Bulk for Conwy

CH 2986 2005

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1 This is an appeal by a landlord (L) against a decision of the Colwyn Bay appeal tribunal on 04 05 2005. The tribunal upheld in part the appeal by L against a decision of Cyngor Bwrdreistref Sirol Conwy County Borough Council ("the Council").

2 For the reasons below, I allow the appeal. The decision of the tribunal is set aside. The appeal is to be reheard subject to the directions below.

3 I held the oral hearing on 18 09 2006 at the County Court in Colwyn Bay. L attended and represented himself. The Secretary of State was represented by Mr Huw James, instructed by the Solicitor to the Department for Work and Pensions. The Council was represented by Mr Stuart Dunn, Solicitor to the Council, accompanied by a colleague. I am grateful to each of them for a full discussion of this case.

4 DIRECTIONS FOR A NEW HEARING

(a) The appeal is to be reheard by way of an oral hearing.

(b) The parties to the appeal are the landlord, the tenant and the Council. The Secretary of State, who is a party in the appeal before the Commissioner, is also to be served with the papers and notice of the hearing.

(c) The Council is directed to notify the tribunal within one month of the issue of this decision of the last known address of the tenant for service of the papers for this appeal.

(d) The tribunal is to serve notice of the hearing on all parties, and to copy all appeal papers now held by the landlord and the Council to the tenant. Those papers are to include a copy of this decision.

(e) The tenant may make any written submissions she wishes to make on this appeal within one month of being served with the full set of papers for this appeal. If she wishes to produce any written evidence, then that is to be sent to the tribunal at the same time as any submission. The tenant has not previously taken part in this appeal. She should consider getting advice from a citizen's advice bureau, welfare rights officer, solicitor or other expert adviser in welfare law about this appeal before making any submission.

(f) The decision before the tribunal is the decision of the Council that payment of housing benefit local housing allowance be made to the tenant and not the landlord for the period from 26 July 2004.

REASONS FOR THIS DECISION

5 The appeal raises issues about the operation of housing benefit by a pilot authority under the local housing allowance scheme. When the scheme started, the

Council stopped paying housing benefit to L and started paying direct to the tenant ("T"). The tribunal confirmed that action in part. L was granted permission to appeal by Commissioner Pacey. The Commissioner invited the Secretary of State for Work and Pensions to be a party to the appeal to the Commissioner. The Secretary of State accepted, and was joined as first respondent. The Council is the second respondent. T was not and is not a party to the appeal.

6 Although this decision concerns a claim for housing benefit by, and payment of the benefit to, T during the period under dispute, T has taken no direct part in this appeal or the underlying dispute at any stage. Bearing in mind individual issues in the case, the Council felt prevented by the Data Protection Act 1998 from disclosing any details about T to L as part of this appeal. The Commissioner saw no reason to join T in this appeal for the purposes of the oral hearing. But I must deal with T's status as part of this decision. If the submissions of the Secretary of State are correct, then T is not affected by the consequences of this decision. But if other arguments are accepted then T is clearly directly affected.

Local Housing Allowance

7 Before turning to L's appeal, it is important to note the background. The Council was selected as one of nine pathfinder authorities in England, Scotland and Wales, for the introduction of a modification of housing benefit given the informal name of "local housing allowance". The actions challenged in the appeal came about as part of the introduction of local housing allowance by the Council.

8 Local housing allowance is not a new benefit or allowance. It is a modification of housing benefit applying in some areas. The legislation introducing the modification is a series of statutory instruments modifying the Housing Benefit (General) Regulations 1987 ("the HB Regulations"). Save for the changes, the HB Regulations apply in full to awards of local housing allowance. Equally, the administrative provisions applying to decision making and appeals about local housing allowance are the same as those applying to housing benefit generally, save for express modifications made by those statutory instruments. There were no changes to any primary legislation.

