IN THE UPPER TRIBUNAL **Case Nos.** CH/5066/2014
ADMINISTRATIVE APPEALS CHAMBER CH/5070/2014

1. These are appeals by the Claimant, brought with my permission, against decisions made on 4 July 2014 by a First-tier Tribunal sitting at Fox Court, London, in respect of housing and council tax benefit. For the reasons set out below those decisions were in my judgment wrong in law. I allow the appeals, set aside the FTT's decisions of the housing and council tax benefit appeals and remit those matters for redetermination by an entirely differently constituted FTT. **The new tribunal will proceed as stated in para. 66 below. The Council shall, within one month from the date of issue of this decision, send to the First-tier Tribunals Service, for addition to the papers, a further submission summarising, in not more than 3 pages, its contentions on the issues referred to in para. 65 below. I think it sensible to require that further submission primarily owing to the inclarity to which I refer in para. 35 below, but also because the Council may no longer realistically wish to contend that the value of the Claimant's share in the equity of no. 170 itself at all times exceeded £16,000. The Claimant should then have a better idea of what case she has to meet.**

Introduction and background

2. The evidence before the First-tier Tribunal was voluminous. There were in excess of 1800 pages of documents, and the oral hearing, at which the Claimant and her husband (Mr H) gave evidence, took place over two days on 26 and 27 June 2014. The Tribunal, which comprised a financially qualified panel member in addition to the First-tier Tribunal Judge, reserved its decision until 4 July 2014.

3. The Claimant is a woman now aged 36. From 1998 she was awarded income support on the basis of being a lone parent.

4. In 1999 the Claimant and Mr H purchased, with the aid of a mortgage and as a buy-to-let investment, a property at no. 170 B Road in Huddersfield. The purchase price was £58,000. That property was then let to tenants.

5. The Claimant's contention in these proceedings has been that she separated from her husband in 2002 or 2003, and that as far as she was concerned she thereafter had no interest in no. 170 and no liability under the mortgage of it.

7. In 2004 the Claimant moved to London, where she lived in rented accommodation, and was in receipt of housing benefit and council tax benefit from the Respondent, London Borough of Waltham Forest ("the Council"), from 1 August 2004.

8. On 1 September 2004 an additional advance of £40,000 was made by the mortgagee, Cheltenham and Gloucester Building Society, on the security of no. 170. That sum was paid into an account with HSBC in the joint names

of the Claimant and her husband. That sum was removed from the account over the following week, largely in the form of cash withdrawals (see p.651).

9. On 19 August 2005 no. 170 was re-mortgaged in favour of Birmingham Midshires, subsequently in effect owned by Bank of Scotland. The remortgage was an interest only mortgage, the capital being repayable after 25 years. The amount of the loan outstanding by 2009, and I assume therefore the original amount advanced by way of remortgage in 2005, was £158,000 (p.1310). The amount shown on a BM document dating from 2009 (p.1310) as the estimated value of the property was £185,000. That may have been its estimated value at the time of the remortgage in 2005, as I doubt whether BM would have needed to revalue it thereafter. After repaying the previous mortgage and costs the net amount of the remortgage proceeds was some £71,000, which was again paid into the joint account with HSBC. That sum was removed from the account over the next 6 weeks or so, as to some £43,000 in cash. (pp.633-4).

10. In November 2009 the Claimant was removed as a party to the mortgage of no. 170, but her name was not removed from the land registry entry showing her as a registered proprietor. It is not clear how the Bank could have been persuaded to release her from her liability as mortgagor.

11. On 23 February 2011 a decision was made by an officer of the DWP superseding and removing the Claimant's entitlement to income support with effect from 14 February 2011 on the ground that she was in remunerative work. Payment of housing and council tax benefit continued, I assume on the basis that the Claimant's income, including that from her employment, still entitled her to those benefits.

12. On 23 May 2012 the Claimant and her husband were interviewed under caution by officers of the Council. Payment of housing and council tax benefit was suspended with effect from 21 May 2012.

13. In October 2012 no. 170, having been repossessed by Bank of Scotland, was sold by or on behalf of the Bank for £149,950. The amount outstanding on the mortgage was £158,000. (Information available on Zoopla indicates that no. 170 was sold again in March 2014 for £207,500).

14. In November 2012 the Claimant was declared bankrupt on her own petition. She had been discharged from bankruptcy by the date of the FTT hearing in June 2014 (p.1850).

