Bellis 184
CS Hunt

PLH *Commissioner's File: CH 4854/03*

SOCIAL SECURITY ACTS 1992-2000

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Appellant:	*[the claimant]*
Respondent:	Rotherham Borough Council
Claim for:	Housing Benefit (Overpayment)
Appeal Tribunal:	Sheffield
Tribunal Case Ref:	U/01/138/2003/02061
Tribunal date:	9 September 2003
Reasons issued:	21 October 2003

1. The decision of the Sheffield appeal tribunal consisting of a chairman sitting alone on 9 September 2003 was in my judgment erroneous in point of law, and I set it aside. I have considered whether I can substitute my own final decision on the case as suggested by the claimant's solicitor but have concluded that the material before me is insufficient to enable me to do so: one of the principal grounds of criticism of the tribunal's decision is that it does not contain sufficiently detailed findings as to what the relevant facts actually were, so as to be able either to relate the tribunal's conclusions to them or safely draw fresh conclusions of one's own. In those circumstances, the right course has to be to refer the case to a fresh tribunal under paragraph 8(5)(c) schedule 7 **Child Support Pensions and Social Security Act 2000** for redetermination of the claimant's appeal against the overpayment determinations made against her by the Council for periods from 26 March 2001 to 20 April 2003 inclusive, with particular reference to the nature and purpose of her tenancy arrangement from 4 September 2001 to 25 July 2002 while her son was living with her in the property she occupies. I decline the claimant's request for an oral hearing of this appeal as the course I am taking will enable her case to have a complete rehearing at the tribunal on both facts and law.

2. The claimant is a lady now aged 56, who has lived in the same property and claimed housing benefit on it for a number of years. There is no dispute that at all material times she has been living there as a tenant; and there has never been any suggestion by the Council that her tenancy or tenancies have been other than genuine and such as to give rise to a legal liability on her part to pay the rent, even though the evidence of the precise terms of the agreement or agreements in force from time to time has been vague and incomplete. The issue which required to be determined by the

tribunal was whether whatever tenancy arrangements she had over the period 26 March 2001 to 20 April 2003 inclusive had been shown by the Council to be "not on a commercial basis" or to have been "created to take advantage of the housing benefit scheme" so that her liability for the rent fell to be treated as if it did not exist, which would disentitle her to housing benefit: regulation 7(1)(a), (l) **Housing Benefit (General) Regulations** 1987 SI No. 1971 as amended and in force at the material time.

3. The determinations against which the claimant appealed to the tribunal were communicated to her by letters dated 23 April, 30 April and 21 May 2003, and were to the effect that (1) her previous entitlement to housing benefit over the whole of that period was cancelled, and (2) the total benefit overpaid amounting to some £5,000 was legally recoverable from her, because the landlord was her son-in-law and the arrangements between them non-commercial and "contrived": pages 15 to 30.

4. Down to the start of that period on 26 March 2001, the claimant's tenancy arrangements appear to have been acknowledged by the Council as unexceptionable. According to her solicitor's letter of appeal dated 14 November 2003 at page 104, she had been receiving housing benefit since 1998 or thereabouts even though the house was owned by her mother, a fact of which the Housing Benefit department were aware. In or about March 2001 the house was sold to the claimant's son-in-law and the Council was notified that he would become the landlord from 29 March 2001 onwards: pages 1G-3. The rent was notified to the Council as being £75 a week which, according to the tribunal's findings, remained unaltered as did all the other terms of the tenancy upon the change of landlord. The claimant's housing benefit too continued unaltered at the rate of £55 a week both before and after the change.

5. That remained the position until 4 September 2001, when the claimant's son moved in to live with her. The Council was notified of this at the end of the same month, and also notified that new tenancy arrangements had been entered into between the claimant, her son and the landlord, under which the claimant and her son each had rooms of their own and shared the remaining accommodation and facilities in the house, at separate rents for fully furnished accommodation of £55 a week payable by each of them: see page 5. According to the Council's submission to the tribunal although there is no actual evidence of this, the claimant's housing benefit then reduced to £35 a week, with another £35 being payable in respect of her son; so that a total of £70 a week was from then on paid by the Council to her son-in-law as the landlord. Matters continued in that way until the following year, with the claimant signing a review form in January 2002 giving her current rent as £55 a week but answering No to the question

whether she and the landlord were related; an answer she admits was incorrect, though she has consistently maintained it was given by mistake rather than deliberately.

6. At the end of July 2002 she notified the Council of a further change, in that her son had left on 25 July and the property was reverting to her sole occupation as tenant from that date. On 7 August 2002 her daughter wrote on behalf of the son-in-law to confirm this and notify the Council that the rent payable by the claimant as sole tenant would become £70 a week from that date: page 10. The claimant's housing benefit then appears to have been put back up to £55 a week from 29 July 2002.

7. In January 2003 the claimant completed another review form giving her current rent as £70 a week and naming her son as still living with her, but this time stating that she was related to the landlord, who was her son-in-law: pages 11-12. This caused the Council to launch an investigation into possible fraud and the claimant was interviewed under caution on 1 April 2003, though the tribunal was provided only with a partial summary of some of the answers she gave, supplemented by notes of some subjective impressions of the interviewing officers, rather than anything like a complete note or transcript: pages 13-14. It is not however in dispute that during that interview the claimant told the interviewing officers that she had never had a rent book and the arrangements between her and the landlord were informal, so she was not able to give more than an approximate idea of the arrears she owed, which she put at about £150.

