

R(H) 2/08

**Mr E Jacobs
Commissioner
3 April 2007**

CH/3629/2006

Housing benefit – payment to landlord – benefit paid to tenant where duty to pay to landlord – whether possible to pay to landlord for same period – effect of offsetting provisions

The claimant had authorised the payment of housing benefit to her landlord under regulation 96(1)(a) of the Housing Benefit Regulations 2006. In January 2006, at the claimant's request, the local authority decided to stop payments to the landlord and pay benefit instead into the bank account of a friend of the claimant, but it did not notify the landlord of its decision. In April 2006 the landlord contacted the local authority and the authority accepted that it was required by regulation 95(1)(b) to make payments to the landlord because the claimant was more than eight weeks in arrears with her rent. The authority reinstated direct payments to the landlord. The landlord appealed to an appeal tribunal, arguing that payment should be made to him under regulation 95(1)(b) for the period from January to April. The tribunal dismissed the appeal, holding that there was no power to order a second payment of housing benefit to the landlord. The landlord appealed to the Commissioner. Before the Commissioner it was common ground, on the authority of CH/2986/2005, that: (i) the decision to pay housing benefit to the claimant should have been made on a supersession; (ii) the supersession decision should have been notified to the landlord; (iii) it carried a right of appeal by the landlord; and (iv) it was that decision which was under appeal to the tribunal.

This case was heard together with R(H) 1/08, which raised the same issue.

Held, dismissing the appeal, that:

1. the absence of any provision for recovery of the payment made in error to the tenant did not prevent a payment being made to the landlord for the same period, since the recovery provisions follow on in their effect from the entitlement provisions, and cannot have any effect by relation back on what payments may be made (paragraph 29);
2. it was possible that entitlement to a retrospective payment to the landlord might arise since a decision on revision or supersession is a decision dealing with all aspects of entitlement (R(I) 9/63 followed) and it would have been open to the local authority or the tribunal to make a retrospective decision on revision that included the payment of the benefit to the landlord (paragraphs 30 to 37);
3. however that result was prevented by regulation 98, which provides that any sum paid in respect of a period covered by a subsequent decision shall be offset against arrears of entitlement under the subsequent decision treated as properly paid on account of them (paragraphs 39 and 40).

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is given under paragraph 8 of Schedule 7 to the Child Support, Pensions and Social Security Act 2000:

The decision of the Liverpool appeal tribunal under reference U/06/062/2006/00725, held on 9 August 2006, is not erroneous in point of law.

I direct that a copy of my decision in CH/1821/2006 be sent to the parties to this appeal along with this decision.

REASONS

2. This is an appeal brought by a landlord with the leave of the tribunal's chairman against the decision of the appeal tribunal. The other parties who have taken part are the local authority and the Secretary of State. The claimant has taken no part in the proceedings.

The issue

3. The issue is this. When housing benefit has been paid to the tenant, is it possible thereafter to pay housing benefit to the landlord in respect of the same period? The landlord argued that it was. The local authority and the Secretary of State argued that it was not. The parties referred to the issue as the "double payment issue". I will explain later why this is a misleading label, but I shall use it for convenience.

The oral hearing

4. I held an oral hearing in London on 27 March 2007. The local authority was represented by Mr Michael Bailey and the Secretary of State by Miss Marie Demetriou, of counsel. I am grateful to them both for their clear, helpful and succinct submissions.

5. Mr Lindsay and Mrs Wilkinson attended on behalf of the landlord. They spoke to me of the circumstances of this case and of the difficulties that landlords face when dealing with housing benefit tenants who do not pay their rent. I found what they had to say interesting in setting out the landlord's perspective on payment of housing benefit. It confirmed much of what I had heard or suspected in other cases. As the result of a concession made by Mr Bailey in the course of the hearing, the only outstanding issue for me to decide was the legal one I have identified above. On this Mr Lindsay and Mrs Wilkinson, neither of whom has any legal knowledge or experience, were able to say little. They did, though, point to the unfairness from their point of view if they could not now be paid, especially as it was the local authority's failure to notify its decision that led to the gap in direct payments to the landlord.

