Bulletin 184

CH/3013/2003

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal to the Commissioner is allowed. The decision of the Fox Court appeal tribunal dated 13 March 2003 is erroneous in point of law, for the reasons given below, and I set it aside. It is expedient for me to substitute a decision on the claimant's appeal against the local authority's decisions dated 26 July 2002, having made the necessary findings of fact (Child Support, Pensions and Social Security Act 2000, Schedule 7, paragraph 8(5)(b)). The decision is that the appeals are allowed and that the claimant is, subject to the calculations to be carried out by the local authority in accordance with paragraphs 52 and 53 below, entitled to housing benefit and council tax benefit for the benefit periods from 18 April 2001 to 17 April 2002 and from 18 April 2002 to 17 April 2003 of amounts to be determined in the calculations mentioned above.

The case as presented to the appeal tribunal

2. The appeal tribunal was concerned with the claims for housing benefit and council tax benefit for a period starting on 1 April 2001 which were signed on 8 April 2002. It appears to have been agreed (and it is not worth quibbling over a few days) that, subject to an argument mentioned below, the claims were made on 18 April 2002. The claims were in respect of a garden flat in a house in London NW1. The landlord lived on another floor of the house. The annual tenancy agreement made on 26 February 1999 was between the landlord and Herman Properties Ltd, under which the company could permit occupation by the claimant as the named and approved occupier. The claimant was a director of Herman Properties Ltd, which it seems was the vehicle for his business as a property developer both in Italy and in the United Kingdom. The tenancy was renewed in 2000, 2001 and 2002. The rent initially was £1,733.33 per calendar month. By April 2001 it was £1,785.33.

3. The claimant had the misfortune to suffer a severe stroke in March 1999. Although he made a gradual recovery to a much better condition than had at some stages been feared, he has been unable to carry on his business as a property developer or do other work. As a result the company's trading more or less ceased. The bank statements from the claimant's personal current account from the end of March 2001 to 2 April 2002, which were before the local authority and the appeal tribunal (with the exception of one important page), showed the payment of cheques drawn on that account for the amount of the monthly rent. They also showed the agreement in April 2001 of an overdraft limit of £5,000, long periods of substantial overdraft, occasionally over that limit, and some large incoming payments at intervals which either cleared off or reduced the overdraft outstanding at the time.

4. In the course of the local authority's investigations, the claimant was asked about the source of the following payments into his current account: £1,993.00 on 4 May 2001, £3,318.14 on 19 June 2001, £6,000 on 17 July 2001 and £11,064.39 on 14 January 2002. He explained that they were from Luisa [LB], who had supported him financially since his stroke. She lives in Italy and has later been described as the claimant's girlfriend. He produced a letter from her dated 3 May 2002 in which she wrote:

> "This letter confirms that I have supported you financially since your stroke - the payments I have made to you are not regular and since the 5 of April 2001 I have paid you £22,375.00."

The claimant later stated in a letter dated 16 June 2002 that his parents had provided about £2,465 since April 2001. He had been in receipt of incapacity benefit (weekly rate £78.40 from 11 April 2002) since April 2001.

5. On 26 July 2002 the local authority issued a decision disallowing both claims. The notification letter contained the following:

> "I have decided that I cannot pay you any Housing Benefit/Council Tax Benefit because you are receiving substantial sums of money from other sources that, on the balance of probabilities I believe, are being used to cover your accommodation costs. You have told me that since April 2001 you have received £22,375.00 from Ms [LB] and about £2465 from your parents. You have not supplied evidence that these sums of money are loans that have to be repaid.
>
> I have also taken into account that you are living in expensive accommodation that is now beyond your financial mens and that you have not considered moving to more suitable, cheaper accommodation. You have also paid rent from your own resources.
>
> I have considered your claim for backdated Housing Benefit and/or Council Tax Benefit but I am unable to grant it. I cannot backdate your claim because I do not consider that you had good cause for delaying your claim."

6. Following a refusal of an application to revise that decision, the claimant appealed against it on 9 October 2002. The grounds were given in a letter dated 17 October 2002 from Kentish Town Citizens Advice Bureau. The letter rebutted the views expressed in the local authority's letter of 26 September 2002 refusing revision (that the claimant had not provided correct information, that the payments from Ms LB related to his business interests and that the payments should be taken into account as income). It enclosed a letter dated 16 September 2002 from Ms LB saying:

> "Further to my letter to you of the 3 of Mai 2002, I confirm that the money I have paid you are not a gift and that you will repay me when you have the means to do so."

