Bulletin 177

PLH, HL, CF *Commissioners' Files: CH 5216/01, CH 841/02 & CH 3880/02*

SOCIAL SECURITY ACTS 1992-2000

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

(CH 5216/01)	*Appellant:*	Watford BC
	Respondents:	(1) W *[the landlord]* (2) Secretary of State (3) *[the claimant]* (4) Child Poverty Action Group
	Claim for:	Housing Benefit (Overpayment)
	Appeal Tribunal:	Watford
	Tribunal Case Ref:	U/04/048/2001/00757
	Tribunal date:	15 August 2001
	Reasons issued:	22 October 2001
(CH 841/02)	*Appellant:*	G *[the landlord]*
	Respondents:	(1) Manchester CC (2) Secretary of State (3) *[the claimant]* (4) Child Poverty Action Group
	Claim for:	Housing Benefit (Overpayment)
	Appeal Tribunal:	Stockport
	Tribunal Case Ref:	U/40/125/2001/01512
	Tribunal date:	28 September 2001
	Reasons issued:	14 December 2001
(CH 3880/02)	*Appellant:*	Arena (*formerly* Liver) Housing Association Ltd
	Respondents:	(1) Halton BC (2) Secretary of State (3) *[the claimant]* (4) Child Poverty Action Group
	Claim for:	Housing Benefit (Overpayment)
	Appeal Tribunal:	Warrington
	Tribunal Case Ref:	U/06/078/2002/00159
	Tribunal date:	28 May 2002
	Reasons issued:	2 July 2002

[ORAL HEARING]

Introduction

1. In these cases we were appointed as a Tribunal of Commissioners pursuant to section 16(7) **Social Security Act 1998** to determine the questions of law of special difficulty facing tribunals and decisionmakers on the practical application of the provisions for recovery of overpaid housing benefit under section 75 **Social Security**

Administration Act 1992, following the creation of statutory rights of appeal relating to such overpayments from 2 July 2001 under section 68 and schedule 7, **Child Support, Pensions and Social Security Act 2000,** and the decision of the Court of Appeal on 26 March 2003 in **Secretary of State v Chiltern District Council and Warden Housing Association** [2003] EWCA Civ 508 (the *Warden* case). In that case it was held that the jurisdiction of appeal tribunals under the statutory right of appeal extends to permit a challenge to any exercise of discretion, or choice, by an authority in initiating the recovery procedure against the particular appellant, rather than some other person also potentially liable under the Act or regulations for the same overpayment.

2. Two main questions were argued before us, each at present unresolved by authority. The first was whether the Court of Appeal's decision means that on any such appeal the appeal tribunal is required to reconsider and redetermine for itself the entire *merits* of any such choice made by the determining authority, or is only concerned with the more limited question of the *lawfulness and propriety* of the use of its statutory powers. The second was whether the switch from the previous system of legal control of housing benefit cases by judicial review alone, to one of full statutory appeal to an independent judicial tribunal with jurisdiction to rehear and redetermine all relevant factual as well as legal issues, means that any procedural defect affecting the validity of an initial determination can now be cured in a proper case by the tribunal substituting its own decision after a rehearing, instead of the matter having to be remitted to the authority to start the process again as would have been the case under judicial review.

The three cases before us

3. In **CH 5216/01** ***Watford BC v W & others***, the facts were that the Council turned out to have overpaid one week's housing benefit amounting to £110 to a private landlord, for one of his tenants for the week 18 to 24 December 2000 after she had moved out of the property; a fact of which the landlord was unaware. The authority sought to recover this money from the landlord who had been the direct recipient of the payment, relying on both its statutory powers of recovery under section 75 against the landlord as payee, and also an express undertaking previously given by him to refund any overpayment due in such circumstances. It issued letters determining the amount of the benefit overpaid in excess of entitlement, and (on 12 and 22 January 2001: pages 10, 13-14 of this appeal file) determining that £110 was recoverable from the landlord as the person to whom the overpayment had been made. The landlord appealed to the tribunal against that determination, resisting recovery on the ground that the claimant had a subsisting tenancy agreement until the following May, and he had been confused by the Council's letters as to the basis on which recovery was being sought against him. There

was no indication of any attempt at operating the recovery procedure against the tenant, and conversely no dispute that the money in question had been overpaid in excess of entitlement, though without "official error", so that it was in principle within the authority's powers of recovery. The tribunal, consisting (as is now the standard practice) of a legally qualified chairman sitting alone, allowed the landlord's appeal and held that the overpayment was not recoverable from him, on the ground that the authority had failed to show it had operated the statutory procedure correctly. This was stated to be because the initial letter in December 2000 which had identified the overpayment had failed to specify the reason why it was recoverable, and although the subsequent determinations of 12 and 22 January 2001 did give an explanation of the basis on which recovery was being sought from the landlord, **"the damage had already been done and the local authority are not entitled to cure the fundamental defect in their determination in this way"** (page 30). The authority appeals with the leave of the single Commissioner on the ground that there was no material defect in the later determination, which was the one actually under appeal to the tribunal and gave the relevant information. In any case it was plain by the time of the tribunal hearing that there were no outstanding material defects, as the landlord himself had made it clear that by January 2001 he fully understood the reasons for the determination and availed himself of his full right of appeal against it. The authority was entitled to exercise its recovery powers in the way it had sought and had acted properly in doing so. In consequence the tribunal's decision should be set aside and the determination of recoverability from the landlord confirmed.

4. In **CH 841/02** ***G v Manchester CC & others***, there is again no dispute that there had been an overpayment of housing benefit to the landlord, this time of £1,820 for the period of six months from 11 January to 11 July 1999 in respect of a tenant who had already vacated the property so that his entitlement had ceased. Again this came to light only subsequently, and again the circumstances did not amount to "official error" on the part of the authority so as to render the overpayment irrecoverable. By letters dated 9 November 1999 and 26 January 2001 (on a somewhat delayed review, after some correspondence had gone astray) the authority notified the landlord of the determination that this housing benefit had been overpaid, and of its further determination that subject to his rights of appeal the overpayment was recoverable from and should be repaid by the landlord, because as the review determination of 22 January 2001 put it:

> **"I can understand that because your tenant had left belongings in the property ... you may have thought they were still living there. But unfortunately it does not prove that they were still living at the property and I have evidence that they had left. Because you risk having to repay overpayments, I advise you to satisfy yourself that your tenants still live at the property before you accept benefit payments on their behalf.**

The overpayment happened because no one told me in time that your tenant had moved out of the property. It was not caused by an official error, therefore it is legally recoverable.

The law allows me to ask either you or your tenant to repay this. I have a financial duty to local taxpayers to recover overpaid benefit. I am asking you to repay this because you received payment. I think it would be unreasonable to ask your tenant because he did not receive payment or appear to derive any benefit from it."

5. G appealed against the determination, accepting that in principle the overpayment caused by his tenant's failure to notify the authority of the move might be recoverable either from the claimant or from himself as the recipient. However he contended (in a written submission to the tribunal, in a form used by the Residential Landlords' Association on behalf of private landlords) that it was unfair in such circumstances to use the power to recover from him, when in his view there had been "fraudulent" conduct by the claimant against whom the Council had the powers and resources to proceed to recovery and possible prosecution instead. The tribunal rejected his appeal, finding as a fact that the claimant had not been living at the property after 6 January 1999 and that the circumstances did not fall within the relevant exception for official error ("**where the claimant, a person acting on his behalf or any other person to whom the payment is made did not cause or materially contribute to that mistake**"), with the result that the overpayment was fully recoverable. The contention that the claimant should have been selected as the only target for recovery was dealt with in the chairman's statement of reasons at pages 35 to 36 of this appeal file as follows:

"Clearly the claimant caused or materially contributed to the mistake, act or omission in this case because he failed to inform the Housing Benefit Office that he was no longer living at [the property] contrary to his duty to notify a change of circumstances under regulation 75 as the appellant quite correctly states. However, that does not mean that the Housing Benefit Office is not entitled to recover from the landlord as the appellant seems to argue. On the contrary it makes the overpayment recoverable and one of the persons from whom the overpayment is recoverable is the landlord if the landlord is the person who received the payment as in this case.

A number of further points have been made by and on behalf of [G]. However, I can only decide whether the decision maker has made a correct decision within the law. I find that the decision maker has made a correct decision within the law for the reasons I have given and I uphold it."

6. G appeals against that decision on the ground that the authority could and should have exercised its recovery powers against the tenant and not him in such circumstances, and both the authority and the appeal tribunal had erred in failing to give any weight to the tenant's failures to comply with his duties, instead merely picking the landlord as a "soft target" which was unreasonable. Further arguments were raised in later written submissions on his behalf by the Residential Landlords' Association that to proceed against a landlord in such circumstances infringes his right to peaceful

enjoyment of possessions under Article 1 Protocol 1 and/or to a fair trial under Article 6 of the Convention on Fundamental Rights and Freedoms now directly applicable under the **Human Rights Act 1998**. Consequently it is sought to have the tribunal's decision set aside and the overpayment declared irrecoverable from him.

