

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the appeal tribunal (the tribunal) held on 3 June 2005 under Registration No. U/04/054/2005/01160 was erroneous in law. Under paragraph 8(4) of the 7th Schedule to the Child Support, Pensions and Social Security Act 2000 I set the tribunal's decision aside and under paragraph 8(5)(a), I give the decision which I consider the tribunal should have given, namely:

“The overpayment of housing benefit of £1,639.70 for the period 31 May 2004 to 10 October 2004 paid to the first respondent is recoverable from the first respondent notwithstanding that, as Agent, it may have accounted to its principal, the landlord, for such sum or part of it.”

2. At the request of the Secretary of State who accepted my invitation to become a party to this appeal, I held an oral hearing in this appeal in London on 19 September 2006. Unfortunately, neither the appellant Authority (which had indicated that it did not intend to appear) nor the first respondent, the agent company, (the Agent) was present. I am grateful to Mr P. Patel of Counsel who represented the Secretary of State, for his assistance on that occasion.

3. The facts, which do not appear to be disputed, are that on 22 August 2003 a claimant (A) made a claim for housing benefit (HB), based on his entitlement to income support, stating that he had taken a tenancy of a property (the property) with effect from 21 August 2003. The claim form identified both the landlord and the Agent (page 24) and requested that any benefit entitlement should be paid direct to the Agent (page 26). Benefit was awarded with effect from 21 August 2003 and payment was made direct to the Agent. The amount of benefit was increased with effect from 1 April 2004.

4. The rent was referred to the rent officer in August 2004; following which both A and the Agent were informed by letter that benefit entitlement would remain unchanged. On 14 September 2004, the decision-maker received an 'in claim postal check form' signed in the names of A and his partner. On 15 September 2004, a check with the Department for Work and Pensions (the DWP) indicated that the income support claims for both A and his partner were dormant. Requests to A for confirmation of his entitlement to income support received no reply and on 24 October 2004 the Authority informed A and the Agent by letter that the claim had been suspended pending receipt of this information. A further check with the DWP revealed that A's partner had made a new claim for benefit in a different county.

5. The Agent received back the keys for the property in October 2004. A visiting officer was asked to establish who was resident in the property and when he inspected on 12 January 2005 he found a new tenant in occupation whose tenancy began on 10 January 2005 and who did not know A. The decision-maker then terminated A's claim with effect from 24 October 2004. Notification was sent to the Agent and to A's last address.

6. On 1 February 2005 the DWP issued an income support decision notice advising the Authority that A's entitlement to income support ceased on 28 May 2004 when he was taken

into legal custody. The decision-maker then superseded A's entitlement with effect from 30 May 2004 with the result that there had been an overpayment of housing benefit of £1,639.70 for the period 31 May 2004 to 10 October 2004 inclusive. The decision-maker decided this overpayment should be recovered from the Agent as the person to whom the payments were made and the Agent was duly notified (page 1).

7. The Agent appealed, challenging
 - (i) that the overpayment had occurred in the first instance; and
 - (ii) that in any case a decision to recover any overpayment of benefit should not be directed to the Agent.

The Agent asserted both that A had signed documentation after 30 August 2004, and that the Benefits Section had written to the Agent confirming the benefit level had been re-set, which would not have happened had the claimant vacated earlier. It gave details of the two cheque payments it had made to the landlord for the rental periods 21 July 2004 to 20 September 2004 inclusive, stating that they had been cashed by the landlord. The decision was reconsidered, an explanatory letter was sent to the Agent (pages 79 to 80); the decision was not revised and the appeal proceeded.

8. The tribunal was held on 3 June 2005, the Agent being represented by two employees. The tribunal allowed the appeal, stating on the decision notice that:

“The overpayment was not recoverable from the appellant because they were at all relevant dates agents for another, to whom they had accounted for the monies received.”

9. The Authority appealed with my leave, submitting that the tribunal's decision on a “technical point of Agency law” was in error of law. It could see no precedent for determining whether or not the tribunal's interpretation was correct. The Authority itself always made a clear distinction between landlords and agents so that where overpayments (or for that matter underpayments) of benefit had occurred, the Authority always sought repayment from (or made additional payments to) an agent if that were the ‘person’ named on the application form as entitled to receive the payments of benefit due. The clear intention of the Housing Benefit (General) Regulations 1987 (the Housing Benefit Regulations) was that it is proper for an authority to seek recovery from an agent if that is the ‘person’ to whom the payments were made. .