15. On 17 April 2013 the Secretary of State made a decision superseding, with effect from 4 August 2003, the decision awarding income support which was on foot on 4 August 2003, and revising all subsequent decisions awarding income support, so as to remove those awards, on the ground that the Claimant had capital in excess of the prescribed limit at the relevant times. The limit above which no income support is payable was £8,000 until a date in 2006 and £16,000 thereafter.

16. On 22 April 2013 the Secretary of State made a decision that income support totalling some £44,000 had been overpaid in respect of the period from 4 August 2003 to 14 February 2011, and was recoverable from the Claimant on the ground that she had failed to disclose that she had capital in excess of the prescribed amount.

17. On 7 June 2013 the Council made a decision revising and removing the awards of housing benefit and council tax benefit with effect from 1 August 2004 and a decision that the total sums of about £75,000 in respect of housing benefit and about £7900 in respect of council tax benefit, had been overpaid to the Claimant in respect of the period from 1 August 2004 to 21 May 2012 and were recoverable from her.

18. The ground for revision of the decisions which had awarded housing benefit and council tax benefit was also essentially that the Claimant possessed capital in excess of the prescribed limit (which was £16,000 throughout), although the Council also relied on some other matters, including receipt by the Claimant of rent in respect of no. 170.

19. The Claimant appealed against the decisions made by the Secretary of State and the Council.

20. On 24 December 2013 a Judge of the First-tier Tribunal made some Directions which were interpreted by the DWP and the Council as directions for a joint submission to be made in the appeals. The result was what was by far the longest submission which I have seen in a social security appeal. Including citation of regulations etc (but excluding the 1500 pages or so of annexed documents) it ran to 323 pages, and Section 7 alone ("the decision maker's submission") ran to some 170 pages. I mention those figures not for the purpose of being critical, but in order to demonstrate the complexity of the matters which the FTT had to consider.

21. As I have said, the hearing took place on 26 and 27 June 2014.

The FTT's decision

22. The FTT's summary of the allegations and assertions by the DWP and the Council respectively is at Section B of its Statement of Reasons. The FTT took the view that the DWP was relying in support of its supersession/revision decision on only one matter, namely the Claimant's alleged entitlement to a beneficial interest in a property in London which I shall refer to as no. 29 L Road. The Council also relied on that, but in addition relied on the Claimant having a beneficial interest in no. 170 and in two other properties. The Council, and I think probably also the DWP, contended that the Claimant and Mr H had been members of the same household during the material period, which if established would have meant that his income and assets were aggregated with hers for means tested benefit purposes.

23. The FTT found that the Claimant and Mr H were not living together as husband and wife at any material time (paras. 47 to 50 of the Statement of Reasons). That is not quite the right test. In the case of husband and wife the

test is whether they were "members of the same household" (see the definitions of 'couple' in reg. 2 of the Housing Benefit Regulations 2006 and reg. 2 of the Income Support (General) Regulations 1987 respectively). But I doubt whether that made any difference to the outcome.

24. The FTT further found that the Claimant did not have any beneficial interest in any of the properties other than no. 170.

25. However, the FTT found that the Claimant did have a beneficial interest in no. 170 and/or the proceeds of the further advance/remortgages in respect of that property. The FTT found that the value of this interest exceeded £16,000 at all material times.

26. What the FTT did, in the light of those findings, was, firstly, to allow the Claimant's appeal against the DWP's decisions and set those decisions aside, with the result that the Claimant remained entitled to income support for the periods for which that benefit had been awarded and paid. It was specifically stated in para. 2 of the FTT's Decision Notice that "the appellant is entitled to income support for the period in question."

27. Secondly, the FTT dismissed the Claimant's appeals against the decisions made by the Council, taking the view that the awards of housing and council tax benefit had been correctly revised, and that the amounts of those benefits which had in consequence been overpaid were recoverable from the Claimant.

The Claimant's grounds of appeal to the Upper Tribunal

28. The grounds of appeal to the Upper Tribunal were prepared by solicitors acting on behalf of the Claimant. They were in summary as follows:

(1) The FTT did not sufficiently explain or justify why it did not accept the evidence of Mr H in relation to the particular matters in issue (as opposed to other matters relevant only to his credibility);

(2) The FTT did not sufficiently explain why it did not accept the Claimant's evidence, and why the fact that it rejected Mr H's evidence meant that hers had to be rejected.

(3) The FTT was not entitled on the information before it to conclude that the value of the Claimant's interest in no. 170 exceeded £16,000 at all material times. If the Tribunal considered that it lacked sufficient information in relation to the value of no. 170 it should have given the Claimant the option of an adjournment of the hearing so that additional information could be provided.