7. In **CH 3880/02** ***Arena Housing Association v Halton BC and others*** the overpayments were even more substantial, totalling £7,031.52 paid to the Association from 9 November 1998 to 7 January 2001. As is not open to dispute before us, the tenant in respect of whom this was paid as an income support claimant was never in fact entitled to it, because she was wrongly drawing income support while in full-time employment of which she failed to notify the authorities. It took some time for these matters to come to light, but when they did the social security authorities stopped her income support retrospectively, which had the effect of removing her right to housing benefit for the same period. Following that, the amount overpaid was determined; and although the paperwork put in evidence was not as complete as it might have been, and the Association complained that the notifications served on them had been incomplete, the tribunal having heard the evidence recorded findings of fact that

> **(1) there had been a recoverable overpayment in the total amount claimed, which had not been caused by official error and was therefore in principle recoverable;**
>
> **(2) the authority was entitled to recover the overpayment from the landlord and had considered "all the relevant factors when deciding from whom to recover, factors such as the cost, difficulty and time span of recovery from those who are relevant"; and**
>
> **(3) overpayment determination letters which "contained the amount and relevant dates" had been issued to *both* the tenant and the landlord, dated 2 February 2001.**

The Association's contention that the procedure had been nonetheless defective because they had received no express notification of their right of appeal (though they had of course fully exercised that right, lodging a notice of appeal against the determination on 23 February 2001, making both written and oral submissions to the tribunal and taking a full part in the appeal hearing) was rejected because:

> **"The tribunal accepted that the appellant was a housing association familiar with disputes in relation to housing benefit and that the officers of that housing association would have known their rights of appeal. The tribunal accepts it is not appropriate to declare the housing benefit department's determination in this case as invalid on the grounds submitted ...."**

8. As is apparent from the tribunal's findings, the facts of this case are different from those in the other two before us, and also from those in *Warden* itself where the Court of Appeal referred to an exercise of choice, in that recoverable overpayment determinations had been issued to impose liability on *both* the landlord and the tenant

concurrently for the full total overpaid. Copies of the forms of determination used were produced at our direction by the authority and added to this appeal file at pages 54ff. Those addressed to the landlord inform it of the relevant amounts and dates, stating that **"as the benefit was paid direct to you the overpayment is to be recovered from you"** and that the landlord is to be invoiced for the amounts which may be offset (under a provision in section 75(5) referred to below) against benefit payments due in respect of other tenants, who will be deemed to have paid rent to the value so recovered. Those to the tenant deal with overpaid council tax benefit as well as housing benefit, and again set out the relevant details of the overpaid amounts and the periods to which they relate, stating that those for council tax benefit would be debited to her council tax account while those for housing benefit would be invoiced directly to her.

9. There was no appeal to the tribunal by the tenant, so the Association's appeal to us is thus against the tribunal's confirmation of its *concurrent* legal liability as payee: the procedural grounds rejected by the tribunal are repeated, as is the broader contention that the powers of recovery ought not to have been used against the Association at all in the circumstances, since by doing so **"the local authority is effectively transferring the debt to a third party which in no way contributed to the overpayment"** which penalises the Association and is unreasonable. Further, the tribunal chairman misdirected herself by taking too narrow a view of the "relevant factors", and should have made and recorded findings and reasons extending to the more general merits, e.g. whether a non-profitmaking social landlord such as the Association should have legal liability imposed on it at all in such circumstances. A decision in its favour should therefore be substituted or the case remitted for a fresh tribunal to address these wider issues.

The parties before us

10. We considered it important that as these were test cases we should have the benefit of submissions and argument from each of the relevant interest groups potentially affected. Accordingly the Secretary of State was (with his consent) joined as the second respondent in each appeal, and each tenant was also formally joined as third respondent in the appeal concerning his or her benefit. It soon however became apparent that none of the individual tenants would take any effective part in the proceedings, even to the extent of giving formal instructions for legal argument to be presented on their behalf; and in those circumstances we exercised our powers in regulations 4, 24 **Commissioners Procedure Regulations** 1999 SI No 1495 to join the Child Poverty Action Group as the fourth respondent to each appeal, for the purpose of representing the interests of housing benefit claimants generally and making submissions on the issues in these appeals as they affect such claimants. We are extremely grateful to the CPAG for agreeing to adopt

this role, and indeed to all the parties who appeared before us by Counsel at the oral hearing, or sent in written submissions. This way of proceeding has at least enabled us to have the benefit of comprehensive legal argument from all points of view on the difficult issues of statutory interpretation and general law that arise: an advantage that (without seeking to imply criticism of anyone) it can be seen with hindsight as unfortunate that the procedure adopted in the *Warden* case did not afford, at any level.

11. We held a combined oral hearing of all three appeals. For the authorities, Manchester CC and Halton BC appeared by Lorna Findlay of Counsel, instructed by their respective solicitors' departments; and we were also supplied with written argument by Mr Stephen Lowndes of the Watford BC on that authority's behalf. For the landlords, Arena Housing Association appeared by Sarah McKeown of Counsel, directly instructed by the Association itself; and we also had and took into account the written submissions provided by and on behalf of the other two landlords, W and G, who did not appear before us. The Secretary of State appeared in all three cases by James Maurici of Counsel, instructed by the solicitor to the Department for Work and Pensions. As already noted, the Child Poverty Action Group effectively represented the interests of the tenants on all general legal issues, as none of them appeared or took part in the proceedings at all; it appeared in all three cases by Daniel Kolinsky of Counsel, instructed by its Legal Officer Stewart Wright. All Counsel made their submissions with the aid of extremely helpful skeleton arguments, and we repeat our thanks to them and to those instructing them for the amount of work carried out to bring these test cases on for full hearing as quickly and effectively as they were.

Housing benefit recovery powers

12. The starting point for a consideration of the issues that confront us must be the substantive recovery powers themselves. These are conferred by section 75 **Social Security Administration Act 1992**, where they form part of the provisions under Part III of that Act (**"Overpayments and Adjustments of Benefit"**), which begin with the Secretary of State's own powers of recovery in respect of the main social security benefits under section 71, relevant because of the similar language used:

> **"71.- (1) Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure –**
>
> > **(a) a payment has been made in respect of a benefit to which this section applies; or**
> >
> > **(b) any sum recoverable by or on behalf of the Secretary of State in connection with any such payment has not been recovered,**

the Secretary of State shall be entitled to recover the amount of any payment which he would not have made or any sum which he would have received but for the misrepresentation or failure to disclose. ...

(3) An amount recoverable under subsection (1) above is in all cases recoverable from the person who misrepresented the fact or failed to disclose it.

(4) In relation to cases where payments of benefit to which this section applies have been credited to a bank account or other account under arrangements made with the agreement of the beneficiary or a person acting for him, circumstances may be prescribed in which the Secretary of State is to be entitled to recover any amount paid in excess of entitlement ...

(8) Where any amount paid is recoverable under –

(a) subsection (1) above;

(b) regulations under subsection (4) ...

it may, without prejudice to any other method of recovery, be recovered by deduction from prescribed benefits. ...

(10) Any amount recoverable under the provisions mentioned in subsection (8) above –

(a) if the person from whom it is recoverable resides in England and Wales and the County Court so orders, shall be recoverable by execution issued from the County Court or otherwise as if it were payable under an order of that Court ..."

13. After further provision in the intervening sections 72-74 for recovery and adjustment of benefits to which section 71 applies (those do not include housing benefit), follow the powers in section 75 (**"Overpayments of housing benefit"**) that directly concern us. As in force from 31 July 1997 to 30 September 2001, the form applicable to each of these three cases, the section provided so far as material that:

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

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

(3) An amount recoverable under this section is in all cases recoverable from the person to whom it was paid; but, in such circumstances as may be prescribed, it may also be recovered from such other person as may be prescribed.

(4) Any amount recoverable under this section may, without prejudice to any other method of recovery, be recovered by deduction from prescribed benefits.

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

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

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

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

(7) Where any amount recoverable under this section is to be recovered otherwise than by deduction from prescribed benefits –

(a) if the person from whom it is recoverable resides in England and Wales and the County Court so orders, it is recoverable by execution issued from the County Court or otherwise as if it were payable under an order of that Court; ..."

14. It is common ground that the procedure for making a specific amount legally recoverable from a particular person under these provisions so as to permit enforcement against him is that of "determination" prescribed in Part XI of the **Housing Benefit (General) Regulations** 1987 SI No. 1971, as amended and applicable from 2 July 2001, as follows (the diamond brackets show where there was a partial change in terminology from that date, noted further below):

"Part XI – <Decisions on> questions

Who is to make a <decision>

76.- (1) Unless provided otherwise by these Regulations, any matter required to be determined under these Regulations shall be determined in the first instance by the relevant authority.

[By reg 2(1) a "relevant authority" means an authority administering housing benefit; regs 76 (2)-(5) deal with decisions made on *claims*, agreed not to be applicable]

Notification of <decisions>

77.- (1) An authority shall notify in writing any person affected by a <decision> made by it under these Regulations –

(a) [in the case of a determination on a claim ....]

(b) in any other case, within 14 days of that determination or as soon as reasonably practicable thereafter;

and every notification shall ... include a statement as to the matters set out in Schedule 6. ...

(4) A person affected to whom an authority sends or delivers a notification of <decision> may ... request the authority to provide a written statement setting out the reasons for its <decision> on any matter set out in the notice. ...

(5) The written statement ... shall be sent to the person requesting it within 14 days or as soon as is reasonably practicable thereafter.

....

Schedule 6 - Matters to be included in the <decision notice>

Part I – General ...

2. Every <decision notice> shall include a statement as to the right of any person affected by that decision to request a written statement under regulation 77(4) ...

3. Every <decision notice> shall include a statement as to the right of any person affected ... to appeal against that decision

....

Part VII – Notice where recoverable overpayment

14.- (1) Where the appropriate [sic] authority makes a <decision> that there is a recoverable overpayment within the meaning of regulation 99 ... the <decision notice> shall include a statement as to –

(a) the fact that there is a recoverable overpayment; and

(b) the reason why there is a recoverable overpayment; and

(c) the amount of the recoverable overpayment; and

(d) how the amount of the recoverable overpayment was calculated; and

(e) the benefit weeks to which the recoverable overpayment relates ...; and

(f) where recovery of the recoverable overpayment is to be made by deduction from a rent allowance ... that fact and the amount of the deduction.

