IN THE UPPER TRIBUNAL **Case No.** CH/2227/2016
ADMINISTRATIVE APPEALS CHAMBER

Before: M R Hemingway: Judge of the Upper Tribunal

Decision: The decision of the First-tier Tribunal sitting at Sutton on 1 June 2016 under reference SC154/15/01722 involved an error of law and is set aside. The appeal is remitted for determination at an oral hearing before a differently constituted tribunal. However, the findings which appear under the heading "Findings of fact" as contained in the First-tier Tribunal's statement of reasons for decision and which run from paragraph (a) to paragraph (s) of that statement are expressly preserved and shall represent the starting point for the new tribunal.

This decision is given under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007.

Directions: Subject to any later directions as to any of the procedural matters set out below and which may be issued by a district tribunal judge of the First-tier Tribunal, the Upper Tribunal directs as follows:

(1) The appeal should be considered at an oral hearing before a differently constituted tribunal to that which considered the appeal on 1 June 2016.

(2) The new tribunal must take, as its starting point, the preserved findings as set out above but may consider additional oral or documentary evidence for the purpose of making supplementary findings.

(3) If the parties have further written material to put before the new tribunal this should be sent to the appropriate tribunal office within one month of the issuing of this decision.

REASONS FOR DECISION

1. This is the claimant's appeal to the Upper Tribunal, brought with my permission, from a decision of the First-tier Tribunal (hereinafter "the tribunal") of 1 June 2016, to the effect that the claimant was not entitled to housing benefit from 9 July 2012 to 23 August 2013 because she did not have a legal liability to pay rent and had, therefore, received a recoverable overpayment of housing benefit, during that period, amounting to £15,437.51.

2. The claimant has a number of family members but, in particular, a sister whom I shall refer to as FZ. The claimant applied for housing benefit to the respondent local authority ("the LA") in respect of a private sector first floor flat which I shall simply refer to as "the premises". I shall call the owner of the premises M. The LA initially paid housing benefit pursuant to the application but subsequently concluded that the agreement was not commercial or had been created to take advantage of the housing benefit scheme. It was later to argue that the claimant was not liable to make payments in respect of the premises and so had never been entitled to housing benefit on that basis too. It also said there had, in consequence, been a

recoverable overpayment of housing benefit. A composite decision encompassing entitlement and the alleged overpayment was made on 27 January 2014.

3. I shall set out, at this stage, the various legal provisions of relevance.

4. Section 130 of the Social Security Contributions and Benefits Act 1992 provides 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;"

5. The Housing Benefit Regulations 2006 (hereinafter "the 2006 Regulations") provide:

> " **Circumstances in which a person is to be treated as liable to make payments in respect of a dwelling –**
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> **8.** - (1) Subject to regulation 9 (circumstances in which a person is to be treated as not liable to make payments in respect of a dwelling), the following persons shall be treated as if they were liable to make payments in respect of a dwelling –
>
> (a) the person who is liable to make those payments;
>
> (b) a person who is a partner of the person to whom sub-paragraph (a) applies;
>
> (c) a person who has to make the payments if he is to continue to live in the home because the person liable to make them is not doing so and either –
>
> (i) he was formerly a partner of the person who is so liable; or
>
> (ii) he is some other person whom it is reasonable to treat as liable to make the payments; …
>
> **Circumstances in which a person is to be treated as not liable to make payments in respect of a dwelling –**
>
> **9.** - (1) A person who is liable to make payments in respect of a dwelling shall be treated as if he were not so liable where –
>
> (a) the tenancy or other agreement pursuant to which he occupies the dwelling is not on a commercial basis; …
>
> (l) in a case to which the proceeding sub-paragraphs do not apply, the appropriate authority is satisfied that

> the liability was created to take advantage of the housing benefit scheme established under Part 7 of the Act."

6. The tribunal held a lengthy oral hearing on 1 March 2016. It received oral evidence from the claimant. It adjourned for the filing of further documentary evidence and, thereafter, issued its decision on 1 June 2016 in the form of a single document constituting both the decision notice and its statement of reasons for decision ("statement of reasons"). It set out its relevant factual findings under the heading "Findings of fact" from paragraphs (a) to (s). Although I have set its decision aside and remitted, for reasons which I shall explain below, I have preserved those factual findings in their entirety.

7. The tribunal made findings which I shall now summarise in paragraphs 8 to 10 of this decision:

8. It found that M owned the premises. She used letting agents I shall refer to as ECB. The claimant and her child (who had been born on 31 May 2005) were, until 1 July 2012, living with the claimant's parents. However there had been some family disagreements and so the claimant wished to move out. She spoke to FZ about that and the two sisters approached ECB to enquire about the renting of the premises. They said to ECB that they proposed to occupy the property together though that was not the intention and, in fact, FZ never resided there. ECB indicated that M did not wish to let the property to a recipient of housing benefit (it was intended that the claimant would apply for housing benefit) so a tenancy agreement was drawn up naming FZ as the sole tenant. That agreement was for the premises to be rented to FZ under an assured shorthold tenancy for a two year fixed term at a rent of £1,238.39 per calendar month. The tribunal found that although the claimant has limited literacy skills she was aware that FZ was to be the tenant. There were some terms of the tenancy of which the claimant was unaware including one prohibiting occupation by children without consent.

