Appeal No. CH/2053/2016

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Poynter

DECISION

The local authority's appeal is allowed.

The making of the decision of the First-tier Tribunal given at Ipswich on 4 February 2016 under the reference SC134/15/00545 involved the making of an error on a point of law.

That decision is set aside.

The case is remitted to the First-tier Tribunal for reconsideration in accordance with the directions given immediately below. **The parties should note that those directions are addressed to them as well as to the First-tier Tribunal and specify time limits for compliance**.

DIRECTIONS

To the First-tier Tribunal

1 The appeal is to be re-considered by a judge of the First-tier Tribunal ("the new tribunal"). The judge who gave the decision dated 4 February 2016 that I have set aside is excluded from further involvement in the case.

2 The new tribunal must hold an oral hearing of the appeal and conduct a complete re-hearing of the case.

3 The new tribunal should begin by considering whether the claimant, the claimant's mother and the landlord entered into a signed agreement in the same, or similar, terms as the document that appears in the appeal papers.

4 If the new tribunal concludes that such an agreement was signed then, unless he or she also accepts new evidence which undermines the factual basis of my reasoning at paragraphs 27–33 below, the new tribunal must, as a matter of law, conclude that the claimant was not legally liable to make payments in respect of his home.

5 If the new tribunal concludes that no such agreement was signed, then he or she should make detailed findings of fact about the terms on which the claimant occupied his home and decide whether he was legally liable to make payments in respect of his home. In these circumstances, the new tribunal must have regard to what I say at paragraph 30 below as to what must be included in any written statement of reasons.

6 If the new tribunal decides that the claimant was not legally liable to make payments in respect of his home, it must then consider whether he can be treated as if he were so liable under regulation 8 of the Housing Benefit Regulations 2006. The new tribunal must follow the guidance I give at paragraphs 38–39 below when considering that issue.

7 If the new tribunal decides that the claimant was not legally liable to make payments in respect of his home, and cannot be treated as if he was so liable, then it must refuse the appeal and confirm Babergh's decision.

8 If, however, the new tribunal decides either that the claimant was legally liable to make payments in respect of his home, or that he can be treated as if her were so liable, then I advise, but do not direct, that he or she should issue a decision allowing the appeal, setting aside Babergh's decision, stating the new tribunal's conclusions on that issue and directing Babergh to make a new decision as to whether, on that basis, the claimant is entitled to housing benefit from and including Monday 13 July 2015.

To the claimant

9 You should not regard the fact that your appeal to the Upper Tribunal has succeeded as any indication of the likely outcome of the re-hearing by the FTT. Except as set out in Direction 4 above, the new tribunal will re-decide all the issues in this case and, through your representative, you should attend the hearing that I have directed and be prepared to make your case again.

10 One issue that the new tribunal may have to decide is whether it would be reasonable to treat you as if you were liable to pay the rent on your flat, even if the person who was actually liable to pay the rent was your mother. In order to decide that issue, the new tribunal will probably want to know in more detail why you are unable to live in the family home. The new tribunal will be looking at the circumstances that existed on or before 14 July 2015. The medical evidence in the papers is considerably older than that and—through your representative—you may wish to provide medical evidence that is closer in time to July 2015.

11 The new tribunal will also need evidence on which to decide how long your grandmother would have been able to afford to, and would have been prepared to, continue to pay your rent.

12 The best way to give the new tribunal that evidence would be for your grandmother to come to the tribunal with your mother and answer the judge's questions. The judge will probably want to know about any income she has coming in and how much she has in savings and other capital.

13 However, if your grandmother is not able to go to the hearing, she should write a letter to the First-tier Tribunal giving as much information as she can about those issues.

To Babergh District Council

14 You must send the First-tier Tribunal a full copy of the claim form received on 8 July 2015. The copy in the appeal papers is incomplete.

To the parties

15 The additional evidence referred to in Directions 10, 13 and 14 above must be sent to the Birmingham office of the HMCTS so that it is *received* no later than one calendar month after this decision is *sent* to the parties.

