Neutral Citation Number: [2025] UKUT 125 (AAC)
Appeal No. UA-2024-000493-HB

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

Capital Housing Association Limited

Appellant

- v -

London Borough of Ealing

First Respondent

and

SR

Second Respondent

Before: Upper Tribunal Judge Wikeley
Upper Tribunal Judge Wright
Upper Tribunal Judge Smith

Hearing date: 9 January 2025

Representation:
Appellant: Bill Irvine, accountant
First respondent: Francis Hoar of counsel
Second respondent: Litigant in person

On appeal from:
Tribunal: First-tier Tribunal (Social Entitlement Chamber)
Tribunal Case No: SC242/22/00076
Tribunal Venue: Fox Court, London
Decision Date: 30 November 2023

SUMMARY OF DECISION

This is a decision by a panel of three Upper Tribunal judges about whether an overpayment of housing benefit paid to a landlord was recoverable from the landlord. The legal issue of special difficultly for which the three-judge panel had been appointed did not in the end arise. The appeal is dismissed because the arguments made by the landlord were no more than evidential reargument. The decision addresses the scope of regulation 101(2) of the Housing Benefit Regulations 2006.

KEYWORD NAME (Keyword Number) 16 (housing benefit); 16.7 (recovery of overpayments)

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judges follow.

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

REASONS FOR DECISION

Introduction

1. This appeal is about an overpayment of housing benefit that arose when the housing benefit continued to be paid to the landlord after the tenant, who claimed the housing benefit to meet her rental obligations under her tenancy with the landlord, had moved out of the property.

2. The appeal therefore concerns from whom a recoverable overpayment of housing benefit may be sought under regulation 101 of the Housing Benefit Regulations 2006 (SI 2006 No. 213, as amended) ("the HB Regs").

3. The landlord is the appellant on this appeal to the Upper Tribunal, as it was before the FTT. The housing benefit authority, the London Borough of Ealing, is the first respondent and the tenant (now ex-tenant) is the second respondent.

4. At one stage it had been thought that the appeal might also give rise to potentially difficult issues concerning the statutorily prescribed means of notifying a change of circumstances found in regulations 88, 88A and Schedule 11 to the HB Regs. For the reasons which we give below, those issues do not arise for decision on this appeal. In fact, the legal issues on this appeal cover a short compass and are relatively straightforward.

5. In order to understand the decision under appeal to the First-tier Tribunal ("the FTT"), it is necessary to first set out the relevant parts of the statutory scheme.

The statutory scheme

6. The primary source of entitlement to housing benefit is found in section 130(1) of the Social Security Contributions and Benefits Act 1992, which provides relevantly as follows:

> "**Housing benefit.**
> **130**. (1) A person is entitled to housing benefit if—
> (a) he is liable to make payments in respect of a dwelling in Great Britain which he occupies as his home….."

7. Section 5 of the Social Security Administration Act 1992 authorises the making of regulations concerning claims for and payments of housing benefit. It provides of relevance to this appeal the following:

> "**Regulations about claims for and payments of benefit**
> **5**. (1) Regulations may provide-
>
> (j) for notice to be given of any change of circumstances affecting the continuance of entitlement to such a benefit or payment of such a benefit or of any other change of circumstance of a prescribed description…"

8. Section 75 of the Social Security Administration Act 1992 deals with housing benefit overpayments. It provides for the following, insofar as is relevant to this appeal:

> "**Overpayments of housing benefit**
> **75**. (1) Except where regulations otherwise provide, any amount of housing benefit determined in accordance with regulations to have been paid in excess of entitlement may be recovered either by the Secretary of State or by the authority which paid the benefit.
> (2) Regulations may require such an authority to recover such an amount in such circumstances as may be prescribed.
> (3) An amount recoverable under this section shall be recoverable—
> (a) except in such circumstances as may be prescribed, from the person to whom it was paid; and
> (b) where regulations so provide, from such other person (as well as, or instead of, the person to whom it was paid) as may be prescribed."

9. The last provision in a statute to which we need to refer is paragraph 6(6) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000, which sets out the following in relation to housing benefit:

> "**Appeal to First-tier Tribunal**
> 6. (6) Where any amount of housing benefit…..is determined to be recoverable under or by virtue of section 75…of the Administration Act…, any person from whom it has been determined that it is so recoverable shall have a right of appeal to the First-tier Tribunal."