9 It is an unfortunate feature of some recent social security schemes that those who draft the new legislation and those who draft the guidance seem to find it necessary to use different vocabularies. The name "local housing allowance" cannot be found anywhere in the HB Regulations as amended. But the term is used repeatedly throughout the guidance. Lawyers are used to hearing Humpty Dumpty's famous dictum about the meaning of words being cited to explain that a word bears some unusual meaning. Put at its simplest, it is the logical statement that A means B. The wording of this official guidance presents a different problem. It presents the meaning B with only an inferred link to A. Rather than logic, the grin of the Cheshire Cat comes to mind. More seriously, there is a danger that in using the unofficial label rather than the terms of the law one may lose sight of the fact that every payment of local housing allowance is a payment of housing benefit. To distinguish that form of housing benefit from the general form of housing benefit in this decision I refer to payments in the form of the local housing allowance as "HBHLA". This adopts the title of the official guidance: "Housing Benefit Local Housing Allowance". I use that abbreviation, and stress the status of HBLHA,

because some of the arguments and guidance appear to assume that HBHLA is a new and separate allowance.

10 Put at their simplest, the changes introduced in HBHLA are:
(a) HBLHA is awarded as a flat rate allowance payable at the same level to tenants with similar circumstances living in the same area. It is not linked to individual rents;
(b) HBLHA is normally paid direct to the tenant and not to the landlord;
(c) HBLHA is awarded without being limited to a specific tenancy or fixed term.

11 The change in question here is the change from paying T's benefit to L to payment to T directly. L appealed because T paid nothing to L.

12 The Council became a pathfinder authority - that is, one of the councils selected to pilot the new arrangements - on 9 February 2004. It was one of the pathfinder authorities that introduced the new provisions in a phased programme. On that basis, the new provisions only applied to T's claim on the first occasion after that date when the tenancy arranged between L and T would have been referred to a rent officer. That is not in dispute between the parties.

The official guidance to the Council

13 The Council, with other pathfinder authorities, received instructions from the Department for Work and Pensions. They are in the form of guidance in the *"Housing Benefit Local Housing Allowance Guidance Manual"* (the HBLHA Guidance"). The guidance most relevant to this appeal is in chapter 4, "Paying Local Housing Allowance".

14 I commented above about the use of "local housing allowance" throughout the publicity and guidance but nowhere in the legislation. The same is true for the key problem in this case. As set out in the HBLHA Guidance (and as discussed by all three parties at the oral hearing) the problem in this case is whether T was a vulnerable tenant. But the term "vulnerable tenant" cannot be found anywhere in the legislation. It is therefore not entirely surprising, as Mr Dunn frankly told the hearing, that councils found complying with both the guidance and the letter of the law as a pilot authority could cause problems. That point was accentuated as Mr James had to admit, on instructions, that if the views of the Secretary of State put to the Commissioner about the new provisions were correct, then the Guidance did not entirely follow the legislation.

15 I make that point because the appeal tribunal, as part of the reasons it gave for its decision, held that the Council should have followed specific paragraphs in the guidance. The tribunal decided that the Council was wrong in law in not doing so. But it does not appear to have given any thought to the accuracy of the guidance as a statement of law. The point in issue is one not to be found in any of the relevant regulations. To require the Council to follow it therefore required a decision about the law by the tribunal that it did not make. It is not the task of a tribunal to enforce ministerial guidance unless it is satisfied that the guidance is an accurate expression of the law or is empowered by law. Where guidance goes beyond the law to direct or suggest the proper form of administration, the tribunal exceeds its jurisdiction if it deals with the matter. That may be for a Local Government Ombudsman, or possibly the Parliamentary Ombudsman, but not a tribunal.

The facts

16 L agreed in full with the statement of facts presented by the Council to the tribunal, but not with the further facts found by the tribunal. The Secretary of State expressed no views on the facts. It is common ground between L and the Council that the Council gave L, together with all other landlords, advance notice of the changes to be made to housing benefit in September 2003. The letter enclosed a newsletter warning that rent would normally be paid direct to the tenant. T was given warning in June 2004 that the new scheme would be applied to that tenancy on 26 July 2004. L was warned specifically on 28 June 2004. L was told on 21 July 2004 that payments to him would stop with effect from 26 July 2004. That is what happened. On 9 September 2004 a letter was sent by an officer of the Council's social care department to the department responsible for housing benefit. This warned the housing benefit staff that T was not someone to whom housing benefit should be paid direct. A housing benefit officer replied asking for more information. This was provided by 7 October 2004. The Council told L that the benefit would be paid to him from 11 October 2004. It was duly paid.

17 L and the Council did not agree about other correspondence said to have taken place, and calls and visits said to have been made, between L and various officers of the Council from September 2003 to June 2004. But, as I discussed with the parties at the hearing, at least part of the disagreement seemed to me to be a matter of administration rather than law and so beyond my jurisdiction.

