Bulletin 185

(Smith)

CH/3586/2005

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the claimant against the decision of the appeal tribunal given after a hearing on 7th September 2005. By its decision the tribunal dismissed the claimant's appeal against the decision of the local authority made on 12th November 2003 that she was not entitled to housing benefit. The local authority does not support the appeal. Nevertheless, I have come to the conclusion that the decision of the tribunal was erroneous in point of law and must be set aside, for the reasons given below. The findings of fact made by the tribunal, together with certain additional findings of fact which I make as set out in paragraph 31, are sufficient to enable me to exercise my power under paragraph 8(5) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000 to substitute for the tribunal's decision the decision which I consider the tribunal should have given. That is, that the claimant's claim to housing benefit is not defeated by any of regulation 7(1)(a), regulation 7(1)(l) or regulation 10(2)(a) of the Housing Benefit (General) Regulations 1987, S.I. 1987 No. 1971. It is to be noted that the local authority conceded before the tribunal that the claimant is under a legal liability to pay rent to her son and that no issue of deprivation of capital arises. It has not been suggested that there is any other circumstances which has the effect that the claimant is not entitled to housing benefit.

2. This is an unfortunate case which has had a very long history. It is necessary to set out some of that history to explain the present position. For some time prior to 2003, the claimant was in receipt of income support. On 12th February 2003 she moved to live with a friend at 25 Minster Court and in due course completed a form NHB1A(IR) in connection with her change of address. As a result, the local authority was notified that she might be entitled to housing benefit and provided her with a claim form under cover of a letter dated 24th June 2003. P.108 of the bundle contains a note of a telephone call to the local authority from the claimant made on 27th June 2003 in which she said she would be coming in to get help in completing the form.

3. On 1st August 2003 the claimant moved again, to 25 Thorpe Hall, which was on the second floor of a block of flats. She then completed a housing benefit and council tax benefit claim form, apparently issued on 15th July 2003 (although the date has clearly been altered from 15th August 2003), seeking housing benefit in respect of the monthly rent of £1,100 which she said she was liable to pay in respect of her occupation of that property. The form was dated 1st August 2003 (although again the date has clearly been altered) and was handed in on 1st September 2003. The claimant stated on the claim form that the landlord was her son, who lived elsewhere, and that her own last address was 39B, Tubbs Road. She originally completed the form on the basis that she had an assured shorthold tenancy, but crossed that answer out. She nevertheless completed the box asking how long the shorthold was for, answering "as long as I am alive". She went on to explain that she had not had a fixed address for the past three years, having been living with her son or sister-in-law or friend. She produced her

driving licence, which gave her address as 36 Welsby Court, and a bank statement for August 2003, addressed to her at 39B Tubbs Road and showing receipt of her income support (by then pension credit) but no payments of rent. She also produced a copy of a tenancy agreement stated on its face to be an agreement for an assured shorthold tenancy, dated 1st August 2003 and signed by both the claimant and her son, the landlord. The term of the tenancy has obviously been altered and in fact is difficult to read or understand in the absence of an explanation. I return to this point later.

4. On receipt of that claim form, the local authority asked for, and received, copies of June and July 2003 bank statements, again showing receipt of income support but only cash machine withdrawals, a letter addressed to the claimant at 191 Plough Way, her son's address, about her entitlement to pension credit, her passport and a pension credit change of address notification from the Department of Social Security. The further change of address led, as I understand it, to a request for the claimant to complete further forms, this time NHB1A(HB) and NHB1A(CTB). No relevant further information appeared on those forms.

5. The local authority then proceeded, without further inquiry, to consider the claim. It was decided that the claimant was not entitled to housing benefit. The decision was recorded on an internal document (p.64 in the bundle), which states, "Reason for NIL Entitlement to HB: Close Relative/contrived tenancy." That document is dated 13th October 2003. On the same date the local authority wrote to the claimant, stating:

> "Under Housing Benefit Regulation 7(a)(i) a person who is a 'Close Relative' of his/her landlord and is treated as not liable to make payments of rent, and subsequently cannot be paid Housing Benefit. This tenancy can be conduced as being 'contrived' so as to take advantage of the Housing Benefit system."

6. Unhappily, that is an unsatisfactory explanation of the local authority's reasons for its decision. Not only is it very poorly expressed, so that in my view it requires a knowledge of the housing benefit system to make an informed guess at what the local authority were attempting to say, but also it refers to a regulation which had ceased to apply some years previously. Under regulation 7(a)(i) of the Housing Benefit (General) Regulations 1987 (S.I. 1987 No. 1971) as originally made, a person who resided with the person to whom he was liable to make payments in respect of the dwelling and who was a close relative of that person was to be treated as if he was not liable to make those payments. The regulations as they stood at the relevant time provided:

> "7. (1) A person who is liable to make payments in respect of a dwelling shall be treated as if he were not so liable where –
>
> (a) the tenancy or other agreement pursuant to which he occupies the dwelling is not on a commercial basis;
>
> (b) his liability under the agreement is to a person who also resides in the dwelling and who is a close relative of his or his partner;
>
> ...