10. The detail about entitlement to housing benefit, notification of changes of circumstances and overpayments of that benefit is found in the HB Regs. The relevant parts of the HB Regs are as follows:

> "**Duty to notify changes of circumstances**
> **88**.—(1)…..if at any time between the making of a claim and a decision being made on it, or during the award of housing benefit, there is a change of circumstances which the claimant, or any person by whom or on whose behalf sums payable by way of housing benefit are receivable, might reasonably be expected to know might affect the claimant's right to, the amount of or the receipt of housing benefit, that person shall be under a duty to notify that change of circumstances by giving notice... to the designated office—
> (a) in writing; or

(b) by telephone—

(i) where the relevant authority has published a telephone number for that purpose or for the purposes of regulation 83 (time and manner in which claims are to be made) unless the authority determines that in any particular case or class of case notification may not be given by telephone; or

(ii) in any case or class of case where the relevant authority determines that notice may be given by telephone; or

(c) by any other means which the relevant authority agrees to accept in any particular case.

Notice of changes of circumstances given electronically

88A. (1) A person may give notice of a change of circumstances required to be notified under regulation 88 by means of an electronic communication in accordance with Schedule 11.

Meaning of overpayment

99. In this Part, "overpayment" means any amount which has been paid by way of housing benefit and to which there was no entitlement under these Regulations (whether on the initial decision or as subsequently revised or superseded or further revised or superseded) and includes any amount paid on account under regulation 93 (payment on account of a rent allowance) which is in excess of the entitlement to housing benefit as subsequently decided.

Recoverable overpayments

100.(1) Any overpayment, except one to which paragraph (2) applies, shall be recoverable.

(2) Subject to paragraph (4) this paragraph applies to an overpayment which arose in consequence of an official error where the claimant or a person acting on his behalf or any other person to whom the payment is made could not, at the time of receipt of the payment or of any notice relating to that payment, reasonably have been expected to realise that it was an overpayment.

(3) In paragraph (2), "overpayment which arose in consequence of an official error" means an overpayment caused by a mistake made whether in the form of an act or omission by—

(a) the relevant authority;

(b) an officer or person acting for that authority;

(c) an officer of—

(i) the Department for Work and Pensions; or

(ii) Revenue and Customs,

acting as such; or

(d) a person providing services to the Department for Work and Pensions or to the Commissioners for Her Majesty's Revenue and Customs, where the claimant, a person acting on his behalf or any other person to whom the payment is made, did not cause or materially contribute to that mistake, act or omission….

Person from whom recovery may be sought

101. (1) For the purposes of section 75(3)(a) of the Administration Act (prescribed circumstances in which an amount recoverable shall not be recovered from the person to whom it was paid), the prescribed circumstance is—

(a) housing benefit has been paid in accordance with regulation 95 (circumstances in which payment is to be made to the landlord) or regulation 96 (circumstances in which payment may be made to a landlord);

(b) the landlord has notified the relevant authority or the Secretary of State in writing that he suspects that there has been an overpayment;

(bb) the relevant authority is satisfied that the overpayment did not occur as a result of any change of dwelling occupied by the claimant as his home;

(c) it appears to the relevant authority that, on the assumption that there has been an overpayment—

(i) there are grounds for instituting proceedings against any person for an offence under section 111A or 112(1) of the Administration Act (dishonest or false representations for obtaining benefit); or

(ii) there has been a deliberate failure to report a relevant change of circumstances contrary to the requirement of regulation 88 (duty to notify a change of circumstances) and the overpayment occurred as a result of that deliberate failure; and

(d) the relevant authority is satisfied that the landlord—

(i) has not colluded with the claimant so as to cause the overpayment;

(ii) has not acted, or neglected to act, in such a way so as to contribute to the period, or the amount, of the overpayment.

(2) For the purposes of section 75(3)(b) of the Administration Act (recovery from such other person, as well as or instead of the person to whom the overpayment was made), where recovery of an overpayment is sought by a relevant authority—

(a) subject to paragraph (1) and where sub-paragraph (b) or (c) does not apply, the overpayment is recoverable from the claimant as well as the person to whom the payment was made, if different;

(b) in a case where an overpayment arose in consequence of a misrepresentation of or a failure to disclose a material fact (in either case, whether fraudulently or otherwise) by or on behalf of the claimant, or by or on behalf of any person to whom the payment was made, the overpayment is only recoverable from any person who misrepresented or failed to disclose that material fact instead of, if different, the person to whom the payment was made; or

(c) in a case where an overpayment arose in consequence of an official error where the claimant, or a person acting on the claimant's behalf, or any person to whom the payment was paid, or any person acting on their behalf, could reasonably have been expected, at the time of receipt of the payment or of any notice relating to that payment, to realise that it was an overpayment, the overpayment is only recoverable from any such

person instead of, if different, the person to whom the payment was made…..
(3A) For the purposes of paragraph (2)(c), "overpayment arose in consequence of an official error" shall have the same meaning as in regulation 100(3) above.