The decision under appeal

18 L regarded the letter of 21 July 2004 as a decision refusing to pay the benefit to him from 26 July 2004 to 10 October 2004. The Council also regarded this as a decision.

19 The tribunal found that the decision under appeal was a decision dated 11 10 2004. This was the decision transferring payment of HBLHA from T to L. The tribunal decided that the decision should have been that the payment to T stopped on 13 September 2004 and transferred to L from then. This was because of the letter from the social care team. But its reasoning in reaching that decision relied on the HBLHA Guidance and not the law. That is clear on the face of the decision, and I need not discuss it further. The decision is wrong in law for that reason, and must be set aside. But the decision was also challenged by the parties for other errors.

20 The Secretary of State, on becoming a party, argued that the tribunal had no jurisdiction to take any decision. In the view of the Secretary of State, confirmed by Mr James at the hearing, there had been no decision by the Council. There was therefore no decision from which L could appeal. Alternatively, if that was not accepted, then the parties were wrong about the only operative decision that was under appeal. This was the decision on 11 10 2004. But the tribunal was wrong in trying to backdate the effect of that decision. It could not be given retrospective effect in the way that the tribunal had attempted.

21 I can deal with one aspect of this divergence of views immediately, and with the agreement of all parties. At the oral hearing Mr Dunn and L both confirmed that payment had been made to L of an amount of, or equal to, the benefit entitlement of T from 13 September onwards. That was no longer in dispute between them. To that

extent, the Council accepted the decision of the tribunal on the facts although it did not agree its reasoning. But the disagreements between L and the Council have now been fully resolved between them as from 13 September 2004. I agree with Mr James that the appeal should now be regarded as settled from that date. I do not therefore need to explore the facts about the letter of 9 September 2004. L maintains his appeal for payment to him of T's benefit from 26 July 2004 to 12 September 2004.

The issues in dispute

22 The appeal raises several important issues about the Council's decision to pay T and not L, and then L and not T, and the validity of the subsequent appeal by L. These include:
(a) whether a decision was made by the Council transferring payment from L to T;
(b) if so, the nature of that decision;
(c) whether that decision, if any, was appealable;
(d) if it was appealable, the nature of the appeal and the appropriate procedure.
I must then turn to the application to this appeal.

The law

23 The Act under which housing benefit takes effect is the Social Security Contributions and Benefits Act 1992, Part 7. The procedure is provided in the Child Support, Pensions and Social Security Act 2000 ("the 2000 Act"), section 68 and Schedule 7. As noted, there have been no amendments to those Acts relevant to HBLHA. The detail about entitlement and payment is set out in the HB Regulations. Detailed procedure is set out in the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 ("the Decisions Regulations").

24 The detailed legislation about payments is in Part XII (Payments) of the HB Regulations. The general rule applying to all housing benefit, including HBLHA, is in regulations 92. No amendments were made to regulation 92 on the introduction of the changes to bring in HBLHA. There are exceptions to that rule in the following rules, to which that rule is made subject.

25 Amendments have been made to the following provisions to provide for payment of HBLHA by reference to alternative rules to those normally applying to housing benefit. Those amendments are in regulation 93 (circumstances in which payment is to be made to a landlord) and 94 (circumstances in which payment may be made to a landlord) of those regulations. It is common ground that regulation 93 is not relevant to this appeal. The Council emphasised at the hearing its view that it had no reservations about L being a landlord within the scheme, and indeed it was complimentary of him. L had previously been receiving payments of rent direct, so there were no arrears.

26 Regulation 94 provides, as it applies to HBLHA pathfinder authorities and to this case:

> "(1) Subject to paragraph 8(4) of Schedule A1 (treatment of claims for housing benefit by refugees), where regulation 93 (circumstances in which payment is to be made to a landlord) does not apply but subject to paragraphs (1B) and (1C), a payment of a rent allowance may nevertheless be made to a person's landlord where –

(a) ....
(b) ....
(c) the person has ceased to reside in the dwelling in respect of which the allowance was payable and there are outstanding payments of rent but any payment under this sub-paragraph shall be limited to an amount equal to the amount of rent outstanding.

...