(l) in a case to which the preceding paragraphs do not apply, the appropriate authority is satisfied that the liability was created to take advantage of the housing benefit scheme ..."

The local authority's letter, in so far as it relied on the "close relative" provision, gave a wrong reference and was misconceived, since the claimant's son was not residing at 25 Thorpe Hall. In so far as it relied on the "taking advantage" provision, again the reference was wrong and no attempt was made to give reasons for the conclusion that that provision applied. It was in fact admitted in the local authority's submission to the tribunal that the letter was wrong.

7. The claimant, evidently having had access to legal advice, appealed against that decision by letter dated 6th November 2003. She pointed out that her son did not reside with her; recognising the possibility that the local authority intended to rely on the "non-commercial basis" provision, she asked for any information which might suggest that that was the case; and she asked for an explanation of why she was said to be taking advantage of the scheme. She pointed out that the only reason why she had entered into the agreement was to have a roof over her head, having been without a stable home for a number of years.

8. The claimant's letter of appeal was treated as a request for a revision and the claim was reconsidered on 12th November 2003, but the decision was not revised. It is not entirely clear from the papers before me what was sent to the claimant as a result, but the unsigned document at p.71 implies that if she did receive an explanation, it read as follows:

> "You state that your son does not live with you. However, since 25.01.99 for the rules to apply it is no longer necessary that your son, ie, your landlord, to live in the same property. The rule applies regardless of where your son lives.
>
> ...
>
> You wanted an explanation as to why the Local Authority thinks your tenancy is contrived.
>
> The letter dated 13.10/03 gives you a list of 'close relative' category. As you are a 'mother and son', the regulations assumes that a 'non commercial tenancy', as in your case.
>
> The following regulation applies
>
> S7(a)(1) Housing Benefit Regulation 1987".

9. This is not an improvement on the previous effort. As is clear from paragraph 6 above, the "close relative" provision still applies only where the landlord and the tenant are living in the same property. The regulations do not provide for it to be assumed that where the landlord and the tenant are close relatives there is a non-commercial tenancy. Further, the "taking advantage" ("contrived") provision expressly applies only where the preceding sub-paragraphs do not. The fact that, as it

is claimed, other sub-paragraphs do apply therefore cannot be relied upon as a ground for the conclusion that the "taking advantage" provision applies.

10. The claimant's appeal on the local authority's approved appeal form was received on 16th December 2003. It seems that nothing happened for about seven months, precipitating a complaint by the claimant to the Local Government Ombudsman. Substantively, the next development was on 23rd August 2004, when the local authority sent the claimant a letter asking for further information on 13 points, arising in part out of the variety of earlier addresses the claimant had given and the pattern of cash withdrawals from her bank account. The claimant's solicitors responded by letter dated 7th September 2004, but that letter seems to have gone astray. Clearly, however, it had been received by 28th September 2004, when a further letter raising queries on another 12 points was sent. It does not appear that a response was received to that letter. The vast majority of questions in both letters were based on information which the local authority had had for the best part of a year.

11. The matter was listed for hearing on 8th December 2004, with a time estimate of 25 minutes. Unfortunately, the chair, the local authority and the claimant's representative all agreed that the time estimate was too short and the matter was therefore adjourned, on the footing that there would be an interpreter and that the estimate would be two hours.

12. The matter was then re-listed for hearing on 15th February 2005. At that hearing the tribunal and the local authority were faced with a 13 page written submission on behalf of the claimant and a bundle of authorities. It was said on behalf of the claimant that the documents had been sent before the previous hearing, but the file did not disclose receipt. The tribunal understandably decided that the case could not properly proceed, but gave directions for a further exchange of submissions and for the filing of certain documents. It had previously been believed by the local authority, on the basis of inquiries made of the Land Registry as late as August 2004, that the claimant's son did not own 25 Thorpe Hall and so was not in a position to grant her a tenancy. On this occasion it emerged that he was indeed the owner of a long leasehold interest, but that there had been a delay on the part of his solicitors in registering his title. The documents to be filed related to the conveyancing transaction.

13. The local authority produced a supplementary written submission on 25th February 2005. In summary, the arguments raised were as follows:

    (1) the tenancy was non-commercial. It was pointed out that the claimant had not initially disclosed that she herself had previously owned a property (36 Welsby Court) or that 25 Thorpe Hall was purchased specifically for her. She had no need to leave 191 Plough Road other than that the property had been purchased. It was said that the length of the term showed that the tenancy was non-commercial, as did the fact that the landlord had taken no steps to evict the claimant although she had not paid any rent for nearly two years;

    (2) the claimant had deprived herself of capital, namely, the net proceeds of sale of 36 Welsby Court;

(3) the tenancy was a long tenancy within the meaning of the Regulations and so housing benefit was not payable in respect of payments made under it, by virtue of regulation 10(2)(a);

(4) the tenancy was contrived because it was created to take advantage of the housing benefit scheme;

(5) (possibly) there was no legal obligation on the claimant to pay rent to her son.