(2) In a case where it is –

(a) determined that there is a recoverable overpayment;

(b) determined that that overpayment is recoverable from a landlord; and

(c) decided that recovery of that overpayment is to be made by deduction from a rent allowance paid to that landlord to discharge ... an obligation owed to him by [a claimant other than the one in respect of whom the overpayment had been made]

the decision notice to that landlord shall identify [both claimants concerned]."

Before 2 July 2001 the expressions used instead of "decision" and "decision notice" for what was to be determined and notified by an *authority* in relation to housing benefit had been "determination" and "notice of determination" throughout.

15. The relevant regulations prescribing under section 75(1) when an overpaid amount of housing benefit was non-recoverable, and under section 75(3) the persons from whom overpayments might be recovered in addition to the payee, appear in Part XIII, in the applicable form in which they stood down to 30 September 2001:

"Part XIII – Overpayments

Meaning of overpayment

98. In this part "overpayment" means any payment which has been paid by way of housing benefit and to which there was no entitlement under these regulations (whether on initial determination or as subsequently revised on review or further review) and includes any amount paid on account under regulation 91 which is in excess of the entitlement to housing benefit as subsequently determined.

Recoverable overpayments

99.- (1) Any overpayment, except one to which paragraph (2) applies, shall be recoverable.

(2) This paragraph applies to an overpayment caused by an official error where the claimant or a person acting on his behalf or any other person to whom the payment is made, could not, at the time of receipt of the payment, reasonably have been expected to realise that it was an overpayment."

[Regulation 99(3) sets out the definition of "overpayment caused by official error" noted in paragraph 5 above; it is common ground this does not cover any of the overpayments at issue in these three cases.] ...

Person from whom recovery may be sought.

101. (1) Subject to paragraph (2) a recoverable overpayment shall be recoverable from either –

> **(a) where the overpayment was in consequence of a misrepresentation or failure to disclose a material fact (in either case whether fraudulent or otherwise) by or on behalf of the claimant or any other person to whom a payment of housing benefit may be made, the person who misrepresented or failed to disclose that material fact; or**
>
> **(b) in any case, the claimant or the person to whom the overpayment was made.**

(2) Where a recoverable overpayment is made to a claimant who has one or more partners, recovery of the overpayment may be made by deduction from any housing benefit payable to a partner, provided that the claimant and that partner were members of the same household both at the time of the overpayment and when the deduction is made."

[Regulations 102 to 105 then set out further provisions about the method of recovery, special provisions about the calculation of the overpayment in certain cases, and what social security benefits are to count as "prescribed benefits" for section 75(4), on none of which does any material point arise.]

16. From 1 October 2001 both section 75 and Part XIII of the regulations were altered, so that from that date there were certain defined circumstances in which overpaid housing benefit was *not* to be recoverable at all from the payee; and the provisions about additional or alternative persons from whom recovery might be sought were altered. It was common ground that these new provisions did not remove the need to decide the points of principle arising on the pre-October 2001 law, and that corresponding points

also arise, at least to some extent, under the new provisions. For completeness and ease of comparison it is convenient to set those out here, first a new section 75(3):

> **"75.- ... (3) An amount recoverable under this section shall be recoverable –**
>
> > **(a) except in such circumstances as may be prescribed, from the person to whom it was paid; and**
> >
> > **(b) where regulations so provide, from such other person (as well as, or instead of, the person to whom it was paid) as may be prescribed."**

and then (after an altered but still not applicable definition of "overpayment caused by official error" in regulation 99) a new regulation 101 in the following terms:

> **"Person from whom recovery may be sought**
>
> **101.- (1) For the purposes of section 75(3)(a) of the Administration Act (prescribed circumstances in which an amount recoverable shall not be recovered from the person to whom it was paid), the prescribed circumstance is –**
>
> > **(a) housing benefit has been paid in accordance with regulation 93 (circumstances in which payment is to be made to the landlord) or regulation 94 (circumstances in which payment may be made to a landlord);**
> >
> > **(b) the landlord has notified the relevant authority or the Secretary of State in writing that he suspects there has been an overpayment;**
> >
> > **(c) it appears to the relevant authority that, on the assumption that there has been an overpayment –**
> >
> > > **(i) there are grounds for instituting proceedings against any person for an offence under section 111A or 112(1) of the Administration Act (dishonest or false representations for obtaining benefit); or**
> > >
> > > **(ii) there has been a deliberate failure to report a relevant change of circumstances contrary to the requirement of regulation 75(1) (duty to notify a change in circumstances) and the overpayment occurred as a result of that deliberate failure; and**
> >
> > **(d) the relevant authority is satisfied that the landlord –**
> >
> > > **(i) has not colluded with the claimant so as to cause the overpayment;**
> > >
> > > **(ii) has not acted, or neglected to act, in such a way as to contribute to the period, or the amount, of the overpayment.**
>
> **(2) For the purposes of section 75(3)(b) of the Administration Act (recovery from such other person, as well as or instead of the person to whom the overpayment was made), the prescribed person is -**
>
> > **(a) in a case where the overpayment arose as a consequence of a misrepresentation or failure to disclose a material fact (in either case, whether fraudulently or otherwise) by or on behalf of the claimant or any other person to whom housing benefit has been paid, the person who misrepresented or failed to disclose that material fact;**

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

(c) the claimant. ...

(4) For the purposes of paragraph (2)(b), recovery of the overpayment may be by deduction from any housing benefit payable to a partner provided that the claimant and that partner were members of the same household both at the time of the overpayment and when the deduction is made."

The two stages of the process: establishing legal liability, and then enforcing it

17. Each of the systems of recovery provided for by sections 71 and 75 may be seen as similar in that they consist of two distinct stages, the detailed conditions to be complied with in each of them differing of course according to the benefit. In the first stage the authority seeking to recover (the Secretary of State alone under section 71, the Secretary of State and/or the relevant housing authority under section 75) must initially identify an amount of benefit overpaid in excess of entitlement which meets the threshold conditions for recovery, of misrepresentation or failure to disclose under section 71 or merely being overpaid without prescribed official error under section 75. To complete the first stage it must then identify, and fix with a presently enforceable legal liability, one or more persons within the scope of its recovery powers; which involves making a determination, so as to crystallise the general *potential* liability of that person laid down in the legislation into an *actual* present liability for a specific sum of money – in other words a debt – on which it may proceed to actual recovery by offset, County Court proceedings or otherwise. Such actual recovery or enforcement is the second stage, to which the authority can only proceed once the specific legal liability to support it has been properly established, and any dispute as to that legal liability resolved through the statutory appeal process by the tribunal. It is beyond doubt, and common ground among all parties, that the function of the tribunal appeal process is confined to the *first* stage, of determining the legal liability: decisions of the Secretary of State or a relevant authority whether to proceed with the *second* stage, of enforcing it once properly established, lie outside the appeal jurisdiction with which we are concerned.

18. That distinction between the two stages has been an established and undoubted one in the social security law on recovery of overpaid benefits for many years. It is normally referred to as that between matters going to "recoverability" of an amount reclaimed from a particular person, and those going to "actual recovery" from him after liability to repay it has been established. Thus in reported decision **R(SB) 44/83** the difference was explained by the Commissioner as follows:

"It is for the benefit officer, or, on appeal, the tribunal or Commissioner, as the case may be, to determine whether any sum is recoverable and if so the amount ...

However, if a proper determination has been made by the relevant authority, declaring a specific sum recoverable ... it is for the Secretary of State, and him alone, to decide upon the method of recovery. Moreover, it is for him to consider, should the question arise, whether the right to recover has, for some reason or other, become extinguished or ceased to be enforceable, and it is for him, if he thinks fit, to test this issue in the courts."

That passage has been recently cited with approval and followed by a Tribunal of Commissioners in Northern Ireland under the corresponding post-1998 legislation **(C3/01-02(IS)**, to be reported as **R1/02(IS)(T)**) where they said:

"15. The existing provisions (ie. post-1999) still refer to 'recoverable'. In our view had it been intended to deal with whether or not an amount was to be recovered, this would have been clearly stated. The word "recoverable" in the pre-1999 legislation had a clearly established meaning – it did not embrace a decision whether or not to recover and no provision has been made to deal with the actual recovery. Therefore, in our view, the pre-1999 section ... dealt with what could be recovered, as opposed to what would be recovered.

16. Post-1999, in our view, the meaning of the legislation is still plain. There is a two stage process – (i) the amount that is recoverable i.e. recoverability and (ii) whether it is actually recovered. The tribunal was concerned with stage one in this case. Stage two was not a matter for the tribunal on appeal from the Department but was entirely a matter for the Department at a later stage.

17. The Department, when assessing what is actually recovered, can take into account all sorts of factors that are not matters for the tribunal – including whether it is worth while trying to recover in light of extreme impecuniosity, age or infirmity of the claimant and also any inherent unfairness – but these matters do not concern the tribunal, which can only deal with recoverability in light of [the equivalent provision to section 71 of the Administration Act, cited above]. Accordingly we conclude that ... the tribunal, on appeal, does not have some kind of residual quasi-equitable jurisdiction to decide the amount that is to be recovered. ..."

19. Those observations though not strictly binding here are of strongly persuasive authority in accordance with the practice of the Commissioners as explained in cases **R(I) 12/75** and **R(SB) 1/90**; and they in any case accurately state the undoubted law as also applied in Great Britain – in particular the difference between the "could" and the "would" of overpayment recovery.

