

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. CH/4640/2014

Before Upper Tribunal Judge Robin C A White

Decision: The decision of the tribunal of 12 May 2014 is erroneous in law. I set it aside. I remake the decision of the tribunal.

My substituted decision:

I set aside the decision of 13 March 2013 deciding that the claimant had no entitlement to housing benefit and council tax benefit from 17 December 2012.

I set aside the decision of 13 March 2013 deciding that there was a recoverable overpayment of housing benefit and council tax benefit.

The effect of my decision is to resurrect the decision of 19 September 2012 awarding the claimant housing benefit and council tax benefit as the operative decision.

REASONS FOR DECISION

How I will refer to the parties

1. In order to make my decision easier to follow, I will refer to the appellant as “the claimant”, to her partner as “Mr M” and to the partner’s wife or ex-wife as “Mrs M”.¹ I will refer to the respondent as “the local authority”.

Context and background

2. On 30 December 2011, the claimant made a claim for housing benefit and council tax benefit. She declared that Mr M was her partner. She reported that she had moved into the house in respect of which benefit was claimed on 23 July 2011 and that Mr M had moved in on 14 November 2011. The claimant reported that she had never previously claimed housing benefit or council tax benefit.
3. The claimant reported that she worked as a self-employed book-keeper for 16 hours a week, and that Mr M was unemployed. The form indicated that Mr M would apply for a jobseeker’s allowance.
4. The claimant said she had £4,760.00 in the bank and that Mr M had £9,600.00 in the bank. No other savings or capital was declared.
5. The claimant, in a supplementary information sheet, said she had a separate bank account into which child benefit was paid; that she had reported to HMRC in relation to tax credits that Mr M was living with her; that she had been advised that she was entitled to working tax credits and was waiting for an award notice; and that she had only just started work for 16 hours a week and so had no accounts to submit.

¹ I have been unable to find any clear statement in the documents I have as to whether or when Mr M and Mrs M divorced, and this explains the equivocal way in which I refer to Mrs M’s status.

6. On 11 January 2012, the local authority sent Mr M a request for further information concerning an interest he had in a property which is not the property he was living in. I could not find any response to this request for information among the documents I have. It is unfortunate that the local authority did not follow this up—or, if they did, that the documents I have do not report this.
7. On the same day, the local authority made an award of housing benefit and council tax benefit from 2 January 2012. [pages 78-86].²
8. On 17 July 2012, the claimant advised that the family had moved to a new address.
9. On 13 August 2012, the claimant provided the local authority with further information. Among the information provided was a statement that Mr M was not working at present but was looking for work; he was not claiming jobseeker's allowance. The claimant also provided further details of her self employment.
10. On 12 September 2012, the local authority sent an award letter to the claimant. [pages 154-65]. This looks like an initial award but must be a supersession of the January 2012 award as a consequence of the claimant's having move house.
11. On 27 February 2103, the local authority sent the claimant a request for further information relating to (a) the sale on 14 December 2012 of a property in which Mr M had an interest; and (b) a business in which Mr M had a role.
12. In relation to the property sale, which was of Mr M's former matrimonial home,³ a copy of a completion statement dated 14 December 2012 [page 172] was provided which showed that the solicitors were holding £609,837.15 in their client account in respect of Mr M and Mrs M. The letter from the solicitors to Mr and Mrs M [page 173] stated:

I confirm that the amount shown on the completion statement will remain in our client account until instructions are received from both of you as to how this is to be split.
13. In the questionnaire response, the claimant made the following statements [page 170]:

No funds have been received until this goes to court.

We are waiting for a date in order to get financial settlement asap.

Once the money from the sale of the property is agreed and released we will no longer need housing benefit. My partner potentially has a new project to start in September and I have plans to build a website and run an online business. We need the financial settlement asap. With the money we will use part to buy a house (deposit 80/90K) and we will use the rest as investment towards [a business] and buying stock for my business.
14. Details were also provided in relation to a business, but this information is not directly material to the issue arising in this appeal.

² References to page numbers in square brackets are references to the page or pages in the documents I have which provide the evidence for the statements made.

³ I will refer to this property as "the matrimonial home".

