

**R(H) 9/09**  
**(JD v Leeds City Council [2009] UKUT 70 (AAC))**

**Judge Mesher**  
**21 April 2009**

**CH/3495/2008**

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**Recovery of overpayments – bankruptcy order made before recoverability decision – whether liability for overpayment bankruptcy debt**

The claimant was made bankrupt on 6 June 2007 and discharged from bankruptcy on 23 April 2008. On 4 September 2007 the local authority made decisions that she had not been entitled to housing benefit or council tax benefit for the period from 1 February 2002 to 20 November 2006, because of the amount of capital possessed by her husband, and that the resulting overpayments were recoverable from her. She appealed, arguing that the overpayments were not recoverable as her liability to repay was a bankruptcy debt incurred before the bankruptcy order and therefore, unless obtained fraudulently, was deemed to form part of the bankruptcy estate. The appeal tribunal accepted the local authority's view that the appeal was against the local authority's decision to exercise its discretion to recover the debt by way of deductions from the claimant's incapacity benefit and disallowed the appeal on the basis that it had no jurisdiction to decide it. On the claimant's further appeal it was common ground that her appeal was against the recoverability decision.

*Held*, allowing the appeal, that:

1. there is no liability to repay an overpayment of housing benefit until a local authority has made a decision that it is recoverable under section 75 of the Social Security Administration Act 1992 and the Housing Benefit Regulations 2006 and so the liability that arose as a result of the decision of 4 September 2007 was not a bankruptcy debt and there could therefore be no question of there being any inhibition on the making of the decision on 4 September 2007 or of the debt being discharged on the discharge from bankruptcy on 23 April 2008 (*R (on the application of Steele) v Birmingham City Council and Secretary of State for Work and Pensions* [2005] EWCA Civ 1824, [2006] 1 WLR 238) and *Secretary of State for Work and Pensions v Balding* [2007] EWCA Civ 1327, [2008] 1 WLR 564) followed) (paragraph 12);
2. the only evidence before the appeal tribunal of the claimant's capital, including her husband's capital, was the income support decision-maker's decision that she was not entitled for part of the period in issue to any income support (for which the capital limit was £8,000) but that did not show that the capital exceeded £16,000 (the limit for housing benefit and council tax benefit) for any part of the period and the amounts mentioned by the income support decision-maker should have put the appeal tribunal on enquiry to investigate the actual amounts of capital throughout the period in question (paragraphs 13 and 17);
3. the question of whether debts have been obtained fraudulently is only relevant when the debt is a bankruptcy debt, having been incurred before the date of the bankruptcy order, and so was not relevant in this case (paragraph 14).

The Judge remitted the case to a differently constituted tribunal with directions.

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**DECISION OF THE UPPER TRIBUNAL**  
**(ADMINISTRATIVE APPEALS CHAMBER)**

The claimant's appeal to the Upper Tribunal is allowed, although the ultimate outcome may not be of any advantage to her. The decision of the Leeds appeal tribunal dated 22 July 2008 involved an error on a point of law, for the reasons given below, and is set aside. The case is, subject to any action that may be taken by the local authority as mentioned in paragraph 19 below, remitted to a tribunal within the Social Entitlement Chamber of the First-tier Tribunal for determination in accordance with the directions given in paragraph 20 below and any further

directions that may be given by a district tribunal judge (Tribunals, Courts and Enforcement Act 2007, section 12(2)(b)(i)).

### **REASONS FOR DECISION**

1. The claimant had been in receipt of housing benefit and council tax benefit (CTB) for some years, at least since 2002. The awards had been based on her entitlement to income support for the period from 10 October 2001 to 9 May 2003 (which would have meant that the local authority did not need to investigate the claimant's income and capital). From 10 May 2003, the awards had been calculated on the claimant only having income from disability benefits and having little or no capital. The legislation for both housing benefit and CTB provides for the income and capital of a claimant's partner to be treated as the claimant's. Apparently payment of both benefits ceased after 20 November 2006 at the claimant's request when at an interview on 16 November 2006 she was shown copies of bank statements for accounts in her husband's name.

2. On 6 June 2007 the claimant was made bankrupt by an order of Leeds County Court. She was discharged from bankruptcy on 23 April 2008.

