IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. CH/2857/2017 &
CH/2858/2017

Appellant: **Susan Thompson**

Respondent: **Sunderland City Council**

DECISION OF THE UPPER TRIBUNAL

Upper Tribunal Judge Paula Gray

ON APPEAL FROM:

Tribunal: **First-Tier Tribunal (SSCS)**
Tribunal Case No: **SC 269/16/00173 & SC 269/16/00174**
Tribunal Venue: **Sunderland**
Hearing Date: **28 March 2017**

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

CH/2857/2017 & CH/2858/2017

Before Upper Tribunal Judge Paula Gray

Decision

This appeal by the claimant succeeds.

Permission to appeal having been given by Judge Jacobs on 24 October 2017 in accordance with the provisions of section 12(2) (b) (i) of the Tribunals, Courts and Enforcement Act 2007 and rule 40(3) of the Tribunals Procedure (Upper Tribunal) Rules 2008 I set aside the decisions of the First-tier Tribunal sitting at Sunderland and made on 28 March 2017 under reference SC 269/16/00173 and SC 269/16/00174. The decisions were made in error of law. I remit both appeals to be reheard in accordance with my directions below.

Directions for the rehearing

1. The hearing may be taken by the District Tribunal Judge (DTJ) who heard the case previously or another judge, as is thought by a DTJ to be the preferable use of judicial resources. The error of law that I have identified would not prevent the judge who made it making a fair decision at the rehearing in accordance with the principles I set out here.
2. In each case as a matter of fact and law it is established that the equivalent of eight-weeks rent arrears had accumulated by the date upon which the payability decision was made.
3. The only issue which falls to be considered is whether, in each case, it is in the overriding interest of the claimant not to make direct payments to the landlord. That should be determined by the judge with the assistance of my remarks on the matter below.
4. If the DTJ giving listing directions think it is appropriate, further evidence as to each tenant's circumstances as known to the City Council at that time may need to be filed.
5. Given the complexities of the situation and the possibility of extra statutory compensation for the landlord the parties will have a period of six weeks from the date of issue of this decision to discuss whether or not it is in either of their interests for this further hearing to take place. Should the issue of compensation be agreed, the appeal might be withdrawn or compromised by consent.

Reasons

Background

1. The appellant is a landlord who rents out properties in the Sunderland area. Having requested direct payments of rent from Sunderland City Council (the housing authority) she appealed two decisions that it made, the first, in relation to a tenant Mr D made on 9 October 2015; the second in relation to a tenant Ms A made on 16 December 2015. Both decisions were to the same effect, that housing benefit properly payable to each tenant in respect of a specified period. The appellant appealed, contending that in each case the housing benefit payments should have been made to her as the landlord under regulation 95 (1) (b) of the Housing Benefit Regulations 2006. The two cases were heard together in front of a District Tribunal Judge, and the appellant and a Presenting Officer attended.
2. Neither tenant had been invited to the hearing, however it was the judge's view that it was unlikely that their attendance would assist the tribunal or affect their interests and that matter has not been an issue before me.
3. The judge dismissed both appeals and refused permission to appeal, and the appellant approached the Upper Tribunal.

Matters before the Upper Tribunal

4. Upper Tribunal Judge Jacobs granted permission to appeal, and in doing so directed that the papers be sent to the Secretary of State for Work and Pensions who was invited to join as a party or make a submission on the central issue, the proper interpretation of regulation 95 of the Housing Benefit Regulations 2006. All references in this decision to the regulations are to those regulations. Judge Jacobs noted that this issue had been the subject of a circular, and a change of mind by the Secretary of State as to its proper meaning. In a submission filed on 18 December 2017, however, the Secretary of State declined the opportunity to join as a party. Certain observations as to the Secretary of State's position in relation to the regulation under consideration were made, but the submission, regrettably, is of little assistance. The written submissions from the parties have been more useful, and I have been grateful for them, as I was for their oral submissions at the hearing which I held in Newcastle in September. At that hearing I asked for further written submissions on a particular issue which are now to hand.

The legislation

5. The issue is the meaning of regulation 95 of the Housing Benefit Regulations 2006:

Circumstances in which payment is to be made to a landlord

95.—(1) Subject to paragraph (2) and paragraph 8(4) of Schedule A1 F1 (treatment of claims for housing benefit by refugees), a payment of rent allowance shall be made to a landlord (and in this regulation the "landlord" includes a person to whom rent is payable by the person entitled to that allowance)—

(a)where under Regulations made under the Administration Act an amount of income support or a jobseeker's allowance payable to the claimant or his partner is being paid direct to the landlord; or
(b)where sub-paragraph (a) does not apply and the person is in arrears of an amount equivalent to 8 weeks or more of the amount he is liable to pay his landlord as rent, except where it is in the overriding interest of the claimant not to make direct payments to the landlord.