The right of appeal against a recoverable overpayment determination

20. Statutory rights of appeal to an independent judicial tribunal were provided for the first time in housing benefit cases by section 68 and Schedule 7 **Child Support Pensions and Social Security Act 2000,** in force from 2 July 2001 onwards. The basic structure of the housing benefit appeal provisions in this new primary legislation is derived, though with important differences, from that applying to the main social security benefits under section 12 **Social Security Act 1998** by which:

"12.- (1) This section applies to any decision of the Secretary of State ... which –

(a) is made on a claim for, or on an award of, a relevant benefit, and does not fall within Schedule 2 to this Act;

(b) is made otherwise than on such a claim or award, and falls within Schedule 3 to this Act; ....

(2) In the case of a decision to which this section applies –

... the claimant and such other person as may be prescribed shall have a right to [appeal to an appeal tribunal];

but nothing in this subsection shall confer a right of appeal in relation to a prescribed decision, or a prescribed determination embodied in or necessary to a decision ...

(4) Where the Secretary of State has determined that any amount is recoverable under or by virtue of section 71 or 74 of the Administration Act, any person from whom he has determined that it is recoverable shall have the same right of appeal to an appeal tribunal as a claimant. ...

(6) A person with a right of appeal under this section shall be given such notice ... as may be prescribed. ..."

21. For housing benefit Schedule 7 to the 2000 Act sets out a separate and self contained code, providing so far as material by paragraph 6:

"Appeal to appeal tribunal

6.- (1) Subject to sub-paragraph (2), this paragraph applies to any relevant decision (whether as originally made or as revised under paragraph 3) of a relevant authority which –

(a) is made on a claim for, or on an award of, housing benefit ...; or

(b) does not fall within paragraph (a) but is of a prescribed description.

(2) This paragraph does not apply to –

(a)-(d) [various types of specified decision, none of which is material here]

(e) such other decision as may be prescribed.

(3) In the case of a decision to which this paragraph applies, any person affected by the decision shall have a right of appeal to an appeal tribunal.

(4) Nothing in sub-paragraph (3) shall confer a right of appeal in relation to –

(a) a prescribed decision; or

(b) a prescribed determination embodied in or necessary to a decision. ...

(6) Where any amount of housing benefit or council tax benefit is determined to be recoverable under or by virtue of section 75 or section 76 of the Administration Act (overpayments and excess benefits), any person from whom it has been determined that it is so recoverable shall have a right of appeal to an appeal tribunal.

(7) A person with a right of appeal under this paragraph shall be given such notice ... as may be prescribed. ..."

22. Schedule 7 thus follows the 1998 Act in making some distinction between a "decision" concerned primarily with questions of entitlement under a claim, or when entitlement under an award already made is to come to an end or be subject to alteration by a further decision, and a "determination" that an overpayment is recoverable from a particular person (not necessarily the claimant) under the statutory procedure. The reason for having such a distinction in terminology is less important in the present context than the fact that the legislation clearly makes it: cf. paragraph 14 above.

23. The schedule however departs from the pattern of the 1998 Act in setting much narrower limits to the types of housing benefit "decision" within the main right of appeal for a "person affected" under paragraphs 6(1)-(3). This it does by the initial restriction which necessarily governs the whole of paragraph 6(1), and thus also paragraph 6(3), to a "relevant decision" of a "relevant authority", those expressions being defined by paragraph 1 of the schedule as follows:

> **"1.- (1) In this Schedule "relevant authority" means an authority administering housing benefit ....**
>
> **(2) In this Schedule "relevant decision" means any of the following –**
>
> > **(a) a decision of a relevant authority on a claim for housing benefit ...;**
> >
> > **(b) any decision under paragraph 4 of this Schedule which supersedes a decision falling within paragraph (a), within this paragraph or within paragraph (b) of sub-paragraph (1) of that paragraph;**
>
> **but references in this Schedule to a relevant decision do not include references to a decision under paragraph 3 to revise a relevant decision. ..."**

24. Paragraphs 2, 3 and 4 provide for decisions on *claims* for benefit to be made so as to base any entitlement only on circumstances subsisting at that time; and for *relevant decisions* once made by an authority to be "revised" under paragraph 3 (by a substituted decision that normally has effect from the date of the original), or "superseded" under paragraph 4 (by a substituted decision that normally has effect from some later date, for example after a change of circumstances), each in prescribed cases. A decision by an authority that a housing benefit award previously made should be terminated from the date the tenant was found to have vacated the premises would be an example of the latter kind of "superseding" decision, which would be a "relevant decision" within (b) of the definition in paragraph 1(2)(b).

25. Neither branch of that definition however appears capable of covering a determination of the kind within paragraph 6(6); and the implications of that will have to be considered further below. We will attempt to summarise the contentions before us and the effect of the legislation before returning to what was decided in the *Warden* case.

The main contentions

26. As already noted, the two main questions were the scope of any permissible challenge on appeal to any choice involved in the authority's use of the procedure against the particular appellant rather than someone else; and the scope and consequences of any procedural challenge on the ground of non-compliance with the notification or other formal requirements.

27. On the first question Ms Findlay for the housing authorities submitted that the only permissible challenge a tribunal could consider was to the *propriety and lawfulness* of an authority's choice to initiate the process against the appellant (referred to generally in argument as its "exercise of discretion"); in other words a challenge on judicial review principles sufficient to show a defective and invalid misuse of power. All the other parties before us argued for a much broader basis of appeal against such a "discretion" extending to the general *merits* of the exercise itself.

28. It was common ground that as an appeal to an appeal tribunal is a full appeal by way of a rehearing of all issues properly before it, if the broader argument was correct it had to follow that *all* possible arguments on finance, policy, social and other considerations that might affect the choice of any possible target for recovery would be open to debate before the tribunal; and that the tribunal would be obliged to form its own view and if necessary substitute its own decision on such matters even where that of the public authority was in no way shown to be unlawful or unreasonable. All Counsel were further agreed that if the broader basis was correct there was no complete list of admissible relevant factors that could be compiled, but potentially the considerations to be argued and taken into account would be very wide. They would include for example such matters as the relative moral culpability of the persons against whom recovery powers might be available, financial considerations (both of the authority seeking recovery, and of individual appellants – e.g. a non-profit making social landlord whose activities could be hard hit or even curtailed if required to bear the cost of substantial overpayments caused by others), hardship or homelessness among claimants the system is designed to assist, general policy and social considerations, and so forth.

29. In the ***Arena*** case, where at first sight no power to select *between* anyone was exercised because recoverable overpayment determinations for the same amounts had been made concurrently against both landlord and tenant, Ms McKeown, with support from Mr Maurici in the latter stages of the oral argument, submitted that the concept of selection or "choice" ought also to be construed broadly. While neither of them suggested there was anything wrong in principle in making both landlord and tenant

concurrently liable for the same overpayment where the statutory conditions were met (that would have been difficult, given the use of "**in all cases ... also**" in section 75(3)), they both agreed in submitting that it should be open to landlords in such circumstances to appeal the "choice" to pursue them in addition to the tenants, rather than not at all. The practical effects for the landlord were likely to be just the same as an overt choice to proceed only against it, and any other answer would be harsh and inconsistent.

30. Mr Kolinsky in his argument went one stage further again, and submitted that the entire machinery under section 75 was a "regime of discretion" (subject to the single exception of section 75(2), under which no regulations for any compulsory recovery had in any event been made). In that context, it was unreal to differentiate between the powers of selection among people for possible legal liability under section 75(3), and what he said was the completely general discretion of an authority whether to proceed and impose legal liability at all, implied by the use of "may" rather than "shall", and "recoverable" rather than "must be recovered", in sections 75(1) and (3). Thus *all* questions on the merits of any aspect of an authority's use of its powers under the section should be open to debate and full reconsideration *de novo* by the tribunal by way of appeal. On how a tribunal should approach the exercise of such discretions, he said the clear starting point identifiable from section 75(3) was that the recipient of the benefit was to be considered the first person to make good an overpayment; consistently with that, and supporting it, regulation 101(1) as it stood down to 30 September 2001 only operated to make claimants liable where responsible for misrepresentation or non-disclosure, or recipients of the benefit, or both, but not otherwise.

31. On the second question on the effect of procedural irregularities all of the housing authorities before us, supported by Mr Maurici for the Secretary of State, argued that the test to be applied in the new context of a statutory appeal should be the same as that under judicial review: namely whether defects such as a failure to include all the prescribed details in a recoverable overpayment determination had caused the person it sought to make liable "significant prejudice". In the absence of that, a tribunal could be satisfied there had been "substantial compliance" with the statutory machinery, such that the attempt at recovery would not be invalidated: ***Haringey LBC v Awaritefe*** (1999) 32 HLR 517, CA. In addition it was now the case that the tribunal's fuller jurisdiction could enable it to use its own procedure to remedy outstanding errors – e.g. by adjourning for proper calculation or other details to be provided – and the test of whether any significant prejudice actually remained was to be applied in the light of that; thus a determination the tribunal found to be justified on the facts could be confirmed in a proper case without the need to send it back: CH 5217/01. From the landlords' viewpoint Ms McKeown argued that if the manner in which an authority had sought to recover an overpayment

was procedurally defective, e.g. because the prescribed details were not included in a notification, that invalidated the whole procedure: the tribunal then had *no* jurisdiction to make its own findings or determine the substantive questions for itself. Alternatively if substantive harm was the test, the extra administrative burden imposed by not being supplied with proper notices and details at the right time was sufficient for this purpose, such that the tribunal should reject the whole process as defective and invalid: the formal requirements under the regulations were mandatory and imposed for a reason, and there would otherwise be no incentive on councils to comply.