The local authority disputed the claimant's assertion that it had a blanket policy of declining all claims where there was a relationship between landlord and tenant, asserting that it looked at the facts of each case. There was also an argument to the effect that if the rate of interest payable under the landlord's mortgage was based on residential occupation rather than on the property's being let, that would show that the tenancy was not commercial. It is not clear to me whether the local authority was contending that in fact the landlord had misled the mortgagee or that if he had done so the point would be relevant. There is no copy of the mortgage conditions (as opposed to the single page legal charge) with the papers and it is unnecessary to pursue this aspect further.

14. The claimant produced a further written submission dated 23rd March 2005 relying on her previous submission but adding that:

(1) from the time of her occupation the claimant had always been under an enforceable obligation to pay rent to her son, whether or not he was registered as proprietor of the property;

(2) the misstatements or misunderstandings of the law evident in the two decision letters from which I have quoted above illustrated the fact that the local authority never applied the correct legal test to determine the claimant's entitlement to housing benefit;

(3) the local authority were factually wrong about the claimant's need to move somewhere at the point when 25 Thorpe Hall was bought;

(4) the claimant did not fail to declare any matters relevant to her capital, since the form she completed did not ask for that information. She had provided an explanation of what happened to her capital to the best of her ability given the lapse of time.

On the long tenancy point, the claimant relied on her previous submission, in which it was stated that, being "overzealous", she had unilaterally altered the agreement after it had been executed. Her case was that she had an assured shorthold tenancy but the landlord would not evict her if she complied with all the terms of her tenancy agreement. The claimant also produced a number of additional authorities.

15. There was then substantial further delay before the matter was again listed. It appears from a letter dated 14th March 2006 written by the claimant to the Commissioners that that may have been because it was in fact listed for 8th July 2005, the day after the

London bombings, and the hearing was cancelled as a result. In the event it came on for hearing on 7th September 2005, as already mentioned.

16. As I understand the record of the proceedings, it was conceded at the outset that the claimant had a liability to pay rent and that there was no issue about deprivation of capital. (Some further documents relevant to the latter point had emerged in the meantime.) The local authority's case was put primarily on the basis that the tenancy was not on a commercial basis or alternatively that the agreement had been entered into to take advantage of the housing benefit scheme. It seems that the long tenancy point remained in issue; the tribunal in fact heard substantial evidence about the parties' intentions in relation to the tenancy agreement. The local authority representative added nothing to the submissions already made on that point, but the claimant's representative concluded by submitting that the intention of the parties was not to create a lease for a term of more than 21 years but to create a six month term which would be renewed every six months until the claimant's death.

17. In the event, the tribunal dismissed the claimant's appeal on the ground that her tenancy was a long tenancy. In the combined decision notice and statement of reasons, the tribunal summarised the evidence about the circumstances leading up to the creation of the tenancy and about the alteration of the term in the agreement and continued:

> "The tribunal found that on a balance of probabilities the intention of the parties was to create a tenancy for life which takes effect as a tenancy for 90 years by virtue of section 14996) of the Law of Property Act 1925 and that being longer than a tenancy for 21 years, is a long tenancy for the purposes of the housing benefit scheme. The burden of proof rests on [the claimant] to prove the terms of her tenancy agreement.
>
> It is submitted on behalf of [the claimant] that she does not have a long tenancy, the agreement signed by the parties was for 6 months [p137] and the alteration by [the claimant] was done to emphasise that her landlord would not evict her from the property provided she complied with all the terms of her tenancy agreement [p132]. It was further submitted that the intention of the parties was that the tenancy was for 6 months which would be renewed every 6 months until her death.
>
> Unfortunately the tribunal did not accept these submissions as they contrasted with the parties' own evidence. The manner in which [the claimant] gave evidence showed her honest and firm belief that she could remain in the property for the rest of her life as stated in her claim form and subsequently confirmed in her oral evidence. Throughout the hearing this was confirmed on more than one occasion but was never qualified in any way by either party. The submissions also contrasted with the intention of the parties in purchasing the property, namely to provide [the claimant] with a stable and secure accommodation given her life experiences and circumstances. A tenancy for a period of 6 months would not give her the security or stability she desired nor is there any evidence that the tenancy was renewed after the expiry of the fixed term. The tribunal accepted that [the claimant] could not alter the terms of the tenancy agreement unilaterally. But neither could [the son] which he purported

to do by giving an assured shorthold tenancy for 6 months and which [the claimant] altered to reflect their original intention. The tribunal felt that in their desire to do best for [the claimant] unwittingly created a tenancy which is not covered by the housing benefit scheme (*sic*)."

The tribunal did not deal with the local authority's arguments based on regulation 7(1)(a) and (l), which on the tribunal's view of the nature of the agreement between the claimant and her son did not need to be considered.

18. The claimant's representatives sought leave to appeal by letter dated 3rd October 2005. In effect it was argued that:

(1) by virtue of s.54 of the Law of Property Act 1925 a fixed term tenancy for a term of more than three years must be put in writing. Otherwise the interest created is simply an interest at will;

(2) the agreement signed by the claimant and her son was not an agreement in writing for a tenancy for more than three years, since the version signed by them provided for a six months term. The alteration was made subsequently and unilaterally by the claimant;

(3) therefore there was no long tenancy of the property.