(4) As the Claimant was unable to say what had happened to the proceeds of the additional sums advanced on no. 170, it was wrong to draw adverse inferences against her in respect of those monies.

Did the FTT go wrong in law in relation to the value of no. 170/the remortgage proceeds?

(i) The parties' contentions to the FTT

29. The Claimant's contentions in relation to no. 170 were that as from the time of separation from her husband in around 2002 she had no interest in this property. She said that she had nothing to do with the lettings of it, and received no rent. The further advance and remortgage must have been obtained by Mr H by forging her signature on the necessary documents. She did not receive any part of the proceeds, and had no knowledge of what had happened to them.

30. Mr H's own evidence at the hearing was to the same effect. He said that he had forged the Claimant's signatures on the remortgage documentation.

31. The Council's contentions in relation to no. 170 and the proceeds of the further advance/remortgage are set out at a number of points in the lengthy submission to the FTT. I would draw particular attention to the following. At paras. 7.37 to 7.40 (pp.176-7) it was submitted as follows:

> "7.38 The proceeds from the remortgages should be treated as notional capital which was available on application to the appellant as the account was in joint names when the proceeds were received and throughout the period in question. It is also reasonable to treat the proceeds from the remortgages as jointly held by the appellant and her husband.
>
> 7.39 The Respondents submit that the appellant deprived herself of capital, namely the ownership of proceeds from the remortgaging of [no. 170] as her intention was to obtain benefit which the Respondents cite may not have been her predominant motive but it was a 'significant operative purpose' in line with reported Commissioners' decisions R(SB) 9/91 and R(H) 1/06.
>
> 7.40 The Respondents have determined the appellant's relevant actions after the disposal of her share of the proceeds indicates "her significant operative purpose" to deprive herself of this capital in order to obtain benefit. ……..The Respondents consider they have been able to provide the breakdown and analysis of the actual amounts or occasions in respect of which the appellant was being found as a fact to have (a) deprived herself of capital; and (b) done so for the purpose of obtaining benefit."

32. At paras. 7.72 to 7.87 the submission set out the facts relating to the further advance and remortgage, including setting out in full what appeared from the joint bank account statements as to the payment out of those proceeds. In para. 7.85 it was submitted that

> "…..It is reasonable to assume however that the remortgaging proceeds of £71,970, in whole or in part, were used as the deposit for the purchase of [no. 65 P Street] by Mr H alone for £249,000 on 23 December 2005".

Para. 7.86 said:

> "The appellant has not complied with the Respondent's request for a valuation to be carried out on [no. 170] .. and this means that the appellant's claim that the outstanding mortgage would exceed the valuation of the property (thus leaving a significant negative equity) cannot be substantiated. The Respondent has therefore made an adverse inference that the appellant's claim had no basis and that the equity (less the mortgage and other incumbrances) would still exceed the £16,000 capital cut-off limit)."

33. In paras. 7.190 onwards the submission dealt with whether the Claimant had a beneficial interest in a property at no. 125 E Road, which had been purchased by a Mr A.H.Mughal for £316,000 in July 2006, with a mortgage for about £268,000. In that connection, it was submitted at para. 7.207 that as the total of about £43,000 from the £71,000 remortgage proceeds which had been withdrawn in cash remained unaccounted for, the Council had drawn an adverse inference that that £43,000 had been used to pay the part of the purchase price of no. 125 E Road which had not been advanced on mortgage.

34. At paras. 7.266 onwards the DWP and the Council presented a summary of their case:

> "7.266 .. The Respondents have ……. formed an overall and agreed view that the appellant does not qualify for income support, housing benefit or council tax benefit on a number of common grounds which have been summarised below in ascending order of priority and importance ……
>
> 7.269 The principal reason is due to the appellant's share in the ownership of [no. 170] and whose share of the interest in the property would exceed the capital cut off l…….
>
> 7.270 ……The Respondents cite that as the proceeds [of the re-mortgaging in 2004 and 2005] exceeded the capital cut-off limit the appellant was disqualified for income support, housing benefit and council tax benefit.
>
> **Value of [no. 170]**
> 7.311 The appellant has stated that the property was worth less than the mortgage on the property so even if it was sold she would have been "out of pocket".
>
> 7.312 The Respondent cannot accept this statement on its own as the appellant would need to provide documentary evidence of this fact and so far has stated that the property did not belong to her when in reality it did throughout the period in question. The appellant was sent forms LA1 on 15 November 2012 but [this] was not completed and returned. The Respondent is unable to ascertain the value of the property and has therefore drawn an inference that the net value of the property would exceed the capital cut-off limit.
>
> **Proceeds from the remortgaging of [no. 170]**
> 7.313 [Refers to the further advance/remortgage in 2004 and 2005].
>
> 7.314. A number of debit transactions have been made after these two large deposits which are mainly cash withdrawals. The Respondents have now