7. The local authority's written submission to the appeal tribunal raised three issues for consideration: whether the claim form signed on 8 April 2002 was not properly completed and the claim thereby invalidated; whether the claimant's failure to account for the proceeds of sale of a previous property invalidated the claim; and whether the receipts from friends and family were loans to be ignored in calculating benefit or should be taken into account as income or capital. It is now agreed on behalf of the local authority that, as it had made a decision on the claim, the circumstances in which an authority is entitled to decline to determine a claim were

irrelevant. And at the second oral hearing before me the local authority's representative resiled from any reliance on the principle of intentional deprivation of capital in relation to the proceeds of sale of the previous property. Thus, I need say no more about the first and second of those issues.

The appeal tribunal's decision

8. The claimant attended the appeal tribunal hearing on 13 March 2003 and was represented by Mr Glyn Tucker of Camden Tribunal Unit. The local authority (London Borough of Camden) was represented by Mr Peter de la Mothe, Deputy Chief Housing Benefits Officer.

9. The appeal tribunal disallowed the appeal and in the corrected decision notice confirmed the decision of 26 July 2002 that the claimant was not entitled to council tax benefit from 18 April 2001. Plainly the omission of housing benefit was a mere slip. The appeal tribunal accepted, with the agreement of the local authority, that the claimant's health problems gave him good cause for the delay in claiming. It decided that the claim was valid and that as the claimant received the net proceeds of sale of the previous property (£17,564.96) three years before the claim, when no claim for benefit was contemplated, he had been entitled to do as he wished with the money. In relation to the £22,375 received from Ms LB the appeal tribunal noted that the claimant had said in evidence that these payments had been for his living expenses. It said in its statement, relying on the case of *R v Oxford City Council, ex parte Jack* (1984) 17 HLR 419, that it was:

> "of the opinion that the monies received from Ms [LB] (described as a girlfriend) were not legally repayable loans and therefore were to be considered as income being paid to [the claimant] over a period of time."

The appeal to the Commissioner

10. The claimant now appeals against that decision with my leave, granted on 10 September 2003. The main grounds put forward by Mr Tucker were that the appeal tribunal should not have followed the *Jack* case and treated the payments from Ms LB as income and that, even if it had been right on that point, it should have required the local authority to say whether the amount of the claimant's income took him out of entitlement to benefit, especially as the first payment from Ms LB was not made until after 18 April 2001, so that it gave inadequate reasons for deciding the issues of entitlement against the claimant.

11. The local authority made a detailed written submission, drafted by Mr Paul Stagg of counsel, dated 11 October 2003 and received on 17 October 2003. That submission supported the appeal to the extent of agreeing that the appeal tribunal had erred in law by not properly considering the amount of weekly income the claimant received and how that affected his entitlement to benefit. It was suggested that the case should be remitted to a new appeal tribunal. However, it was submitted, by reference to several additional authorities (including *Morrell v Secretary of State for Work and Pensions* [2003] EWCA Civ 526, R(IS) 6/03) that the payments from the claimant's parents and from Ms LB, used for living expenses, properly fell to be treated as income, despite their irregular nature. A number of other points were raised that a new appeal tribunal might need to consider. The most important was that, as the claimant was not liable

under the tenancy agreement and there was no evidence of any subletting, he had no liability for rent as required in relation to housing benefit by section 130(1)(a) of the Social Security Contributions and Benefits Act 1992.

12. In his reply dated 19 November 2003, Mr Tucker argued that *Morrell* did not support the local authority's position and also relied on regulation 40(6) of the Housing Benefit (General) Regulations 1987 (regulation 31(6) of the Council Tax Benefit (General) Regulations 1991 - all references below to the Housing Benefit Regulations are to be taken as including a reference to the equivalent provisions in the Council Tax Benefit Regulations):

> "(6) Any charitable or voluntary payment which is not made or due to be made at regular intervals, ..., shall be treated as capital."

13. In the meantime, on 3 October 2003, the Secretary of State for Work and Pensions had declined the invitation to become a party to the claimant's appeal.

14. I directed an oral hearing because regulation 40(6) had not been raised before and the local authority's point on liability for rent, if made out, might enable the housing benefit case to be disposed of regardless of other issues. A hearing took place on 25 February 2004. The claimant was present with Mr Tucker and so was Mr de la Mothe.