6. The case was heard together with CH/1821/2006 (now reported as R(H) 1/08), as they shared the same legal issue. Mr Howard Mason, who represented the local authority in that appeal, also made submissions supportive of Mr Bailey on the double payment issue. By agreement at the hearing, my reasons on the double payment issue are dealt with only in this decision.

The legislation

7. When the decision under appeal in this case was made, it was governed by the Housing Benefit (General) Regulations 1987 (SI 1987/1971). Since then, the relevant provisions have been consolidated in the Housing Benefit Regulations 2006 (SI 2006/213). For convenience, I will refer to and quote from the new Regulations. The substance of the law is the same.

The law on payment with some commentary

8. Regulation 91 distinguishes between entitlement to benefit and payment of benefit. Payment is, inevitably, secondary to entitlement.

9. The default position is that the local authority is under a duty to pay the benefit awarded to the person entitled to it: regulation 94(1). However, this is subject

to a series of discretions and duties. I will take them in the order they appear in the legislation.

10. If the claim was not made by the tenant, but by someone appointed to act for the tenant under regulation 82, the local authority has a discretion to pay the benefit awarded to that person instead: regulation 94(2).

11. If the person entitled nominates someone to receive the benefit, the local authority has a discretion to pay the benefit to that person instead: regulation 94(3).

12. The local authority is under a duty to pay housing benefit direct to the landlord in two circumstances. This duty is governed by regulation 95:

“Circumstances in which payment is to be made to a landlord

95.—(1) Subject to paragraph (2) and paragraph 8(4) of Schedule A1 (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.”

13. Sub-paragraph (b) is relevant to this case. The duty to pay under this provision is subject to two qualifications. First, it does not apply if it is in the overriding interest of the claimant not to pay the landlord direct. (Note that it is the interests of the claimant and not of the tenant that matter. Usually the claimant will be the tenant, but this is not necessarily so. It is possible for someone who is not the tenant to claim for the tenant – see regulations 82 and 94(2). And it is possible for persons other than the tenant to claim and be entitled to housing benefit in their own right – see regulation 8(1)(b) and (c)). Second, it does not apply if the landlord is not a fit and proper person to receive payment: regulation 95(3). Neither qualification applies in this case.

14. If the local authority is not under a duty to pay housing benefit direct to the landlord, it nonetheless has a discretion to do so in the circumstances set out in regulation 96(1):

“Circumstances in which payment may be made to a landlord

96.—(1) Subject to paragraph 8(4) of Schedule A1 (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.”

Sub-paragraph 1(a) is relevant to this case.

15. Payment direct to a landlord under regulations 95 and 96 is of a different quality from payment under any other provision, even from payment to a landlord as the tenant’s nominee under regulation 94(3). If payment is made under either regulation 95 or 96, that “payment ... 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”: regulations 95(2) and 96(4). This is important in defining the issue I have to decide. If payment is first made to the landlord, a second payment of benefit cannot then be paid in respect of the same period to the claimant. The reason is that there is no longer any rental liability for that amount in that period. (The same principle underlies regulation 96(2)(a).) This is why I have defined the issue in terms of making a second payment to the **landlord** after payment has been made to the **tenant**.

16. The legislation creates duties on the local authority. There is a default duty to pay to the person entitled if none of the exceptions applies and a duty to pay to a landlord if regulation 95 applies. And if a local authority decides to pay direct to the landlord under any of its discretions, it is under a duty so to pay until its decision is changed on revision, supersession or appeal. Correlative to those duties is the right in the person to receive the payment. Usually rights are associated with the protection of an interest in the holder of the right. However, in the case of the payment provisions the position is not so simple. 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.