> been able to show that the appellant did have access to the joint HSBC account as it has now received a copy of a cheque signed and cashed by the appellant on 28 September 2005 for £12,000. She also received a further £7,000 from her husband on 3 October 2005. These factors have now been cited as a matter of material fact that links the appellant to her husband financially at a time when she purported that they were separated/estranged. As the appellant has not provided a full or satisfactory explanation as to what happened to this money the rest of the proceeds nor has she provided any further evidence to support her statement the Respondent has drawn an inference that she still possessed the funds until it was all spent. The proceeds are treated as notional capital as money that was available on application and that had been jointly held by her and her husband. The proceeds in turn exceeded the capital cut-off limit for income support, housing benefit and council tax benefit from 1 September 2004."

35. I would make two points in relation to those submissions to the FTT, in so far as they relate to the further advance/remortgage proceeds. First, the submissions seem to have contained an inconsistency in that in paras. 7.38 to 7.40 it was submitted that the Claimant had disposed of her share in the proceeds, but had done so in order to deprive herself of capital, and so should be treated as having notional capital. In paras. 7.314 and elsewhere it was submitted that the Claimant should be treated as having not disposed of her share of the proceeds. That would lead to a conclusion that she retained the proceeds as actual capital (although the word "notional" was again used in para. 7.314). That paragraph also contained an important inclarity in that it was stated that "the Respondent has drawn an inference that she still possessed the funds "until it was all spent". It is unclear whether it was being accepted that the funds had been "spent" when they were removed from the joint HSBC account.

(ii) The FTT's reasoning

36. The Tribunal found that the Claimant did not have anything to do with the lettings of the property, and played no part in its management (paras. 6 to 9 of the Statement of Reasons).

37. The Tribunal then dealt with the Claimant's beneficial interest in no. 170, and its value, in paras. 10 to 14 of the Statement of Reasons. Those paragraphs are of central importance to these appeals and should be treated as incorporated in this decision.

(iii) Analysis

38. In my judgment the FTT did not go wrong in law in not accepting the Claimant's evidence that she did not know about the further advance and remortgage in 2004 and 2005, or what happened to the proceeds. First, in my judgment the FTT sufficiently explained why it did not accept Mr H's oral evidence, including the evidence that he had forged the Claimant's signature on the remortgage documents. The FTT gave ample reasons for rejecting that evidence. Secondly, in my judgment the FTT sufficiently explained why it did not accept the Claimant's evidence on those matters either; it was entitled to regard the Claimant's evidence on that point as falling with his evidence.

39. It is clear that in para. 11 of the Statement of Reasons the Tribunal found that the Claimant had and throughout retained a one half share in the beneficial interest in no. 170. I doubt whether that finding turned on whether or not the FTT accepted or rejected the evidence of the Claimant and Mr H. It was probably sufficient that she had been a party to the original purchase, with the aid of a mortgage, in 1999, and that she had remained a registered proprietor. It seems to me (although I do not give any binding directions to the new tribunal) that even on the Claimant's evidence she remained entitled to a one half share in the equity of no. 170.

40. The FTT further found that the Claimant was jointly entitled to the advance/remortgage proceeds when they were initially received from the lender. However, I am unable to accept the Council's contention in this appeal that the Tribunal found that the Claimant continued, after the removal of those proceeds from the joint account and down to at least the end of the overpayment period, to own a half share in those proceeds. I consider that the references to "the property" in paras. 12 to 14 of the Statement of Reasons are only to no. 170 itself, and do not include the proceeds. It seems to me that, if the Tribunal had been intending to find that the Claimant retained a half share in proceeds totalling £110,000, some reference to her interest in the proceeds alone being worth £55,000 would have been made in paras. 12 to 14. If that had been the Tribunal's finding, then as from the 2005 remortgage it would not have mattered (subject to the question of a diminishing capital calculation, which the Tribunal in any event overlooked) what no. 170 itself was worth, as her share in the proceeds alone would substantially have exceeded £16,000.

