "it recognises that tenancy agreements can be verbal". It does, however, "question why the tenancy agreement was only drawn up in relation to the application for Housing Benefit".

25. Chester-le-Street's position strikes me as unreasonable and not a little unfair. The letter quoted at paragraph 16(s) above told the appellant that he must

> **"provide a tenancy agreement signed by you and your landlord"**

and that that agreement

> **"will need to show the amount of rent paid and a breakdown of what is included and amounts i.e. how much is for water rates etc."**

26. Both those statements were incorrect.:

(a) As Chester-le-Street now acknowledge, a written agreement is not required to create a valid liability to pay rent or a licence fee. Neither is it a condition of entitlement to housing benefit. The appellant needed to satisfy Chester-le-Street that he had a legally enforceable liability to pay Mrs S and as to the amount of that liability. He therefore

needed to produce some evidence on those issues (and, indeed, had already done so in the form of the letter from Mrs S that appears at page 13). However, contrary to what he was told, he was not required to enter into a written agreement with Mrs S.

(b) Similarly, it is not a condition of entitlement to housing benefit that the owner and occupier should itemise charges for such services as fuel and water. There are obvious difficulties in agreeing such an itemisation where the property occupied by the claimant is not self-contained and some of the living areas are shared with the owner. It is for that reason that the Housing Benefit Regulations make provision for the circumstances in which a contribution towards the cost of fuel and water is included in the rent itself. The relevant provisions are regulation 10(3)(b) and (6) and Schedule 1 (particularly Part II of the Schedule).

27. But the appellant did not know that what Chester-le-Street had told him was incorrect or that it had no legal power to carry out the threat that it had made. What he knew was that he had been told that he must provide a written tenancy agreement or his claim for benefit would be treated as withdrawn. As he did not have a written tenancy agreement at the time, I do not think it surprising that he took Chester-le-Street at their word and entered into one. The appellant and Mrs S did not claim that the agreement on page 19 was anything other than it was: they did not, for example, backdate the agreement and pretend that it had always been in existence. I therefore attach no weight at all to the fact that that agreement came into existence following the appellant's claim for benefit. In my judgment, it is not open to Chester-le-Street to demand that a claimant should produce a written agreement that does not exist and is not legally required, to threaten, unlawfully, not to process his claim for benefit unless that document is produced and then, when he does enter into a written agreement in response to that demand, to use that fact as a reason for refusing the claim.

(c) The licence fee

28. It is implicit in the tribunal's decision that she considered the licence fee to have been uncommercially low, even in June 2000. It would have been better if she had made express findings on the point and indicated what she thought a reasonable market "rent" would have been. She would have been entitled to use her local knowledge in making such a finding.

29. I am unable to make any finding on that point at all. I have no local knowledge of historic rent levels in County Durham and there is no evidence before me to supply that deficiency. Chester-le-Street do not rely on the level of the licence fee as showing that the agreement is uncommercial.

30. However, like the tribunal, I do attach weight to the fact that the licence fee has not been increased for over four years. Even in times of relatively low inflation, and even in an informal arrangement, one would normally expect some increase over such a period. But although this is a significant factor supporting Chester-le-Street's contention that the agreement between the appellant and Mrs S is non-commercial, I regard it as outweighed by the factors that suggest the contrary.

(d) Notification of the mortgagees

31. I attach very little weight to the consideration that Mrs S did not tell her mortgagees that she had taken in a lodger: she sought advice from a reputable source and was told that she did not need to do so.

Conclusion

32. Overall, weighing each of the above factors in the context of the others, I cannot say that "as a matter of the proper use of language the arrangement was not on a commercial basis". I consider that the agreement was commercial even though Mrs S may not be a "commercial landlord" in the sense in which that phrase is commonly understood.

33. For those reasons, my decision is as set out at paragraph 1 above. Chester-le-Street should now process the appellant's claim.

(Signed on the original)

Richard Poynter
Deputy Commissioner

14 December 2005