(1C) In a case where a pathfinder authority has determined a maximum rent (standard local rate) in accordance with regulation 11A -

(a) sub-paragraphs (a) and (b) of paragraph (1) shall not apply; and

(b) payment of a rent allowance to a person's landlord may be made where -

(i) the eligible rent was determined by reference to a maximum rent (standard local rate) which was determined by virtue of regulation 11A(1)(a) and -

(aa) the maximum rent (standard local rate) was determined less than six months previously;

(bb) no subsequent maximum rent (standard local rate) has been determined in accordance with paragraph 11A (1)(a); and

(cc) the claimant has, since the date the maximum rent (standard local rate) was determined, been continuously entitled to, and in receipt of, housing benefit in relation to the dwelling he occupied as his home at that date;

(ii) the pathfinder authority considers that the claimant is likely to have difficulty in managing his affairs;

(iii) the pathfinder authority considers that it is improbable that the claimant will pay his rent; or

(iv) a direct payment has previously been made by the pathfinder authority to the landlord in accordance with regulation 93 in respect of the current award of housing benefit.

(2) In this regulation "landlord" has the same meaning as in regulation 93, and paragraph 2 of that regulation shall have effect for the purposes of this regulation."

I have not set out paragraphs (1A) or (1B). It is common ground that neither apply.

27 The key provisions are in regulation 94(1C). It is common ground that the Council had determined a maximum rent at the standard local rate for T. So the question was whether any of the four conditions under which the rent allowance can be paid direct to a landlord applied to T or T's tenancy. Each of the four conditions operates separately, and they are not cumulative. Only one - that referred to in the hearing and the guidance as vulnerability - was in question in this appeal. Extracting the relevant part only of regulation 94(1)(C), the relevant provision here is that:

> "(b) payment of a rent allowance may be made where
>
> (i) the pathfinder authority considers that the claimant is likely to have difficulty in managing his affairs".

28 The HBLHA Guidance is as follows:

> "4.10 In recognition of the risk that some tenants may struggle with the responsibility of budgeting for, and paying, their rent, safeguards will be put in place. Pathfinder authorities will have discretion to make payment to the landlord if they consider
>
> a that the tenant is likely to have difficulty managing their affairs. For example, if tenant is known to have a learning disorder or a drug/alcohol problem that would mean they are likely to have difficult handling a budget, payment could be made to the landlord
>
> b it is improbable that the claimant will pay their rent. For example, if the Pathfinder authority is aware that the tenant has consistently failed to pay the rent on past occasions without good reason, payment might be made to the landlord.
>
> See *Identifying vulnerable tenants* later in this Manual.
>
> 4.11 Allowing the Pathfinder authority to use their discretion in identifying cases where payment should be made to the landlord was thought to be more effective than attempting to define a precise list of circumstances when direct payment would be necessary. Given the different circumstances of individual tenants, it would be extremely difficult to identify only and all those claimants who would have difficulty handling a budget or who would be unlikely to pay their rent."

29 Chapter 5 of the HBLHA Guidance sets out at some length how a council should identify a vulnerable tenant. While conceding that "vulnerability is not actually used as a word in the regulations" it adds: "for the purposes of LHA, it means a description of an LHA claimant who, in the wording of the regulations ... *is likely to have difficulty managing his affairs*".

30 Chapter 5 tells pathfinder authorities the procedures they must, may, and should not follow in concluding if someone is vulnerable. It was to this guidance that the appeal tribunal turned for one of its findings. However, much of this is best practice for administration. In so far as the HB Regulations give pathfinder authorities a discretion, they must exercise that authority according to law. Any attempt to impose rules upon themselves, or to accept guidance without question in

all cases, may fetter that discretion and thereby render the decision of the tribunal wrong in law.

31 I now turn to the questions that arise in this appeal.

Did the Council take a decision when it transferred payment from L to T?

32 Mr James raised as an initial problem the identity of the decision, if any, under appeal. L and the Council made the same assumption about this. The appealable decision was to pay T and not to L. When was that decision made? L, in the appeal form, gave the date as 31 01 2005. The Council's submission to the tribunal referred to the two letters to L on 28 June 2004 and 21 July 2004 in which it was stated that payment would be made direct to T. The tribunal stated that the decision under appeal was that of 10 October 2004. This was the letter in which the Council accepted that it should pay T's benefit to L and not to T.