41. However, it is clear that the FTT did find that the value of the Claimant's beneficial interest in no. 170 itself exceeded £16,000 throughout. As noted above, the Council's contention was that it had been unable to instruct a valuer to value no. 170 because the Claimant had not returned form LA1, and that the Tribunal should therefore draw appropriate inferences against the Claimant. The fact that the FTT (in my view) inferred that the value of the Claimant's interest in no. 170 itself (and not including any entitlement to the proceeds) at all times exceeded £16,000 meant that it did not need to consider further whether she also retained, and for what period, a share in the proceeds, or whether she should be treated as having 'notional capital' by reason of having disposed of the proceeds with the intention of retaining entitlement to benefit.

42. The fact that inferences may need to be drawn does not absolve the Tribunal from first considering the effect of such information as to value as it does have. The Tribunal did not in paras. 12 to 14 seek to do that. An analysis might have been along the following lines. As far as the position between August 2004 (the beginning of the relevant period) and August 2005 (the date of the remortgage) is concerned, we know that in August 2005 a bank was prepared to lend what appears in effect to have been an additional £71,000 on the security of the property. Further, it appears likely (see para. 9 above), that in August 2005 the bank estimated the value at £185,000, and the total lent by way of re-mortgage was £158,000. As regards the position between

August 2004 and August 2005, there would appear to be ample evidence to find that the net value of the equity (taking into account the existence of the initial loan in 1999 and the further advance in 2004) was substantially in excess of £32,000. If it had not been, the Bank would not have been willing to lend a further £71,000.

43. But the position from August 2005 onwards, after the remortgage, is much less clear. From then on the property was of course subject to a mortgage securing £158,000. If the estimated value of £185,000 related to August 2005, as I strongly suspect it did, then the net equity after deducting the loan of £158,000 was only £27,000. But one must also not overlook that reg. 47 of the Housing Benefit Regulations 2006 provides that one must also deduct 10% of the gross value, in respect of the costs of sale. That means that, in order for the Claimant's half share in the net equity to exceed £16,000, the gross value would have had to exceed £211,000. We know that it actually sold for £149,950 in October 2012. As the Council points out in its submission in this appeal, prices rose between 2005 and about the end of 2007, and then fell sharply. But in my view it is very doubtful whether it was reasonable to infer that the gross value was in excess of £211,000 throughout the period between August 2005 and the end of the overpayment period in May 2012.

44. The Council also points out in its submission in this appeal that there could have been other causes (i.e. other than a fall in property values) of the fact that there was negative equity by 2012, such as "disrepair or sustained and significant damage". However, there was no reason to think that there had been any such lack of repair or significant damage.

45. In my judgment the Tribunal went wrong in law in not undertaking, at least in outline, some such reasoning process as I have just indicated, in order to see what, if any, inference was reasonable. It was not in my judgment sufficient simply to rely (if that is what the Tribunal did) on the fact that the Claimant had not returned Form LA1. So far as I am aware no specimen of that form was before the Tribunal, so the Tribunal did not know how much better a position the Council would have been in to value no. 170 if it had been completed. Clearly, the District Valuer would not have been able to inspect the inside of the property.

46. As the Council accepts in its additional submission following issue of my draft decision (see below), there was in my judgment also an additional error of law, namely the failure by the Tribunal to consider the effect of undertaking a diminishing capital calculation, as required by reg. 103 of the Housing Benefit Regulations 2006. That would in effect require the Council, in calculating the amount of the overpayment (if any), to reduce the amount of actual capital by the amount of housing benefit overpaid each year. It is not therefore sufficient simply to find that the Claimant's actual capital exceeded £16,000 throughout the period, if there was a possibility that, for the purpose of calculating whether there was an overpayment, it would have been reduced to below that figure by reg. 103. Since the overpayment period was some 8 years, I infer that the housing benefit claimed and paid was some £9,000 per annum, on average. So by, say, around the middle of 2010, the net equity

would have been reduced by a further £50,000 or so, for these purposes. Clearly, that would have reduced the equity in no. 170 itself to nil by then, whatever reasonable inference one draws as to the gross value of no. 170 from time to time.

47. It may also be necessary for the new tribunal to take into account that tariff income applies where a claimant has capital in excess of £6,000 but less than £16,000. It is not therefore necessarily a question of deciding whether the claimant had capital of £16,000 or more.