8. The Council's decision that the whole arrangement between the claimant and her son-in-law as landlord had been non-commercial and "contrived" from its inception in March 2001 appears to have been based largely on the fact that the relationship between the two of them was undisclosed and on the claimant's inability to give precise details of the state of accounts between them. In addition, the inference was drawn from the fact that the housing benefit payable in respect of the claimant and her son while the two of them were living at the property as tenants added up to £70 (the same as the rent charged to the claimant alone from the end of July 2002 onwards though £5 less than she had paid previously) that the combined tenancy arrangement from 4 September 2001 onwards was an artificial one, created to take advantage of the housing benefit scheme and increase the amount of benefit payable: see the reasoned decision letter dated 30 April 2003 at pages 28 to 29.

9. When the matter came before the tribunal on 9 September 2003, the claimant failed to appear and no additional evidence was provided by the Council. Hence as recorded in the statement of reasons issued to the parties on 21 October 2003,

the case was decided solely on the information contained in the appeal papers, the Council's written summary of the facts being accepted by the tribunal as accurate.

10. The appeal was allowed in part because the tribunal chairman did not consider the Council to have made out its case as regards the benefit for the period from 26 March 2001 down to the time when the son moved into the house and the tenancy re-arrangement of 4 September took place. As he pointed out, the only actual change during that time was the change in the identity of the landlord, which took place on 29 March 2001; this was not sufficient to show that an arrangement previously accepted as giving rise to a liability to make payments in respect of the property, and not invalidated under regulation 7, had suddenly become non-commercial in nature.

11. As stated for example by Sedley J in **R v Poole BC *ex parte* Ross** (1995) 28 HLR 351, what is important in this context is the nature of the *arrangement:* the fact that the parties are friendly or related to one another cannot by itself turn a commercial arrangement or agreement into a non-commercial one. I therefore consider the tribunal chairman was right when he said in his decision at page 46:

> **"The original tenancy ... had not been determined to be of a non-commercial nature before 26 March 2001. On that date, although the landlord became the son-in-law, the tenancy continued on the same terms. The landlord simply changed identity, the liability between landlord and tenant rested on privity of estate not upon contract. The tenancy as such does not alter and cannot thereby in effect overnight become non-commercial."**

12. However he found against the claimant as regards the period from 4 September 2001 in view of the tenancy changes made from that date. On that part of the case I accept the submissions made on the claimant's behalf that the recorded findings and reasons are insufficient to support the conclusions reached, that the two re-arrangements made when the son came to live in the property, and again when he left, had both been shown by the Council to be non-commercial in nature, or alternatively done for the purpose of maximising the *claimant's* own housing benefit which was what the tribunal expressly held. The only findings and reasons set out in the tribunal's statement in support of those further conclusions were as follows:

> **"As far as the period thereafter is concerned it is absolutely clear that the facts confirm that [the claimant] colluded with her landlord to create a new tenancy and then change it once more, the effect of which was simply to maximise her *[sic]* housing benefit, rather than reflect the true nature of a normal landlord and tenant relationship. It was conducted on a basis that no commercial and [contractually] bound parties would otherwise be able to do."**

13. This fails to address the explanation put forward by the claimant herself that at that particular time her son was going through a bad patch, and she wanted him to

have some stability and responsibility, which the joint tenancy arrangement was designed to provide; the fact that this actually *reduced* her housing benefit and the later change only put it back to where it had been before; or the reasons why the sole tenancy arrangement of £70 per week from 25 July 2002 was considered outside the bounds of commerciality when that in force down to 29 March 2001 had been accepted as within them.

14. I do not accept the Council's submission that because all such questions are matters of fact and degree for the tribunal to decide, there can be nothing wrong in the way this tribunal reached and expressed its decision on the material before it such as to give rise to an appeal on law. It is well established that although the decision on questions of fact and degree is one for the tribunal of fact hearing and seeing the evidence to make, nevertheless such decisions have in law to be made rationally, in accordance with evidence that is capable of supporting the conclusions arrived at, and on a reasoned basis sufficiently explained for the parties and their advisers to understand. Decisions not complying with these criteria are liable to be set aside as erroneous in law.

15. In the present case the passage last quoted from the tribunal's statement does in my view fall short of those admittedly exacting standards, and the right course is for there to be a further hearing at which the facts and circumstances surrounding the changes in tenancy arrangements on 4 September 2001 and 25 July 2002 can be identified and gone into more thoroughly. In particular I direct the new tribunal that some clear findings on what actually happened about the housing benefit apparently awarded to the son are needed, as well as in relation to the claimant herself, before any inference can be drawn that the whole September 2001 arrangement was collusive and done to put extra housing benefit money into the pocket of the son-in-law as landlord. That, as Sedley J observed in ***ex p* Ross** cited above, would be equivalent to a finding of bad faith and would of course taint the claimant's own separate tenancy arrangement. Absent such a finding however, it is hard to see how regulation 7(1)(l) can apply in relation to her own benefit by itself: the effect was only to reduce and then restore it.

16. The appeal is allowed and the case remitted for rehearing accordingly.

(Signed)

P L Howell
Commissioner
2 July 2004