15. Shortly before the hearing, Mr de la Mothe had received information from the landlord's solicitors about an action for possession taken by the landlord against Herman Properties Ltd as the first defendant and the claimant as the second defendant. The action had been brought on the basis that the company was the tenant and it was alleged that no rent had been paid since 28 June 2002 (and that the payment for that month had not been made until September 2002). Orders were made in the Central London County Court on 3 July 2003 giving the landlord possession as against both defendants and giving judgment for the arrears of rent and for payments for the use and occupation of the premises against the company. The two defendants were made jointly and severally liable for the costs of some £8,000. The company was apparently in administration. The landlord's solicitors' letter of 23 February 2004 informed the local authority that, as the costs had not been paid, a bankruptcy petition had been presented against the claimant. One purpose of the letter was to request that any arrears of housing benefit payable to the claimant as a result of the proceedings before the Commissioner should be paid to the landlord.

16. In addition, a page from the current account bank statements which had been missing before the appeal tribunal (but not noticed as such until Mr Stagg's submission of 11 October 2003) was produced. This covered the period from 2 November 2001 to 16 November 2001 and showed a deposit of £11,493 on 7 November 2001 with the reference [LB]. That took the balance from £6,708.82 overdrawn to £4,784.18 in credit.

17. I had rejected Mr de la Mothe's request for a postponement so that the claimant could be directed to produce all the relevant documents from the court proceedings, as I wished to take the opportunity to clarify what legal issues were in dispute.

18. At the hearing, Mr Tucker put forward a submission that the course of dealings between the landlord and the claimant, in circumstances where the rent had been paid from the outset from a personal account of the claimant and there had been annual renewals, had created a tenancy between the landlord and the claimant personally. In the event that that submission was rejected, Mr Tucker relied on regulation 6(1)(c)(ii) of the Housing Benefit Regulations:

> "(1) Subject to regulation 7 (circumstances in which a person is to be treated as not liable to make payments in respect of a dwelling) the following persons shall be treated as if they were liable to make payments in respect of a dwelling--
> (a) the person who is liable to make those payments;
> (b) a person who is a partner of the person to whom sub-paragraph (a) applies;
> (c) a person who has to make the payments if he is to continue to live in the home because the person liable to make them is not doing so and either--
> (i) he was formerly a partner of the person who is so liable, or
> (ii) he is some other person whom it is reasonable to treat as liable to make the payments; and
> [(d) and (e) need not be set out]."

In reply, Mr de la Mothe submitted that in regulation 6(1)(c)(ii) the "person" liable to make payments who was not doing so could not include a limited company, as was the case here.

19. Submissions were also made about the meaning of regulation 40(6) of the Housing Benefit Regulations and "voluntary payments" in the context of loans and the general distinction between capital and income. Mr de la Mothe suggested that a ruling on that issue might be welcomed generally, and that there were many loose ends, especially some created by the landlord's witness statement in the possession proceedings, which would need to be dealt with either by a new appeal tribunal or by the Commissioner.

20. Accordingly, I directed further written submissions on the issues raised as to the claimant's liability for rent, as to the treatment of payments as capital or income and as to my powers in the appeal before me to make any ruling on whether the local authority should pay any benefit direct to the landlord. I also directed Mr Tucker to produce as many documents as were available from the possession proceedings, which he did promptly. On reflection, I should have renewed the invitation to the Secretary of State to become a party to the proceedings, in view of the questions raised on the interpretation of the legislation, but I did not do so. As it is, it is the responsibility of the particular local authorities concerned in appeals before the Commissioners to make submissions on the interpretation of regulations made by the Secretary of State if they wish cases to be decided in their favour.

21. The local authority's further submission, again drafted by Mr Stagg, was dated 5 April 2004 and was received on 13 April 2004. The further submission on behalf of the claimant was dated 12 May 2004 and was drafted by Mr Stephen Knafler of counsel. I mention at this point that the parties were agreed that I had no power to make any ruling about direct payment and

that that question would have to be the subject of a separate decision of the local authority if any benefit were awarded to the claimant. I agree and therefore say no more about that question. In addition the further submission for the claimant resiled from the submission that in the circumstances of the case there was a tenancy between the landlord and the claimant personally. I accept that view of the evidence and therefore do not need to say any more about the question of a tenancy arising from a course of dealings.

22. A further oral hearing was directed, as had been envisaged. The hearing took place on 13 July 2004. The claimant again attended with Mr Tucker. The local authority was represented by Mr Stagg, with Mr de la Mothe in attendance. I am grateful to both representatives for their submissions in a difficult and complex case and to the claimant for his patience in trying circumstances.