10. The Agent has played no part in the proceedings despite my repeated requests, given that it is so clearly in its interests to do so. The Secretary of State's representative made a detailed submission to which I shall return later as it formed the basis of Mr Patel's submission at the hearing. The Authority confirmed that it had brought the appeal following discussions with officers of the DWP acting on behalf of the Secretary of State, and was content to rely on the Secretary of State's representations, without further active participation in the appeal.

11. At the oral hearing, Mr Patel gave an outline of the facts, There was no issue as to the amount and the period involved, (other than, initially, an erroneous reference to August 2004 rather than to October 2004) and the appeal turns on whether section 75(3)(a) of the Social

Security Administration Act 1992 (the 1992 Act) allows the overpayment to be recovered from the Agent.

12. Section 75 of the 1992 Act as in force from 1 October 2001 provides:

“(1) Except when regulations otherwise provide, any amount of housing benefit determined in accordance with regulations to have been paid in excess of entitlement may be recovered either by the Secretary of State or by the authority which paid the benefit.

(2) Regulations may require such an authority to recover such an amount in such circumstances as may be prescribed.

(3) An amount recoverable under this section shall be recoverable –

(a) except in such circumstances as may be prescribed, from the person to whom it was paid; and

(b) where regulations so provide from such other person (as well as, or instead of, the person to whom it was paid) as may be prescribed.

(4).....

(5) Where an amount paid to a person on behalf of another person is recoverable under this section, subsections (3) and (4) above authorise its recovery from the person to whom it was paid by deduction –

(a) from prescribed benefits to which he is entitled;

(b) from prescribed benefits paid to him to discharge (in whole or in part) an obligation owed to him by the person on whose behalf the recoverable amount was paid; or

(c) from prescribed benefits paid to him to discharge (in whole or in part) an obligation owed to him by any other person”

Mr Patel submitted that although section 75(3)(a) does not distinguish the persons from whom an overpayment may be recovered where regulations so provide, section 75(3)(b), (not relevant in this particular appeal), does so. In CIS/4022/2004, Mr Commissioner Angus’ stated that it is

“a well known canon of statutory construction ... that legislation is drafted and enacted in the knowledge of the common law and unless an enactment explicitly or implicitly disappplies the common law there is a presumption that common law principles continue to apply”;

In Mr Patel’s submission, section 75(3)(a) should not be read as being subject to the law of agency because the overpayment provisions in the legislation disapply the law of agency.

13. He also drew to my attention that section 75(5) of the 1992 Act expressly authorises an amount paid to a person on behalf of another person to be recoverable, and that subsections (3) and (4) authorise recovery *from the person to whom it was paid* by various deductions. In addition, the Housing Benefit (Recovery of Overpayments) Regulation 1997 (the Overpayment Regulations) - which prescribe the benefits from which deductions to recover an overpayment may be made - explicitly disapply the law of agency in that regulation 2 provides:

“2. – (1) The benefits prescribed for the purposes of section 75(5) and (7) of the [1992] Act (recovery of overpayments) are those set out in the following paragraphs.

- (2) Prescribed benefits within section 75(5)(a) of the Act (benefits to which a landlord or agent is entitled) are –
 - (a) housing benefit; and
 - (b)
- (3) Housing benefit is prescribed for the purposes of section 75(5)(b) or (c) of the Act (benefits paid to a landlord or agent to discharge an obligation owed by another person)

In his submission this clearly signifies that recovery can be made from an agent and that the rules of agency do not necessarily apply, as recovery could be from either landlord or agent. In his further submission primary legislation may be construed by reference to secondary legislation in force at the relevant time and this secondary legislation makes it quite clear that “person” in section 75(3)(a) of the 1992 Act embraces both landlord and agent by virtue of section 75(5). This is clear from both regulation 2(2) and 2(3) of the Overpayment Regulations and the common law provisions are thus ousted. Section 75(3) is within the same statutory scheme as section 75(5) as is also made clear by the opening words of section 75(5). It follows that recovery could be effected under section 75(3)(a) regardless of whether the person from recovery is sought is agent or principal, so long as it is made from the person to whom the payment was made.

