

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. CH/213/2016

Before Judge S M Lane

DECISION

This decision is made under section 12(1) and (2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

The decision of the Leicester First-tier Tribunal heard on 13 August 2015 under reference SC314/15/00282 is SET ASIDE because its making involved an error on a point of law. The decision is RE-MADE as follows:

The appellant was a person liable to make periodical payments for use and occupation of the dwelling 'L Close' by virtue of regulation 12(1)(d) of the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations) 2006.

The period for which he was liable to make such payments was 1 July 2014 to 12 December 2014 inclusive.

The time for claiming may be extended from 1 July 2014 (the day following the end of the tenant by succession's tenancy) to 26 August 2014 under regulation 64(1) of the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations) 2006.

Any entitlement found to exist when the remaining conditions of entitlement for Housing Benefit are considered must end on to the date he and his grandchildren left the dwelling on 12 December 2014.

REASONS

1. The parties agree that the F-tT's decision should be set aside for error of law.
2. The appeal relates to entitlement to Housing Benefit where members of an extended family unit remain in a dwelling after a tenant by succession has moved away and terminated her tenancy. I find as fact that the appellant and other occupants of the dwelling became trespassers (who were tolerated by the respondent Housing Benefit Authority) and that the appellant was liable to pay for use and occupation of the dwelling.
3. The case presented to the F-tT was in such a muddled state that it is surprising that the F-tT felt able to make a decision without further evidence and explanation from the respondent).
4. The facts are complex. The appellant moved to the dwelling in issue following the death on 17 March 2014 of his ex-wife (T), who had been the tenant. T, who was disabled, had lived with one of her adult daughters (J), J's young daughter, and two other grandchildren, D and P, (aged nearly 18 years old (d.o.b. 22 May 1996) and 16 years old respectively when T died). P and D were the children of another one of T's daughters. They were estranged from their mother and father. D was due to start university at the beginning of the 2014-2015

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academic year. T acted as their informal guardian but J shouldered the responsibility for looking after all three children in the household as well as acting as T's carer. The appellant is their grandfather. He reached the age at which he would qualify for State Pension Credit as of 6 September 2012. The Housing Benefit Authority did not deal with the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations) 2006 when refusing his claims, but this only makes a difference in relation to 'backdating'.

5. On the information known to the F-tT, the relationship between J, D and P became very strained following T's death, and J wished to move into a house of her own with her daughter. The appellant, D and P wished to move into a house better suited to their needs as the dwelling was adapted for the needs of a disabled person and was too big. The appellant was the only person in the house with more than trivial earnings.

6. The following events and dates are relevant. Any page number after 120 is correspondence or evidence provided *after* the F-tT hearing.

- | | |
|----------------|---|
| 17 March 2014 | T passed away |
| 28 March 2014 | Appellant makes a first claim for HB |
| 1 April 2014 | The Local Authority terminated T's award of HB from or around 31/3/14 (p141). |
| 24 April 2014 | Appellant's application for Housing Benefit is refused (p43) because the appellant did not have a rental liability at the property. |
| 24 April 2014 | J signed a document notifying that she wished to succeed to the tenancy. (Page 42 shows a screen print indicating J was entitled to succeed to the tenancy.) Although J denies she did so, the notice of succession at p 147 appears to bear her signature and J continued to pay rent. |
| 6 May 2014 | The paperwork for the tenancy was completed. A transfer request at or around this time states 'If J and her daughter are re-housed first, it will leave the other 3 family members as illegal occupants as there would be no further rights to succession and they would not qualify for the house with it being a four bed fully adapted for a wheelchair user.' |
| 22 May 2014 | D turns 18. |
| 30 June 2014 | J and her daughter move out of the dwelling. |
| 9 July 2014 | The Local Authority set up a mesne profits account in J's name even though J had already moved out (p 142). According to an email from the local authority statement management officer, the account was set up after J left the premises so that remaining occupants could pay rent (p89). |
| 23 July 2014 | A council tax bill addressed to J and the appellant is paid ((p88). |
| 26 August 2014 | Appellant makes a second application for HB. |

- 11 September 2014** Claim is refused. This is the decision under appeal.
- 12 December 2014 Occupation by the appellant, D and P ends (p89).
- 24 February 2015 Letter to appellant asserting that tenancy had been transferred to D.

7. There is no evidence that D assumed the tenancy despite the Housing Benefit Authority's assertion in their letter of 24 February 2015. Indeed, the Housing Benefit Authority's policy documents produced to the Upper Tribunal show that the Local Authority did *not* allow a second person to become a tenant by succession (p 159 – 162 at p160, [4.4]). There is also a letter at p70 from the estate management officer dated 20 October 2014 setting out that -

'[D] is named as the tenant as this was the only way to allow the family priority for re-housing as she had rights having already lived at the property, but [the appellant] would have had no rights as he was lodging elsewhere with other family members'.