3. On 13 August 2007 a decision-maker for the Secretary of State for Work and Pensions decided that the claimant was entitled to a reduced amount of income support for the period from 10 October 2001 to 31 January 2002 (because of tariff income from capital) and was not entitled to income support at all from 1 February 2002 to 9 May 2003 because her capital exceeded the limit of £8,000 in force at the time. Although the copy of that decision in the papers (page 3) does not mention this, the change in entitlement must have been by way of revision on the ground of ignorance of or mistake as to a material fact resulting in the award being more advantageous to the claimant than it would otherwise have been. The material fact was the amount of capital possessed by the claimant's husband. There was mention of the husband having five active accounts on 10 October 2001 with a total balance of £4,385.06. A further account was opened on 25 April 2002 (possibly after the husband's father died), at which time the total balance was £11,252.45. There was also reference to an amount of £12,725.81 in an account in the name of the claimant's and her husband's son Joseph on 1 March 2007. I do not know how old Joseph is, but according to the decision of 13 August 2007 he is affected by autism and there is some issue that money left by the claimant's husband's father was intended to provide for Joseph's future.

4. On 4 September 2007 an officer of the local authority gave a decision reassessing entitlement to housing benefit and CTB to the effect that there was no entitlement for the period from 4 February 2002 to 20 November 2006 and deciding that the resulting overpayments of £11,071.49 and £2,899.89 respectively (representing all the benefit paid in that period) were recoverable from the claimant.

5. On 28 September 2007, the claimant's then solicitors wrote to the local authority asking it to refrain from making any deductions from her incapacity benefit (which had been threatened) until it had been established whether the liability to repay the housing benefit overpayment was incorporated within the bankruptcy. A letter dated 28 September 2007 from an officer of the Insolvency Service to the local authority stated that debts incurred by a bankrupt prior to the order are deemed to form part of the bankruptcy estate, with the exception of debts obtained fraudulently

or by criminal means, and suggested that the debt due to the local authority fell within the bankruptcy estate.

6. On 15 November 2007 the claimant lodged an appeal. On the form she put “housing and council tax” in the box for the benefits she was appealing against and “investigation started on 16/11/2006” in the box for the date of the letter telling her about the decision she was appealing against. Under reasons for the appeal she wrote:

“I am appealing against the overpayment of housing/council tax benefit. After a thorough investigation by the benefit fraud dept, it has been decided by them that I have not committed fraud (tel conversation on 7/11/2007). Therefore, because I am a declared bankrupt, I can include the amounts owed to yourselves on the bankruptcy order.”

7. In a letter dated 14 December 2007, part of a more general correspondence, an officer of the local authority stated that the liability did not come into existence until after the date of the bankruptcy order, so was not included in the estate, but also referred to the overpayment having been “raised due to a fraud investigation” so that it could be recovered on that ground.

8. The local authority’s written submission to the appeal tribunal described the decision under appeal (no copy was provided) as being that on 6 November 2007 the decision-maker had used their discretion to recover the overpaid sums of housing benefit via a deduction from the claimant’s incapacity benefit in accordance with regulations 102(1) and 105 of the Housing Benefit Regulations 2006 (SI 2006/213). The submission dealt with several issues, but its central point was that in accordance with regulation 16 of and paragraph 1 of the Schedule to the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 (SI 2001/1002) there is no right of appeal against a decision under regulation 102 of the Housing Benefit Regulations.

9. The appeal tribunal, made up of a legally qualified panel member (LQPM) alone, accepted that view and disallowed the claimant’s appeal on the basis that the appeal tribunal had no jurisdiction to decide it.

10. When giving the claimant permission to appeal against the appeal tribunal’s decision on 5 December 2008, I said that I would have agreed with the LQPM (as set out in paragraph 2 of the reasons given on that date) if the claimant’s appeal had merely been against the method of recovery by deduction from incapacity benefits or against the local authority’s decision under regulation 102(1) of the Housing Benefit Regulations to request the Secretary of State to make those deductions. However, I went on to say in paragraph 3 that:

“in my judgment, the claimant’s appeal on the form received on 15 November 2007 could only be properly interpreted as an appeal against the Council’s decision notified in the letter dated 4 September 2007 – that housing benefit amounting to £11,071.49 had been overpaid in the period from 4 February 2002 to 20 November 2006 and was recoverable from the claimant – on the ground that the making of the bankruptcy order against her on 6 June 2007 meant that the overpayment could not have been made legally recoverable from her on 4 September 2007. The decision of 4 September 2007 was plainly an appealable decision and it seems to me that

the claimant was not merely appealing against the method of recovery, but was challenging the legality of the decision on recoverability.”