REASONS FOR DECISION

Introduction

1 No-one can be entitled to housing benefit ("HB") unless he is “liable to make payments in respect of a dwelling in Great Britain which he occupies as his home” or is treated by the HB scheme as if he were so liable. “Liable” in this context means legally liable. So, as a general rule, you can only get HB if the landlord of the property in which you live can sue you for the rent if you do not pay it.

2 In this case the First-tier Tribunal ("FTT") found that the claimant was liable to pay the rent on his home despite the apparent existence of a tenancy agreement which said that the claimant’s mother, not the claimant himself, was the tenant and that the claimant was only a “permitted occupier” of the property.

3 The local authority, Babergh District Council in Suffolk ("Babergh"), now appeals against that decision with the permission of a District Tribunal Judge.

4 The claimant’s mother—who is also his representative in this appeal—has requested an oral hearing of this appeal. As required by the Upper Tribunal’s procedural rules, I have had regard to her views. However, I do not consider that holding a hearing at this stage would further the overriding objective of dealing with the matter fairly and justly. I therefore refuse the request. If I were to hold a hearing, it would lead to delay and would be unlikely to assist me in deciding the purely legal points that arise in these proceedings. The claimant, through his mother, will have an opportunity to make any further points that need to be made about the facts of the case at the hearing before the new tribunal.

Background

5 As I am remitting this appeal to the FTT, I will try to say as little as possible about the facts, which will be for the new tribunal to determine.

6 However, to understand my decision, it is necessary to know that, at the time of the events that gave rise to this appeal, the claimant was 19 years old, unemployed, and had mental health problems which, it is said, meant that he could not live in the family home. According to his mother, he had been living in a bedsit that was not suitable given his ill-health. His mother and grandmother therefore took steps to find him a flat. They found that most landlords did not want to let to an unemployed teenager with mental health problems. Therefore the mother or grandmother had—to put it in neutral terms for the moment—to be involved in the letting arrangement.

7 The claimant's mother eventually found a two-bedroom flat at a rent of £620 per month and the claimant moved into it on 14 March 2015. The disputed issue in this case is whether his occupation of that flat was under the written tenancy agreement described above, or whether—as the FTT held—it was under a pre-existing oral agreement that the claimant was to be the tenant and his mother was to act as a guarantor.

The FTT's decision

8 The FTT's decision notice stated that the claimant was "entitled to housing benefit from 8 July 2015", the date on which Babergh received his claim. Unfortunately, that on its own was an error of law which requires me to set the FTT's decision aside.

9 HB is payable by reference to benefit weeks that begin on a Monday and end on a Sunday: 8 July 2015 was a Wednesday. As the claimant, had not moved into the property during the week in which he made his claim, the earliest date from which he could have been entitled to HB under a claim made on Wednesday 8 July 2015 was the following Monday, 13 July 2015: see regulation 76 of the Housing Benefit Regulations 2006 ("the Housing Benefit Regulations").

10 Moreover, although the decision before the Tribunal was that the claimant was not entitled to HB, the only issues that Babergh had decided were that he was not legally liable to make payments in respect of his home, and could not be treated as if he were so liable.

11 If correct, Babergh's conclusions on those issue were sufficient to support a decision that the claimant was not entitled to benefit. But when the FTT reached the opposite conclusion on the first issue, that was not a sufficient basis for a decision that the claimant *was* entitled to HB. Many people are liable to pay rent but are not entitled to HB. Before the FTT could decide that the claimant was entitled to HB, it had to consider all the other conditions of entitlement as well. It did not do so. It appears simply to have assumed that the claimant met all the other conditions.

12 However, the facts of this case are not so straightforward that that can be assumed.

13 First, the claimant was 19 and was occupying a two-room flat on his own, with occasional visits from his mother. If, as the FTT decided, he was liable to pay rent, then he would have been a private tenant and his maximum HB would fall to be

calculated under the local housing allowance ("LHA") rules: see regulations 13C and 13D of the Housing Benefit Regulations.