Error of law in relation to the effect of the decision on the DWP's appeal

48. The FTT allowed the Claimant's appeal in relation to the DWP's decisions. It explained in para. 20 of the Statement of Reasons why it considered it justifiable to make what were in effect inconsistent decisions in relation to the DWP's and the Council's appeals:

> "The Tribunal considered its powers in relation to the fact that there were, in effect, two different decisions. Neither was fatal to the other. [The Council] had made a decision based on the whole catalogue of suggested irregularities as detailed above at Section B. The DWP had made the decision to base their case solely on this aspect. The Tribunal has the power to amend a decision of the Secretary of State and indeed stands in his shoes (metaphorically) when considering an appeal. The question therefore for the tribunal was whether to, in effect, ignore the fact that the Secretary of State had only relied upon the [29 L Road] issue and find, should we do so, if proved on another aspect. The appellant submitted that the tribunal should not so act. The Secretary of State had been given at least two chances to amend his decisions so as to include the other nuances of this case and had deliberately chosen not to do so. She further submitted that to do so would be to rescue the Secretary of State from his own failings and that a conscious decision had been taken not to include the other aspects. The Tribunal agree with the appellant. We did not think it in the interests of justice to remake decisions that the Secretary of State had had the opportunity to change but had chosen not to."

49. However, the FTT overlooked (as also I appear to have done when giving permission to appeal) that on the face of it the effect of its finding that the Claimant was entitled to income support down to 14 February 2011 was that in respect of the period down to that date the Claimant was deemed, for housing and council tax benefit purposes, to have no income or capital: see, in relation to housing benefit, para. 4 of Schedule 5 (income) and para. 5 of Schedule 6 (capital) to the 2006 Regulations.

50. However, the FTT made an even more fundamental error of law in failing to apply its findings in relation to the value of no. 170 to the income support appeal. It is doubtful whether it was appropriate to regard the DWP as not having relied on the value of no. 170 as constituting capital with a net value in excess of the prescribed limit. The written submission was a joint submission to the Tribunal. But in any event the Tribunal, having found, for the purposes of the housing benefit appeal, that the net value of no. 170 was throughout in excess of £16,000, should have applied that finding to the

income support appeal, and disallowed that appeal as well. It should not have made factually inconsistent decisions.

51. However, I have no jurisdiction over the income support appeal, as the DWP did not appeal against the FTT's decision of it. Only the housing benefit and council tax benefit appeals are before me.

52. It is contended by the Council that (even in the absence of the point which I referred to in para. 50 above) the fact that the FTT allowed the Claimant's appeal in respect of the income support decisions, and decided that the Claimant remained entitled to income support down to 14 February 2011, did not require the FTT also to find that the Claimant remained entitled to housing and council tax benefit down to those dates. The Council contends that it is entitled to rely on the doctrine applied by the Court of Appeal in *R v South Ribble DC HBRB ex p Hamilton* [2000] 33 HLR 102, under which a local authority can 'go behind' an income support award where that award was obtained by fraud.

53. However, I do not accept that the Council can rely on that doctrine in the unusual situation which obtains here. As I have said, the problem only arises in the present case because the FTT, in error of law, made inconsistent findings of fact, in the appeals against the DWP's decisions, on the one hand, and those by the Council, on the other, on the question whether the Claimant had capital in excess of the prescribed limit.

54. The Court of Appeal justified its decision in the *Hamilton* case on essentially two bases. First, on the ground that there is a general principle that, in the oft-quoted words of Denning LJ in *Lazarus Estates v Beazley* [1956] 1 Q.B. 702 at 712: "Fraud unravels everything." Secondly, that in the light of that principle the words "a person in receipt of income support" in the definition of "person on income support" in reg. 2 of the Housing Benefit Regulations 2006 must be read as "a person <u>lawfully</u> in receipt of income support" – i.e someone who has not obtained or maintained the income support award by fraud or dishonesty.

55. In my judgment the rationale behind the *Hamilton* principle cannot apply where a FTT, on appeal, has considered the correctness of the income support award and upheld it, unless, possibly, the FTT's decision was itself obtained by fraud, which is clearly not the present case. It cannot in my judgment be contended by the Council that the income support award is vitiated by fraud or dishonesty where the award was upheld by a FTT, after full investigation of the facts. I reach that conclusion for a number of reasons.

56. First, it is in my judgment supported by the reasoning in *GB v London Borough of Hillingdon* [2010] UKUT 11 (AAC) and the decisions referred to in it. The effect of that decision is that if the DWP has considered whether to supersede/revise the income support decision, and decided that there are insufficient grounds to do so, the local authority cannot go behind the award of income support in reliance on the *Hamilton* principle. It may be otherwise if the DWP has simply taken no action, or is still considering its position. If that

is the case in the situation where the DWP has considered the position and made a decision not to supersede/revise, it must a fortiori be the case where the DWP has decided to supersede/revise, but that decision has been reversed by an FTT on appeal, unless (possibly) the FTT's decision was itself obtained by fraud or dishonesty.