14. Thus, in his submission, it follows that the tribunal was wrong in its conclusion that because the Agent disclosed it was an agent it was not therefore “a person to whom housing benefit had been paid” for the purposes of section 75(3)(a). It would offend the scheme as a whole given that there were, overall, many references to payment to both landlord or agent. The secondary legislation made the intention plain. Further, the Agent was not left without a remedy, as no doubt it had a contract with the landlord (there is a copy at page 90).

15. Mr Patel also submitted that if recovery could only be obtained from the landlord, the Authority would be entitled only to recover the net sum paid to the landlord, because that would be the sum the landlord had received. In my view, in any event this point cannot be correct, as whatever arrangements a landlord and his agent make regarding deduction of fees would be a matter for them, and the gross payment available to the landlord would be the gross payment received by his agent. The deductions would be made by virtue of the contract entered into between the landlord and his agent. The file papers indicate concern on the part of the Agent that it would be unfair if the Agent were put to the trouble of recovery from the landlord. The Authority cannot take account of this, as its activities are limited by the legislation, which makes no recognition of this point.

16. I note in passing that the Agent also expressed a view that the 1992 Act would “supersede” the Housing Benefit Regulations, presumably because it was passed at a later date, but the 1992 Act was a consolidating Act, and section 75 had its genesis in section 29(4) –(7) of the Social Security Act 1986 under which the Housing Benefit Regulations were made. From time to time the 1992 Act and the Housing Benefit Regulations have been amended in

part, and indeed there have been recent amendments to regulation 101 of the 2001 Regulations with effect from 10 April 2006, which do not concern us here.

17. In issuing directions at the outset of this appeal, I asked whether it could be said that the overpayment arose because of a mistake of fact or in consequence of a wrongful act, which is relevant in considering the law of agency. In the Secretary of State's submission as amplified by Mr Patel at the hearing, it can be argued that the overpayment arose out of a mistake of fact on the part of both the Authority and the Agent, in that both state they were not aware that A was no longer resident in the property. He accepted that the tribunal was broadly correct in its finding that, under agency law as applied by the tribunal, if the Agent had not paid over the rent to his principal, the Authority could then have recovered from the Agent because the benefit had been paid to the Agent under a mistake as to fact.

18. As Mr Patel said, although the Agent provided some evidence of payment for the period 21 July to 20 September 2004, that does not cover the entire period in question and it may be that, in any event, the Agent did retain part of the overpayment; there was no evidence on the point. In Mr Patel's submission the tribunal had erred in recording that

“before the [Authority] notified the [Agent] ... about the overpayment it had accounted in full to its principal for the sums received during the overpayment period, including *the whole of the overpaid benefit.*” [My italics.]

I accept this point, which is corroborated at pages 76 and 77 of the file papers, although in the event nothing will turn on this nor on Mr Patel's view that it could be argued that the Agent acted wrongfully in not informing the Authority, being negligent in not having investigated A's absence.

19. I also asked whether the Agent was a principal when receiving the benefit, to which the Secretary of State submits that if the law of Agency were to apply, then the evidence would suggest that the Agent was not acting as a principal when receiving benefit, it being clear from the housing benefit application form that the Agent held itself out only as agent for the landlord and was accepted as such by A and the Authority. However, in any event, this should not affect the outcome, because the Agent still fell within the definition of “a person” to whom the payment had been made under section 75(3)(a) of the 1992 Act. He accepted that if the common law does continue to apply in these circumstances then, subject to its being confirmed that the Agent had parted with all funds, there would be no claim against it and recovery would be solely against the landlord.

20. Although it was not argued before me, regulation 101 of the Housing Benefit Regulations, in the form in force at the relevant time 1 October 2001 to 9 April 2006, dealing with persons from whom recovery may be sought provides that:

“Person from whom recovery may be sought

101. - (1) For the purposes of section 75(3)(a) of the Administration Act (prescribed circumstances in which an amount recoverable shall not be recovered from the person to whom it was paid), the prescribed circumstance is -

(a) housing benefit has been paid in accordance with regulation 93 (circumstances in which payment is to be made to the landlord) or regulation 94 (circumstances in which payment may be made to a landlord);

(b) the landlord has notified the relevant authority or the Secretary of State in writing that he suspects that there has been an overpayment;

(c) it appears to the relevant authority that, on the assumption that there has been an overpayment -

(i) there are grounds for instituting proceedings against any person for an offence under section 111A or 112(1) of the Administration Act (dishonest or false representations for obtaining benefit); or

(ii) there has been a deliberate failure to report a relevant change of circumstances contrary to the requirement of regulation 75(1) (duty to notify a change in circumstances) and the overpayment occurred as a result of that deliberate failure; and

(d) the relevant authority is satisfied that the landlord -

(i) has not colluded with the claimant so as to cause the overpayment;

(ii) has not acted, or neglected to act, in such a way so as to contribute to the period, or the amount, of the overpayment.