(2) Any payment of rent allowance made to a landlord pursuant to this regulation or to regulation 96 (circumstances in which payment may be made to a landlord) shall be to discharge, in whole or in part, the liability of the claimant to pay rent to that landlord in respect of the dwelling concerned, except in so far as—

(a)the claimant had no entitlement to the whole or part of that rent allowance so paid to his landlord; and

(b)the overpayment of rent allowance resulting was recovered in whole or in part from that landlord.

(3) Where the relevant authority is not satisfied that the landlord is a fit and proper person to be the recipient of a payment of rent allowance no such payment shall be made direct to him under paragraph (1).

It is also helpful to cite regulation 96

96 (1) Subject to paragraph 8(4) of Schedule A1 F1 (treatment of claims for housing benefit by refugees), where regulation 95 (circumstances in which payment is to be made to a landlord) does not apply but subject to paragraph (3) of this regulation, a payment of a rent allowance may nevertheless be made to a person's landlord where—

(a)the person has requested or consented to such payment;

(b)payment to the landlord is in the interest of the claimant and his family;

(c)the person has ceased to reside in the dwelling in respect of which the allowance was payable and there are outstanding payments of rent but any payment under this sub-paragraph shall be limited to an amount equal to the amount of rent outstanding.

(2) Without prejudice to the power in paragraph (1), in any case where in the opinion of the authority—

(a)the claimant has not already discharged his liability to pay his landlord for the period in respect of which any payment is to be made; and

(b)it would be in the interests of the efficient administration of housing benefit,

a first payment of a rent allowance following the making of a decision on a claim or a supersession under paragraph 4 of Schedule 7 to the Child Support, Pensions and Social Security Act 2000 F2 may be made, in whole or in part, by sending to the claimant an instrument of payment payable to that landlord.

(3) In a case where the relevant authority is not satisfied that the landlord is a fit and proper person to be the recipient of a claimant's rent allowance, the authority may either—

(a)not make direct payments to the landlord in accordance with paragraph (1); or

(b)make such payments to the landlord where the authority is satisfied that it is nonetheless in the best interests of the claimant and his family that the payments be made.

(4) In this regulation "landlord" has the same meaning as in regulation 95 and paragraph (2) of that regulation shall have effect for the purposes of this regulation.

And regulation 98

Offsetting

98.—(1) Where a person has been paid a sum of housing benefit under a decision which is subsequently revised or further revised, any sum paid in respect of a period covered by a subsequent decision shall be offset against arrears of entitlement under the subsequent decision except to the extent that the sum exceeds the arrears and shall be treated as properly paid on account of them.

(2) Where an amount has been deducted under regulation 104(1) (sums to be deducted in calculating recoverable overpayments) an equivalent sum shall be offset against any arrears of entitlement under the subsequent decision except to the extent that the sum exceeds the arrears and shall be treated as properly paid on account of them.

(3) No amount may be offset under paragraph (1) which has been determined to be an overpayment within the meaning of regulation 99 (meaning of overpayment).

Common ground

6. Both cases concern regulation 95 (1) (b); regulation 95 (1) (a) was not applicable. The landlord in this case was a private, not a social landlord, but, together with her husband she had been active in the locality over many years renting out properties often to those who might otherwise have found it difficult to obtain accommodation, and there was no question but that she was a fit and proper person to be the recipient of a claimant's rent allowance, so regulation 95 (3) did not apply.
7. Under the tenancies that were offered by the landlord two months rental in advance was required. The effect of this for tenants who could not pay that much as a lump sum was that by the time they took possession of the property they were in arrears, sometimes by the full eight weeks, and in both of these cases there was evidence to that effect.
8. The issue was whether the circumstances of these cases permitted direct payments to the landlord under regulation 95.

The oral arguments

9. I deal below with the arguments, and, although it was not the order in which they were made to me, it seems more logical for me to begin

with that of the housing authority, because those arguments informed its original decisions.