8. The fact that the Local Authority was prepared to name her as tenant in an application for re-housing does not establish that D took up the tenancy of the dwelling as a matter of law, or that the Local Authority intended her to do so.

The F-tT's decision

9. The F-tT confirmed the Housing Benefit Authority's decision notified to the appellant on 11 September 2014 that he was not entitled to HB in respect of the dwelling. The appellant entered an appeal against the Local Authority's decision on 8 October 2014. The appellant's representative was rightly concerned about the basis on which the F-tT and the LA approached this case.

Discussion

10. I refer to the regulations under the Housing Benefit Regulations 2006 as used by both parties unless the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations) 2006 make a difference.

11. The first error of law is that the F-tT failed to recognise that payments other than rent may create a liability to make periodical payments for a dwelling for the purposes of Housing Benefit. Section 130 of the Social Security Contributions and Benefits Act 1992 requires a person to be liable to make payments in respect of a dwelling as one of the conditions of entitlement to Housing Benefit. The types of payments that qualify are set out in regulation 12(1) of both the Housing Benefit Regulations 2006 and Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations) 2006. They include periodical payments for use and occupation of the dwelling and mesne profits. The tribunal accordingly made a fundamental error of law by not recognising the significance of this regulation for the appellant.

Regulation 12(1)

(1) '...the payments in respect of which Housing Benefit is payable...are the following periodical payments which a person is liable to make in respect of the dwelling which he occupies as his home -

- (a) payments of, or by way of, rent;

- (b) payments in respect of a licence or permission to occupy the dwelling;
- (c) payments by way of mesne profits...**
- (d) payments in respect of, or in consequence of, use and occupation of the dwelling**

12. Mesne profits and payments in respect of, or in consequence of, use and occupation of a dwelling relate to types of wrongful occupation of land. Mesne profits refer to compensation payments a former tenant is liable to make if he remains in occupation after his lease is forfeit. They are usually assessed on the basis of the letting value of the land. 'Payments for use and occupation' refer to payments a trespasser must pay as compensation for unlawful occupation and use and are normally assessed on the same basis. Upper Tribunal Judge Turnbull reminds tribunals that these are relevant payments in *CH/3189/2009* and *CH/3190/2009*.

13. When J moved out of the property, the LA's unflinching position was that W, D and P became trespassers. That is correct in law. Their trespassory occupation led the Housing Benefit Authority to set up a 'mesne profits' account. It would have been more apt, but unwieldy, to call it an account for use and occupation payments. The payments would be periodic. These are primary forms of liability falling on the claimant. He is not simply deemed to make a relevant payment. It *is* a relevant payment.

14. Because the appellant was liable for use and occupation payments, he was potentially entitled to Housing Benefit. This provides a sufficient reason to set the decision aside for error of law.

15. The second problem was the F-tT's approach to regulation 8(1)(c)(ii) of the Housing Benefit Regulations 2006.

16. The Housing Benefit Authority's case was that the appellant was not eligible for Housing Benefit because (i) he had no liability to pay rent (section 130 of the Social Security Contributions and Benefits Act 1992); and (ii) he did not fall within regulation 8(1)(c)(ii)¹. The former fails to take into account the meaning of payments in regulation 12. The latter, regulation 8(1), includes a series of circumstances in which a person is *treated* as liable to make payments (subject to regulation 9) even though that would not otherwise be the case. The relevant circumstance is that he is a person -

- (c) ...who has to make the payments if he is to continue to live in the home because the person liable to make them is not doing so and either
 - (i) not relevant or
 - (ii) *he is some other person whom it is reasonable to treat as liable to make the payments.*

17. They argue that, at the time of the application under appeal, the tenancy had been transferred to D, who was to be a full-time student at university. She would not be entitled to Housing Benefit as a full time student, and it was not reasonable to circumvent her non-entitlement by making an award instead to the appellant.

18. The Local Authority's submission was based on *CH/606/2005*. In that case, the F-tT found as fact that the claimant was *not* a person who would have to make payments to continue to live in the home. The claimant therefore failed at the first hurdle, and that was the end of the matter. The issue of whether it was reasonable to treat the claimant as liable to pay did not arise for decision. Commissioner May (as he then was) said this::

¹ None of the other provisions of regulation 8 are relevant.