The first question: how far an appeal tribunal has jurisdiction over a "discretion"

32. To understand the first question it is necessary to be clear about how it can get in front of a tribunal under the statutory appeal process at all: in other words what appeal rights in relation to recoverable overpayment determinations the new system actually provides. The appeal tribunal being purely a creation of statute, the *only* rights of appeal to it are statutory: there can be no question of its having any inherent jurisdiction, or of any extra-statutory right of appeal being able to be created by judicial decision.

33. In our judgment, it is clear beyond argument from the express provisions of schedule 7 noted above that the right of appeal provided in housing benefit cases for a person from whom an amount of overpaid benefit is determined to be recoverable under section 75 arises not under paragraphs 6(1)-(3) at all, but separately and exclusively under the express provision for it in paragraph 6(6); and such an appeal is by necessary implication an appeal by that person against the making of that determination.

34. The separate source and nature of that right of appeal against a recoverable overpayment determination follows necessarily from the terms of paragraphs 6(1)-(3) in conjunction with those of paragraph 1 defining "relevant decision" and "relevant authority", which (with no exceptions) exclude from the main right of appeal against "decisions" under paragraph 6(3) any determination or action either by the Secretary of State or by a local authority in exercise of their respective powers under section 75(3). Such a determination was conceded by all parties before us not to be a *decision made on a claim* so as to be a relevant decision under paragraph 1(2)(a); nor can it be within paragraph 1(2)(b) as a *decision superseding* any of the types of decision there referred to. (A decision to supersede the award of entitlement that gave rise to the overpayment in the first place will normally be a *precondition* to any determination to impose legal liability to repay it under section 75(3), since that is the way of determining the amount paid in excess of entitlement for the purposes of the threshold provision in section 75(1), but the two things are necessarily different: they do not even have to be against the same

person. If for convenience the altered decision on entitlement and the determination as to recoverability are both recorded and notified in the same decision notice, that still does not alter their separate nature or the separate appeal provisions that apply.)

35. It was common ground that no relevant regulations to include additional rights of appeal under the power in paragraph 6(1)(b) had been made, but in any event as the restriction in paragraph 6(1) to relevant decisions of relevant authorities applies to the whole of the paragraph there could be no question of a determination under section 75(3) being covered by such regulations. Whether the power in paragraph 6(2) to prescribe *ex*clusions from the decisions to which "this paragraph" applies could extend to the right of appeal in paragraph 6(6) was raised in argument before us, but is not necessary to decide. The different use of "decision" and "determination", coupled with the mention in paragraph 6(1) but not paragraph 6(6) of its being subject to paragraph 6(2), would appear to be against it; and where a statutory procedure for the recovery of money from a person is concerned, section 3 **Human Rights Act 1998** and Article 6 of the Convention would demand a restrictive interpretation of any claimed power of the Secretary of State to cut down or exclude the right of appeal to an independent tribunal that the primary legislation in paragraph 6(6), in unqualified terms, otherwise provides.

36. Argument was addressed to us on the terms of regulation 16(1) of, and the schedule to, the **Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations** 2001, made under paragraph 6(2)(e) of schedule 7 to the 2000 Act and prescribing from 2 July 2001 certain types of decision against which an appeal is not to lie under paragraph 6(3); and to certain assumptions about the rights of appeal under the Act those regulations were said to embody. We did not find this of assistance on the questions before us, for the rather basic reason that such regulations (still less any assumptions made by the people who draft them) cannot of course alter the primary legislation or create a right of appeal the Act does not, on its true construction, itself confer or authorise. It was (rightly) not argued by anyone that implementation of the broader view so as to confer a right of appeal to reopen the *merits* of a discretion was essential to comply with Article 6 of the Convention, or that section 3 **Human Rights Act 1998** requires or enables paragraph 6 of schedule 7 to be given an extended meaning to achieve such a result if that is not its effect by normal canons of construction.

37. What then is the proper scope of the challenge that may be mounted, in an appeal under paragraph 6(6), to the exercise of executive discretion or choice that led to the issue of the determination against which the appeal is brought? Despite the assistance of Counsel we were unable to identify any truly parallel instance of a statutory appeal where broad discretionary powers of an executive department of an elected

authority, requiring the making of essentially non-legal judgments on matters of policy, finance, and social considerations, were handed over for full reconsideration to a purely judicial body to form its own subjective views on such matters, and if necessary substitute them for the considered decision of the authority even if unobjectionable by the normal standards of judicial control. Nor could we identify a reason why Parliament would be likely to have intended such an unusual result. It could well involve tribunals in the same council area arriving at different decisions from one another, and from the council itself, on similar overpayment cases on the basis of legitimately differing individual views on policy or finance questions not really justiciable at all.

38. We found no real help in the various examples suggested. A planning inspector has power to substitute his own decision for that of the local authority on an appeal but does so as the delegate of the Secretary of State, applying policy guidelines determined centrally and promulgated by government circular: he is not an independent, wholly *judicial* tribunal. Nor were the now-abolished housing benefit review boards under the Housing Benefit Regulations 1987 before 2 July 2001, who were themselves members of the relevant authority and exercised their own expressly conferred discretions: see the repealed regulation 83(2) and schedule 7. On certain appeals against local authority licensing decisions the magistrates' or Crown court has power to make "such order as it thinks fit", but that is too closely connected with their own licensing and public order jurisdictions to provide an analogy for what is suggested here, namely a purely judicial tribunal being given a general discretion on questions affecting policy and resources.

39. We would sound too a note of caution about the use of the word "discretion" to describe the statutory recovery powers at issue in the cases before us, useful though that expression is to denote the broad category of executive or administrative powers where normal judicial intervention is limited to curbing misuse, as distinct from reopening debatable questions of judgment on the merits. The more limited nature of these particular recovery powers is in our view clear from the context of the legislation. So is their main purpose: to minimise the waste of public money from mistaken overpayments of housing benefit by giving an express statutory power to recover them, not tied to blameworthiness or fault, wherever it turns out that too much has been paid - for *any* reason, other than the closely defined instances of "official error", or reporting by the landlord under regulation 101 from 1 October 2001, where recoupment is excluded.

40. Such a statutory power to recover overpaid public money which the primary legislation says in principle is to be legally recoverable is obviously not a "discretion" of the same kind as, for example, a power to appoint money gratuitously among beneficiaries in a private discretionary trust. It has been held there is also a "clear

distinction" between it and a power to make discretionary grants out of public money for an identified purpose, such as the discretionary education grants or awards at issue in **R v Hampshire CC *ex parte* W** [1994] ELR 460 and **R v Warwickshire CC *ex parte* Collymore** [1995] ELR 217: *per* Jackson J in **R v Thanet DC *ex parte* Warren Court Hotels** (2001) 33 HLR 339 at 348, para 46, distinguishing *Collymore* and saying:

> **"In the nature of things, it will only very rarely be appropriate for a local authority not to seek to recover housing benefit which has been overpaid."**

41. The powers before us were also considered in **Haringey LBC v Awaritefe** (1999) 32 HLR 517, where it was left as an open question "**whether the authority has a discretion to recover the overpayment in whole or in part**": *per* Otton LJ at p.529. Roch LJ who also left open whether a decision to recover could be challenged as "*Wednesbury* unreasonable" said in the penultimate paragraph of his judgment at p.528:

> **"The payment of housing benefits involves the expenditure of public money which is in short supply. If there have been overpayments as defined by the regulations and there is a person who has received those overpayments and from whom they can be recovered, the decision of the review board should be to confirm the local authority's decision to recover the overpayments."**

That understanding of the scope and proper use of an authority's statutory powers in relation to recovery appears to us very closely reflected in the decision of the chairman Mrs Goodman in the third of the appeals before us, **CH 3880/02 *Arena v Halton BC*** at page 26, when she referred to the authority as having

> **"considered all the relevant factors when deciding from whom to recover, factors such as the cost, difficulty and time span of recovery from those who are relevant."**

42. We therefore reject Mr Kolinsky's suggestion that an unlimited discretion, akin to the making of grants of public money by relieving landlords and others from the obligation to repay overpaid housing benefit, is implied by the use of the words "may" or "recoverable" in the legislation, as distinct from expressions such as "must be recovered". The use of "recoverable" in the passages already set out from section 71, and those that mirror them in section 75, is plainly not in that sense, but of "legally recoverable" or "legally due"; as one also finds for example in the Taxes Management Act where tax is said to be "payable to" or "recoverable by" the collector of taxes, without of course implying the existence of any "discretion" in the gratuitous sense for the collector or anyone else over whether the taxpayer is legally bound to pay it.

43. Whether correctly described as discretionary or more limited, there is of course no doubt that a local authority's powers to seek recovery of overpaid housing benefit are, like any other power vested in a public authority, amenable to control by judicial review.

The well established "judicial review grounds" for challenging the misuse of such powers in public law include, for example, that the authority has acted in bad faith or for improper purposes, or has exercised its powers in such a perverse or irrational way that no authority acting properly and reasonably could have reached such a result, or has substantially failed to comply with the procedure laid down for exercising them validly. In all such cases the supposed exercise of power may be struck down in public law proceedings on a judicial review application, as unlawful and invalid.