11. The local authority has agreed with that in its response dated 15 January 2009, rightly adding that the appeal was to be interpreted as against the CTB overpayment recoverability decision as well. That must be so, even though the claimant had apparently agreed to make regular periodical payments to clear that overpayment. In my view it is clear that none of the claimant’s statements about what she wished to challenge in her appeal altered the conclusion above at all.

12. My reasons for granting permission to appeal continued as follows:

“4. The appeal tribunal did not say anything about that ground of challenge [to the legality of the overpayment recoverability decisions in the light of the bankruptcy order] in its statement of reasons. That was an error of law that would normally justify giving permission to appeal. But since I am completely satisfied that that ground of challenge could not succeed in law, I would not grant permission on that ground. That is the result of the decisions of the Court of Appeal in *R (on the application of Steele) v Birmingham City Council and Secretary of State for Work and Pensions* [2005] EWCA Civ 1824 ([2006] 1 WLR 2380) and *Secretary of State for Work and Pensions v Balding* [2007] EWCA Civ 1327 ([2008] 1 WLR 564) (upholding the decision of the Divisional Court on 3 April 2007, [2007] EWHC 759 (Admin)). The essential point of law is that there is no liability to repay an overpayment of housing benefit until a local authority has made a decision that it is recoverable under section 75 of the Social Security Administration Act 1992 and the Housing Benefit Regulations 2006. So, here, although the period over which the overpayment accrued was before the date of the bankruptcy order, the recoverability decision had not been made at that date. Accordingly, the liability that later arose as a result of the decision of 4 September 2007 was not a bankruptcy debt and there could be no question of there therefore being any inhibition on the making of the decision on 4 September 2007 or of the debt being discharged on the discharge from bankruptcy on 23 April 2008. The legal position is set out most fully in the judgment of the Divisional Court in *Balding*, which was upheld and approved by the Court of Appeal, whose judgments are already in the papers at pages 35 to 40. In view of the length of the Divisional Court judgment I am not attaching a copy to this ruling, but if the claimant wants to read it and has difficulty in obtaining it from another source, she may apply to the Upper Tribunal office, which will arrange for a copy to be sent to her.

5. I give permission to appeal on the following ground, on the basis that the appeal before the appeal tribunal was against the decision of 4 September 2007. There was virtually no evidence before the appeal tribunal of the amount of capital possessed by the claimant, through her husband’s capital being treated as hers, through the period of overpayment. In essence, there was only the income support decision-maker’s decision dated 13 August 2007 that the claimant was not entitled to any income support from 1 February 2002 to 9 May 2003. That might have been regarded as not very important, because the claimant did not apparently dispute that the capital exceeded the £8,000 limit throughout the period from 4 February 2002 to 20 November 2006. However, the precise amounts were very important

indeed to the operation of regulation 103 of the Housing Benefit Regulations 2006 (quarterly diminution of the amount of capital used for calculating the amount of an overpayment that is recoverable by the amount of benefit overpaid in the previous quarter). Bearing in mind that the relevant capital appears only to have been in the £11,000 range in April 2002 (any capital belonging to Joseph, if a child or not a member of the family for housing benefit purposes, not counting as the claimant's capital) and that the amount overpaid over the four years or so was just over £11,000, there appears to be a powerful case for the application of regulation 103. It is arguable that the appeal tribunal erred in law by failing to enquire about that or properly to identify the appeal before it."