33 For the Secretary of State, Mr James' primary submission was that there had been no decision. The transfer of T's benefit entitlement from the usual system to the new system being run by the Council as a pilot authority took place as a matter of law. The Council had to decide nothing, and it did decide nothing. It merely carried out the terms of the new legislation. So there was no decision, and therefore could be no appeal. The tribunal should have struck out the appeal. He emphasised the importance of establishing if there had been a decision, and if so when that decision took place.

34 I pointed out to Mr James that there were no changes in the primary legislation supporting the introduction of HBLHA, and also no relevant changes about appeals in the amending regulations. Further, paragraphs 5.61 and 6.61 of the HBLHA Guidance both stated that the rules about appeals remained unchanged and that in particular:

> "The "person affected" rules will not change as a result of the LHA. A landlord may appeal against a decision made under regulation 93 or 94, as amended by the LHA Regulations."

On his primary analysis, the landlord would have no right of appeal. This seemed to run against not only the identified changes in the law but also the stated policy. When asked to do so, Mr James could not point to any provision changing the previous rules about appeals, but confirmed that his instructions - as set out in the submission for the Secretary of State in the papers - were that there was no valid appeal before the tribunal in this case.

35 It is clear from the methods used to introduce HBLHA into the legislation that whether there was a decision in this case, and the identity of that decision, must be decided under the HB Regulations read with the primary legislation and the Decisions Regulations.

36 Decisions about housing benefit are either made on new claims or applications or by way of changes to existing awards. There is no evidence of any relevant new claim or application being made by T. Under the primary legislation, a claim ceases to exist once a decision is made on the claim: 2000 Act, Schedule 7, paragraph 2. Once an award is made, it can only be altered by specific statutory

processes or on appeal: Schedule 7, paragraphs 3, 4, 6, 10, 11. That is provided in the 2000 Act so can be altered only by primary legislation. The legislation used to introduce HBLHA were not made by primary legislation, so cannot alter it or its proper interpretation. The actions of the Council should therefore be assumed to be taken in accordance with standard housing benefit procedure, as it is to be assumed, and is assumed by both L and the Council, that it acted according to law.

37 As there is no new claim and no statutory provision deeming the Council to have taken action or requiring it to take action, the Council must have followed standard procedure in altering the existing decision to pay L. The only procedure available to the Council is that of supersession under Schedule 7 paragraph 4. The action of the Council transferring payment from L to T must therefore have been a decision superseding the previous decision under that paragraph. The Council was clearly entitled to act on its own initiative in considering such a decision. And the grounds for doing so were clearly that the previous legislative authority for paying L not T was removed when the amendment to regulation was to be applied to T's award of housing benefit. That took place on and from 24 July 2004. That is a change of circumstances empowering the Council to consider a supersession under Schedule 7 paragraph 4 and Decisions Regulations, regulation 7(2)(a).

38 That accords with the actions of the Council. The Council told L in its letter of 28 June 2004, under a heading which stated "Local Housing Allowance" and T's name, that "with effect from 26 07 2004 the above named tenant's rent will be paid directly to them as a result of the above new scheme". The letter of 21 July 2004 to L started with the leader: "Further to a review of the application of housing benefit from your tenant [T]." It continues: "It is now required, in accordance with Local Housing Allowance regulations, that benefit payments are made direct to the tenant."

39 I accept that as proper notification to L, and also that there had been proper notification to T, of the Council's decision. I do not accept the statement in the letter of 21 July 2004 as an accurate statement of the law. The council was *not* required by regulations to make the payments direct to T or to tenants generally. It had a discretion. The operative word in regulation 94 - as correctly repeated in the guidance - is "may". But that does not alter the nature of the decision or the validity of the notification.

40 It follows that either in the decision that led to the letter of 28 June 2004 or the review identified as having taken place before the letter dated 21 July 2004 the Council took the decision to make payment to T. That was an exercise of the power given to it in regulation 94(1C)(b) of the HB Regulations. Whether it exercised that power correctly in law is a different issue. The critical point is that it made a decision. It must have made that decision under regulation 94, because there is no other power under which it could have transferred payment to T from L. And it must have made it in or before the letter of 21 July 2004. However expressed, it took the decision to supersede the previous decision to pay L with a new decision to pay T from 26 July 2004.

41 I therefore reject the submission for the Secretary of State that there was no decision.

42 Was the tribunal right in finding a decision made on 10 October 2004? In my view, this was a further decision made by the Council superseding the decision made in June or July 2004. The tribunal was wrong in law in identifying no earlier decision, but having identified that decision it decided it. As both the Council and L accepted the decision of the tribunal on the facts on that later decision, I have already indicated that I need not examine that decision any further.