Leave to appeal was granted by the district chairman on 11th October 2005 on the ground that the point seemed to be arguable and, if the claimant's representatives were correct, the potential relevance of section 54 to housing benefit appeals was something that could profitably be drawn to the attention of tribunals and those who appear before them.

19. Following the grant of leave, a legal officer directed the parties to make observations on the appeal in the usual way. Unfortunately, owing to a departmental removal at the local authority, there was delay in complying with the direction and an extension of time had to be granted. The local authority's complete submission was finally received on 15th March 2006. Reference was made to Commissioner's decision *CH/2743/2003*, in which it was held that a tenancy for life, converted by section149(6) of the Law of Property Act 1925 into a tenancy for 90 years determinable on death by the procedure specified in the section, was a long tenancy for the purposes of the housing benefit scheme. The local authority drew attention to the volume of evidence in support of the tribunal's finding that both parties intended the tenancy granted to the claimant to be for life and argued that the tenancy agreement as amended had been "upheld" by both parties as the correct version and so became the true tenancy agreement in writing. As an alternative it was contended that the term of the tenancy agreement defining the term as six months was a sham. On this aspect the submission continued:

"There was no intention by either of the parties that the tenancy would not be 'on-going' and no plans made to end the tenancy at any particular time. The fact that the true intentions of the parties were not displayed in the written agreement surely would make the period quoted a 'sham'. This would surely lead to a finding of 'non-commerciality' or that the tenancy was contrived

under regulation 7(1)(l), by displaying the tenancy as six monthly and one within the bounds of the Housing Benefit Regulations, whilst it was in fact a 'long tenancy' and precluded from Housing Benefit under regulation 10(2)(a)."

The local authority later specifically addressed the Law of Property Act, saying:

> "It is the Authority's belief that the Law of Property Act 1925 is more commonly used in relation to property, which is owned or transferred by lease, rather than Landlord-Tenant situations.
>
> ...
>
> The issue with regard to Sections 53(1)(a) of the Law of Property Act, this can be deemed to apply to this case in that the version of the Assured Shorthold Tenancy provided to the Authority at the outset of the Housing Benefit application was that of the amended agreement. If the agreement is in writing and signed by both parties, and they were both aware of the amendment, then it surely meets the requirement of 53(1)(a) unless either party sought to have the original agreement reinstated. This action was not taken by either party."

20. The claimant's representatives responded with observations sent by fax on 20th March 2006. They repeated that the agreement had been altered unilaterally by the claimant and pointed out that the tribunal's decision was based on what she found to be the intention of the parties and not on the amended agreement's being binding on both parties although the landlord had not agreed to the amendment. It was argued that the amendment would have had no effect in law if there was a dispute in relation to the terms of the contract and that the tenancy "was likely to be assumed to be an assured shorthold tenancy" which could easily be terminated by the service of notice and possession proceedings. It was also argued that the sham argument was ineffective to enable a long tenancy to be discerned from the intention of the parties, because there would still not be a written agreement.

21. The claimant herself had already sent a lengthy letter dated 14th March 2006 in support of her appeal. In the course of her letter she said that the tribunal had mistakenly thought that the amendment to the tenancy agreement read "for ever", whereas in fact she had written "for over 6 months". This point was picked up in the observations from her representatives, although on the basis that what she had written was "6 to over". Any intention to ask the Commissioner to look at the facts again was disclaimed by the representatives. Reference to the document itself (p.33 in the bundle) is of no assistance; there is a clear "6", followed by what might well be "to", but I find it impossible to reach a view on whether what follows is "ever" or "over". As will appear, however, I have come to the conclusion that this point is immaterial.

22. My task is first to determine whether or not the tribunal's decision was erroneous in point of law. As I have said, the tribunal confined herself to the issue whether or not there was a long tenancy. I should say at the outset that I agree with and accept the proposition in *CH/2743/2003* that the effect of section 149(6) of the Law of Property Act 1925 is to convert a tenancy for life into a long tenancy for a term certain of more than 21 years.

23. The framework of the formalities provisions of the Law of Property Act as they relate to leases and tenancies is as follows. First, section 52(1) imposes a general requirement that all conveyances of land or an interest in land (which includes the grant of a lease or tenancy) are void for the purpose of conveying a legal estate unless made by deed. Section 52(2) makes an exception for leases or tenancies not required by law to be made in writing. It follows that where writing is required, the grant has to be made by deed if a legal estate is to be created. Secondly, section 53(1)(a) provides that no interest in land (which includes both legal estates and equitable interests) can be created or disposed of except by writing signed by the person creating or conveying the interest, or by his agent authorised for that purpose, or by will, or by operation of law. That provision is subject to subsequent provisions about the creation of interests in land by parol: that is to say, otherwise than in writing. It follows that, while failure to comply with section 52 means only that no legal estate is created, failure to comply with section 53(1)(a) means that no interest of any kind is created unless the exception applies. Section 54(2) sets out the exception, which is that a lease taking effect in possession for a term not exceeding three years and satisfying other conditions may be created by parol.