The facts with some commentary

17. The claimant became a tenant of the landlord in May 2005. It was a term of her tenancy “To authorise Housing Benefit to make direct rental payments to the landlord during the period of occupation and give ‘the reason’ for a change of circumstances as soon as possible.” In compliance with that term, the claimant asked for benefit to be paid direct to the landlord and this was done under the authority of regulation 96(1)(a).

18. In January 2006, the claimant asked that payment to the landlord should stop and be made instead into the bank account of a friend. That was permissible under regulation 94(3). The local authority decided to do as the claimant asked and made its final payment to the landlord on 30 January 2006. It did not notify the landlord of its decision.

19. The landlord was not surprised when payments ceased, as it was not unusual for the local authority to suspend payment while making enquiries on various matters relevant to entitlement. The landlord only contacted the local authority in April 2006. The local authority immediately accepted that the case fell within regulation 95(1)(b) and reinstated direct payments to the landlord.

20. The landlord exercised the right of appeal to an appeal tribunal, but the tribunal dismissed the appeal, holding that there was no power to order a second payment of housing benefit to the landlord. However, the chairman gave the landlord leave to appeal to a Commissioner.

Some common ground

21. Both the local authority and the Secretary of State now accept, on the authority of Mr Commissioner Williams' decision in CH/2986/2005, that: (i) the decision to pay housing benefit to the claimant should have been made on a supersession; (ii) the supersession decision should have been notified to the landlord; (iii) it carried a right of appeal by the landlord; and (iv) it was that decision which was under appeal to the tribunal.

22. At the oral hearing, Mr Bailey accepted that, on the evidence now available but not on the evidence available to the local authority in January 2006, regulation 95(1)(b) was satisfied at the date when the local authority began to pay the housing benefit to the claimant.

The parties' arguments in brief

23. For convenience, I will combine Mr Bailey's and Miss Demetriou's mutually supportive arguments. They argued that there could be no second payment of housing benefit to a landlord once the claimant had been paid. There was no authority for this in the legislation. Section 5(1)(d) of the Social Security Administration Act 1992 envisaged only one award on a claim. As the matter related to payment rather than entitlement, neither the overpayment provisions nor the offset provisions applied. Miss Demetriou accepted that the identity of the payee was an integral part of the initial award and all other decisions. Payment was not a separate matter that was dealt with in isolation from issues of entitlement.

Changes to decisions

24. In order to assess these arguments, I need to refer to the legislation that governs how decisions are made and changed.

25. A local authority is under a duty to decide a claim for housing benefit: regulation 89(2). The decision will either refuse or award housing benefit. I accept that if the local authority makes an award, that will be a single decision. I am not sure that the wording of section 5(1)(d) of the 1992 Act compels that conclusion, but I cannot see any other way that the legislation can sensibly operate.

26. Paragraph 11 of Schedule 7 to the Child Support, Pensions and Social Security Act 2000 provides:

“Subject to the provisions of this Schedule, any decision made in accordance with the preceding provisions shall be final.”

The opening qualification significantly reduces the extent to which a decision, once made, is final. The revision and supersession powers, under paragraphs 3 and 4, make elaborate provision for correcting mistakes in decisions and bringing them up-

to-date to take account of changes of circumstances. The appeal provisions under paragraph 6 allow further opportunity for decisions to be changed.

27. It is the inevitable result of these provisions that a claimant's entitlement to housing benefit for a period may be later varied, either to the claimant's advantage or disadvantage. A change to a decision that has a retrospective effect can result either in benefit having been paid to which there was no entitlement or in entitlement arising to a further payment of benefit in respect of the same period. The legislation deals with both these possibilities.

28. I will deal first with the possibility that benefit has been paid that should not have been paid. If the mistake is later corrected, the local authority may be able to recover all or part of the amount that should not have been paid. This is governed by the overpayment provisions. They are relevant, because Mr Bailey and Miss Demetriou both argued that the absence of any chance of recovering a double payment showed that there was no authority to make one.