(2) For the purposes of section 75(3)(b) of the Administration Act (recovery from such other person, as well as or instead of the person to whom the overpayment was made), the prescribed person is -

(a) in a case where the overpayment arose as a consequence of a misrepresentation or failure to disclose a material fact (in either case, whether fraudulently or otherwise) by or on behalf of the claimant or any other person to whom housing benefit has been paid, the person who misrepresented or failed to disclose that material fact;

(b) in a case where a recoverable overpayment is made to a claimant who has one or more partners, the claimant's partner or any of his partners;

(c) the claimant.

(3) For the purposes of paragraph (1), "landlord" shall have the same meaning as it has for the purposes of regulation 93.

(4) For the purposes of paragraph (2)(b), recovery of the overpayment may be by deduction from any housing benefit payable to a partner provided that the

claimant and that partner were members of the same household both at the time of the overpayment and when the deduction is made."

In turn, regulation 93(1) provides:

93. (1)A payment of rent allowance shall be made to a landlord (and in this regulation the "landlord" includes a person to whom rent is payable by the person entitled to that allowance) –
....."

It therefore appears that at least in those parts of the secondary legislation mentioned in this decision, the intention was to include an agent within the definition of landlord, effectively without distinction.

21. Notwithstanding Mr Patel's submission that secondary legislation may make plain the primary legislation, secondary legislation will be ultra vires if it attempts to make provisions which are outside the regulation making powers given by the primary legislation. It is therefore necessary to consider whether the secondary legislation, the Housing Benefit Regulations and the Overpayment Regulations were entitled to treat the landlord and his agent interchangeably in this respect by virtue of the primary legislation, a query which I raised in a further direction after the hearing, although without receiving a satisfactory response from the Secretary of State.

22. The primary legislation is section 75(3) of the 1992 Act. I conclude that "person" referred to in section 75(3) without any qualification (or indeed amplification), must be taken as being wide enough to encompass both a natural person and an incorporated company (Schedule to the Interpretation Act 1978) and both a landlord and an agent. Section 75(3)(b) provides for recovery from "such other person (as well as, or instead of, the person to whom it was paid) as may be prescribed". Thus the Overpayment Regulations and the Housing Benefit Regulations are not ultra vires in this aspect. Section 75(3) does not make any reference to the person who would otherwise be *entitled* if there had been no overpayment. I am reinforced in my views by the fact that the claim form specifically authorised payment to be made to the Agent, and the capacity in which the Agent acted was plain.

23. The tribunal took no evidence from the Agent, stating that it decided the appeal on a narrow point, that of the law of agency. It gave what it described as two practical examples, in that if the overpaid benefit had been paid to the Agent's bank, then on a literal interpretation of section 75, the bank would qualify as a person to whom the relevant sums were paid, similarly, payment for goods in a supermarket would be made to the checkout operator who therefore was "the person" receiving the payment. Those examples do not appear to be correct. A payment to a bank would be made, whether in cash or by cheque for the credit of the designated account, and not simply made payable to the bank at large. The

checkout operator would be held out as an employee of the supermarket company, and the credit card or cheque payment would be made for the credit of the supermarket company. In this case payment was made to the Agent as authorised. I do not consider the position to be analogous, but in the event the position is not governed by the law of agency.

24. In view of the importance to the Agent of this decision, it is very regrettable that no submissions were made which could be tested against the submission of the Secretary of State, but I conclude that the primary legislation as embodied in section 75(3) of the 1992 Act

is wide enough to permit recovery in any event from an agent as the person to whom payment has been made, and the amplification in the Housing Benefit Regulations and the Overpayment Regulations which are *intra vires* reinforce my judgment that this is the correct interpretation.

25 It therefore follows that the Authority's appeal succeeds and as set out in my decision in paragraph 1 the overpayment is recoverable from the Agent.

(Signed on the Original)

**E A Jupp
Commissioner**

2 March 2007