24. It will be appreciated from the foregoing that if the grant of a tenancy for life is to create a legal estate, the grant must be made by deed. The definition of "long tenancy" in regulation 2 of the Housing Benefit Regulations, however, simply refers to "a tenancy granted for a term of years certain exceeding 21 years"; there is no express requirement that the grant should create a legal estate. In the absence of such a requirement, I see no need to read one in. The crucial question in this context is the effect of sections 53 and 54.

25. It is clear that the exception in section 54 does not apply here, in so far as a tenancy for life is in contemplation. (It would, of course, apply to an ordinary assured shorthold tenancy agreement.) It is therefore necessary to ask whether there is writing signed by the claimant's son which creates a tenancy for life in favour of his mother. The only candidate for any such writing is the assured shorthold tenancy agreement, which the tribunal accepted did not by its terms create a tenancy for life when the son signed it. She regarded his execution of an assured shorthold tenancy agreement as purporting to alter unilaterally the terms of what she must therefore necessarily have regarded as a pre-existing tenancy agreement: see the last paragraph of the decision quoted in paragraph 17 above. Any such pre-existing agreement, however, was ineffective by virtue of section 53(1)(a) to create an interest in land, and so could not have given rise to a long tenancy. It is understandable that the tribunal failed to deal with this point, since no argument directly raising it was put to her, but the effect is to render her decision erroneous in point of law, because it cannot be sustained on the basis on which it was put.

26. For those reasons, I set aside the tribunal's decision. Of course it does not follow that the decision cannot, and ought not, to be sustained on another basis, and I turn to examine whether that is the case.

27. The local authority's first argument is that the assured shorthold tenancy agreement can and does constitute the necessary writing for the creation of a long tenancy because the son accepted that as amended it correctly reflected the parties' intention that 25 Thorpe Hall should be a home for the claimant for the rest of her life. I do not

accept that argument. There simply is no writing signed by the son which creates a long tenancy; the evidence is clear that he signed an assured shorthold tenancy agreement with an initial term of six months. The fact that he did not challenge the alteration made by the claimant might, in appropriate circumstances, have an effect on the rights and remedies of the parties. One could envisage, for example, a situation in which a person in the position of the claimant had relied to her detriment on conduct of the son and might therefore be able to claim some equitable relief by way of estoppel. It has never been suggested that that is the case here. The son was under no obligation to seek to "reinstate" the original wording of the agreement; he was entitled to say, as was the fact, that the document he signed was an assured shorthold tenancy agreement.

28. I pause at this stage to make the point that there is no necessary inconsistency between the assured shorthold agreement which was signed by the son and the intentions of the claimant and the son. The agreement gives the tenant a fixed term of six months, but provides, in clause 4.2, that if the tenant stays on after the end of the fixed term, the tenancy will continue but will be a monthly periodic tenancy. The purpose of specifying a fixed term is not to put an end to the tenant's right to occupy under the agreement when the fixed term expires, but to identify the date after which the landlord can recover possession by following the prescribed procedure. Unless and until the landlord does so, the tenant remains the tenant of the property. The tribunal in effect found that the son had no intention of seeking possession while his mother continued to need the accommodation and that she had every confidence that he would not do so. When the terms of the agreement are properly understood, it will be seen that their intentions could perfectly well be achieved under this form of agreement, without the need for six monthly renewals. It is by no means clear from the record of the proceedings that the claimant was looking for legal security in the form of a tenancy for life, as opposed to practical security in the form of a landlord who was her son and who, as she said, loved her, and the tribunal made no clear finding to that effect. Such a practical arrangement would indeed have been consistent with what the local authority said in its submission when raising the sham argument; there was no intention that the tenancy should not be ongoing and no plans were made to terminate it at any particular time. That is exactly what the assured shorthold tenancy agreement provided for. The tribunal was mistaken as to its legal effect. On a true understanding of the provisions of the agreement, there was no evidence to support the finding that by entering into the assured shorthold tenancy agreement the son was purporting unilaterally to vary a prior agreement between the parties.

29. This brings me to the sham argument itself. The local authority has helpfully referred to the explanation of "sham" in *R(H) 3/03* and I accept that what is in issue here is whether the terms in the assured shorthold tenancy agreement as to the termination of the agreement represented the genuine arrangement between the parties or whether neither of them regarded those terms as genuine terms. I further accept that, as there stated, the burden of proof is on the local authority.