The Housing Authority

10. The housing authority's central position was its reluctance to accept that what it saw as, in my words, "engineered" arrears could, at the outset of a housing benefit claim, give rise to a direct payment to the landlords, nor that rent charged in advance could be rent in arrears until the tenant had been in possession of the property for that period. It suggested, further, that the tenancy agreement had been designed to take advantage of the Housing Benefit Regulations. Those propositions had been the basis of the original decisions.
11. The authority's more general position, which had been developed before the FTT and was argued before me, was a principled one, which sprang from its understanding of the purpose of the various changes that had been made in relation to the housing benefit scheme for claimants to have responsibility for their own budgeting, and the conviction that direct payments should not be made without giving the tenant a chance to manage their income, including rental payments, and until they had failed to do so. Ms Younger, in her helpful submissions to me, spoke of her experience within the City Council of the benefits of such a policy of financial inclusion.

The landlord

12. The appellant explained to me that she and her husband had been letting properties in the vicinity since 1983. She strongly disagreed that the tenancy agreements were drawn up with any intention to either engineer the eight-week arrears, or to take advantage of the housing benefit scheme: they had always stipulated two-months rent in advance in their tenancy agreements, and, unlike many current landlords, they offered assured tenancies with more protection to the tenant than the more usual assured short hold tenancies, but the disadvantage as landlords of an assured tenancy was that possession proceedings on one of the statutory grounds might take more than a year, during which rent may not be paid. If direct payments of housing benefit were being made that delay was less acute for the landlord, and because payments made under regulation 95 (unlike regulation 96) were mandatory, it gave the landlord certainty.
13. She argued that rent payable in advance was rent which was in arrears as a matter of law after the time due for its payment, and that in such circumstances direct payment to a landlord was mandatory, subject to it not being in the overriding interests of the tenant.
14. As to that, she said that it was in the interests of the tenant to make direct payments to the landlord because it resulted in a more secure occupation, and queried why tenant failure was a necessary ingredient under the regulations.

The importance of the issue

15. A decision of the First-tier Tribunal case *Doncaster v City of Coventry* was to the effect that arrears of rent did accrue where they were established by non-payment of a contractual period of rent in advance. The appellant argued that the decision was a correct statement of the law. As a first instance decision it was not binding other than upon the parties to the case, but after it was issued the DWP produced a Circular AS2/2009 in which it accepted that rent was in arrears once the contractual date for payment had passed irrespective of whether rent is due in advance or in arrears. This was in direct contrast to its previous position on the issue. It is apparently a matter which arises frequently for housing authorities across the country, and I am told that a binding decision will be of practical assistance.

My analysis

Contrivance

16. I can deal swiftly with the argument that if an arrangement was made to defeat an implicit eight-week waiting period then it must fall foul of the housing benefit scheme.
17. As to issues of contrivance, the only statutory provision is regulation 9 (1) (l) under which a housing authority can find that a tenancy is contrived to take advantage of the housing benefit scheme, with the result that the tenant is treated as not liable for the rent. That is not the argument here. In my judgment whether or not the eight-week advance rental provision in the tenancy agreement was set with the intention of defeating the eight-week arrears rule in regulation 95 (and I remind myself of the appellant's explanation that this provision was in their standard tenancy agreements well before that provision came into effect) is irrelevant to the issues I must decide.

Rent

18. Rent is a payment that a tenant is bound by contract to make to his landlord for the use of the property let: *Property Holding Ltd v Clark* [1948] 1 KB 630 at 638. It may be payable in advance or in arrears. It is due on the date fixed for payment, and becomes arrears after midnight on that date: *Re Aspinall, Aspinall v Aspinall* [1961] Ch 526. The remedy of distress arises the day after the rent becomes due: *Dibble v Bowater (1853) 2 E&B 564*, and rent payable in advance may be distrained for on the day following that fixed for payment.[1]

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[1] The common-law remedy of distress has been prospectively abolished by s71 Tribunal Courts and Enforcement Act 2007, but the provision has not yet been brought into force.

19. In the context of these appeals it is clear that the contractual position was for payment of two-months rent in advance, and arrears of rent accrued at the time the tenant took possession which, being equivalent to arrears of eight-weeks, mandated consideration of direct payments to the landlord under regulation 95 (1) (b).

Regulation 95

20. Where, as here, subparagraph (a) of paragraph (1) does not apply, and the equivalent of eight weeks arrears exists, the housing authority is under a duty to make direct payments, subject to two qualifications: *CH/3629/2006*.
    (i) it does not apply if it is in the overriding interest of the claimant not to pay the landlord direct: Regulation 95 (1) (b).
    (ii) it does not apply the landlord is not a fit and proper person. Regulation 95 (3) (b).