43 Accordingly, the answer to issues (a) and (b) is that the Council did take a decision and that this decision was a decision properly considered by the Council as a supersession on its own initiative because of a change of circumstances.

Was the decision appealable?

44 Yes.

45 As the HBLHA Guidance correctly states, there has been no amendment to the appeals provisions applying to decisions such as the Council's supersession decision in issue here. Appeal right are governed by the 2000 Act, Schedule 7. The details are in regulation 16 of the Decisions Regulations and the Schedule to those regulations. Ignoring the double negatives used in drafting, paragraph 1(d) of the Schedule expressly confirms the right to appeal against a decision made under regulation 94. It is also worth noting that this is further confirmation that the argument put by Mr James is wrong. Had it been intended to stop appeals against the actions of pathfinder authorities, then I would have expected an express amendment to this Schedule. The courts have long taken the view that rights of appeal cannot be removed by implication or inference.

46 It follows that the tribunal did have jurisdiction to consider L's appeal against the decision of the Council although, in the event, it considered the wrong decision.

The nature of the appeal

47 Two further general points arise about the appeal. First, who are properly the parties to that appeal? Second, what was the scope of the appeal? Did the tribunal have an open jurisdiction to redetermine the supersession decision, or is it restricted in the scope of its powers to question the Council's decision. Those issues interact. As in this appeal, a decision to pay a tenant rather than a landlord under regulation 91(1C)(b)(ii) or (iii) is either a decision about the abilities of the tenant to manage affairs or a decision about the probability that the tenant will pay the rent (or both). A pathfinder authority taking that decision properly will have access to all the facts about the tenant. Does a tribunal have the same access? That follows only if the tenant is or can be made a party to the appeal. I must therefore consider if T should be a party to this appeal.

48 The appeal to the tribunal is an appeal by a landlord under regulation 94 of the HB Regulations against a supersession decision of the Council making payment to the tenant. Regulation 23 of the Decisions Regulations makes provision for the procedure on appeals. Those regulations apply parts of the Social Security and Child Support (Decisions and Appeals) Regulations subject to the phrase "party to the proceedings" being read as referring instead to "principal parties": regulation 23(3)(b). Regulation 1 of the Decisions Regulations provides that "principal parties" has the same meaning as in paragraph 7(4) of Schedule 7 to the 2000 Act.

49 Paragraph 7(4) provides that:

> "In this paragraph and paragraph 8, "principal parties" means -
>
> (a) where he is the applicant for leave to appeal or the circumstances are otherwise such as may be prescribed, the Secretary of State;
>
> (b) the relevant authority against whose decision the appeal to the appeal tribunal was brought;
>
> (c) the person affected by the decision against which the appeal to the appeal tribunal was brought or by the tribunal's decision on that appeal."

The context of that provision is that it provides for those who can apply to a tribunal to have the decision redetermined without an appeal to a Commissioner.

50 Paragraph 8 provides for appeals to the Commissioner. Somewhat curiously, the rights of appeal in paragraph 8(2)(c) are given to:

> "(c) any person affected by the decision against which the appeal to the appeal tribunal was brought or by the tribunal's decision on that appeal."

I comment that this is curious because paragraph 7(4)(c) and paragraph 8(2)(c) use identical language save that the former refers to *the person affected* while the latter refers to *any person affected*. Can these have been intended to be different? If they were, then the logic is that one person (and none other) must be identified as "the person" with a right to apply to a tribunal for it to set aside its decision, but no such identification is needed when deciding if someone has a right of appeal. As the procedure under paragraph 7 is intended to be a more efficient way of dealing with appeals where it is obvious that there has been an error, it would be curious if the right to ask for that procedure was more limited that the right of appeal. I take from that the view that no difference was intended between "the person" and "any person". The singular in paragraph 7(4) includes the plural under the general rules of the Interpretation Acts.

51 The term "person affected" is, under regulation 2 of both the Decisions Regulations and the HB Regulations, to be construed in accordance with regulation 3 of the Decisions Regulations. That regulation provides, as relevant:

> "(1) For the purposes of Schedule 7 to the Act and subject to paragraph (2) a person is to be treated as affected by a relevant decision of a relevant authority where that person is -
>
> (a) a claimant
>
> ....
>
> (d) a landlord ... and that decision is made under regulation ... 94 ... of the Housing Benefit Regulations.