57. Secondly, the primary cause of the problem in the present case is the FTT's own error of law, in the appeals to it against the DWP's decisions, in failing to apply to the income support appeal its findings of fact in the housing benefit appeal. But the law provided a remedy for that error, namely the possibility of appeal by the DWP to the Upper Tribunal. The fact that the DWP did not exercise that right does not in my judgment justify applying the *Hamilton* doctrine to a situation in which it is inappropriate. One result of doing so would be that it would be necessary for the Council, in order to go behind the income support award, to prove that it was obtained (or retained) by fraud or dishonesty. But proof of fraud or dishonesty should not be necessary or relevant. Proof of fraud or dishonesty was not necessary in relation to either the issue whether the Claimant had capital in excess of the prescribed limit (and so was not entitled to income support) or the issue whether any overpaid benefit was recoverable, and it would be unsatisfactory to bring in questions of fraud or dishonesty in order to circumvent the effect of the primary error of law made by the FTT, namely its making of inconsistent factual decisions in the two appeals.

58. Thirdly, if I were to apply the *Hamilton* principle and to remit the appeals against the Council's decisions to a fresh FTT for redetermination, that would mean that the issue whether the Claimant was fraudulent or dishonest would become material, when in my judgment it was not previously. It would be highly unsatisfactory, in a case of this complexity, for the issue of fraud to become material only at the stage of remission. The Claimant could justifiably say that her case had not until now been prepared on the basis that she needed to defeat a claim of fraud or dishonesty. I accept that the Respondents had raised the issue of fraud, particularly on the issue of the effect of the Claimant's bankruptcy, but it was unnecessary for them to do so (see para. 64 below).

59. As I have said, my conclusion is that the proper remedy in the very unusual circumstances of the present case would have been an appeal by the DWP against the FTT's decision of the income support appeals.

60. On 11 November 2015 I made a Direction annexing a draft decision of this appeal, in order to give the Council the opportunity to ascertain whether the DWP intended to apply for permission to appeal to the Upper Tribunal out of time, and to consider whether to apply under Rule 9 of the Tribunal Procedure (First-tier Tribunal) Rules 2009 to be joined as a respondent to the Claimant's income support appeal for the purpose of the Council itself seeking permission to appeal out of time. It was only on receipt of that Direction that the parties were alerted to the possible significance, for the housing and council tax benefit appeal, of the FTT's decision in the income support appeal.

I indicated in para. 54 of my draft (and expressly provisional) decision as follows:

> "54. I am very doubtful whether it would be right for either a Judge of the FTT (or, if the application is renewed here, the Upper Tribunal) to give permission to the DWP (or, if it is joined as a respondent, the Council) to appeal out of time against the FTT's decision that there is no recoverable overpayment of income support. Since the FTT's decision on 4 July 2014 the Claimant has been entitled to act on the basis that there is no overpayment of income support which is recoverable from her, and I very much doubt whether it would be right now to give any permission which might have the effect of changing that. But it might well be right to give permission out of time to appeal against the decision that the Claimant was entitled to income support because she did not have excess capital. The only practical effect of a successful appeal to the Upper Tribunal against that decision would then be to prevent the Claimant being deemed to have no capital for housing and council tax benefit purposes."

61. As regards the possibility of the DWP appealing, the Council has not in its further submission, made pursuant to my Direction, been able to say more than that "the DWP are likely to have not *even considered the matter* as to whether to appeal the FTT's decision of the income support appeal." The Council further states that it does not intend to apply to be joined for the purpose of itself appealing the FTT's decision of the income support appeal. The Council does not explain why it has decided not to do so. It may possibly have to do with the amount which the Council considers which it could at the end of the day realistically recover.