‘15. The conclusion having been reached [by the F-tT] that the claimant was not a person who would have to make the payments if she was to continue to live in the home, that concludes the matter. It is only if the conclusion had been reached that she had to make the payments if she was to continue to live in the home, that consideration as to whether it is reasonable to treat her as liable to make the payments would have arisen. In the event it appears that the tribunal did look at that issue. In their reasons the tribunal said:

... [‘The tenant] was disentitled from Housing Benefit and the Tribunal was of the view that the application by [the claimant] was simply a device to circumvent [the tenant’s] ineligibility for benefit because she was excluded by virtue of Regulation 7(1)(d). The Tribunal concurred with the Secretary of State’s submission at Section 7 of the papers that it was unlikely that Regulation 6(1)(ii) was intended to be applied for that purpose. The Tribunal did not consider it reasonable in the present circumstances for a dependent child of 15 years of age to make application for housing benefit and found on the provisions of Regulation 6(1).’

16 Whilst it was not strictly necessary for them to do so, having regard to their decision on the primary question, I am satisfied they were entitled to reach the conclusion that it would not be reasonable to have treated the claimant as liable to make the payments. I take that view because the effect of doing so would have been to negate the legislative change to regulation 7. That cannot be what Parliament intended.’

19 Commissioner May happened to agree with that view in those particular circumstances, but that conclusion was neither binding nor inevitable.

20 Treating Commissioner May’s remarks as immutable led the tribunal into legal errors.

(i) The bundle before the F-tT did not contain any evidence apart from the Local Authority’s assertion that D had succeeded to the tenancy that she had done so. In many cases, it may be possible to rely on a Housing Benefit Authority’s simple assertion, but in this case the F-tT simply could not do so. Documentary evidence before the F-tT clearly showed that J was to succeed to the tenancy (p42), not D, and the presenting officer did not produce any further evidence to counter it. (If the Presenting Officer did say anything further, it was not recorded legibly.) In these circumstances, it is impossible to see how a tribunal acting properly in compliance with its inquisitorial duty could have gone ahead without seeking further evidence. Indeed, in response to my direction to provide evidence and an explanation on this point, the result confirmed that D did not become the tenant. The Tribunal’s failure to act inquisitorially led to its making a significant error of fact which had serious consequences for the appellant.

(ii) The F-tT failed to consider the meaning of *reasonable* as it applied to the facts of the case before it. What is reasonable will vary with the facts and context in which it is to be considered, and CH/606/2005 was readily distinguishable. Even on the limited basis of regulation 8(1)(c)(ii), had the F-tT had not elevated Commissioner May’s *opinion* into a binding principle of law on the meaning of ‘reasonable’ regardless of the circumstances, it may have reached a decision that a person the claimant should be treated as liable to make the payments.

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22 In brief, the question that regulation 8(1)(c)(ii) requires to be answered is whether treating a person as liable to make payments is reasonable on all of the facts. In other words, it is multi-factorial and not to be determined on a single issue. The F-tT erred in its approach.

23 I have considered whether the F-tT should have treated the appeal against the second decision as a late appeal against the previous decision in April 2014 as well. This power is not infrequently used. *R(H) 3/05* provides an example. However, until J moved out of the house, the appellant, D and P were lawful occupiers, and there was nothing sufficient to displace the view in the evidence before me that J continued to pay the rent.

24 The appellant requested backdating of his first claim, but the claim in issue does not appear to mention this specifically. That, however, is immaterial since the rule on 'backdating' under the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations) 2006 is more liberal than under the Housing Benefit Regulations 2006.

25 For those who are of pension credit age, the earliest date of entitlement is established by extending time *forward* for a maximum of three months from any day on which a claimant would have been entitled (had he made the claim) down to the date of claim. In the appellant's case, this means that if the remaining conditions of entitlement are satisfied, Housing Benefit can be awarded from the day after J moved away and gave up her tenancy, down to 26 August. The Housing Benefit Authority will, of course, need to find out whether the appellant fulfilled the financial conditions of entitlement during this time. Any change in D's and P's status as a dependent/non-dependent may also affect calculations.

26 Finally, the F-tT did not deal with the appellant's representative's request to the F-tT that it deal with the Local Authority's refusal to reduce any liability he might have for Council Tax. This was not an error of law by the First-tier Tribunal (Social Entitlement Chamber) because the F-tT (SEC) had no jurisdiction over such appeals. They must go first to the Valuation Tribunal for England following which there may be a further appeal to the High Court (regulation 43(1) of the Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009).

27 I do not consider that any useful purpose would be served by remitting this appeal to a F-tT and I have therefore remade the decision as far as possible. If there is any query over calculations, the appellant has liberty to apply to the Upper Tribunal.

(Signed on original)

(Dated)

S M Lane
Judge of the Upper Tribunal
31 March 2017