29. The recovery provisions allow a local authority to recover some payments, provided that they were in excess of entitlement: see section 75(1) of the Social Security Administration Act 1992 and regulation 99. Not all overpayments are recoverable. Recovery is only permitted in the circumstances provided in regulation 100. If an overpayment is not recoverable under these provisions, there will always have been an official error: regulation 100(3). I do not understand the argument that these provisions are relevant to the double payment issue. The fact that there is no provision for recovery does not mean that a double payment cannot be made. The recovery provisions follow on in their effect from the entitlement provisions. I do not understand how the recovery provisions can have any effect by relation back on what payments may be made.

30. I now come to the second possibility – that entitlement may arise to a further payment of benefit in respect of the same period. In order to deal with this, I need to say more about the way that this possibility arises. It arises because of the nature of revision and supersession. The latter is relevant in this case. Its operation is especially important, as I believe that all of us at the oral hearing lost sight of it.

31. There are key elements that must be present in any award: (i) the person entitled; (ii) the benefit awarded; (iii) the amount of the benefit; (iv) the date from which it takes effect or the period to which it applies; and (v) the payee. I will follow this numbering in my later analysis. It may not be necessary to specify all of these elements in the decision. The payee, in particular, will usually be the person entitled and the decision will not need to specify this.

32. These elements may be changed on revision, supersession or appeal. In the early 1990s, it was fashionable for a time to think of an award as a goods train consisting of a number of carriages. From time to time, the contents of a particular wagon might be changed or a wagon might be added or removed. See paragraph 37 of the Common Appendix to CSSB/281/1989 and its companion decisions. This image must not be taken too literally, but it is useful in capturing how an award is amended through time as decisions are altered to correct mistakes or to take account of changes of circumstances.

33. The legislation does not make clear whether a superseding decision (a) replaces the previous decision in respect only of the elements changed or (b) replaces it completely on all elements, whether they have been changed or not.

34. This issue was considered by a Tribunal of Commissioners in R(I) 9/63. The Tribunal emphasised the ideal of a single decision governing a particular period. This was based partly on law and partly on convenience:

“it is not legally possible to have two decisions by different boards or tribunals on an identical question relating to the same period, which conflict with each other. Nor indeed is it convenient to have two decisions even to the same effect, since if one were reviewed there would then be a conflict.”

35. Applying that approach to housing benefit decisions given on supersession, it is desirable that there should be a single operative decision covering all matters relating to a particular period. This decision provides the single reference point for resolving matters of doubt as to the terms of the award, the target for any subsequent revision or supersession that relates to that period, and the subject of any appeal.

36. How does this apply to the circumstances of this case? The claimant made a claim for housing benefit in respect of her new dwelling when she moved into the landlord’s property. The local authority awarded (i) the claimant (ii) housing benefit (iii) of a specified amount (iv) from the start of the claim, (v) which was to be paid (at the claimant’s request) to the landlord. Call this decision A. When the local authority decided to pay the housing benefit to the claimant instead of the landlord, it superseded decision A with a new decision. Call this decision B. This decision provided that (i) the claimant (ii) was entitled to housing benefit (iii) of a specified amount (iv) from the date of the change, (v) which was to be paid now to the claimant herself. And when the local authority later reinstated payment direct to the landlord, it superseded decision B with another new decision. Call this decision C. This decision provided that (i) the claimant (ii) was entitled to housing benefit (iii) of a specified amount (iv) from the date of the change, (v) which was to be paid again to the landlord. Decision B is the decision that was before the tribunal.

37. The effect of decisions B and C, as made by the local authority, were both prospective only in their effect. What would have happened if the local authority or the tribunal had substituted a different and retrospective decision for decision B? Call this decision D. This would have been that (i) the claimant (ii) was entitled to housing benefit (iii) of a specified amount (iv) for the period governed by decision B, (v) which was to be paid to the landlord instead of the tenant. The result would have been that there were at different times two decisions governing the same period.