SCHEDULE 11
Electronic Communication

PART 2
Electronic Communication – General Provisions

2(2) A person other than the relevant authority may use an electronic communication in connection with the matters referred to in sub-paragraph (1) if the conditions specified in sub-paragraphs (3) to (6) are satisfied.
(3) The first condition is that the person is for the time being permitted to use an electronic communication by an authorisation given by means of a direction of the Chief Executive of the relevant authority.

(4) The second condition is that the person uses an approved method of—
(a) authenticating the identity of the sender of the communication;
(b) electronic communication;
(c) authenticating any claim or notice delivered by means of an electronic communication; and
(d) subject to sub-paragraph (7), submitting to the relevant authority any claim, certificate, notice, information or evidence.
(5) The third condition is that any claim, certificate, notice, information or evidence sent by means of an electronic communication is in a form approved for the purposes of this Schedule.
(6) The fourth condition is that the person maintains such records in written or electronic form as may be specified in a direction given by the Chief Executive of the relevant authority.
(7) Where the person uses any method other than the method approved of submitting any claim, certificate, notice, information or evidence, that claim, certificate, notice, information or evidence shall be treated as not

Relevant factual background

The housing benefit overpayment

11. We can take the relevant factual background fairly briefly from the FTT's key findings of fact, none of which are disputed on this further appeal to the Upper Tribunal.

12. On 18 January 2018, the second respondent (who will we refer to from now on as the "the tenant", even though the undisputed basis of the decision under appeal is that she had moved out of the relevant property she was renting) was

granted a tenancy of a flat in the London Borough of Ealing ("the flat") by Capital Housing Association Limited ("the landlord"). The tenant was subsequently awarded housing benefit in respect of that tenancy by the London Borough of Ealing ("Ealing"). Importantly, the award of housing benefit was paid directly to the landlord.

13. In early December 2018 Ealing received a telephone call from the tenant in which she stated she had vacated the flat. The FTT found that the tenant had in fact ceased to occupy the flat as her home on 29 November 2018 and that the landlord was immediately aware of this fact. The tenant's award was suspended by Ealing on 24 December 2018 and the landlord was informed of this. On 24 January 2019, Ealing reinstated the tenant's award of housing benefit and a letter was issued to the landlord to this effect. Further to this, on 11 March 2019 a system notification letter was issued by Ealing to the landlord stating that the tenant's housing benefit for the flat had been re-assessed and the benefit would be paid directly to the landlord. Another system notification letter to the same effect was issued on 9 March 2020.

14. On 29 July 2021, the landlord contacted Ealing by telephone to state that the tenant had vacated the flat on 29 November 2019 (sic) and that an email to that effect had been sent by the landlord, to Ealing on 27 May 2020. Following this telephone call, the tenant's award of housing benefit was suspended with effect from 29 November 2019. Ealing then noted, through a check of its council tax records, that the tenant had in fact moved out of the flat on 29 November 2018, and not 2019 as the landlord had stated. As a result, the award was further suspended back to 28 November 2018.

15. By its decision of 31 July 2021 (as subsequently revised on 16 December 2021, though that revision is not material for the purposes of the issues on this further appeal to the Upper Tribunal), Ealing made the following five decisions (as identified by the FTT):

    (i) the tenant was not entitled to housing benefit in relation to the flat after 2 December 2018;
    (ii) as a consequence, on various dates between 18 December 2018 and 15 July 2021 the landlord had been overpaid housing benefit by Ealing of £38,685.09 in respect of the flat: per regulation 99 of the HB Regs;
    (iii) of this overpaid amount, £37,805.89 was a recoverable overpayment: per regulation 100 of the HB Regs;
    (iv) this recoverable overpayment was recoverable from both the tenant and the landlord: per regulation 101(2) of the HB Regs; and
    (v) Ealing had decided to recover the recoverable overpayment only from the landlord.