30 What I have said in paragraph 28 above about the true effect of the assured shorthold tenancy agreement is, of course, highly relevant to the question whether its terms as to termination were a sham. In all the circumstances, the local authority has failed to discharge the burden of proof which is on it. In the light of the tribunal's findings of

fact, which the tribunal understandably applied to a view of the tenancy agreement then taken by the claimant's representatives but, for the reasons I have given, mistakenly taken, and in the light of the tribunal's acceptance that both the claimant and the son were honest and genuine witnesses, it cannot be said on a balance of probabilities that the son at least did not regard the terms of the agreement as genuine. It is clear that he originally had no intention of doing other than allowing his mother to stay in the property for the rest of her life if she so wished. It is also clear from his evidence that he could not have afforded to buy the property without a mortgage and that therefore payment of housing benefit was an integral part of the plan to finance the rent (p.256), that he was aware in general terms of the effect of shorthold tenancy agreements because he had been involved in renting property previously (p.256), that the situation was explained to the mortgage lender, who was aware that the expectation was that the claimant's rent would be met, or sufficiently met, by housing benefit (p.257) and that since housing benefit has not been paid the son finds himself in a very difficult position and is being forced to contemplate evicting his mother in order to be able to sell the property or rent it elsewhere and to deal with his financial situation (p.259). This is sufficient material to enable me to say that the burden of proof has not been discharged.

31. Moreover, given that evidence, in exercise my power under paragraph 8(5)(b) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000, I make further findings of fact as follows. First, I find that the son's intention was to enter into an assured shorthold tenancy agreement but not to exercise his right to possession while his mother still needed the property. Secondly, I find that he was not thereby going back on a prior agreement with his mother under which she was to have a legally enforceable right to stay in the property for the rest of her life (and indeed the other rights which would flow from the creation of a valid tenancy for life). I have explained in paragraph 28 above why the tribunal's finding of a purported unilateral variation cannot stand.

32. This is, of course, fatal to any argument for the local authority that the provisions for termination in the assured shorthold tenancy agreement, being a sham, are to be construed as if they provided for a tenancy for life. As I understand the local authority's argument, however, it is not quite to that effect. What is suggested is that the parties' expectation that in fact the tenancy would continue for life rather than for the brief period implied by the use of an assured shorthold tenancy form can be relied upon to show that the claimant falls foul of regulation 7(1)(a) or (l). The argument is not spelt out in detail, and, as I have said, the tribunal did not consider those provisions at all, but in fairness to the local authority I turn to deal with them now, although relatively briefly.

33. I have set out in paragraph 13 the nature of the local authority's case that the tenancy was on a non-commercial basis. (The original submission to the tribunal concentrated very heavily on regulation 7(1)(l) and appeared to argue regulation 7(1)(a) only on the basis that legal liability to pay rent had not been established.) Some of the matters relied on do not advance the case. As the claimant's solicitors pointed out, there was no reason why she should have disclosed matters she was not asked about, such as her ownership of 36 Welsby Court or her son's motive in acquiring 25 Thorpe Hall. Also as pointed out, the local authority was factually wrong about where the claimant had

been residing immediately before moving into 25 Thorpe Hall and her need to change her address. The features of the (expected) length of the tenancy and the non-commercial attitude to rent arrears taken by the son as landlord do, however, point to a non-commercial basis.

34. The answer to that line of argument, in my view, appears in the authorities cited on behalf of the claimant. I begin with *R.* v. *Suttom London Borough Council, ex parte Partridge* (1994) 28 H.L.R. 315. The claimant went to live with an elderly relative and agreed to pay her rent. She declined to accept the rent until his entitlement to housing benefit was finally settled. The local authority decided that the agreement was on a non-commercial basis. Laws J. quashed the decision, stating that it was necessary to look at the whole relationship between the parties relating to occupation. In *R.* v. *Poole Borough Council, ex parte Ross*, (1995) 28 H.L.R. 351, Mr. Ross shared a bungalow with a friend. It was argued by the local authority that there was no tenancy agreement and that if there was, it was not on a commercial footing and had been created to take advantage of the housing benefit scheme. Sedley J. held that for the "non-commercial" provision to apply the Review Board (as the procedure then required) had to be satisfied that, on a balance of probabilities, the dominant purpose of the arrangement was non-commercial and that an element of friendship did not make a commercial basis non-commercial. He pointed out that what was important was the nature of the arrangement, not the relationships between the parties.

35. In Commissioner's decision *CH/2329/2003* the Commissioner was concerned with an arrangement under which parents were tenants of their daughter's house while she and her husband were working abroad. They were responsible for repairs and maintenance and paid the monthly mortgage instalments. Mr. Commissioner Angus dismissed an appeal from the tribunal, which had concluded that the arrangement was not caught by regulation 7(1)(a). He expressed the view that an arrangement would be other than commercial only if it conferred no benefit on the owner of the property which was proportionate to the benefit conferred on the occupier. Commissioner's decision *CH/4854/2003* concerned a lady who occupied as tenant a property which had originally been owned by her daughter and then came to be owned by her son-in-law. Mr. Commissioner Howell adopted the approach of Sedley J. in *Ross*. The last case cited on this point was Commissioner's decision *CH/0296/2003*, which concerned a father who moved into a house with a self-contained flat for his disabled son. They entered into a tenancy agreement and there was evidence that the father needed the income. The father provided support to enable the son to live an independent life. Mr. Commissioner Jacob expressed the view that he would have expected the local authority to accept the arrangement as on a commercial basis if the parties had not been father and son. He went on to consider what difference the relationship made and, having done so, concluded that on the evidence before him he could and should decide that the agreement was not on a non-commercial basis.