Did the appeal tribunal err in law?

23. As noted in paragraph 11 above, it was agreed on behalf of the local authority in Mr Stagg's first written submission of 11 October 2003 that the appeal tribunal went wrong in law by not expressly considering how, if the payments from Ms LB were treated as income, they and possibly other payments were to be taken into account over the whole period of the claim from 18 April 2001 onwards and how they would affect entitlement to housing benefit and council tax benefit. I am also inclined to say that the appeal tribunal's reasoning on the treatment of the payments from Ms LB as income was far too briefly expressed to be adequate in the circumstances and was probably based on a wrong legal approach. The appeal tribunal seems not to have looked at all the factors which would have been relevant to categorising the payments as capital or income. It certainly did not consider the possible effect of regulation 40(6) of the Housing Benefit Regulations. Although neither party had mentioned that provision at that stage, it was in my view part of the overall issue of the proper categorisation of the payments from Ms LB, which had been raised by the parties. The omission to consider regulation 40(6) was therefore an error of law.

24. Accordingly, I set aside the appeal tribunal's decision of 3 March 2003 as erroneous in point of law. It is expedient for me to substitute a decision on the claimant's appeal against the local authority's decisions of 26 July 2002. That was I think the final preference of both parties at the hearing on 13 July 2004. As I have heard some further evidence from the claimant and as the bankruptcy proceedings against the claimant (which had been adjourned pending the outcome of the present appeal) are now due for hearing on 23 July 2004, that is plainly the proper course.

The Commissioner's decision on the appeal against the decisions of 26 July 2002

25. I look first at the question of the claimant's liability for rent, which is relevant only in relation to housing benefit, and then at the questions which are common to housing benefit and council tax benefit.

Liability for rent

26. As it is now not disputed that the legal liability to make payments under the tenancy agreement lay throughout on Herman Properties Ltd and not on the claimant, the claimant can

only be found to be liable to make payments in respect of the dwelling occupied as his home (Social Security Contributions and Benefits Act 1992, section 130(1)(a)) if he can be treated as so liable under regulation 6 of the Housing Benefit Regulations.

27. Regulation 6(1)(c)(i) could potentially apply to the claimant if the "person" who is liable to make payments in respect of the dwelling occupied by the claimant as his home and is not doing so can include a limited company. By section 5 of and Schedule 1 to the Interpretation Act 1978, unless the contrary intention appears, "person" in any legislation includes "a body of persons corporate or unincorporate". That would bring a limited company within the meaning of "person".

28. In his submission of 5 April 2004, Mr Stagg referred to the rule in section 11 of the Interpretation Act 1978 that expressions used in subordinate legislation, unless the contrary intention appears, bear the same meaning as in the Act conferring power to make the subordinate legislation. He pointed out that section 130(1) of the Social Security Contributions and Benefits Act 1992, in setting out the conditions under which a "person" can be entitled to housing benefit, plainly could only have been referring to natural persons. Only natural persons can occupy dwellings as their homes or have applicable amounts (section 130(1)(c)). Mr Knafler, in his submission of 12 May 2004, although identifying a couple of instances in which "person" was used in the Housing Benefit Regulations with a general meaning extending beyond natural persons (regulations 71(3) and 92(3)), considered that the Interpretation Act 1978 created something of a legal stalemate. I do not agree.

29. I am not sure how much force section 11 of the Interpretation Act 1978 is to be given when a word or phrase does not have a specific definition in the enabling legislation. Where the word or phrase takes a meaning from its context in the enabling legislation, it seems to me that that simply goes into the general context when the subordinate legislation is considered. I have no difficulty in accepting that when the word "person" is used in the Housing Benefit Regulations in relation to a person who is or might be entitled to housing benefit, the context requires a limitation to natural persons. But where the word "person" is used in relation to other persons, the context could produce a different result. I can see quite a number of instances apart from regulations 71(3) and 92(3) where the word "person" is used in a context which plainly could extend beyond natural persons to limited companies or other bodies. Examples include: the definition of "designated person" in regulation 2(1) (person providing services to the Secretary of State or a local authority); regulation 35(5) (notional income and a person for whom the claimant provides services at less than the going rate); regulation 93(1) and (3) ("landlord" including a person to whom rent is payable); regulation 99(2) (recoverability of overpayments and person acting on behalf of the claimant or to whom payment is made); and regulation 99(3) (person providing services to the Department for Work and Pensions or the Board of Inland Revenue). That is in line with the fairly undiscriminating use of the word "person" in social security legislation in general, which may involve different meanings within a few lines.