62. I have considered whether, notwithstanding a failure to appeal the FTT's decision of the income support appeal, I can remedy the FTT's primary error of law by in effect simply ignoring the outcome of the income support appeal and deciding the housing and council tax benefit appeal as if the FTT had (as it ought to have done) applied its finding that the Claimant throughout had capital worth more than £16,000 to the income support appeal as well. That is an attractive possibility. The arguments which can be put forward in favour of that course of action seem to me to be as follows:

> (1) The present situation is wholly exceptional and I ought simply to proceed on the basis on which the FTT should have proceeded, particularly in the situation where the two appeals were decided together. Proceeding on that basis would avoid the problems arising from bringing fraud and dishonesty into the equation, which an application of the *Hamilton* doctrine would have done.
>
> (2) The Council should not be prejudiced by the DWP's failure (if there was such a failure) to rely on the Claimant's interest in no. 170 or the proceeds of further loans/remortgage as an asset or on its failure to appeal the FTT's decision of income support appeal. The Claimant would in no way be prejudiced by that course being taken.

(3) The tenor of the FTT's reasoning in para. 20 of its Statement of Reasons indicates that it is clear that, had the FTT realised the potential significance for the housing and council tax benefit appeals of its decision of the income support appeal, it would not have allowed the income support appeal.

(4) The purpose behind the provision that a claimant on income support is in effect deemed to have no income or capital for housing and council tax benefit purposes is that it is assumed that the claimant's means have been examined for the purpose of awarding income support, and that it would be wrong to require that exercise to be carried out again in relation to housing and council tax benefit. But that rationale does not apply when, in concurrent appeals, the Claimant's means have been examined by a FTT and the Claimant has been found to have had assets.

(5) This is an inquisitorial jurisdiction; the purpose of the adjudication and appeal structure is to ensure that a claimant receives neither more nor less than his true entitlement under the legislation, and to adopt this solution is the only satisfactory means of achieving that. The Claimant's position should not be improved by the technicality that there has been no appeal against the FTT's decision of the income support appeal.

(6) What causes the difficulty for the Council is the provision in para. 5 of Schedule 6 to the 2006 Regulations that the whole of the capital of a claimant "on income support" is disregarded. At the time of the Council's revising decisions the Claimant had not been "on income support" in respect of any of the material period in that her awards of income support had been removed by supersession and revision decisions made by the DWP. The later decision of the FTT should in the exceptional circumstances of this case be ignored for this purpose.

63. I have decided that I ought to accede to the force of the arguments in the previous paragraph. The result is that the Council is not affected by the FTT's (inconsistent and for that reason incorrect) decision of the income support appeal.

64. I have referred above to the fact that the FTT held (in para. 53 of the Statement of Reasons) that the Claimant's bankruptcy in November 2012 did not prevent the overpayments of housing and council tax benefit being recoverable from the Claimant because the overpayments had been made as a result of "fraud" on the part of the Claimant. However, in my judgment the First-tier Tribunal went wrong in law in making that finding, in that in para. 14 of the Statement of Reasons the Tribunal expressly left open and stated that it formed no conclusion on whether the Claimant's actions were dishonest. It seems to me that the FTT has in this respect contradicted itself, to the extent that its reasoning on this point is unclear. However, in my judgment the FTT ought to have held that the Claimant's bankruptcy did not prevent the overpayments being recoverable for another reason, namely that the decision

that overpayments were recoverable was made after the bankruptcy order: see *R (Steele) v Birmingham CC* [2005] EWCA Civ 1824; R(H) 9/09. It was unnecessary to consider the issue of fraud.

The outcome of the present appeals

65. The FTT's decision of the housing and council tax benefit appeal must therefore be set aside by reason of the errors of law referred to above. It is not appropriate for me to attempt to re-make the FTT's decision of those appeals, as I am not in a position to make findings of fact as to (i) the value of the Claimant's interest in no. 170 at the material times, or (ii) whether she possessed (b) actual capital by reason of retaining a share in the proceeds of further loans/remortgage from time to time or (b) notional capital by reason of having disposed of such proceeds with the intention of retaining entitlement to benefit. The matter must therefore be remitted to a fresh First-tier Tribunal.

66. The new tribunal will proceed on the footing that:

(1) it is not bound, by reason merely of the previous FTT having allowed the income support appeal, to decide that the Claimant had no capital (see paras. 62 and 63 above). It will consider the issues referred to in para. 65 above on their merits.

(2) The new tribunal will adopt all the findings of fact made by the previous tribunal, save in relation to the issues to which I referred in para. 65 above. It is only in relation to those factual issues that errors of law have been established. The new tribunal will be entitled to draw adverse inferences from a failure (if that failure continues) to complete form LA1, but only to the extent that it is reasonable to do so.

(3) As regards the significance of the Claimant's bankruptcy, the new tribunal will proceed as stated in para. 64 above.

Charles Turnbull
Judge of the Upper Tribunal
4 April 2016