44. It is also however well established that a challenge on the same grounds of improper or unlawful use of a statutory power may in a proper case be made even in individual *private* law proceedings, in answer to a claim based on its purported use to obtain money from a person or deprive him of benefits. Thus in **Cannock Chase DC v Kelly** [1978] 1 WLR 1, it was said authoritatively by Megaw and Lawton LJJ (with both of whom Sir David Cairns agreed) that a local authority tenant could raise, in answer to a County Court action against him for possession, a properly particularised defence of bad faith on the part of the authority in serving him with notice to quit; *without* the need to apply to the High Court for a prerogative order to quash the alleged misuse of its statutory powers. Megaw LJ, citing Lord Greene MR in **Associated British Picture Houses v Wednesbury Corporation** [1948] 1 KB 223, 228, said at p.6G-H that:

> **"... a public authority's exercise of its statutory powers may properly be challenged before the court if it can be shown, the burden being on the challenger, that the authority has, as a material factor in reaching its decision, taken into account a factor which as a matter of law should not have been taken into account or has failed to take into account a factor which should have been taken into account. To that extent a local authority, as landlord, is under a stricter obligation than a private landlord ..."**

45. That principle was applied and confirmed by the House of Lords in **Wandsworth BC v Winder** [1985] 1 AC 461, where a tenant who objected to the Council's rent increases as improper and void was held entitled to raise this challenge by way of defence to County Court proceedings for recovery of the disputed amount, even though no judicial review challenge had been made. Lord Fraser of Tullybelton, with whom all of their Lordships concurred, said at p.509 E-G:

> **"He did not select the procedure to be adopted. He is merely seeking to defend proceedings brought against him by the appellant. In so doing he is seeking only to exercise the ordinary right of any individual to defend an action against him on the ground that he is not liable for the whole sum claimed by the plaintiff. Moreover he puts forward his defence as a matter of right, whereas in an application for judicial review, success would require an exercise of the court's discretion in his favour. Apart from the provisions of Order 53 in section 31 of the Supreme Court Act 1981, he would certainly be entitled to defend the action on the ground that the plaintiff's claim arises from a resolution which (on his view) is invalid: see for example *Cannock Chase DC v Kelly* ... I find it impossible to accept that the right to challenge the decision of a local authority in the course of defending an action for non-payment can have been swept away by Order 53, which was directed to introducing a procedural reform."**

46. In a further application of the same principle, this time to the statutory powers of recovery directly in point before us, it was held by the Court of Appeal in **Warwick DC v Freeman** (1994) 27 HLR 616 that a landlord against whom the local authority was seeking to recover overpaid housing benefit in the County Court was entitled to raise by way of defence to the proceedings a challenge to the legality of the whole process based on the authority's complete failure to operate the statutory machinery under section 75 against him properly. Hale J (as she then was) who gave the judgment of the court referred to *Winder* and other authorities in the House of Lords pointing out that where private rights are involved a person can raise, especially by way of defence, matters which should otherwise be raised by way of judicial review; and held that as the authority had not gone through the proper process for deciding that the overpayment was recoverable from the defendant landlord (it had on the contrary denied it was under any duty to him to do so at all) the action was not maintainable in the County Court, even for money that might have been recoverable had it acted properly.

47. The principle that a public authority is not entitled to rely on its own improper or substantially defective use of a statutory procedure to obtain money from a person or deprive him of benefits is one of general application, which applies equally to the Secretary of State himself: see for a recent example **R(IB) 3/03** ***Howker v Secretary of State*** [2002] EWCA Civ 1623. It was there confirmed that challenges on such grounds without the need for judicial review proceedings are within the jurisdiction of both Commissioners and tribunals on statutory appeals under the Social Security Acts (which are private law proceedings to determine individual rights, even if one party is a public authority or department of state): cf. also **R(IS) 22/93** ***CAO v Foster*** [1993] AC 754.

48. There is therefore no doubt on the highest authority that a challenge to the *lawfulness* of an authority's actions (or those of the Secretary of State) in the way it chooses to exercise the statutory powers for recovery of overpaid housing benefit under section 75 **Social Security Administration Act 1992** may be made in *any* appeal a person is entitled to bring to an appeal tribunal against a decision or determination given in the purported exercise of those powers. If made good, this provides the appellant with an answer to the claim that the money in question is legally recoverable from him, in exactly the same way as it would in a claim for recovery of the same sum brought through the ordinary courts.

49. The effect of the unambiguous primary legislation, in conjunction with the established law on the extent to which an exercise of power by a public authority may be challenged in answer to a claim for money in any private law proceedings before an ordinary court or tribunal, is thus in our view that:

(1) a person such as a landlord against whom a recoverable overpayment determination (that a particular amount of housing benefit overpaid in excess of entitlement is legally recoverable from him) has been made has a single but unqualified right of appeal to an appeal tribunal against *that* determination; and

(2) in that appeal against that determination, he may raise by way of answer to the claim not only any maintainable dispute as to the factual or legal basis of the determination itself (e.g. that the overpaid amount has been wrongly calculated, or does not fall within the provisions for recoverability at all) but also any challenge to the lawfulness of the authority's actions in or leading up to the making of the determination that can be shown on public law grounds of the kind identified in paragraph 43 above to invalidate it.

50. For the sake of completeness we would add that it appears to us entirely proper and consistent with the above principles to do as most tribunals appear to, and allow a landlord on an appeal against a recoverable overpayment determination to raise any genuine factual dispute that affects the recalculation of entitlement (e.g. as to the date a tenant vacated the premises) even though there may have been no appeal by the claimant against the decision superseding and terminating the award. The landlord ought in any event to have been notified of his separate right of appeal under paragraph 6(3) against that decision, as a "person affected" by the risk of ensuing recovery proceedings. But unless any issues on entitlement have already been so disposed of as to be binding on him, he must be able to raise them on the paragraph 6(6) appeal in the same way as any other precondition to the legal liability sought to be established against him, in a procedure not of his choosing: cf. the passage from Lord Fraser cited above.

51. The ability to raise a challenge on such grounds is of course subject to the qualification emphasised by Megaw LJ in the passage cited above that a judicial body can only interfere with an act of executive authority if it is shown that the authority *has* contravened the law; in the ordinary courts the burden is on those who so assert to establish that proposition. In the tribunals which are inquisitorial bodies not bound by any formal "burden of proof" this still means that the facts to demonstrate a case of improper or unreasonable misuse of power must be affirmatively identified and established. The mere assertion of unreasonableness or unfairness of the result does not begin to do so, and is not to be taken as requiring the authority to prove the opposite, or to open it up to a fishing expedition to give disclosure of its internal processes in the hope of turning up some real or imagined failing: [1978] 1 WLR 6C-7G.

The Warden case, and what it decided.

52. The Court of Appeal's decision in **Secretary of State v Chiltern DC and Warden Housing Association,** on which the bulk of the argument before us focused, arose (solely) out of an appeal to the Oxford appeal tribunal by the landlord Housing Association against the authority's determination that a total of £769.86 housing benefit overpaid in respect of one of the Association's tenants was legally recoverable from it as the recipient of the money. There was no dispute that this amount had in fact been overpaid in excess of entitlement and was in principle a recoverable amount, the overpayment not being due to official error. The tribunal, consisting of a legally qualified chairman sitting alone, confirmed the determination that the money was legally recoverable from the Association on the ground that under section 75 of the Administration Act and regulations 99 and 101 of the Housing Benefit Regulations this was an amount clearly stated by the legislation to be recoverable from the Association as the person to whom the overpayment had been made. The Association appealed to the Commissioner on the single ground of law that the tribunal had erred in wrongly failing to address the material issue raised by the Association in its argument that although the overpayment was in terms recoverable from it under regulation 101, the Council had acted *improperly* (that is, unlawfully) in deciding to use this procedure against the Association rather than the tenant in the circumstances of the particular case.

53. That this was the *only* issue of law raised in the Association's appeal to the Commissioner is clear beyond doubt from the Commissioner's appeal file in that case to which we have thought it right to refer ourselves, to supplement the somewhat short explanation of the facts in the decision. The Association's documents emphasise it at numerous points, for example in its notice of appeal and supporting documents:

> **"The tribunal decided that CDC could recover the overpayment from the Association, because regulation 101 allows recovery from the person the Council paid. We have never disputed this and this is not what our appeal was about. We asked the tribunal to consider whether CDC had used their discretion properly in deciding to recover the overpayment from the Association rather than the claimant (regulation 101 allows recovery from the claimant in all cases). ... the tribunal did not consider this part of our appeal at all.**
>
> **... the tribunal decided that in accordance with regulation 101(1) of the Housing Benefit General Regulations 1987 the overpayment is recoverable from Warden Housing Association. We would like to point out that the Association has never disputed this fact and we did not appeal on this point. We appealed against the Council's improper use of discretion. Regulation 101(1) gives Councils discretion when deciding from whom to recover an overpayment. The Council has an obligation to use its discretion equitably (*Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 at 228, CA). In this case, Chiltern DC could have recovered from either the Association or their claimant. We asked the tribunal to consider whether the Council used their discretion properly in deciding to recover the overpayment from the Association rather than their claimant (Chiltern DC confirmed at the hearing that their claimant caused the overpayment by failing to advise the Council that his circumstances had changed). By offering no rationale for their decision, except to say**

that the regulations allow a recovery from the Association, we believe that both Chiltern DC and the tribunal have fettered this discretion."

And in the written observations on its behalf in reply after receiving the Council's submissions on the appeal:

"I have read Chiltern District Council's comments and have no further comments to add, except to remind the Commissioner that our appeal is not about whether the Council can recover the overpayment from Warden Housing Association. Our appeal was against their improper use of discretion."

Finally in the skeleton argument of Counsel for the oral hearing which ensued (by which time a further argument had been added that the determination had been procedurally defective for want of formality) the main point was restated succinctly as follows:

"Before the tribunal it was argued that the overpayment should be recovered from the claimant rather than from the appellant. The tribunal did not consider that issue at all and thereby erred in law. ... the overpayment 'determination' includes the local authority's decision as to from whom recovery is made: *Warwick DC v. Freeman* (1994) 27 HLR 616 at 619. Accordingly, the tribunal had jurisdiction to consider the issue and erred in law by failing to do so."