21. I have already explained that the issue in (ii) does not arise here, but the question whether or not the landlord is a fit and proper person to receive direct payments of rent cannot be a factor in deciding the overriding interest issue because it is directly provided for under regulation 95 (3).
22. Some helpful analysis of the regulation, including the nature of the decision as to the overriding interest of the claimant appears at paragraph 16 in the judgment of Commissioner (now Upper Tribunal Judge) Jacobs (who also decided *CH/3629/2006*) in *CH/1821/2006*.

    *"...regulation 95 (1) is worded as a duty: 'a payment of rent allowance **shall** be made to a landlord'. That duty does not arise if 'it is in the overriding interests of the claimant not to make direct payments'. That exception may, and usually does, involve issues of fact. It always involves an exercise of judgment. I accept...that different decision-makers and different local authorities might legitimately exercise their judgment differently on the same facts. But that does not make the judgment a discretion. The essential feature of a discretion is choice, albeit one that may be circumscribed. There is no choice involved in regulation 95. There is the potential for a difference of opinion, but that is a different matter. From the point of view of any particular decision-maker there is only one conclusion that can be made and it is determined by the assessment of where the claimant's overriding interests lie."*

23. He went on to explain both that such a decision was appealable by either party, and that the tribunal was able to exercise its usual power on the evidence available to substitute its judgment for that of the local authority: the tribunal stands in the shoes of the local authority and decides the matter afresh; it does not simply exercise a reviewing function, deciding whether or not the decision made was one available to the local authority on the evidence before it. That conclusion is

contrary to the decision of Mrs Commissioner Jupp in *CH/4108/2005*, which has been relied upon in written argument before me.

24. Following the passing into law of the Tribunal Courts and Enforcement Act 2007 Judge Jacobs restated his view on that matter in *R(H) 1/08*. That decision, as a decision in the Administrative Appeals Chamber Reports, carries more weight than *CH/4108/2005* because for a decision to be reported there it must command the support of the majority of the salaried judges in the Chamber.
25. His judgment provides by way of further explanation and perhaps caveat, the following:

"Regulations 95 (1) (b) and 96 (1) (b) show that the law is designed to take account of the interests of both the landlord and the claimant. The result is that a local authority may be under a duty to pay a landlord in order to protect the interests of the claimant. The payment provisions are united by this theme: the choice of payment method is ultimately for the claimant's advantage. This shows that it is too simple to concentrate on the right of a landlord to be paid housing benefit and to assume or expect that it will be accompanied by incidents that might apply if the right existed to protect the interests of the landlord alone.

26. I adopt those remarks, and Judge Jacobs' analysis of regulation 95 above. As to the interaction between the two regulations, 95 and 96, I add that the possibility of direct payments under the wider provisions of regulation 96 arises only where regulation 95 does not apply.

The overriding interest provision

27. The exception to direct payments under regulation 95 (1) (b) is to be applied only where it is in the overriding interest of the claimant not to make them. I have been asked to give some guidance as to the application of that test. I do so with some hesitation, and my remarks are intended as assistance only; they cannot fetter the exercise of discretion in an individual case, which will ultimately turn on its own facts, and, in which, there may be more than one acceptable answer.
28. It is not necessary for me to interpret the phrase "overriding interest"; the words bear their natural meaning under the test in *Brutus v Cozens* 1973 AC 854, but the use of the word overriding sets a high hurdle and the starting point in Regulation 95 is for direct payment to the landlord once sufficient arrears exist, subject to establishment of the claimant's overriding interest to the contrary.
29. The interest being considered is that of the claimant: whether or not the landlord is a fit and proper person to receive direct payments cannot be considered under this exception because one exists under regulation 95 (3) (see paragraph 20 above).
30. Matters directly relevant to a particular claimant must be considered; for example, known previous rental difficulties and matters that might impact on the ability to budget such as addiction or other vulnerability.

31. The question of overriding interest cannot be answered on the basis that it is assumed to be in the interests of the tenant to receive direct rent as part of a policy of financial inclusion, or indeed for any other generic reason; individual criteria need to be considered by the housing authority in each case. Such issues may form part of the picture, but so must be the interest in the tenant retaining the accommodation they have secured: I note that the DWP at paragraph 15 of the circular AS2/2009 points out that the intention behind regulation 95 (1) (b) is to provide landlords with the security of direct payment as an alternative to seeking possession on a mandatory ground and so avoid a situation where a tenant is evicted under housing legislation. That is not binding on me, but I do not disagree with it.