14 Subject to exceptions that do not appear to me to apply in this case (although I make no finding on that point), those regulations provide for single claimants under the age of 35 to have their entitlement to HB calculated at the "shared accommodation rate". That means it is calculated on the basis of the rent that would be appropriate if the claimant were living in a single bedroom in a shared house or flat in the area in which they live—technically, the "broad rental market area" ("BRMA")—rather than on the actual rent the claimant is liable to pay.

15 The claimant's home is in the Bury St Edmunds BRMA. According to Babergh, at the time of the claim, the relevant LHA "shared accommodation" rate for that Area—as determined by the rent officer—was £57.34 per week (although the figure indicated by the Valuation Office Agency website is about £7.00 higher). By contrast, the rent payable in respect of the claimant's home was equivalent to approximately £143 per week.

16 On its own, that would not have been enough to exclude the claimant from benefit. However, there is the additional problem that (according to the evidence that the FTT accepted), the claimant's grandmother had been paying his rent for him for three or four months at the time of his claim and (according to the claim form) the claimant's mother and grandmother had also been paying his utility bills. That brings into play the notional income rules in regulation 42 of the Housing Benefit Regulations.

17 So far as is relevant, regulation 42(6)(b) provides as follows:

> "(6) Any payment of income … made—
>
> (b) to a third party in respect of a single claimant … shall … be treated as possessed by that single claimant … to the extent that it is used for the food, household fuel or, subject to paragraph (13), rent or ordinary clothing or footwear of that single claimant…or is used for any council tax or water charges for which that claimant … is liable"

and regulation 42(13) provides that:

> "(13) In paragraph (6) "rent" means eligible rent …"

In other words, it is arguable—putting it at its lowest—that regulation 42 treated the claimant as having an income of at least £57.34 per week in respect of the rent his grandmother was paying, and a further weekly income to reflect what his mother and grandmother were paying towards his utilities. To support the FTT's decision that the claimant was entitled to HB from 8 July 2015, it would have been necessary for the written statement of reasons to record findings of fact about the total level of claimant's notional income and explain why—given the low level of his eligible rent under the LHA rules—that level of income did not extinguish his entitlement to HB.

18 The written statement of reasons did not contain such findings (which is unsurprising because there was no evidence on which they could have been made). Neither did it discuss the issues set out in paragraphs 13–16 above, even though both were clearly apparent on the evidence and relevant to the FTT's decision as set out on the decision notice.

The decision of the Upper Tribunal

19 In those circumstances, the FTT was wrong in law to decide that the claimant was entitled to HB.

20 Even if the FTT's decision was otherwise legally correct, the decision notice should have done no more than allow the appeal, set aside Babergh's decision, record a finding that the claimant was liable to make payments in respect of the dwelling he occupied as his home and direct Babergh to reconsider the claim for HB on that basis.

21 For those reasons, I set aside the FTT's decision. It is not expedient that I should substitute my own decision and I therefore remit the case to the FTT for reconsideration in accordance with the directions above and the guidance below.

22 As I am setting aside the decision on other grounds, it is not necessary to dwell on the other errors the FTT made. However, it is necessary to record that the FTT's decision was not otherwise legally correct.

23 As Upper Tribunal Judge Lane pointed out in the written observations she gave as part of the case management of this appeal, the written statement of reasons failed to give adequate reasons to explain why the FTT treated the written agreement as unsigned, given the uncontradicted evidence of the claimant's mother that an agreement in that form had been signed.

24 There were also substantive errors as to the law of contract. Rather than analyse these in detail, I have decided to set out the contractual issues as part of my guidance to the new tribunal as to how to approach those issues at the re-hearing.

25 Finally, in an apparent attempt to "appeal-proof" the FTT's decision the written statement of reasons asserts that various matters are questions of fact. That is as may be. However, the rules about when a contract is formed, what is or is not a "sham", and when it is possible for a party to escape from his or her obligations under a written agreement on the grounds that it does not reflect his or her subjective intentions, are rules of law. The FTT misapplied those rules in this case.

Guidance to the new tribunal.