36. Further guidance is also to be found in *R(H) 1/03*, paragraphs 16 to 18 of which summarise the principles which emerge from the authorities. Of particular relevance to the present case is the following passage:

> "18.5 A long-term stable relationship between the parties does not necessarily show there was not a commercial basis. Nor does friendship.

18.6 The test that must be applied is one of dominant purpose of the arrangement. The issue is: is the tribunal satisfied on the balance of probabilities that the principal basis on which the arrangement was made was not a commercial one?

18.7 In appropriate circumstances, it is necessary to consider: (a) the owner's need for rent; (b) the claimant's need for accommodation; and (c) the history of previous arrangements between the parties."

37. Applying this guidance to the present case, I note first that the local authority seems purely and simply to have got off on entirely the wrong footing by its attempted rejection of the claim on what seemed to be the basis that it was an arrangement between mother and son. It is not possible to discern in either the original letter of explanation or the letter possibly sent following the review that the local authority then considered any other matter to be relevant to its rejection. When it became obvious that the appeal was going to be pursued, the local authority apparently took a fresh look at the file and raised a considerable number of additional points which could have been raised originally, including the point on the length of the tenancy and some which were of dubious relevance. I have some sympathy with the local authority's desire for a clear explanation of the multiplicity of addresses and what happened to the claimant's own property, and it was not the local authority's fault that registration of the leasehold title to the property in the son's name was unduly delayed, thus fuelling their suspicions. Nevertheless, the local authority seems to have failed to take fully into account information which was already available, in particular relating to the claimant's need for accommodation.

38. Looking at the matter as a whole, the claimant plainly had a need for accommodation somewhere and the son had a need for income to meet the mortgage payments. No doubt a commercial landlord would have been less ready to await the outcome of this appeal, but the delays which have unfortunately occurred were unpredictable and as time has passed, the hope of a successful outcome to the appeal may well have been the only means by which the son could hope to recover the rent which he has not sought to obtain by way of legal action. It is recognised in *CH/0296/2003* that more leeway may be expected where there is a personal relationship between landlord and tenant. Once it is accepted that a personal relationship does not of itself make the arrangement non-commercial, it is only to be expected that there may be a gentler approach to enforcement.

39. The other substantial point is the length of the tenancy. I accept that a tenancy for life is generally a family rather than a commercial arrangement. For the reasons I have already given, however, in my view no such tenancy was created and the son at least did not intend to create such a tenancy. What was intended was, as the local authority recognised in connection with its sham submission, a tenancy of indefinite duration (the expectation being that notice would not in fact be given while the claimant required accommodation) rather than a tenancy for a six month term. In practice, that does not seem to me significantly different from the sort of arrangement which was apparently envisaged in the other cases involving relationships as discussed above, and it does not, in all the circumstances, suffice to render the agreement non-commercial.

40. I recognise that so far I have expressed a view on what the term of the tenancy was not rather than on what is was. There appear to be two possibilities about what it was. The first is that it was the term spelt out in the assured shorthold tenancy agreement: that is to say, a fixed term of six months followed by a monthly periodic tenancy. The second is that the terms of the agreement do not apply at all, since the parties were not agreed as to the term when the tenancy was granted. In that case, given the claimant's agreed legal liability to make monthly payments of rent, the probable inference is that there was a monthly periodic tenancy from the outset.

41. On the footing that one or other of the possibilities discussed in paragraph 40 above represents the term of the tenancy, and having regard to the other matters I have considered, I conclude that the agreement did not fall foul of regulation 7(1)(a).

42. I come, then, to regulation 7(1)(l). The local authority addressed this head at some length in its original submission to the tribunal under the recognised five heads of:

(1) the means, circumstances and intention of the claimant;

(2) the means, circumstances and intention of the landlord;

(3) the prior relationship of the landlord and the tenant;

(4) whether or not the agreement is commercial;

(5) the rent charged.

Unfortunately, the submission under (1) relied heavily on the local authority's mistaken understanding that the claimant had been living for the three years prior to August 2003 with the son, while the submission under (2) described the claim as "currently ... a fraudulent claim with a fictitious landlord" on the basis of the Land Registry documents. The point about the son's ownership of the property indeed runs through the submission. When that is stripped away, what remains is essentially the relationship of the parties, the point that the tenancy agreement has been altered (and it may be noted that the local authority reasonably, in my view, read it at that stage as providing for a term of 610 months), the fact that the claimant said that the tenancy was for as long as she was alive and that the property had two bedrooms rather than one.