38. So far it looks as if the housing benefit paid already under the authority of decision B would have to be paid again under the authority of decision D. However, the legislation anticipates and prevents this effect by using the concepts of offsetting and payment on account:

“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.”

39. I referred Miss Demetriou to this regulation at the hearing. She argued that it did not apply, because it dealt only with arrears of entitlement, not arrears of payment. I now consider that that argument is mistaken. Assume that two decisions

were made governing the same period from January to April: the decisions I have called B and D. On my analysis, both would deal with all aspects of entitlement. The arrears that became owing under decision D would, therefore, be arrears of entitlement. Payment that had already been made under decision B would, under regulation 98, have to be offset against those arrears and treated as paid on account of them. As the amount of entitlement was the same under both decisions, the effect of regulation 98 would be to prevent any further payment being made under decision D.

40. I trust that it is now clear why “double payment” was a misleading label and diverted attention away from the correct analysis at the oral hearing by setting up a false contrast between payment and entitlement.

Some practical considerations

41. The underlying structure of the award may be concealed by the practicalities of decision-making and notification. The decision-making will usually involve the use of a computer programme and the notification letters will be in the form generated by that programme. In practice, notifications are likely to concentrate on the changes rather on the continuity of supersessions. And tribunals, as they are entitled to do, may concentrate on the issues raised and refrain from issuing a full outcome decision: see the Tribunal of Commissioners in CIS/624/2006. This, however, cannot affect the legal analysis of the nature of awards. A decision on housing benefit should cover all elements of the award, regardless of how the decision is notified. And a decision given on a particular issue by an appeal tribunal has the effect of changing that element of the relevant operative decision.

42. The problem that has arisen in this case should not arise if the procedures are operated properly. Local authorities have power to make enquiries before changing the payment arrangements and to suspend payment while they do so: see my decision in CH/1821/2006. The authority may make enquiries before deciding to pay housing benefit to the claimant instead. That will allow it, if appropriate, to substitute a decision under regulation 95(1)(b). Even if the local authority does not make enquiries or decides to pay the claimant instead of the landlord, it has to notify the landlord of its decision. That notice is generated by the local authority’s computer at the same time as the notice is generated for the claimant. If that procedure is followed, the landlord will have a chance to apply for direct payment to be restored. This will provide the opportunity to make any (further) inquiries that are necessary before the change the payment arrangement is put into effect. In practice, no payment should be made until the appropriate payee has been identified.

The landlord’s remedies

43. My decision does not leave the landlord without remedy. There are two possibilities.

44. The tenant remains liable for the rent which has not been paid and the landlord may take civil proceedings for the rent or to recover possession of the premises. In the case of a tenant who is entitled to housing benefit, an action for the rent is unlikely to be effective and possession proceedings may take time and will involve costs.

45. The other possibility is compensation from the local authority. This has been considered but refused in this case. I have no jurisdiction over this aspect of this case, but I invite the local authority to reconsider its refusal. The housing benefit was

being paid direct to the landlord. This was changed without notification to the landlord. The local authority accepts that that was wrong. What would have happened if the landlord had been notified? The notification would have been generated by the computer at the same time as the notification to the claimant. The landlord would immediately have applied for the decision to be reversed under regulation 95(1)(b) or 96(1)(b). The local authority would then have investigated and made a decision. The landlord could have produced the evidence on which the local authority has now accepted that regulation 95(1)(b) applies. In other words, the landlord would not have been out of pocket if the local authority had notified its decision.

Disposal

46. I sympathise with the landlord in this case. My inclination throughout has been to allow a further payment if possible. Of the claimant, the local authority and landlord, it is the landlord alone who is not at fault. The claimant failed to pay her rent. The local authority failed to notify its decision. The landlord alone acted promptly and properly. However, my legal analysis has led to the conclusion that the landlord cannot be paid again the benefit that was paid to the claimant. Strictly, the tribunal could have substituted what I have called decision D, but the offset provision would have deprived that decision of any practical benefit to the landlord. I have, therefore, dismissed the appeal.