30. At the oral hearing, Mr Stagg, rightly in my view, concentrated on regulation 6 itself and the context it provides. First, he submitted that "person" should have a common meaning

throughout the regulation and that everywhere else in that regulation the reference could only be to a natural person. For instance, only a natural person can have a partner as defined in the legislation or have a home to live in. Second, he submitted that there would be an obvious possibility of abuse if regulation 6(1)(c)(ii) were interpreted as submitted for the claimant. It was said that if a company tenant were not paying rent to the landlord and a local authority paid housing benefit to a claimant occupying the premises, there was a danger that the claimant could pocket the benefit and disappear. The landlord would have no right of action for rent arrears against the claimant and might have great difficulty in suing a company with no assets. It was suggested that a local authority might not be able to protect itself in such circumstances by making payment direct to the landlord under regulations 93 and 94 of the Housing Benefit Regulations (as the claimant might not be regarded as having a liability to the landlord). I do not think that there is anything in that last point, as regulation 2(3) provides that references to a person who is liable to make payments include references to a person who is treated as so liable under regulation 6.

31. On the "abuse" argument, Mr Tucker stressed the protections provided by the test of reasonableness in regulation 6(1)(c)(ii) itself and by the local authority's power to require production of documents such as tenancy agreements and to obtain information from the landlord. He said that company lets were not an unusual category within the letting market and that it would frustrate the purpose of regulation 6 if occupiers were deprived of the protection of regulation 6(1)(c)(ii) if, for whatever reason, the company was unable to make the rent payments.

32. I reject Mr Stagg's submissions on behalf of the local authority. The argument for consistency within regulation 6 does not work. I accept that in the places in regulation 6 where the word "person" is used in relation to an actual or potential object of an award of entitlement to housing benefit, or to partner of such a person, the meaning is limited to natural persons. However, the first use of the word in regulation 6(1)(c) is not restricted in that way. Although regulation 6(1)(c)(i) creates a special rule for former partners of persons who are liable, in which "person" must be restricted to a natural person, that does not affect the generality of the first use of the word. I can see nothing in the particular context to show an intention contrary to the meaning prescribed in Schedule 1 to the Interpretation Act 1978. I have taken into account Mr Stagg's submissions on potential abuse, but I have found it difficult to see how that potential is significantly increased where the tenant is a company rather than a natural person.

33. Accordingly, I conclude that the circumstances of the present case are not excluded from the operation of regulation 6(1)(c)(ii) of the Housing Benefit Regulations by reason only of the fact that it was a limited company which had the legal liability to pay rent under the tenancy agreement.

34. There is no doubt that as from 18 April 2001 down to the date of the decision under appeal, Herman Properties Ltd, the person liable to make payments for the dwelling occupied as the claimant's home, was not making those payments. I find that the claimant had to make those payments if he was to continue to live there. The evidence of his current account bank statements shows that he was making those payments from his personal account. Whatever the

situation earlier in the tenancy, by April 2001 the company had minimal income coming in and there was no realistic possibility of the claimant taking steps to get the company itself to pay the rent. If the substantial rent payments had not been kept up, the probabilities were that the landlord would take action to recover possession, especially as he was already accepting rent not incorporating increases as provided for in the original agreement. The issue then is whether it is reasonable to treat the claimant as liable to make the payments. In the circumstances of the form of the original agreement, which was expressly for occupation by the claimant, the close identification of the claimant with the company, and the very serious and continuing effects of the illness which unexpectedly intervened shortly after the tenancy was taken out, I conclude that it is reasonable to treat him as liable. As the payments were actually made by the claimant until very near to the end of the period I can look at in this appeal, I do not need to grapple with the effects of different circumstances where payments are not made by anyone, including the claimant, for some substantial time.

The claimant's income

(a) The payments from Ms LB

35. The first and main issue is the proper categorisation of the payments from Ms LB. To the amount of these payments over the period from April 2001 to January 2002 as taken into account by the appeal tribunal (£22,375 in total), must be added the £11,493 received on 7 November 2001.