16. It was this 31 July 2021 decision (as revised) which the landlord appealed to the FTT. We emphasise that Ealing's decision included that the recoverable overpayment was recoverable under regulation 101(2) of the HB Regs from **both** the tenant and the landlord.

The First-tier Tribunal's decision

17. As the FTT correctly noted, and is not disputed, the (fifth) decision as to whether, and from whom, to recover the recoverable overpayment is not an appealable decision: see, if needed, the Tribunal of Commissioner's decision in *R(H) 6/06* at paragraphs [33]-35].

18. More importantly for the purposes of this appeal, the FTT noted, and again this is not disputed (as Mr Irvine made clear to us), the landlord's appeal to the FTT related only to decision (iv) in Ealing's decision(s) of 31 July 2021. As to that appealed decision, the FTT's decision of 30 November 2023 was in the following terms:

> "The decision of the London Borough of Ealing ("Ealing") dated 31 July 2021 (as revised on 16 November 2021) that Capital Housing Association Ltd…is a person from whom the overpayments totalling £37,805.89 may be sought is confirmed."

19. In its decision notice the FTT set out that the only issue raised by the landlord on its appeal was whether it was "a person from whom recovery of the overpayments may be sought". It is plain that by this the landlord meant, and the FTT understood it as meaning, whether the landlord came within regulation 101(2) of the HB Regs. The important effect of this argument, if correct, was (and is) that the overpayment was only recoverable under regulation 101(2) from the tenant. As will be seen, that is the sole determinative issue on this appeal, as it was before the FTT. It was no part of the landlord's appeal before the FTT that it met all the conditions in regulation 101(1) of the HB Regs so as to mean the overpayment was not recoverable from it. (Indeed, regulation 101(1)(bb) would fatally undermine any such argument on the facts of this case.)

20. The FTT noted, correctly, that the fact that the tenant had ceased to occupy the flat was a change of circumstances which both the tenant and the landlord were required to notify to Ealing under regulation 88(1) of the HB Regs.

21. As we have set out above, the means by which changes of circumstance notifications can be made to a housing benefit authority are governed by regulations 88(1) and 88A(1) and Schedule 11 in the HB Regs. These involve giving the designated office notice, firstly, in writing, or, secondly, by telephone where the housing benefit authority has published a telephone number for that purpose or in any case or class of case where that authority decides that notice may be given by telephone, or, thirdly, by any other means which the housing benefit authority accepts in any particular case. Fourthly, under regulation 88A(1) notice of a change of circumstances may be made by electronic communication in accordance with Schedule 11 to the HB Regs. The key relevant feature of Schedule 11 is that it allows the notification of a change of circumstances by electronic means (e.g., by email) only if the Chief Executive of the relevant (housing benefit) authority has permitted it do so by "an authorisation given by means of a direction of [that] Chief Executive": per paragraph 2(3) of Schedule 11.

22. In addressing whether Ealing had been notified that the tenant had ceased to occupy the flat as her home, the FTT found that the tenant had done so when she telephoned Ealing on 7 December 2018. It also found that that telephone call fell within regulation 88(1)(b)(i) of the HB Regs. This was because the tenant by that telephone call had told Ealing she had moved out of the London Borough of Ealing and that was one type of change of circumstance that Ealing allowed to be reported to it by telephone.

23. The FTT went on to agree with Ealing that the payments of housing benefit made after 7 December 2018 were overpayments of benefit (because the tenant was no longer occupying the flat as her home and so ceased to be entitled to housing benefit for the flat). The FTT also agreed with Ealing that those post 7 December 2018 overpayments arose as a consequence of official error under regulation 100(3) of the HB Regs. That 'official error' was Ealing's failure to act on the information provided to it by the tenant on 7 December 2018. This part of Ealing's decision was not under appeal to the FTT.

24. Having arrived at this stage in the decision making process, the FTT concluded that the landlord was "the only person who, on the date of each of the overpayments made after 07/12/2018, could reasonably have been expected to realise that the payments which were being received were overpayments". The FTT understood the landlord not to dispute this. But even if the landlord had disputed this point, the FTT said it would have decided "this point against [the landlord] given it had access to Ealing's payment schedules and for all the reasons set out in section 7 of Ealing's appeal response".