13. I should note at once that paragraph 5 of those reasons includes a serious mistake. I described the capital limit as £8,000, which is where it stood for income support and similar benefits until April 2006. But for housing benefit and CTB the limit had stood at £16,000 since April 1990. Therefore there was not just a problem with the overlooking of the quarterly diminution of capital principle under regulation 103 of the Housing Benefit Regulations. There was no evidence before the appeal tribunal that the claimant's capital, including her husband's capital, exceeded £16,000 for any part of the period from 4 February 2002 to 20 November 2006. Although the local authority document dated 15 August 2007 at page 1 of the papers referred to the claimant's husband's capital details being available, nothing was put in the papers submitted to the appeal tribunal (no doubt because the claimant had said on more than one occasion that she was not disputing the amount of the overpayments). As mentioned in the previous paragraph, the amounts mentioned in the income support decision-maker's decision are all below £16,000 (bearing in mind the rule that capital of a child or young person who is a member of the family is not to be treated as the claimant's). The evidence put forward by the local authority therefore fell well short of showing that the claimant had been overpaid benefit of any particular amount for any part of the period in question. Although there may well have been some tariff income from capital over £6,000 that had not been taken into account, there was no basis for making any firm calculations. Even though the claimant had said that she was not disputing that her husband had the capital (that she said she did not know about) or the amount of the overpayment, in my judgment the amounts mentioned by the income support decision-maker should have put the appeal tribunal on enquiry to investigate the actual amounts of capital throughout the period in question.

14. The claimant has continued to argue that, as she had not been found to have committed fraud, the amounts owed to the local authority should have been included in her bankruptcy order. She has not been able to secure the assistance of any legal representative with expertise in this complex and technical area. I understand why in a general sense the claimant is concerned by the mentions of fraud, but I am afraid that in the particular legal context fraud is a red herring and has been since it was first mentioned. That is because the question of whether debts have been obtained fraudulently is only relevant when the debt is a bankruptcy debt, having been incurred before the date of the bankruptcy order. Then the normal rule that bankruptcy debts are released (ie the liability cannot be enforced) on discharge from bankruptcy does not apply to debts incurred by fraud. But there is only a legal liability to repay an overpayment of housing benefit or CTB under section 75(1) of the Social Security Administration Act 1992 and the relevant regulations once the

local authority has made a decision to that effect. That happened in the present case on 4 September 2007, after the date of the bankruptcy order (6 June 2007). Therefore, the debt created by the making of the decision of 4 September 2007 could not form part of the bankruptcy estate or be a bankruptcy debt that was released on discharge from bankruptcy. And there was nothing in the fact that the claimant was subject to the bankruptcy order on 4 September 2007 to touch the power to make overpayment recoverability decisions under section 75(1).

15. I have considered whether I should defer making a decision until the outcome is known of the appeal to the Court of Appeal against the decision on 27 February 2009 of Mr Michael Supperstone QC, sitting as a Deputy High Court Judge, in *R (on the application of the Child Poverty Action Group) v Secretary of State for Work and Pensions* [2009] EWHC 341 (Admin). That case was concerned with whether the Secretary of State has a right to recover overpayments of social security benefits on the ground that they were paid under a mistake of fact or law under common law principles of restitution, as well as the statutory right to recover when the conditions of section 71 of the Social Security Administration Act 1992 are met. The judge decided that the Secretary of State did have that additional right.

16. Thus, at first sight, it might seem that in present case the local authority had the common law right to repayment of the overpayments made under a mistake of fact week by week as the payments were made, ie before the making of the bankruptcy order. Section 382(4) of the Insolvency Act 1986 provides that a bankruptcy debt can be constituted by a liability arising out of an obligation to make restitution. However, the Deputy Judge made it clear that it was agreed between the parties in the *CPAG* case, and that he accepted, that the restitutionary obligation did not arise until after the decision(s) finding the claimant entitled to the benefit in question and authorising its payment had been revised or superseded to be replaced by a decision that there was no or a reduced entitlement to benefit in the period in question. In the present case, that was not done until it was made part and parcel (in the usual rather vague way) of the decisions notified in the local authority's letter of 4 September 2007. Therefore, even if the Deputy Judge's decision in the *CPAG* case is right in law (which remains to be authoritatively decided), it would not help the claimant here, because any restitutionary liability would not have been incurred before the date of the bankruptcy order and could not have been a bankruptcy debt. There is then no point in waiting for the Court of Appeal's decision.