36. I look first at the effect of regulation 40(6) of the Housing Benefit Regulations (and the equivalent council tax benefit provisions which I include within that label). Were the payments "voluntary payments"? Mr Stagg referred to the decision of Laws J in *R v Doncaster Borough Council, ex parte Boulton* (1992) 25 HLR 195 as the only current authority on the meaning of "voluntary payment" in the housing benefit context (in that case in relation to the disregard as income of charitable or voluntary payments made or due to be made at regular intervals: Housing Benefit Regulations, Schedule 4, paragraph 13). Mr Tucker did not refer to any other authority and accepted the application of Laws J's ruling. The issue in that case was status of payments made by British Coal to the widows of retired miners in lieu of free coal. Eligibility for free coal and for cash payments in lieu where coal could not be used was governed by the national Concessionary Coal Agreement, which was negotiated with the unions and incorporated into the contracts of employment of employees. The argument for the claimant in that case was that she had no private law claim to the money or to force the Coal Board to continue making the payments. Laws J adopted, on House of Lords' authority from the end of the nineteenth century, the principle that the word "voluntary" is commonly used in law both as the antithesis of something done under compulsion and as denoting the obtaining or giving of something without anything being obtained in return. The meaning the word bore in any piece of legislation depended on the context and the purpose of the legislation. He held that in the context he was concerned with it was the second meaning which applied and that, as British Coal had entered into the Concessionary Coal Agreement in the interests of good labour relations so as better to secure the willing services of its employees, it did obtain something in return for making the payments. Therefore, the payments were not voluntary.

37. Although the context of regulation 40(6) is not quite the same as that of paragraph 13(1)

of Schedule 4 to the Housing Benefit Regulations, in my view it is right that the meaning of "voluntary payment" should be the same in both places. I accept the long-standing authority of *Boulton* as applying to regulation 40(6). It has not been submitted to me that it was wrongly decided and I do not see anything to suggest that the conclusion was one that Laws J should not have reached.

38. The submission for the local authority was essentially that if any payments are made as a loan they cannot be voluntary, because the payer gets in return the payee's obligation to repay the loan. That would apply even if the loan is interest-free and if the terms of the loan are that repayment should only be made when the payee is in a financial position to do so. Thus, it was submitted, a voluntary payment, if there was no legal obligation to make the payment, could only be made by way of gift. On the evidence of the two letters from Ms LB, her payments were loans and she got something in return for them. Therefore, they were not voluntary payments and regulation 40(6) of the Housing Benefit Regulations did not apply.

39. The claimant gave evidence about the circumstances of the payments, so far as those were within his own knowledge. I must put that evidence together with that represented by Ms LB's letters and the claimant's bank accounts. He said that at the time of the first payment, although he was much improved from his condition immediately after the stroke, he was still operating at a restricted level of physical and emotional energy and it was open to question whether he would make the degree of recovery which has in fact occurred since. Although the claimant did not suggest that he knew what was in Ms LB's mind at the time, he said that the payments were made simply because she wanted to help him out (as were payments from his parents), at a time when no-one could say if there was any realistic prospect of his earning anything again on his own account. He thought that there was an unspoken assumption, because of the kind of person he was, that if he started to make money again he would make what repayment he could. He thought that what Ms LB had written in her letter of 16 September 2002 was what would have been said at the time of the payments if she or he had been required to think about the question.

40. There must be some doubt about the weight to be put on Ms LB's letters. Not only were they produced for the purposes of provision to the local authority, but there is a suggestion that the letter of 16 September 2002 was produced after the claimant had been advised that evidence of a transaction of loan would be helpful. In addition, the information given in the letter of 3 May 2002 about the amount of the payments was derived from the amounts of the receipts queried by the local authority, not from any independent records of Ms LB. I reach that conclusion because the amount mentioned omitted the substantial payment received on 7 November 2001 and recorded on the missing page of the claimant's bank statements.

41. However, I accept the essence of the claimant's evidence to me that the payments were made without any very clear thought about their legal nature. They were made, so far as one can tell, in a fairly informal way. The unreliability of Ms LB's figures seems to show a lack of clear records or accounting and the evidence points against there having been any express agreement about the terms on which the payments were made. At the hearing, the exact nature of the claimant's relationship with Ms LB was not explored. She was definitely based in Italy and the

claimant's bank statements show that he spent time there. The description of girlfriend seems to indicate that they had an affectionate, stable and trusting relationship, without maintaining a common household in any particular place. In such circumstances, there would not be a presumption that payments made between them were by way of gift, as there would be between spouses or between parent and child. But the overall circumstances indicate to me that there was no intention to create legal relations. The transactions were sufficiently within a domestic sphere, without the trappings of clear legal agreements, to produce that conclusion. Thus no legally enforceable rights or obligations were created by the payments to the claimant.