26 All issues of fact and—subject to what I say at paragraph 31 below—law must now be re-determined by the new tribunal.

27 The first issue for it to decide is the status of the agreement, a copy of which appears at pages 25-46 of the papers.

28 The previous FTT decision proceeded on the basis that the agreement was unsigned: in effect, a draft. Although it is a matter for the new tribunal, I wonder whether that was correct. It seems to me that the document may not be a copy of an unsigned document but rather what is sometimes called a "conformed copy" of a signed one. In other words, it may be a typed copy of a document, the original of which contained manuscript additions (including signatures). Page 44 of the appeal papers records that it has been signed by the claimant's mother and (as permitted occupier) the claimant. Page 45 records that it has been signed on or behalf of the landlord. This is not that unusual. The copies of this decision that are sent to the parties will not include a facsimile of my signature, but they will nevertheless be true copies of a signed document.

29 However, I accept that there are aspects of the document—not the least of which is that it is undated, see page 25—from which the new tribunal could conclude that it is only a draft rather than a copy of a concluded agreement. If that is its conclusion, it must then consider whether the landlord, the claimant's mother and the claimant entered into an agreement in those (or similar) terms.

30 If it decides that they did not, any written statement of reasons must explain why the new tribunal reached that decision despite the evidence of the claimant's mother at the previous hearing that the document was signed and the inherent improbability that a letting agent which has gone to the trouble of drafting a standard tenancy agreement containing 22 clauses and countless sub-clauses over 22 pages would let someone into possession of a flat without signing that agreement. Any written statement of reasons will also need to explain why the new tribunal has not accepted the evidence of the emails that the claimant's mother has produced to the Upper Tribunal in the course of this appeal (pages 113-114). That evidence tends to show that—as one would expect—the agents were insisting that the agreement be signed as a precondition of the claimant being allowed into occupation.

31 However, if the new tribunal concludes that the parties did sign such an agreement, then—unless the evidence before the new tribunal is radically different from the evidence before the Upper Tribunal—it is that agreement that, as a matter of law, governs their obligations. That would, again as a matter of law, have the effect that the claimant's mother, rather than the claimant himself, was the tenant of, and legally liable to pay rent for, the property. I so direct the new tribunal.

32 In particular:

(a) On the current evidence it is not possible to conclude that there was a pre-existing agreement by word of mouth under which the landlord agreed to grant a tenancy to the claimant, the claimant agreed to take it and the mother agreed to guarantee the claimant's obligations. The existence of such an agreement is inconsistent with the mother's evidence to the Upper Tribunal that:

> "When I asked for a copy of the tenancy agreement to read through in advance, I was directed to their standard tenancy agreement example on their website".

If the parties had already concluded an agreement by word of mouth, the letting agent's standard terms would have been irrelevant. The emails referred to at paragraph 30 above are also inconsistent with there being any pre-existing oral agreement. On the available evidence, there was no agreement before the written agreement was signed (if it was), only negotiations.

(b) It makes no difference if the claimant's mother did not intend to become the tenant of the property, but only the guarantor. Whether or not a contract has been formed, and what its terms are, are judged on an objective basis. The question is not what the mother *intended* but what a reasonable person would conclude she had *agreed*. A reasonable person would conclude that by signing the agreement (if she did), she intended to be bound by its terms, particularly as, immediately above her signature (if she signed it), the document stated:

> "You should read this document carefully and thoroughly. Once signed and dated, this Agreement will be legally binding and may be enforced in a court. Make sure that it does not contain Terms that you do not agree with and that it does contain everything you want to form part of this Agreement.
>
> If you are in any doubt about the content or effect of this Agreement, it is recommended that you seek independent legal advice before signing."

To put the matter directly, if the claimant and his mother did not intend that the mother should be the tenant of the property and the claimant should be the permitted occupier, then they should not have signed a document whereby they agreed unambiguously that that would be the case.

