CH/4465/2002.

1. This appeal, brought with leave of the tribunal chairman, succeeds. The decision of the tribunal on 8 7 02 was erroneous in point of law, as explained below, and I set it aside, but I am able under paragraph 8(5)(b) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000 to make such further findings of fact as are expedient and to substitute my own decision, which is to the same effect as that of the tribunal. This is that there has been an overpayment of housing benefit (HB) to the respondent landlord of £585 from 6 November 2000 to 7 January 2001, of which £390 for the period 27 November 2000 to 7 January 2001 is recoverable from the landlord.

2. Even where I am setting a decision aside for error of law, I am reluctant to interfere with a tribunal's findings of fact, even though I might not have made them myself. My jurisdiction is on points of law only. It is for tribunals to find facts, and it is not for commissioners to second-guess them unless their findings are such as no reasonable tribunal, properly instructed in the law, could have made. I do not find that to have been the case here. I therefore take my account of the facts from those found by the tribunal.

3. The claimant/tenant Mr W had been having his HB paid direct to the landlord. He moved out of the property in question on 5/6 November 2000 and reclaimed HB from the appellant authority on 7 November, the new tenancy elsewhere having begun on 6 November. He did not notify the appellant authority of his leaving. Nor did he notify the landlord. He said he posted the keys back, but the landlord denied this, and the tribunal accepted the denial. The landlord had a policy of inspecting dwellings over shops, as this was, every 6 weeks. It had tried to gain access on 24 November, without success. (In one of its earlier letters it told of a prearranged meeting with Mr W at the premises on 23 November, when he said he would be moving out that week, and that it had notified the appellant that from 27 November there would be a new tenant at the premises. Neither this letter nor a copy of it has been produced in these proceedings, and since the tribunal, having seen and heard the landlord's representative at the oral hearing, found otherwise, I say no more about the wholly inconsistent story previously put forward.) However, it was common ground that a new tenant, a friend or acquaintance of Mr W, had taken over the premises from 27 November.

4. The appellant continued to pay the landlord HB for Mr W until 7 1 01. It conceded the whole of the overpayment was due to official error, but argued that since either or both of the landlord and Mr W knew that the payments were continuing, and that there was therefore an overpayment, the whole of the overpayment was recoverable under regulation 99(2) of the Housing Benefit

Regulations. The landlord argued throughout that everything was due to the appellant authority's negligence in not noticing Mr W's new claim and in not noticing that it was paying benefit twice over for the same flat.

5. The tribunal accepted the concession that the overpayment had occurred through official error. It rejected the landlord's contention that everything was the appellant authority's fault and held that the landlord knew of the overpayment once the new tenancy began from 27 November. But it found that the landlord could not have been expected to realise before that date that there was an overpayment, its inspection policy having failed to detect that Mr W had moved out (and his story of returning the keys having been disbelieved). The tribunal couched its decision not only in terms of who realised there had been an overpayment but of who had "contributed" to the official error.

6. This was, in the circumstances, wrong. Whether the claimant and/or the person receiving the payment contributed to the appellant's mistake is relevant only to the question of whether, under regulation 99(3), that mistake *is* an official error. The appellant, by the concession it made, shut itself out from arguing that anyone had contributed to the mistake. The tribunal could have declined to accept the appellant's concession that there was an official error; but it accepted it. All it therefore had to decide was whether the landlord, as the recipient of the payments, or the claimant/tenant, could at the time of receipt of the payments "reasonably have been expected to realise" under regulation 99(2) that they were overpayments. It decided, for reasons which it explained, that the landlord could not have been expected to realise until 27 November, when the new tenancy started. It did not deal with what Mr W could have been expected to realise, other than by saying the overpayment was clearly recoverable from him, presumably because he had contributed to it. It found the overpayment recoverable from 27 November, but not before.

7. The authority appealed on the ground that although it now accepted the landlord could not have known about the overpayment until 27 November, Mr W could, so the whole overpayment was recoverable from the landlord. This is the *Warwick DC v Freeman* (1994) 27 HLR 616 point, criticised in *CPAG's Housing Benefit and Council Tax Benefit Legislation.* It was referred to but not decided by the tribunal.

8. The landlord did not trouble to make a submission, but demanded an oral hearing. I issued a direction asking the appellant authority whether it could not be argued that Mr W could not have been expected to realise that there was an overpayment, since he had never "received" the HB after he moved out, and had reclaimed benefit for another property. The authority responded that as HB was always paid direct to the landlord he never would have "received" it and since he did not let the authority know he had moved, and his claim was not

"cancelled" so no notification of this was issued to him, he could have known payments to the landlord would continue. The authority said it did not want an oral hearing and would not attend one (I find this rather high-handed, coming from an appellant). The landlord then withdrew its request for an oral hearing. It again made no response to the authority's substantive case, merely saying it should not have to pay back anything because it was all the authority's fault, as it had admitted.

9. I wholeheartedly endorse the tribunal's finding that the overpayment is recoverable from the landlord from and including 27 November 2000. It is absurd for the landlord to argue that it was entitled to continue receiving HB for two different tenants at the same flat so long as the authority did not discover its error. Of course the landlord could reasonably have been expected to realise that an overpayment was taking place.

10. But what about the period from 6 November to 26 November? Could Mr W reasonably have been expected to realise, as required by regulation 99(2), that there *was* (not that there might have been) an overpayment? He received no notification of cancellation for the excellent reason that none was sent, because the authority was still labouring under its official error. He had reclaimed from the same authority at a different address, and had made no claim for overlapping benefit because he believed (and the tribunal did not deal with this contention) that there was no notice period. As the tenancy agreement was not produced, I cannot pronounce on this, but the landlord has told such differing stories (originally that it reluctantly agreed that Mr W could leave from 26 November without notice, then that notice ran from 6 November) that I am not disposed to place much credence on what it said about notice. I find on the balance of probabilities that *in this case* the claimant/tenant could not reasonably have been expected to realise that HB was continuing in payment. I do not therefore have to decide the *Warwick DC v Freeman* point. The appellant authority was entitled to seek to make the point on appeal, but it loses on the additional facts which I have found. Even if the claimant/tenant's realisation would have been sufficient to fix the landlord with the obligation to repay, he did not, as I have found, have it.

11. The appeal technically succeeds, but not in a way that is of benefit to the appellant authority.

(signed on original) Christine Fellner

Commissioner

3 February 2003