25. The FTT concluded that as a result "the overpayments made after 07/12/2018 are recoverable from [the landlord] only". We observe at this stage that, on the face of it, this is a different result from the (fourth) decision of Ealing that was under appeal and against which the FTT had refused the landlord's appeal.

26. The FTT then addressed an issue it considered was not necessary to its decision. This was whether there had been a failure to disclose by the landlord. On this issue the FTT decided on the evidence before it that the landlord was required to notify "Ealing's Housing Benefit Service", as opposed to any other part of Ealing Council, of any changes to its tenants' circumstances. The FTT had regard to Ealing's webpage, through which Ealing's landlord portal was accessed at the relevant time. That webpage was headed "Information for landlords". It included a section headed "Your duties, responsibilities and rights" in which landlords were instructed "You must notify us in writing of any change in your tenant's circumstances". Underneath this there was a link labelled "Tell us now" which led to a MyAccount sign-in page, and on the right of that page there was a box with the text "Benefits service….Ealing….".

27. On the basis of the above and other evidence, the FTT reached the following conclusions:

(i) the designated office [for the purposes of regulation 88(1) of the HB Regs] was the office of Ealing's Housing Benefit Service located at Perceval House in Ealing;
(ii) only one telephone number was published for the purposes of regulation 88(1)(b) of the HB Regs, and Ealing had decided that this telephone number could only be used to report (a) if the person was reporting that they were moving, or had moved, out of the borough of Ealing, or (b) if the change being reported was a death;
(iii) other than these two changes, there were no other cases or class of case for which Ealing had decided that notice could be given of a change by telephone under regulation 88(1)(b);
(iv) for the purposes of regulation 88(1)(c) and 88A(1) of the HB Regs, Ealing had (only) agreed to the notification of changes of circumstances being made by post to the Benefits Service postal box address or by use of the MyAccount online change of circumstances form.

28. From this the FTT reasoned and found as follows:

(i) given the terms of regulation 88A(1) of the HB Regs, the phrase "in writing" in regulation 88(1) of the HB Regs had to be interpreted as excluding electronic communications;
(ii) there was no evidence under regulation 88(1)(c) of the HB Regs that Ealing had agreed to another means of communication in this particular case or a class of case into which this case fell;
(iii) under Schedule 11 to the HB Regs, although there was no direct evidence to this effect, it was to be inferred that the Chief Executive had given a direction authorising the use of 'MyAccount' to notify change of circumstances;
(iv) save for this, on the evidence before the FTT no other form of electronic communication had been authorised by Ealing's Chief Executive; and
(v) given all of the above, there were only a limited number of means by which the landlord could discharge its regulation 88(1) duty, and it was no part of the landlord's case on its appeal to the FTT that it had in fact used any of these means to notify Ealing of the tenant's departure from the flat.

Appeal to the Upper Tribunal

29. Permission to appeal was granted by Upper Tribunal Judge Wikeley on 20 May 2024. A direction that the matter be heard by a three-judge panel of the Upper Tribunal, made by the Chamber President of the Administrative Appeals Chamber on 24 June 2024. That direction was made on the basis that the appeal raised a question of law of special difficulty or an important point of principle practice, namely (inter alia) the issue of the proper construction of regulations 88 and 101 of the HB Regs.

30. The appeal was heard in the Rolls Building, London on 9 January 2025. The landlord was represented by Mr Bill Irvine, who is an accountant and not a lawyer. The authority was represented by Mr Francis Hoar of Counsel. The tenant was present at the appeal hearing, but was not represented.

Analysis and conclusion

31. Through Mr Irvine, the landlord's argument before us consisted of two broad points.

32. The first point was that the overpayment was not an official error overpayment because it had been caused by the tenant's failure to notify Ealing that she had moved out of the flat. In relation to this, Mr Irvine argued that Ealing had originally accepted that the tenant had failed to report this change to it. He also argued that the sole requirement on the tenant was provided for in Ealing's notification letters, that was limited to reporting change of circumstances in writing or by the MyAccount facility, and the tenant had done neither of these. Notification by telephone, moreover, was not open to the tenant. This was for four inter-related reasons: (i) that was not an option for which provision had been made in Ealing's notices, (ii) Ealing had not relied on this as a possibility at earlier stages of its decision-making, (iii) the policy allowing for notification by telephone in certain defined circumstances had not been raised by Ealing until the final hearing before the FTT, and (iv) Ealing ought to have been bound legally only by the types of notifications it accepted in its notification letters.