54. The arguments that the tribunal had wrongly declined jurisdiction by failing to consider and determine the issue of whether the Council's use of its admitted powers had been *improper* and therefore unlawful in the circumstances of the particular case, so as to render invalid the determination under appeal, were rejected by the Commissioner. They were accepted by the Court of Appeal in the subsequent appeal to it, brought not by the Association but unilaterally by the Secretary of State, in exercise of his special power in schedule 7 despite not having been a party to the proceedings up to that time at all.

55. Reversing the decision of the Commissioner (who had held such questions of "discretion" arose only in relation to actual recovery and so were outside the tribunal's jurisdiction, and that **Warwick DC v Freeman** was not applicable or binding on him) the Court of Appeal pointed to regulation 101 as the source of a "power to choose"; and held that since any such choice or decision against whom to proceed must logically be made before any determination can be issued so as to make anything recoverable from anyone, it must follow that a challenge to the choice is within the tribunal's jurisdiction on any appeal that ensues from the determination.

56. Hale LJ who gave the principal judgment said (in paragraph 14) that there was no real ambiguity about the statutory position:

"Appeals are against decisions, not against the basis or grounds for the decision, just as appeals are against orders and not the reasons for the orders. There would be no power to choose without regulation 101. ... it is quite clear that the legislation contemplates a right of appeal against the exercise of a discretion in this context."

Arden LJ agreed in rejecting what was understood to be the Commissioner's conclusion that there was no right of appeal for a landlord to a specialist tribunal, even where the landlord considers that it has an arguable case to contest a decision to seek recovery of the overpayment of housing benefit from it, and held that a right of appeal to a specialist tribunal is a matter of importance particularly in the light of the European Convention on Human Rights; so that the construction advanced by the Secretary of State as to the scope of the appeal was to be accepted as correct in law, and consistent with sound principle and policy. Brooke LJ agreed with both judgments.

57. The Court of Appeal's judgments (given, we were told, *extempore* at or very shortly after the conclusion of Counsel's single address, the whole proceedings being disposed of within an hour) must in our respectful view be read in the context of the *single* issue of jurisdiction raised, and the contentions advanced on it, by the Secretary of State who was the sole appellant and appeared as the only party before them. We have been most helpfully provided by Mr Maurici with copies of the Secretary of State's notice of appeal and Counsel's skeleton argument in the case, which show that as formulated in the notice of appeal the point of jurisdiction was that:

> **"the Commissioner ... erred in determining that the appeal tribunal has no jurisdiction [sic] over a decision by a local authority as to the person from whom it recovers an overpayment of housing benefit;"**

Counsel's argument was likewise limited to the question of whether the tribunal had wrongly declined jurisdiction to entertain the challenge the Association had sought to make to the *propriety* of the authority's use of the procedure, the Secretary of State's contentions on the construction of the legislation being stated thus:

> **"On a proper reading of the legislation, a decision by a local authority to recover an overpayment from one of these persons rather than the other is open to challenge before an appeal tribunal. Thus, if a local authority decides to recover an overpayment and decides to recover that overpayment from the landlord to whom the payment was made, the landlord may appeal the decision on the ground that, on a proper [sic] exercise of its discretion, the local authority should have decided to recover the overpayment from the claimant."**

58. That the type of challenge contended to be within the jurisdiction of the tribunal on such an appeal was one to the *propriety and lawfulness* of the exercise of any power or discretion involved in the use of the available procedure, and not anything wider, is made clear from that passage and from further passages in the argument maintaining that the jurisdiction extends to allegations

> **"that the local authority had unlawfully [sic] exercised its discretion as between recovering from the payee or the claimant ...**

that the local authority has unlawfully [sic] exercised its discretion when selecting as between two prescribed persons"

which led to the submission that

"the Commissioner was wrong to hold that the appeal tribunal has no jurisdiction [sic] over the exercise by a local authority of its discretion to recover an overpayment from the payee rather than the claimant or vice versa".

59. Those contentions on the effect of the statutory provisions were the ones referred to and substantially accepted in their entirety in the judgments of the Court of Appeal, as is apparent from the terms of the judgments themselves and a comparison with the points set out in Counsel's argument. It was expressly confirmed to us on instructions by Mr Maurici (whose instructing solicitor had fortunately also been in Court instructing Counsel for the Secretary of State throughout the Court of Appeal hearing in *Warden*) that the *only* contention relied on by the Secretary of State was that the tribunal's jurisdiction on the statutory appeal against a recoverable overpayment determination extended to questions of the *lawfulness or propriety* of the selection of the particular appellant as the person against whom such a determination was to be issued. At no stage of the proceedings was any suggestion raised or relied on that the scope of the appeal to an independent judicial tribunal extended to a full reconsideration by that tribunal of the financial, moral or other merits of any selection so made, or led to the tribunal having to substitute its own view on such matters.

60. There is in our judgment no doubt that the decision of the Court of Appeal in *Warden* stands as clear authority that in any attempt by a housing benefit authority or the Secretary of State to make use of the statutory procedure for recovery of overpaid benefit under section 75 of the Administration Act, any person thus sought to be made legally liable for the repayment of money may, in his appeal against the determination of his legal liability to pay under paragraph 6(6) of Schedule 7 to the 2000 Act, put in issue the legality of the authority's action or "choice" under the combined effect of section 75 and regulation 101 to pursue him and make the determination against him.

61. That it should be open to him to raise such an issue in the private law proceedings by way of statutory appeal in answer to the attempt to make him legally liable, and should do so as a matter of right, is wholly consistent with the established principle of the **Cannock Chase DC v Kelly** line of cases cited above. Although as Hale LJ says the *appeal* is against the decision itself - in this context, under paragraph 6(6) against the determination that the money is recoverable from the appellant - not against the basis or grounds for it, or the steps leading up to it, nevertheless those matters are not outside judicial control: a challenge to their legality is

within the jurisdiction of the tribunal in any appeal which is part of the process that depends on them, in exactly the same way as in other private law proceedings before the ordinary courts. The Court of Appeal's decision on the issues and contentions before it in *Warden* was thus effectively to confirm that its own earlier decision in **Warwick DC v Freeman** (the most directly relevant authority on the ability to challenge the use of these particular powers by way of answer to a claim in private law proceedings) applies with equal force in the new context of a statutory appeal. That confirmation cannot however imply or be taken as authority for any departure from the kind of challenge which can be so mounted, as one limited to disputing on judicial review grounds the *legality* of the decision to make use of the relevant statutory powers. On the contrary, to lie within the principle, it must be subject to the same limitation.

62. It was urged in support of the broader view that expressions such as a "right of appeal against the exercise of a discretion" meant that the Court of Appeal's decision had to be read as having a much wider and more radical effect, so as to create a separate right of appeal against the "exercise of choice" under regulation 101 itself; and in that way to step outside the limit of **Warwick DC v Freeman** altogether. Given the nature of an appeal to a tribunal as a full reconsideration of the factual as well as legal basis of the decision appealed against, this would in effect vest in the appeal tribunal a fresh "discretion" of its own, empowering and even obliging it to reconsider and redetermine all issues of finance, social policy, local considerations and so forth involved in the authority's choice to invoke the statutory process against the appellant and cause a determination of legal recoverability against him to be made.

63. While admittedly some individual phrases at points in the judgment of Hale LJ might if read in isolation and out of the context in which that judgment was actually delivered be interpreted as supporting such a theory, it would in our respectful view be a complete misreading of the judgment and of the decision of the Court of Appeal as a whole to conclude that this was what was intended or held.

64. In the first place, the idea of any separate right of appeal against the "choice" under regulation 101 as distinct from the determination to which the choice leads is in direct contradiction to the express terms of the primary legislation; since as already noted, the *only* right of appeal provided against the use of the recovery procedure is that against the determination itself, under paragraph 6(6). The "exercise of choice" under regulation 101, as the Court of Appeal clearly accepted and held, is a necessary part of the process leading up to the making of such a determination, but it is not the determination itself; nor is it any form of "relevant decision" within paragraph 1(2) of the schedule so as to found any separate right of appeal under paragraphs 6(1) to 6(3).

65. The crucial definition of "relevant decision" which precludes any such separate right of appeal under paragraphs 6(1) to 6(3) seems most unfortunately not to have been drawn to the attention of the Court of Appeal in the course of the proceedings (puzzlingly it receives no mention in either the Commissioner's decision or Counsel's argument on which Hale LJ's summary of the appeal provisions, plainly taken as non-controversial, was based). However the suggestion that the existence of a separate right of appeal was intended (which if it were correct would we think have to mean the Court of Appeal's decision was to that extent given *per incuriam*) is refuted by Hale LJ's pertinent observation in paragraph 14 of her judgment that "**Appeals are against decisions, not against the basis or grounds for the decision**". The appeal, and the only possible appeal, with which the court was concerned in that case was that brought under paragraph 6(6), by the Association against the determination that the sum of £769.86 was legally recoverable from it. The idea of a separate right of appeal against the merits of any of the particular grounds, actions, or other intermediate steps or thought processes leading up to the making up of that determination would in our respectful view be quite inconsistent with what Hale LJ there clearly says.

66. Second, the idea of conferring on a purely judicial tribunal the function of reopening and if necessary substituting its own view on the merits, as distinct from the legality, of an authority's exercise of discretion or judgment on essentially non-justiciable questions such as local finance, policy and social considerations would, as noted above, be without parallel and without precedent; yet the Court of Appeal's judgments give no indication whatever of any conscious intention to make such a radical departure, as distinct from simply confirming the application to the new tribunal appeal process of the general principle affirmed in **Warwick DC v Freeman** by Hale LJ herself which the Commissioner had said was irrelevant and not binding.