(c) In any event, it is not merely the intentions of the claimant and his mother that are relevant. There is also the matter of what the landlord intended; or rather agreed to. The previous tribunal's decision notice stated that "in all likelihood" the tenancy agreement did not properly reflect the landlord's intentions. There was no evidence to support such a finding. Objectively, the landlord, acting through her agents offered the claimant's mother a tenancy in the terms of the written agreement and (if she did sign the agreement) the mother accepted that offer and a binding contract was formed. The letter from the landlord that has now been produced (page 115) does not really take matters further. It confirms that she did intend that the claimant's mother should sign the tenancy agreement and, to that extent, supports Babergh's case. The rest of the letter shows, at most, that, understandably, the landlord (who is not a lawyer) has an imperfect grasp of the law about whether someone is a tenant.

(d) It cannot be said that the tenancy agreement was a sham. In HB cases, questions about whether a document is a sham normally arise where *both* the parties (or *all* the parties if there are more than two) to an agreement

bring a document into existence that purports to record that agreement but in fact misstates its terms with a view to misrepresenting those terms to the local authority in support of an HB claim. In this case, the considerations in the previous paragraph establish that the landlord, again acting through her agents, intended to contract with the claimant's mother on the terms set out in the written agreement, so there is no mutual intention to mislead.

(e) I accept that a document can also be sham where the party with greater knowledge and/or negotiating power unilaterally misleads the other party by causing the document to misrepresent the legal effects of what the parties have agreed. However, that is not the case here: the tenancy agreement creates a tenancy between the landlord and the claimant's mother, which is what it says it does.

(f) The FTT also raised the possibility that a written agreement may be invalid on the basis that it is "an inaccurate statement of what was the true substance of the agreement between the parties". The written statement of reasons cites a passage from the judgment of Slade LJ in the Court of Appeal in *Street v Mountford* (1984) 16 HLR 27 that was quoted by Lord Brightman giving the judgment of the House of Lords in the same case ([1985] A.C. 809). However, the House of Lords overruled the decision of the Court of Appeal in that case and the judgment of Slade LJ was not being quoted with approval.

(g) I accept, of course, that in some cases contracts can be void for mistake and that one such case arises where one party is mistaken (*e.g.,* as to the capacity in which she is entering into the contract) and the other party has induced the mistake, or was aware of it but did not correct it. However, even if one were to accept that this is such a case, there is a further problem. The disputed agreement creates a tenancy, which is an estate in land and therefore potentially affects the rights of people who are not party to it. Even if it does not reflect the agreement between the parties, it cannot in my judgment simply be disregarded. For it to cease to have its stated effect of making the claimant's mother the tenant of the property, it would first need to be rectified by a court. The principle is explained at paragraph 16-027 of Snell's *Equity* (33rd edition):

> "The decree [i.e. of rectification] has retrospective force. The effect is not that the instrument continues to exist, though with a parol variation, but that "it is to be read as if it had been originally drawn in its rectified form", …. Thus, existing transactions which only the rectified instrument would have authorised become retrospectively valid. *But until rectification has been decreed, the instrument is binding as it stands; "so long as it remains uncorrected, it is no defence to say, that it does not truly ascertain the real contract of the parties*"" (my emphasis).

(I have removed the footnotes from the quotation. However, the words that are quoted in the final sentence are those of Lord St Leonards LC in *Law v*

Warren (1843) Dr.t.Sugd. 31 at paragraph 41). The agreement in this case has not been rectified

(h) It is irrelevant that—on the basis that the tenant only visits rather than lives in the property—some of the tenant's covenants in the written agreement may not be efficacious. In my judgment, paragraphs 12-16 of written statement of reasons considerably overstate the potential problems. To take one of the examples given, an obligation "to take reasonable precautions not to overload the electrical circuits at the property", includes an obligation to take reasonable precautions to ensure that other occupants of, and visitors to, the property do not do so either.

(i) But suppose those problems did exist. The consequence would be that the landlord had made a bad deal, not that no deal had been made. Moreover, the written agreement, even if imperfect, offered the landlord far more protection than she would have had under a word-of mouth agreement that included no tenant's covenants at all except those implied by law. Therefore if, as the written statement of reasons asserts, "[i]t is intrinsically unlikely that the landlord intended to enter into an agreement which did not protect her", that makes it more probable that she intended to enter into the written agreement than that she intended to make the oral contract that the FTT found to exist.