15. The solicitor's professional charges in relation to the sale of the matrimonial home amounted to £1,960.80. These charges are not included in the completion statement dated 14 December 2012.
16. There is a counter message note dated 8 March 2013 [page 178] which indicates that the claimant visited the local authority and provided further information. The completion statement had overlooked a further mortgage of £200,000 secured on the matrimonial home, leaving the correct balance as £409,837.15. It seems that the claimant advised that a tentative agreement on the split of the proceeds of sale had been based on the higher figure, and that Mr M and Mrs M were now far from agreement as to the division of the proceeds of sale.
17. Although the counter message note refers to the need to request evidence to support the reduction in the figure for the proceeds of sale of the matrimonial home by £200,000.00, this does not appear to have been followed up by the local authority. The local authority appears to have framed its case on the basis of the proceeds of sale of the matrimonial home (following the deduction of the solicitors' charges) being around £406,000.
18. On 15 March 2013 the local authority made two decisions.
19. The first was an entitlement decision [pages 3-7] revising the earlier award with the effect that there was no entitlement housing benefit and council tax benefit from 17 December 2012 because the claimant had capital in excess of £16,000.00. I will refer to this decision as "the entitlement decision".
20. The second was an overpayment decision [pages 8-10] raising a recoverable overpayment of housing benefit of £2,538.50 for the period from 17 December 2012 to 24 February 2013, and a recoverable overpayment of council tax benefit of £718.55 for the period from 17 December 2012 to 31 March 2013. I will refer to this decision as "the overpayment decision".
21. The local authority's position in relation to the disregard of any capital is that there was insufficient evidence to show that the claimant intended to purchase a property with the capital.
22. On 21 March 2013 the claimant appealed by a letter received in the local authority on 8 April 2013. She argued that her partner did not have capital in excess of £16,000.00; that the money was held in a solicitor client account; that it would be necessary to go to court to reach a settlement; and that this would take between eight months and a year.
23. The appeal came before a First-tier Tribunal on 12 May 2014. Neither the claimant nor Mr M attended; the claimant had indicated in responding to a First-tier Tribunal enquiry form that she did not want a hearing. The outcome of the appeal was that the decision of the local authority was confirmed.
24. The decision notice omits reference to council tax benefit, but the full statement of reasons that was subsequently provided notes the omission and confirms that the tribunal's decision was that the overpayments of both housing benefit and council tax benefit were recoverable.

25. The appeal now comes before me with the permission of a judge of the Upper Tribunal.⁴

⁴ Before giving permission to appeal, Judge Lane had requested a submission from the Secretary of State, and this was provided on 22 May 2015 [pages 239-41].

The grounds of appeal

26. The appellant's grounds of appeal are essentially as follows:

- (a) The funds from the sale were not finalised until mid-January 2013.
- (b) There had been no offer of settlement with £49,000.00 being paid to Mr M.
- (c) Regulation 49(2) of the Housing Benefit Regulations 2006 provides that capital available on application is only treated as capital "from the date on which it could be expected to be acquired were an application made."

Did the tribunal err in law?

27. Both the claimant and the local authority now argue that the tribunal's decision was erroneous in law. In part the parties are in agreement about how the tribunal erred, and in part they are not. For example, the claimant makes no reference to the possible application of Regulation 51 of the Housing Benefit Regulations 2006.
28. The tribunal's analysis of the law is a little thin, but the tribunal plainly decided the case on the application of Regulation 49(2) of the Housing Benefit Regulations 2006 (and the corresponding provisions in relation to council tax benefit). In doing so, the tribunal has failed to address the question of the determination of the date on which it could be expected that the capital would be available to Mr M if he made application for it. That is plainly an error of law in the context of this case. For this reason I set their decision aside.
29. The remainder of this decision is my analysis of the application of the law to the circumstances of this case.

Analysis

30. I note, by way of preliminary observation, that the local authority has taken no point as a consequence of the original application failing to disclose that Mr M had an interest in the matrimonial home. There was a question on the claim form asking about any interest in property of the claimant or her partner, to which the claimant has answered "No". However, the local authority plainly knew something about this in January 2012: see the apparently unanswered property questionnaire [pages 72-7].
31. I do not accept that the actual date of completion of the sale of the matrimonial home was mid-January 2013. The completion statement and letter dated 14 December 2012 plainly state that the solicitors had the sum set out in the completion statement in their client account on that date. I do accept that there may have been a need to adjust the figures in the completion statement to account for the apparently overlooked further mortgage of £200,000 secured on the matrimonial home.