67. Third, the case documents referred to above, together with what we were told by Mr Maurici on express instructions about the arguments presented, make it possible to state categorically that no party had at any stage of the *Warden* proceedings ever raised any contention that the scope of the tribunal's jurisdiction went beyond considering a challenge to the *propriety and lawfulness* of an authority's choice to invoke the statutory process against the appellant. If therefore it were right to read anything said in the Court of Appeal as implying acceptance of some broader proposition as to the scope of an "appeal against the exercise of discretion" than the sole basis at any stage argued, it would again have to be regarded as of doubtful authoritative value on the principle explained by Lord Browne-Wilkinson in **re Hetherington decd** [1990] 1 Ch 1, 10G-H, cited and approved by the Court of Appeal in **R v Home Secretary *ex parte* Ku** [1995] QB 364, 374; **R (Kadhim) v Brent BC** [2001] QB 955, 965 paras 33, 35.

68. But in our respectful view no recourse to the principles or authorities on the limits of judicial precedent is necessary or appropriate in this case, since we are unable to accept that on a proper reading in its context the judgment of Hale LJ can be taken as intended to espouse any such broader proposition, unsupported by authority, inconsistent with the primary legislation, and never relied on or argued by anyone in the case at all.

69. For those reasons, we accept though perhaps with some differences of emphasis the submission of Ms Findlay that the right of appeal referred to by the Court of Appeal is one limited to judicial review grounds of the kind identified in paragraph 43 above. We hold that the scope of any challenge on appeal to an authority's choice to use the statutory recovery powers against a particular appellant is limited to the propriety and lawfulness of any such choice that necessarily precedes or is incidental to the making of the determination against which he has the right of appeal under paragraph 6(6) of schedule 7; such an appeal cannot extend to reopening the merits of any such choice or exercise of discretion by the authority.

70. No counsel before us pursued the human rights arguments put forward by the Residential Landlords' Association on behalf of G, and in our judgment they were not well founded. A landlord's money is of course one (or some) of his "possessions" for the purposes of Art. 1 of the First Protocol to the Convention, but it does not even arguably follow that a lawful statutory process for the recovery of housing benefit money paid to him by mistake becomes an unlawful "deprivation" in any of the circumstances in point here: no one of course has a right to receive money by mistake. Moreover there can in our view be no doubt that the system of statutory appeal and judicial control in place from 2 July 2001 onwards provides full compliance with the requirements of Convention Article 6.

71. We are divided over what to say on the additional point argued by Mr Kolinsky that regulation 101 as it stood down to 30 September 2001 did not authorise recovery from a claimant in that capacity alone. Mr Howell would prefer to reserve comment for a case in which this actually arises, beyond noting that as it was not an issue at any stage in the *Warden* case either, the opinion there expressed at one point by the Commissioner was not actually relevant to his decision, and in any event failed to deal with the *ultra vires* argument mentioned next. Mr Levenson and Miss Fellner are satisfied that it is right to express their conclusions as set out in the next paragraph, even if in a sense the issue is *obiter*, because the relevant provisions are part of the overall recovery scheme under consideration and we heard full oral argument.

72. Those conclusions are as follows: The clearest possible statutory language would be needed before a payment could be recovered from a person who never received it and was in no way at fault, while the landlord still retained the payment. Section 75(3) **Social Security Administration Act 1992** (as originally enacted) provides:

> **"75 - (3) An amount recoverable under this section is *in all cases* recoverable from the person to whom it was paid; but *in such circumstances as may be prescribed,* it may also be recoverable from such other person as may be prescribed." [our emphasis]**

Regulation 101 of the 1987 regulations (as in force at the relevant time) specifies those from whom recovery may be sought. Regulation 101(1)(a) deals with the case of misrepresentation or failure to disclose and we make no comment on that in this specific context. However, regulation 101(1)(b) provides that (subject to a provision relating to partners) a recoverable overpayment shall be recoverable from:

> **"(b) *in any case*, the claimant or the person to whom the overpayment was made." [our emphasis]**

Section 75(3) distinguishes clearly between the case of the person to whom the amount has been paid (from whom it is recoverable *in all cases*) and that of other persons (when it is only recoverable in prescribed circumstances).

Regulation 101(1)(b) does not prescribe any circumstances but simply refers to *all* cases. That cannot have been the intention of the legislation and the words "the claimant or" in regulation 101(1)(b) are *ultra vires* the rule making powers in section 75(3) and must be disregarded.

Parties to appeals on recovery issues

73. We heard no detailed argument on whether claimants should be joined as parties to landlords' appeals against recoverable overpayment determinations, or vice versa. Our conclusions that such appeals arise under paragraph 6(6) of schedule 7 separately and independently from any appeal for a "person affected" by a relevant decision under paragraph 6(3), and that the tribunal's jurisdiction over questions of choice between claimant and landlord is limited in the way we have held it to be, make this of much less practical importance than it would be for a tribunal required to conduct a full rehearing of such questions on the merits. Nevertheless occasions may arise when the exercise of a tribunal's procedural discretions will need to be considered: such issues are beyond the scope of this decision, but we record for the benefit of tribunals and others concerned that they are likely to be considered in a forthcoming appeal to the Commissioner in case **CH 3160/03**.

The second question: effect of procedural irregularities

74. That leaves the second main question argued before us which can be disposed of much more shortly. Again the question of the effect of any procedural defect in the steps taken by the authority will only fall to be considered by an appeal tribunal on a properly constituted appeal, by a particular appellant against a recoverable overpayment determination for a particular amount made against him pursuant to section 75. Here the introduction of a full statutory right of appeal to a judicial tribunal having full jurisdiction to rehear and redetermine for itself the *factual* basis of the determination as to recoverability as well as its legality, coupled with the requirement to give a full statement of reasons for its decision if requested, means that many of the arguments which formerly occupied the courts on judicial review applications concerning procedural defects on the part of an authority will cease to have so much practical effect.

75. Failures for example by a local authority to provide particulars of the facts, grounds, amount and period of the overpayment as required by regulation 77, or to notify the appellant of the existence of his rights of appeal, will for practical purposes in the normal case have ceased to cause any significant injustice to an appellant by the time a properly constituted appeal does get before the tribunal. This is because the appeal process affords him the opportunity to adduce evidence and have a full rehearing before a judicial body able to go into the factual basis of the claim that the money is legally recoverable from him, as well as any maintainable challenge to the lawfulness of the whole process. It may still be necessary, in an extreme case where the Council's attempt at operation of the procedure has been so far defective or non-existent that the tribunal is satisfied there has never been a valid basis for a determination against the appellant at all, for the whole process to be held abortive and the appeal summarily allowed on that ground; but such cases of total rejection where the authority will have to abandon its attempt at recovery or start again will now be rarer than in the days when the only judicial control was by way of review.

76. Thus if the tribunal is satisfied on the facts before it that the case for a recoverable overpayment determination against the appellant is made out, incidental procedural defects in the local authority's determination that no longer have any continuing practical effect and have not caused any injustice still unremedied by the tribunal itself will not in our judgment prevent it confirming the authority's determination, or if necessary making its own findings and substituting its own decision as to the amount legally recoverable. Consequently we accept the arguments of the authorities and the Secretary of State summarised in paragraph 31 above, with the test of "siginificant prejudice" or "substantial compliance" explained in ***Haringey LBC v***

Awaritefe (1999) 32 HLR 517 applied as indicated above to take into account what happens in the tribunal appeal process itself. By the same token we reject the arguments for the landlords that any past failure of procedure must be fatal to recovery, or that past administrative cost and delay is a sufficient prejudice in this context to deprive a tribunal of the ability to confirm a determination or substitute its own, even where the original failures of notification, etc., have ceased to be of any practical effect.

Conclusion

77. We accordingly decide the three cases before us as follows:

(1) in **CH 5216/01** ***Watford BC v W & others*** we allow the council's appeal, on the ground that the tribunal chairman misdirected herself in holding the alleged procedural defects in the *earlier* determination of December 2000 had the effect of vitiating the *later* recoverable overpayment determination of 22 January 2001. That later determination (which was the one actually under appeal to the tribunal) substantially complied with the procedural requirements, and any theoretical risk of prejudice was in any case eliminated in the appeal procedure itself. There being no discernible basis for any suggestion of misuse of power on the part of the council, we substitute the decision the tribunal ought to have given: namely to confirm that the £110 overpaid to the landlord is recoverable from him.

(2) in **CH 841/02** ***G v Manchester CC & others*** we dismiss the landlord's appeal, on the ground that the tribunal chairman did not misdirect herself in holding the council's powers to proceed against the landlord were available to it in the circumstances of this case, and no ground for any valid suggestion that these had been exercised improperly was shown; so that the full £1820 remains legally recoverable from the landlord. We reject the argument that this involves any infringement of his human rights.

(3) in **CH 3880/02** ***Arena Housing Association v Halton BC & others*** we also dismiss the landlord's appeal, on the ground that again the tribunal chairman did not misdirect herself as to the availability of the council's powers to proceed against it for the recoverable overpayment, or as to the propriety of any choice it exercised in doing so. She did not err in accepting that the authority had considered the relevant factors and had acted properly, nor in finding that the procedural defects relied on had ceased to be of any materiality in the course of the tribunal appeal proceedings and did not invalidate the determination. It follows from what is said above that we must reject the argument that the special position of a social

landlord ought to have been taken into account by the tribunal, since that is a point on the merits of the authority's use of the procedure rather than its legality. The full £7031.52 overpaid to the Association has therefore to remain legally recoverable from it.

(Signed)

P L Howell

H Levenson

Christine Fellner

Commissioners

8 October 2003