(2) Paragraph (1) only applies in relation to a person referred to in paragraph (1) where, the rights, duties or obligations of that person are affected by a relevant decision."

52 The decision taken by the Council removed the right of L under the decision subject to the supersession to receive payment direct from T. L is therefore clearly a person affected. T's rights were also affected. If the decision had been the opposite then the payment would have continued being made to L after T's request or consent was deprived of legal effect and by reason of what amount to adverse personal findings against T's capacity as a tenant.

53 Under regulation 39(1) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999, as applied by regulation 23(1) and (3) of the Decisions Regulations to appeals involving decisions under regulation 94 of the HB Regulations, all principal parties must be given notice in the approved form of the appeal and must also be given the opportunity to request an oral hearing. Under regulation 49(2), similarly applied, a tribunal hearing the appeal by way of oral hearing is required to give notice of the hearing to the principal parties, as defined above. Under regulation 49(7) as similarly applied, the principal parties are all entitled to be present and heard.

54 It follows that in the appeal before the tribunal L and T were both persons affected. This has the procedural consequence that both L and T were, or should have been, asked if they wanted an oral hearing. When one was listed, both L and T should have been given notice of it. It also has the procedural consequence that if T was not given proper notice of the proceedings, then any decision made is open to challenge without the usual time limits for failure to give notice to all the principal parties.

55 This casts considerable doubt on the approach taken by the Council in this case once the matter had ceased to be an issue under decision by the Council and became an issue on appeal. In particular, the tribunal must be informed of the last known address of the tenant so that proper notice can be served of the appeal. And there are no provisions in the HB Regulations or Decisions Regulations of the kind that exist for child support purposes to keep the address of one party from another. As all documents should be copied to all parties, the practical effect is that the landlord is entitled to know the address of the tenant if it is known to the Council or the tribunal. Without hearing argument, I cannot see how the Data Protection Acts can justify a party withholding this from the tribunal and therefore from the other parties.

56 The provision that both the landlord and the tenant are parties to any appeal about a regulation 94 decision of this sort has a more important effect. It means that any submissions put to the tribunal by the local authority or the landlord must be copied to the tenant (if in documentary form). It also means that a tenant who wishes to do so can require an oral hearing. And if there is an oral hearing, the tenant is entitled to be present.

57 It follows that there is no procedural barrier preventing a tribunal hearing all sides on a regulation 94 decision. There is therefore no procedural barrier on it conducting a full appeal with a view to making its own decision in place of that of the local authority.

58 The decision in this case is whether the decision maker "considers that the claimant is likely to have difficulty in managing his affairs." There is nothing in the language of that provision suggesting - as occurs elsewhere in housing benefit law - that the tribunal's role is limited to what is in effect a judicial review of a wide discretion. The terms of the test are predictive - what is likely to happen, not what has happened. That is essentially a matter of opinion not of fact. But it is an opinion on which the tribunal can have as sound a view as a local authority once it has heard all the parties that wish to be heard. There is no language in the test that suggests that the matter is an unappealable discretion subject only to the usual limits of judicial review. Nor is there any provision relating to HBLHA that suggest otherwise. And, in so far as it is relevant, there is nothing in the Guidance suggesting any such limitation.

59 I conclude that the tribunal has the right and duty to consider for itself on all the evidence before it whether a supersession decision should be made in an appeal such as this.

Application to this appeal

60 The decision of the tribunal must be set aside.

61 The proper parties to the appeal are the Council, L and T. T has not been given notice, and is not a party before me, so the matter must go to a new tribunal.

62 The tribunal must give notice in proper form to both L and T about this appeal. The Council is directed to provide the tribunal with T's last known address.

63 The new tribunal must consider, in effect for the first time, L's appeal against the decision of the Council in June or July 2004 that the decision directing payment of the benefit to L be superseded by a decision directing payment of the benefit to T with effect from 26 July 2004.

64 The tribunal is directed that the Council, from the point of view of procedure, properly considered a decision to supersede the decision paying the benefit to L. It is for the tribunal to decide, applying regulation 94(1C) of the HB Regulations in the light of all the evidence, whether the decision of the Council taken on that consideration, is to be confirmed or varied.

David Williams
Commissioner

13. 11. 2006

[Signed on the original on the date stated]