32. My analysis is of how the Housing Benefit Regulations 2006⁵ treat a significant sum held by solicitors in a client account on behalf of the partner of a claimant who is in dispute with his spouse about the division of property following the breakdown of their relationship. There appears to be no direct authority on this in either the housing benefit context or the income support context (where there is a corresponding provision).⁶
33. In determining the income and capital of a person claiming housing benefit, regulation 25 of the Housing Benefit Regulations 2006 requires the aggregation of the income and capital of the claimant and the claimant's partner.
34. This appeal is concerned solely with the computation of capital. The proceeds of the sale of a matrimonial home are plainly in the nature of capital rather than income and would fall within Regulation 44 of the Housing Benefit Regulations.
35. There has been a suggestion that the proceeds of sale held by the solicitors constitute capital jointly held within Regulation 51. Regulation 51 provides:

Capital jointly held

Except where a claimant possesses capital which is disregarded under regulation 49(5) (notional capital) where a claimant and one or more persons are beneficially entitled in possession to any capital asset they shall be treated as if each of them were entitled in possession to the whole beneficial interest therein in equal share and the forgoing provisions of this Section shall apply for the purposes of calculating the amount of capital which the claimant is treated as possessing as if it were actual capital which the claimant does possess.

36. My view is that Regulation 51 does not apply to the proceeds of sale held by a solicitor in a client account which can only be distributed with the agreement of the parties, or in accordance with an order of the court. I do not consider that such funds can properly be said to fall within the category of a capital asset to which it can be said that the two parties are "beneficially entitled in possession".
37. I have some doubts whether Regulation 51 applies to disputed matrimonial property at all. This is partly because of the difficulty of regarding such property when in dispute as constituting a capital asset to which the parties are beneficially entitled in possession, and partly because a presumption of equal shares flies in the face of the many possible divisions of property in matrimonial proceedings.
38. Money held in a joint bank account in the name of two parties might well fall within Regulation 51, since the bank would be obliged to act on the instructions of either of the account holders.⁷ But disbursement of the proceeds of sale of a matrimonial home held in circumstances such as that in the appeal before me required the agreement of both parties or an order of the court.

⁵ And the corresponding provisions of the Council Tax Benefit Regulations. Unless the context requires otherwise, my references to the Housing Benefit Regulations 2006 should be taken as including references to the corresponding provisions of the Council Tax Benefit Regulations. The Appendix to this decision sets out the corresponding provisions.

⁶ I will refer to *CH/2255/2006* [pages 179-84] in due course.

⁷ The regulation might even apply if the joint account was one which required the signatures of both parties in order to make withdrawals.

39. Because the range of shares which might result from a distribution of the proceeds of sale so held, it seems to me that the capital value of the capital prior to agreement or an order of the court would be minimal. I hesitate to say that there would be no capital value, since the circumstances are not the same as those in *R(IS) 1/03*.
40. My view is that the treatment of the proceeds of sale in circumstances such as this is governed by Regulation 49(2) of the Housing Benefit Regulations which provides:
- (2) ... any capital which would become available to the claimant upon application being made, but which has not been acquired by him, shall be treated as possessed by him but only from the date on which it could be expected to be acquired were an application to be made.
41. As I understand the law on the division of matrimonial property, where agreement cannot be reached, either party can make application to the court for the court to determine the distribution of that property. I note that Judge Lane made the following observation in giving permission to appeal:
- My understanding from a quick reading of the Family Court Practice is that, even if both parties complied with all time limits, it would take over 16 weeks to reach a Financial Dispute Resolution hearing.
42. Reference has been made to *CH/2255/2006*. In that case, the net proceeds of the sale of the matrimonial home were £47,581.52 which were held by a solicitor pending the finalisation of the divorce. Each party had by agreement drawn down £1,500 from the proceeds of sale, but the distribution of the balance was in dispute.
43. Commissioner Levenson (as he then was) addressed the application of Regulation 43(2) of the Housing Benefit Regulations 1987, which is in identical terms to the provisions of Regulation 49(2) of the Housing Benefit Regulations 2006. Commissioner Levenson said:
15. It seems to me that on the evidence that was before the tribunal, the claimant would have access to the proceeds either if she compromised her position in the negotiations with her husband or if she took proceedings to recover at least her agreed minimum share of the [proceeds] (which would have been no less than 50%) She was bound to pursue one of these courses of action in the end anyway if she wanted any money from the proceeds. This was a decision for her to make—a difficult decision no doubt and one that would be made on advice, but no more difficult than many financial decisions that have to be made in life, especially family life, and especially when family life breaks down. It cannot be right that the claimant could be in a position where, by taking a harder line in negotiations with her husband, or by deferring action to secure her entitlement, she could do more to bring herself within the eligibility criteria for means tested benefits.
44. If I understand the position correctly in this case, it was established that the claimant was entitled to at least half the proceeds of sale. What was in dispute was how much more beyond half she might be entitled to.⁸
45. The Commissioner upheld the decision of the tribunal that the claimant was not entitled to housing benefit and council tax benefit on the basis that the claimant's