17. In relation to the point about the proper calculation of the amounts of the recoverable overpayments of housing benefit and CTB (in the technical form of excess council tax benefit) in accordance with regulation 103 of the Housing Benefits Regulations and regulation 88 of the Council Tax Benefit Regulations 2006 (SI 2006/215) (the CTB Regulations), the local authority has accepted that those regulations ought to have been applied, so that the appeal tribunal went wrong in law by failing to get the relevant evidence from the local authority. I agree, but, for the reasons given in paragraph 13 above, would go further and conclude that that evidence should have been obtained for the purpose of checking the proper calculation of the overall overpayments in relation to the £16,000 limit. For those reasons, the appeal tribunal's decision must be set aside.

18. The normal consequence would be to remit the case to a new tribunal for rehearing, directing the local authority to make a fresh written submission, with supporting documentary evidence, showing the revised entitlement in the light of the

capital rules that it says should be put into effect for the period from 4 February 2002 to 20 November 2006 and showing how the amount of any resulting overpayment of housing benefit or excess CTB that is recoverable is to be calculated in the light of regulation 103 of the Housing Benefit Regulations and regulation 88 of the CTB Regulations. In its response of 15 January 2009 the local authority has now asserted that, in addition to the claimant's capital exceeding the limits, it had been ascertained that her income other than earnings was too high for her to have been entitled to benefit. That could be dealt with as part of the necessary detailed submission about what the local authority says the new tribunal should decide. It seems to me that if the local authority made out its case on the basis of income for all or some of the period from 4 February 2002 to 20 November 2006, regulations 103/88 would not apply for the weeks concerned, because in those weeks the overpayment would not have been recoverable in consequence of a mistake or misrepresentation or failure to disclose about capital. However, there is perhaps more point as a result of that new allegation to the possible course open to the local authority mentioned in the following paragraph.

19. The decision of the appeal tribunal of 22 July 2008 now having been set aside, the position is that the claimant's appeal against the decisions notified on 4 September 2007 remains outstanding and undecided. In accordance with regulation 4(1)(c) of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001, the local authority has the power to revise those decisions. It may think it administratively neater and less confusing to revise those decisions and substitute new decisions on the basis that it now thinks is right, rather than to graft further explanations on to the papers that already exist in the present appeal. Then, if the revised decision on either benefit were more advantageous to the claimant than the decision notified on 4 September 2007, for example by a smaller amount being made recoverable, the claimant's existing appeal would lapse (Child Support, Pensions and Social Security Act 2000, Schedule 7, paragraph 3(6) and Decisions and Appeals Regulations, regulation 17(1) and (2)). To challenge the new decision the claimant would then have to make a fresh appeal, on which the local authority would of course have to come forward with argument and evidence to support its decision. If the revised decision on either benefit were not more advantageous than that notified on 4 September 2007, the current appeal would continue against that decision as revised (Decisions and Appeals Regulations, regulation 17(3) to (5)).

#### **Directions to the new tribunal**

20. Subject to any action that may be taken by the local authority under the power mentioned in paragraph 19 above, the claimant's appeals against the decisions notified on 4 September 2007 are remitted to a First-tier Tribunal within the Social Entitlement Chamber for reconsideration in accordance with the directions below. The LQPM who constituted the appeal tribunal of 22 July 2008 is not to constitute the new tribunal. The district tribunal judge who, as standard practice, will look at this case to sort out the arrangements for the rehearing will wish to consider directing a time-limit within which the local authority is to notify the First-tier Tribunal of any action under the power mentioned in paragraph 19 or, if an appeal does not lapse, the local authority is to make a fresh written submission with supporting evidence. In so far as either appeal does not lapse and continues against a decision notified on 4 September 2007 (whether as revised or not), there is to be a complete rehearing on the evidence produced and submissions made to the new tribunal, which will not be bound in any way by any conclusions expressed or findings made by the appeal

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tribunal of 22 July 2008. I do not need to give any further directions of law about the conditions under which amounts of recoverable overpayments are to be calculated beyond those to follow and apply the legal approach set out above and that the burden of proving that the claimant's entitlement to housing benefit and CTB is to be revised to her disadvantage and that any part of a resulting overpayment falls to be recovered lies on the local authority.