42. That crucially affects the approach to the question whether Ms LB got anything in return for making the payments to the claimant. In the *Boulton* case, Laws J held that the intangible benefits received by the Coal Board in return for making the payments to the claimant in that case were enough to take the payments out of the category of "voluntary payments". But that was in the context of a large organisation operating commercially and with many thousands of employees. The benefits received, although intangible, were real. In the context of an individual in a domestic relationship with the claimant concerned, it seems to me that that sort of intangible benefit does not have the same force. If something like the maintenance of a relationship of affection or of familial duty on the part of the payer or the creation of a merely moral obligation on the part of the payee, dependent on undefined future developments, takes a case out of the category of "voluntary payment" nothing significant would be left. In my judgment, in the ordinary use of language, in such circumstances the payer obtains nothing in return for making the payment. I conclude that in the present case Ms LB obtained nothing in return for the payments she made to the claimant by way of loan and that they were voluntary payments within the meaning of regulation 40(6) of the Housing Benefit Regulations.

43. I am also satisfied, from the intervals between payments and their amounts, that they were not due to be paid and were not paid at regular intervals. Accordingly, they fall within regulation 40(6) and are to be treated as capital. I therefore do not need to go into the question of whether the payments would have represented income or capital in the absence of the operation of regulation 40(6). I add, for completeness, that the same conclusion would apply to payments received from the claimant's parents, where the presumption of gift would have applied in the absence of evidence to the contrary.

(b) The claimant's bank overdraft

44. The basic case for the local authority, perhaps made more in this sweeping way at earlier stages, has always been that the claimant had found resources to live on and to pay a substantial rent for the year prior to April 2002 and immediately thereafter and so must have had a source of income. It is just possible that it could have been argued that the claimant's use of the overdraft facility with his bank produced income in his hands. Nowhere in his comprehensive written and oral submissions did Mr Stagg make that specific argument, and it does not specifically appear anywhere else in the papers. In those circumstances I have not sought any further submissions and explain only briefly why I conclude that that argument would not work.

45. The argument could have run as follows. On the statements before me, the first cheque paid by the bank without funds in the account to cover it was paid on 28 March 2001. By 18

April 2001 the overdraft stood at £2,799.55. The overdraft seems initially not to have been agreed, although it probably was by 18 April 2001. But it is established that the drawing of a cheque in excess of the amount standing to a customer's credit is a request for a loan and if the cheque is honoured the customer has borrowed money (see paragraph 11 of Commissioner's decision R(IS) 22/98). Money drawn down under an agreed limit is also borrowing, as is the honouring of cheques taking an overdraft over an agreed limit. The first two payments from Ms LB reduced the amount by which the claimant was overdrawn. The payments on 17 July 2001 and 7 November 2001 took him into credit, but the effect did not last for more than a few weeks in either case. The payment on 14 January 2002 did enable the claimant to stay in credit until 2 April 2002. It might have been argued that the approach endorsed by the Court of Appeal in *Morrell*, R(IS) 6/03, applied to the loans made to the claimant by his bank by way of overdraft. That would have been on the basis that a purpose must have been to allow the claimant to meet the recurrent expenses ordinarily met out of his current account. Chief among these was the monthly rent of £1,785.33, and there were other regular payments for items like home and contents insurance and water rates, as well as payments for cable services and credit card bills. It could have been argued that the provision of resources for such regularly recurring items resulted in the receipt of income.

46. That on its face is a powerful argument. But it seems to me that it is undermined by the principles laid down in *Leeves v Chief Adjudication Officer*, R(IS) 5/99, as followed in *Morrell*). In that case, a student abandoned his course on 27 April 1995 having received the summer term's instalment of grant from his local education authority on 24 April 1995 (and spent it all on paying off mortgage arrears and debts). He had undertaken, in accordance with the legislation then in force on student grants, to repay such sum as might be determined by the authority if he ceased to attend the course before its normal termination date. On 24 May 1995 the authority wrote to the student terminating his grant with effect from 27 April 1995 and requiring repayment of a particular amount. Under the income support rules the payment of grant on 24 April 1995 would be attributed as income to the whole of the summer term. The Court of Appeal held that as from 24 May 1995 the grant monies were not income. The court agreed with counsel for the student that "income" should be given its natural and ordinary meaning and that moneys accruing or to be treated as accruing "under a certain obligation of immediate payment (ie an equivalent debt) do not amount to income". From 27 April 1995 to 23 May 1995, although there was no reason to think that the discretion to call for repayment would not be exercised, it was not clear when the student would be required to repay or what the precise sum would be. So there was no "crystallised" obligation. But there was from 24 May 1995.