33. The second point argued by Mr Irvine was that the landlord's telephone and email notifications of the tenant having vacated the flat were sufficient. No concerns had been raised by Ealing in the past about the landlord using email as a permissible form of notification of changes. Ealing had also accepted notification in the past by telephone from the landlord.

34. Neither of these arguments assist the landlord. Firstly, they are no more than evidential reargument. It was for the FTT to hear and consider these evidential points, as it did. Absent an error of law, which neither of these points show, it is not for the Upper Tribunal on appeal (as Mr Irvine wrongly thought) to redecide these evidential issues on their merits. On the evidence before it and for the reasons it gave, the FTT was entitled to make the findings and arrive at the conclusions which it did.

35. Second, the FTT's role was not to review, akin to a judicial review, whether Ealing had lawfully arrived at its decision. Nor was it required to hold that Ealing was bound by any earlier views or decisions Ealing may have taken. The FTT's role was to stand in the shoes of Ealing and make afresh, and from an independent perspective, the decision or decisions which ought to have been made at the time of Ealing's decisions: see paragraph [19] of the Tribunal of Commissioners' decision in *R(IB)2/04* and the case law cited therein.

36. This appeal could stop and be dismissed at this point as none of the landlord's arguments show any error of law in the FTT's decision. The FTT's decision involved a careful consideration of all the relevant evidence and made findings of fact to which the FTT was entitled to come on all the evidence before it; findings which were rationally and properly based on the evidence it heard from the tenant, the landlord and Ealing. Those findings included, in particular, what was

said in the telephone call the tenant made to Ealing on 7 December 2018 and whether that telephone call was a form of telephone notification which Ealing had permitted under regulation 88(1)(b)(i) of the HB Regs. And as the FTT found, these findings were fatal to the landlord's appeal succeeding.

37. We will, however, extend our consideration of the appeal a little further, first, to explain why, even if the FTT was wrong about the validity of the landlord's notifications, it would not affect the result, and, second, because in our judgement the FTT made an (immaterial) error in its application of regulation 101(2) of the HB Regs to the facts as it found them. We do so with a degree of reservation because we did not receive any detailed or contested argument on the correct construction of regulation 101(2) of the HB Regs.

38. On the first point, and ignoring the fact that even if they were valid the landlord's email and telephone notifications to Ealing were only made on 27 May 2020 and 29 July 2021 respectively, Mr Irvine (rightly) accepted before us that it was not sufficient for the landlord to establish before the FTT that it had validly notified Ealing that the tenant had ceased to occupy the flat. The landlord also had to show that the tenant had not properly notified Ealing in December 2018 that she had left the flat and ceased top occupy it as her home. There are two, related, reasons why the landlord had to show that the tenant had not properly notified Ealing.

39. First, because if the tenant had properly notified Ealing in early December 2018 that she had vacated the flat, it was common ground before us that the payments of housing benefit which continued to be made by Ealing to the landlord after this date were recoverable as 'official error' overpayments under regulation 100 of the HB Regs. This is because, per regulation 100(2) of the HB Regs, the landlord could reasonably have been expected to realise that it was being overpaid housing benefit when it continued to receive those payments from December 2018 onwards in respect of the tenant's occupation of the flat. The landlord knew, as the FTT found (but which in any event was not under appeal to the FTT), in December 2018 that the tenant had moved out and was no longer occupying the flat as her home.

40. The second, and crucial, reason is that if the payments of housing benefit from December 2018 onwards were recoverable 'official error' overpayments, regulation 101(2)(b) of the HB Regs did not apply and the landlord was a person from whom the recoverable overpayment could be sought either under regulation 101(2)(a) (along with the tenant, as Ealing had decided) or under regulation 101(2)(c) (as the FTT decided). Putting this another way and using the language of regulation 101(2)(b) of the HB Regs, the landlord had to establish that the overpayment arose in consequence of a failure to disclose by the tenant, and not in consequence of any failure to disclose by the landlord, so as to make the overpayment "only recoverable from [the] person who…failed to disclose the material fact instead of, if different, the person to whom the payment was made".