(j) It is also irrelevant that the written agreement asserts that it is an assured shorthold tenancy when, given that it was not intended that the tenant should live in the property, that may not have been so. All that that establishes is that the parties were mistaken as to one of the legal consequences of the agreement they reached. It does not establish that the written agreement is not an agreement or that the parties to it contracted in a different capacity from that stated.

33 As a final check on the conclusion expressed in paragraph 31 above, I go back to basics. As I said at the beginning of these reasons, we are discussing legal liability and a person who is legally liable to pay rent can be sued for that rent if it is not paid. If this dispute did not occur in the context of a claim for HB—if, instead, this was a County Court action to recover unpaid rent—I do not think (again, on the basis that the tenancy agreement was indeed signed) there would be any doubt that the landlord was legally entitled to sue the claimant's mother for the rent and was not legally entitled to sue the claimant.

34 For all those reasons, I have directed (Direction 4 above), that if the new tribunal finds that the claimant, his mother and the landlord's agent did sign a written agreement in the terms set out in the papers, it must conclude that the claimant was not liable to make payments in respect of his home.

35 That, however, is not the end of the matter. Under regulation 8 of the Housing Benefit Regulations, some people who are not legally liable to make payments in respect of a dwelling can be treated for HB purposes as if they were so liable. So far as is relevant to this case, regulation 8 states:

> "**Circumstances in which a person is to be treated as liable to make payments in respect of a dwelling**
>
> **8**.—(1) … the following persons shall be treated as if they were liable to make payments in respect of a dwelling—
>
> (a)-(b) …
>
> (c) a person who has to make 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) he was formerly the partner of the person who is so liable; or
>
> (ii) he is some other person whom it is reasonable to treat as liable to make the payments;"

36 Babergh have submitted that to apply regulation 8(1)(c) in this case would require "a very liberal interpretation of the regulation". I am not sure I agree: a *literal* interpretation might be enough. The claimant's mother (who, assuming the agreement was signed, is the liable person) is not making the payments and—although the decision is for the new tribunal, not me—I cannot immediately see why it would not be reasonable to treat the claimant as liable to make the payments. He was, after all, an adult and the main occupier of the property. In so saying, I respectfully agree with Upper Tribunal Judge Hemingway that "the use of the term "reasonable" within regulation 8(1)(c)(ii) is to be regarded as meaning reasonable in all the circumstances and in light of the overall purpose of the housing benefit scheme" (see *FK v Wandsworth Borough Council (HB)* [2016] UKUT 0570 (AAC) at paragraph 21).

37 However, whether it can be said that the claimant is "a person who has to make payments if he is to continue to live in the home" is an issue on which further findings of fact are required. What exactly did the claimant's grandmother agree to pay? Does she have the financial resources to continue doing it indefinitely? If it was more probable than not that she would have to, or would choose to, stop paying the rent within a reasonable period (say, the term of the tenancy) would that mean that the claimant could no longer continue to live in the home?

38 To satisfy regulation 8(1)(c), it is not enough for the claimant to show that he would have to make payments if he is to continue to live in the home. He also has to show that that is *because the person liable to make them is not doing so.* In my judgment, that additional requirement is met if failure of the mother, as tenant, to make the payments is a, non-trivial, cause of the claimant's need to do so. It does not matter that there may also be another cause (such as the grandmother ceasing to make the payments).

39 Finally it is not relevant that the claimant may not be able to continue to live in the home even if he is treated as liable to make payments (*i.e.,* because any HB is unlikely to cover more than a small percentage of the contractual rent). The opening

words of regulation 8(1)(c) are satisfied if it is a necessary condition of the claimant's continuing to live in the home that he should make the payments. It does not also need to be a sufficient condition.

(Signed on the original)

Richard Poynter
Judge of the Upper Tribunal

13 January 2017