47. Although I have no evidence in the present case of the precise terms on which the overdraft was granted to the claimant, I can take judicial notice of the fact that the standard terms are that bank overdrafts are repayable on demand, although the demand may be not be made while the amount stays within an agreed limit. Those terms bring the claimant's repayment obligation within the *Leeves* principles. The obligation is certain, as the amount overdrawn can be identified day by day, and is immediate, even though the bank chooses not to enforce the immediate obligation. Accordingly, the resources provided by the use of the overdraft facility do not amount to income. In my judgment, that result is also in accord with the ordinary and natural

meaning of "income". One would not naturally speak of a person having an income from incurring expenditure and running up an overdraft.

(c) The claimant's use of credit cards

48. Finally, I record very briefly that I have considered Commissioner's decision CH/3393/2003, in which it was accepted that the juggling of credit card balances, where there was no immediate liability to repay beyond the minimum monthly payment, created a regular funding facility to be taken into account as income. The claimant here appears to have had a credit card, because repayments appear on the bank statement. But the local authority has not sought any evidence of the balances on credit card accounts and has not put forward any submission that that might be relevant to the amount of the claimant's income. In those circumstances, I do not need to deal with the point or to seek any further submissions. I do not need to consider whether or not CH/3393/2003 was rightly decided on issues of law or in the particular circumstances of the case, which may not have been fully disclosed in the decision.

Conclusion on the appeal against the decisions of 26 July 2002

49. First, accepting the now undisputed finding of the appeal tribunal that the claimant had good cause for the delay in claiming, the claim made on 18 April 2002 is to be treated as having been made on 18 April 2001 (Housing Benefit Regulations, regulation 72(15)). It is sensible to consider the benefit period from 18 April 2001 to 17 April 2002 separately from the benefit period forward from 18 April 2002. Second, the claimant was throughout the period from 18 April 2001 to 26 July 2002 to be treated as liable to make payments in respect of the dwelling occupied as his home, and there has been no question that he was liable for council tax. So those basic conditions of entitlement were met.

50. The only other obstacle suggested to entitlement was the amount of the claimant's income. In relation to the first benefit period, it is in my view proper to look at the evidence of the claimant's actual income week by week throughout that past period. The result of my conclusions above is that the claimant had no income beyond the fortnightly receipts of incapacity benefit and possible tariff income from capital in some weeks in which the credit balance in his current account exceeded £3,000. The local authority has not asserted that there are any other amounts of capital to be put into that calculation and has expressly resiled from arguments about the intentional deprivation of capital. The tariff income can relatively easily be calculated by the local authority, bearing in mind that the bank account will have included income, in the form of the receipts of incapacity benefit for the fortnight to which they would be attributed, as well as capital.

51. In relation to the second benefit period, beginning on 18 April 2002, there are no bank statements before me beyond 2 April 2002, when the account was £1169.33 overdrawn. Applying regulations 21 and 25 of the Housing Benefit Regulations to the task of estimating the claimant's average weekly income over the benefit period, I conclude that there is insufficient evidence to support the imposition of any amount of tariff income from capital. The claimant's average weekly income is to be restricted to his incapacity benefit. I have thought it right to determine that the second benefit period is to run until 17 April 2003, bearing in mind the local authority's powers to terminate the period at an earlier date if there was a change of

circumstances such that the claimant ceased to be entitled to benefit and to supersede my decision on a change of circumstances (or indeed on other grounds). I also bear in mind that the claimant made a new claim, including an element of backdating, on 4 April 2003 (see page 261).

52. Income of around £78 per week from incapacity benefit would, I think, exceed the claimant's applicable amount as a single claimant aged over 25, whether that applicable amount included a disability premium or not. However, it seems likely enough that, whatever the claimant's maximum housing benefit is determined to be, he will be entitled to some amount of housing benefit and council tax benefit in the two benefit periods. Therefore, I have made awards of entitlement in paragraph 1 above, but (in case I am wrong) subject to the calculations which I direct the local authority to make of the claimant's applicable amount, his tariff income from capital in the first benefit period and the exact amount of incapacity benefit in both benefit periods, the amount of maximum housing benefit in the light of the determination of the rent officer, and accordingly the final amount of any housing benefit and council tax benefit payable.

53. If there is any dispute about those calculations which cannot be resolved between the parties, the case may be returned to me (or to another Commissioner if necessary) for further decision.

(Signed) J Mesher
Commissioner

Date: 21 July 2004