42. Again I am helped by the authorities produced by the claimant's solicitors. The Court of Appeal had to consider the predecessor of regulation 7(1)(l) in *Solihull MBC Housing Benefits Review Board* v. *Simpson* [1995] 1 F.L.R. 140. Mr. Simpson had been living with his family, which included a child with a disability, in unsatisfactory council accommodation. His father-in-law offered to buy a house in a suitable location which he would then rent to his daughter and son-in-law. Mr. Simpson sought advice from the Citizens Advice Bureau and the council's Housing Department on whether he would be entitled to housing benefit in those circumstances and was told he would not be disqualified, although no official confirmation of entitlement was obtained. The arrangement proceeded and the claim was made. The local authority, however, refused the claim on the basis that the liability had been created to take advantage of the scheme. The Court of Appeal noted that it was commonplace for

persons of limited means to enter into tenancies in expectation of obtaining housing benefit and that plainly the provision was not intended to catch all such claimants. It then proceeded to consider in what circumstances the provision could properly be relied on. The court concluded that, although bad faith was not necessary, the words "take advantage" showed that at least in the eye of the beholder there had to be conduct which appeared to some extent improper. The requirement would be made out if the dominant purpose was to take advantage of the scheme when entering a particular tenancy, as opposed to achieving the reasonable satisfaction of housing needs. The Review Board's decision was set aside on the ground that it failed to give adequate reasons for the finding that the tenancy had been created to take advantage of the housing benefit scheme.

44. *Simpson* was followed in *R.*v. *Housing Benefits Review Board of Milton Keynes, ex parte Macklen*, 30th April 1996, in which the landlord had bought a property for his sister-in-law, who suffered from osteoarthritis and could not find suitable local authority accommodation. She paid rent which covered the mortgage payments. The Board had failed to consider whether the dominant purpose was to take advantage of the scheme or to obtain suitable accommodation, and its decision was set aside. It is not sufficient for the local authority to show that the parties knew at the time that the rent could not be paid without recourse to housing benefit, although that factor does not have to be excluded form consideration: *R.* v. *Sutton London Borough Council, ex parte Keegan* (1992) H.L.R. 92. It may also be noted that in *Ross* the local authority was additionally unsuccessful on the alternative ground for its decision that the liability was created to take advantage of the scheme.

45. Although, as I have said, the local authority here considered the established five factors (as discussed on the commentary on this provision in CPAG's *Housing Benefit and Council Tax Benefit Legislation*, 18th ed., pp.234-236), it did not ask the overall question whether the dominant purpose was to take advantage of the scheme. Further, again as I have said, some of the reasoning is affected by mistakes of fact. The question which I must consider is whether, in the light of the remaining relevant factors identified by the local authority and any others which occur to me, the claimant's rent liability was created with the dominant purpose of taking advantage of the scheme.

46. It seems to me clear that that was not the case. There was strong evidence, accepted by the tribunal, that the claimant needed secure and stable accommodation. There was also evidence that she and her son very understandably thought that that was best secured by the purchase of a property suited to her needs (which included the area in which the property was situated) and owned (since she could not herself obtain a mortgage) by a landlord who was a member of the family rather than a stranger. The son expressly denied in evidence that he had a commercial motive (p.257). The indefinite duration of the tenancy agreement in my view has very little bearing on the dominant purpose of the arrangement and I do not see how the alteration of the agreement can bear upon that separately. It is true that the property had two bedrooms and it could be said that the claimant's reasonable housing needs could be satisfied with one bedroom. There was evidence, however, that the claimant sometimes needs someone to stay with her in view of her health, although at other times the bedroom is used by grandchildren. In my view, this point is wholly insufficient to outweigh the

other factors pointing to the conclusion that the dominant purpose was to meet the claimant's reasonable accommodation needs. The case is similar in many respects to the authorities to which I have referred and the local authority does not make out its argument that the liability was created to take advantage of the housing benefit scheme.

47. There remain some further points to be noted. First, if the claimant and the son had in fact reached a prior agreement that the claimant should have a tenancy for live (meaning a tenancy which gave her an enforceable right to remain in the property for the rest of her life) and the intention to enter into such a tenancy had continued, it might have been possible to rectify the original form of the assured shorthold tenancy agreement to make the term stated correspond with the term agreed by the claimant and the son. In view of my findings on the question of prior intention, that issue does not arise. Even if rectification were available, the fact is that the agreement has not been rectified and my present view is that the local authority would not be entitled to treat the agreement as if it had been rectified and a long tenancy had been created.

48. Secondly, there might be circumstances in which a person in the position of the claimant would be entitled to resist a claim for possession by a person in the position of the son and to establish an extended right to remain in the property. On the impression I have formed of the facts here, this case does not give rise to any such right in the claimant, and the contrary has not been suggested. In particular, I cannot at present see that the claimant has acted to her detriment in reliance on any representation by the son about her length of occupation. Again, even if there were arguably such a right, the fact is that it has not been established and it is inevitably unclear what the actual content would be. My present view is that the local authority would not be entitled to proceed on the footing that a right of such a nature as to disentitle the claimant to housing benefit existed.

49. Finally, the local authority concluded its submission on the present appeal by saying that the authority would be happy to attend an oral hearing if I thought it would help with regard to the background of the case, but if I felt it was not necessary the authority would withdraw the request. I have interpreted that as an expression of willingness to attend an oral hearing but not a specific request for one. I am grateful for the expression of willingness, but, as is apparent, it has not appeared to me necessary to hold an oral hearing.

50. For those reasons, which have unfortunately become rather lengthy, the appeal is allowed, the decision of the tribunal is set aside and I substitute my own decision, as set out in paragraph 1 above.

E. Ovey
Deputy Commissioner
26th May 2006