Cessation of Direct Payments

32. As to the cessation of direct payments, the housing authority has argued that if a payment is made by the tenant which takes the arrears below the eight-week period direct payments must cease because there are no longer grounds to make them. The argument is erroneous.
33. Although the regulation does not deal directly with the issue the power at paragraph 2A has some relevance in interpreting it. It provides that where a maximum rent (LHA) has been determined and the rent allowance exceeds the rent payment the direct payment to the landlord may be made at the level of the rent allowance, to include an element in respect of the arrears whilst they remain outstanding. The direct payment *"shall not include any amount by which the rent allowance exceeds the amount which the claimant is liable to pay his landlord as rent and arrears of rent".* This clearly envisages that such payments might continue until the arrears are expunged. That militates against the argument that if the arrears are reduced by a nominal amount, direct payments must cease; indeed, if that were to be so, invoking the direct payment provision would lead to a proliferation of decision-making where circumstances had not necessarily altered, which cannot, in my judgment, have been intended.
34. It is settled law since at least the decision of Mr Commissioner Williams in *CH/2986/2005* that where a decision has been made to make payments directly to the landlord the usual legislative framework applies to any change to that decision. There cannot simply be a cessation; a superseding decision must be made on the proper grounds, generally a change of circumstance; that decision must be notified, and it will carry appeal rights. If while direct payments to the landlord were being made the tenant made a significant payment to reduce the arrears that could provide evidence of a change of circumstances, but, as is clear from the extract of Judge Jacobs judgment at above, where the local authority makes payment to a landlord it is in order to protect the interests of the claimant, and, that principle having been established by the decision as to the overriding interest of the tenant, there must be a proper change of the circumstances which led to that decision being taken to authorise a change of that position.

35. There are provisions, which should be noted, under regulation 11 (2) (a) (ii) Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 to suspend payment of housing benefit whilst enquiries are made as to the proper person to whom such benefit should be paid.

Practical issues in these appeals

36. Each of these appeals covered a discrete period when housing benefit was paid to the claimant and not directly to the landlord, the landlord having sought direct payments on the basis of rent arrears.

37. Neither claimant passed the rent allowance paid to them onto the landlord. The housing authority has stated that it will not attempt to recover the money paid to the tenant as an overpayment. The practical difficulty is whether or not there is a mechanism for reimbursing the landlord. The case of *CH/3629/2006* which I have cited above also dealt with this situation, that is to say where achieving a fair result appeared to call for housing benefit already paid (to the tenant) to be paid again (to the landlord). Judge Jacobs explained the effect of the offsetting provision under regulation 98 (1) (set out at paragraph 5 above) which prevents that occurring. His conclusion was that the problem should not arise if the procedures are operated properly. That was achievable by local authorities, which had the power to make enquiries before changing payment arrangements, and I would add before making initial payment arrangements where a landlord has made representations about direct payments, and to make no payment until the appropriate payee has been identified.

38. I respectfully agree with Judge Jacobs' conclusion, which set out two possibilities for the landlord. The first, in many cases something of a pipedream, was to seek recovery from the tenant, who remained liable for the unpaid rent. The second was to seek compensation from the local authority. The latter option is not a matter upon which I, or a First-tier Tribunal, is able to rule.

39. In the decisions and throughout the extensive correspondence between the city council and the landlord reference is made to the city council refusing to accept arrears that arise out of rent charged in advance. The decision of the First-tier Tribunal adopted that approach. It was wrong in law. The difficulty is that, the money having been paid to the tenant there is no effective mechanism by which this tribunal can direct that it be paid now to the landlord.

40. Firstly, that mechanism doesn't exist for the reasons I set out at paragraph 37. Secondly, although the issue of arrears of rent is now resolved in favour of the landlord, it will be recalled that there are two elements to be established before authorising direct payment to the landlord under regulation 95 (1) (b). If the equivalent of eight-weeks arrears is shown the issue arises as to whether it is in the overriding interest of the claimant not to make direct payments to the landlord. That decision has not been effectively made. Had the FTT accepted

the position in law as to the validity of the rent arrears, it would have gone on to consider the question of the overriding interest of the claimant, and my decision now provides for that opportunity, unless the parties choose to settle the matter between themselves.

My conclusions in brief

41. In conclusion I summarise my rulings on the issues in these appeals as follows:

(i) Rent is in arrears once the contractual date for payment has passed irrespective of whether rent is due in advance or in arrears.

(ii) The plain words of regulation 95 mandate payment direct to the landlord where rent is the equivalent of eight-weeks in arrears, subject to the overriding interest provision set out there.

Upper Tribunal Judge Paula Gray

Signed on the original on 24 January 2019