⁸ That might be a basis for distinguishing the facts of the appeal before me, where there was no agreed starting point for the division of the proceeds of sale.

share in the proceeds of sale would “undoubtedly exceed the eligibility limit of £16,000.”

46. It is not entirely clear to me whether Commissioner Levenson was applying Regulation 43(2) and concluding that the time had come when the local authority could regard the claimant as having notional capital because a reasonable period for acquiring it following application had been reached, or whether he was establishing a separate basis for regarding the claimant as having capital. I do not think it can be the latter, since the paragraph is his conclusion under the heading in which he is considering the application of Regulation 43(2).
47. Regulation 49(2) offers the solution to the problem of the person with potential access to capital who does not act in a timely manner to acquire it, though the decision making process is not easy for the local authority in circumstances like those before me. The local authority is called upon to make a judgment as to the likely distribution of the proceeds of sale, and where agreement cannot be reached between the parties to the failed relationship, to decide how long it is reasonable to allow before application for the court to determine the distribution is required, and how long to allow between application for the capital and its notional acquisition.
48. Where a local authority proposes to rely on Regulation 49(2) in circumstances such as those before me, I would expect them to enquire of the claimant about the progress of negotiations on the distribution of the proceeds of sale, and perhaps to indicate that it would seem certain that the outcome would result in capital which would take the claimant out of the scope of benefit. The local authority, probably acting on advice from their legal department, would make an assessment of the likely period by which a Financial Dispute Resolution hearing would be concluded, and advise the claimant that the local authority would regard the claimant as having capital above the relevant capital threshold (taking account of any disregards which might apply) from that date. When that date materialised, the local authority could make an entitlement decision based on the possession of notional capital under Regulation 49(2).

How does this analysis affect the decisions under appeal?

49. The local authority has jumped the gun.
50. The proceeds of sale first became available in the solicitor client account on 14 December 2012. The local authority decided that the claimant had capital in excess of £16,000.00 from 17 December 2012 and so had no entitlement to benefit from that date. Whatever time scales the application of Regulation 49(2) of the Housing Benefit Regulations might require, this was plainly too soon to deem the claimant to have capital in excess of £16,000.00.
51. Since I can see no other legal basis for the local authority’s determination, I set aside the entitlement decision.
52. Since an overpayment decision requires a valid entitlement decision varying or removing entitlement to benefit, the overpayment decision also falls. I set aside the overpayment decision.

Is this an end of the matter?

53. Almost certainly not.
54. My setting aside of the two decisions made on 15 March 2013 means that the decision of 19 September 2012 is re-instated as the operative decision.⁹
55. The local authority is now able to revise or supersede that decision, and will almost certainly do so.
56. However, I do not see any basis upon which the local authority can now make a decision that there is a recoverable overpayment for the period from 17 December 2012 to 24 February 2013 (or indeed to 31 March 2013 in relation to council tax benefit), since the whole of that period would seem to me to fall within the period before the claimant can be treated as having acquired more than £16,000.00 in capital under regulation 49(2).

**Signed on the original
on 8 April 2016**

**Robin C A White
Judge of the Upper Tribunal**

APPENDIX

Corresponding provisions: housing benefit and council tax benefit

Housing Benefit Regulations 2006	Council Tax Benefit Regulations 2006
Regulation 25 (Aggregation)	Regulation 15
Regulation 44 (Calculation of capital)	Regulation 37
Regulation 49 (Notional capital)	Regulation 39
Regulation 51 (Capital jointly held)	Regulation 41

⁹ Unless there is some later decision between September 2012 and March 2013 of which I have not been told.