41. However, the FTT's findings and conclusions about the tenant having properly notified Ealing in December 2018 that she had moved out of the flat are, in our

judgement, unimpeachable. Moreover, it is not disputed that a notification under regulation 88(1) of the HB Regs amounted to 'disclosure' for the purposes of regulation 101(2)(b) (per *B v SSWP* [2005] EWCA Civ 929; [2005] 1 WLR 3767). In these circumstances, there is no basis for the tenant being caught by regulation 101(2)(b) as a person *instead of* the person (the landlord) to whom the (over)payments of housing benefit were made. It follows from this that it does not matter whether the landlord was able to establish before the FTT that it made valid notifications by telephone or email to Ealing. Regulation 101(2)(b) cannot remove the liability on a landlord who has received the overpayments of housing benefit simply where the landlord has properly disclosed all relevant information, in time to the housing benefit authority. This is because regulation 101(2)(b)'s target is a person "instead of" the person to whom the payments of housing benefit were made, but only if those are different persons, and where the first person in this sentence has failed to disclose or misrepresented a material fact. Regulation 101(2)(b) thus has no application where the person who has failed to disclose is the same person to whom the overpayments of housing benefit were made.

42. Where regulation 101(2)(b) does not apply (as the FTT was plainly entitled to find in respect of the tenant in this appeal), the default position under regulation 101(2) is that regulation 101(2)(a) applies, unless regulation 101(2)(c) is applicable. If regulation 101(2)(a) applies, the overpayment is recoverable from the claimant and the person to whom the overpayments of housing benefit were made, if that person is a different person from the tenant.

43. It is because the FTT was entitled to find that regulation 101(2)(b) did not apply to the tenant, that we do not need to address any of the potentially difficult arguments concerning the legal scope and effect of regulations 88 and 88A of the HB Regs in respect of the information the landlord may have provided to Ealing by email and telephone. Resolving any of those issues is simply not necessary for the proper disposal of this appeal. Even if the landlord had made good disclosure of all relevant information to Ealing, and in time, this would not change the legal effect of the tenant having made good disclosure to Ealing, and with the latter the landlord's attempt to rely on regulation 101(2)(b) of the HB Regs to make only the tenant liable must fail.

44. We turn lastly to the FTT founding its decision on regulation 101(2)(c) of the HB Regs so as to make only the landlord liable to repay the recoverable overpayment. We consider that the FTT was wrong to do so. Regulation 101(2)(c) does not apply so as to oust the default position in regulation 101(2)(a) in all cases simply because the overpayment arose in consequence of an official error. That is a necessary but not a sufficient condition for regulation 101(2)(c) to apply. All the terms of regulation 101(2)(c) must be satisfied in order for sub-paragraph (c) of regulation 101(2) to apply and so oust regulation 101(2)(a) from applying. However, in our judgement, all of the terms of regulation 101(2)(c) did not apply on the facts of this appeal. True it is that the overpayment arose in consequence of an official error and that the landlord could reasonably have been expected to realise it was receiving overpayments from December 2018 onwards. However, the closing words of regulation 101(2)(c) must also be satisfied for it to apply.

Those words remove the default position in regulation 101(2)(a) so as to make the overpayment only recoverable from the person who could reasonably have been expected to realise that it was an overpayment of benefit (here, the landlord) if that person is a person "instead of, if different, [from] the person to whom the payment was made". That does not apply here because the person who could reasonably have been expected to realise that it was an overpayment is the **same** person as the person to whom the (over)payment was made. Regulation 101(2)(c) only applies if the person who could reasonably have been expected to realise that it was an overpayment is a different person to the person to whom the payment was made.

45. The FTT was correct to dismiss the landlord's appeal from Ealing's decision that the overpayment was recoverable from both the tenant and the landlord. Its reasoning about regulation 101(2)(c) applying did not marry up with its decision, but there is no need to set aside the FTT's decision on this basis. That decision upheld Ealing's decision and was correct.

46. Standing back, finally, and looking at the above result under regulation 101(2), and more particularly the landlord having joint liability under that regulation in respect of the overpayment, in legal policy terms we find nothing odd or jarring with that result. It must be remembered that the landlord continued to be paid housing benefit, in respect of someone who it knew was no longer its tenant, which it ought not to have been paid. If that can properly be described as a 'windfall', there was and is nothing unfair in the landlord being liable to repay sums of money which it should not have received.

47. For all the reasons we have given, this appeal must be dismissed.

Nicholas Wikeley
Judge of the Upper Tribunal

Stewart Wright
Judge of the Upper Tribunal

Joanne Smith
Judge of the Upper Tribunal

Authorised for issue on 4 April 2025