9. The claimant moved into the property on or about 1 July 2012 with her child. She claimed housing benefit but was told by the LA that she needed to provide it with a copy of her tenancy agreement. That created a difficulty because she did not have a tenancy agreement with M so, once again, she spoke to FZ. As it happened, FZ had an involvement with a property letting agency I shall refer to as KK. She arranged for a member of staff at KK to draw up an agreement purporting to show the claimant as the tenant and M as the landlord. The claimant then made her claim for housing benefit using that false tenancy agreement. She also, having been advised to do this by a friend, indicated that the monthly rent was slightly higher than the rent which had been indicated in the original tenancy agreement between FZ and M. That was with a view to ensuring that, whatever level of housing benefit the LA agreed to pay, the shortfall between that and the actual contractual rent (according to the contract between M and FZ) would not be too significant. In the event, it was initially decided to pay housing benefit at the rate of £1119.99.00 per calendar month. So there was a shortfall and the claimant regarded herself as being liable to pay that. Initially, she would pay the amount of rent which was due, to FZ who would then pay the money to ECB but, after two months or so, FZ indicated she did not wish that arrangement to continue and, thereafter, the claimant paid the money to ECB herself.

10. The claimant moved out of the premises around 3 September 2013 having been served with a notice of seeking possession following M's discovery that she was living in the property

and was not FZ with whom, of course, M had contracted. The tribunal, and this may ultimately be of some importance, accepted as part of the findings which I have preserved, that the claimant "entered into these arrangements without fraudulent intent. The tribunal observed:

> " (s) I accepted [the claimant's] statements that she entered into these arrangements without fraudulent intent. She was a person on a low income who, given a willing landlord, would have been entitled to enter into a tenancy agreement for a flat for herself and her son and to have received housing benefit to assist her with the rent. She felt driven to these arrangements because landlords preferred not to let to tenants dependent on housing benefit and in the conditions of the property market could afford to adopt such a stance. …"

11. Having made those findings the tribunal then sought to apply them in light of the relevant law which I have set out above. It concluded, unsurprisingly it seems to me, that there was a tenancy agreement between M and FZ. It then went on to consider whether there was a sub-tenancy between FZ and the claimant. It thought that the mere fact that the claimant was, after the first two months, paying the rent money to M (via ECB) did not create a tenancy or similar arrangement between them. It observed that there was "no legal relationship between them". It specifically concluded that FZ was not acting as agent for M. So, it concluded, if the claimant was "liable to make payments in respect of a dwelling" (see regulation 8(1) of the Housing Benefit Regulations 2006) that would have to be on the basis of a liability consequent upon the arrangements she had with FZ.

12. As to that, the tribunal commented that the lack of any written agreement between the two was not decisive. It accepted that there was an understanding between them which it described as being an informal one. Clearly, part of that understanding was that the claimant would pay the rent (leaving aside the first two months) to M. The tribunal went on to conclude that the arrangement between the two sisters did not create any legal liability on the part of the claimant. It set out its position as to that, in this way:

> " (x) As to this, there was no written agreement between the two, but this is not fatal. There was an understanding between them, which was informal. Was it a binding contract? There are three requisites. (1) There must be 'consideration' for the agreement. In this case there was: [FZ] gave up her right to occupy the property in exchange for [the claimant] discharging her liability for rent under the tenancy. (2) It must be a settled agreement. This too was the case: when [FZ] took on the tenancy it was understood between the sisters that she would hold the tenancy for the term, and [the claimant] and her son would occupy it for the term, paying the rent in the interim. (3) There must be an intention to create legal relations. I find that this element was not present.
>
> (y) The liability to pay rent must be legally enforceable, not just a moral obligation (R v Rugby BC HBRB ex p Harrison [1994] 28 (HLR 36). I find that the sisters did not intend their agreement to be legally enforceable. When (the claimant) was asked what would happen if she did not pay the rent, her answer was that she expected that [M's] agents would take action to recover possession. She did not contemplate that her sister would take action against her, either by way of possession action or action to recover unpaid rent under the sub-tenancy. A distinction is to be made between legally enforceable agreements and living arrangements made between family members. I find that, although the arrangements had the features of a sub-tenancy, it was essentially a family arrangement. [FZ] was fulfilling a sense of family obligation in helping [the claimant] out in circumstances where she found it impossible to secure a tenancy when

> reliant on housing benefit. The arrangement was one which relied on the element of family relationship, rather than legal enforceability, for its efficacy. It was not in the contemplation of the parties that, if [the claimant] failed to make the payments, [FZ] would or could take enforcement action against her. All that was expected was that enforcement action would be taken by M (or her agents) if the terms of [FZ's] tenancy were breached. [The claimant] by her own evidence did not consider that, when making the payments, she was doing so on behalf of her sister: she simply thought she was paying rent because she was living in the property."

13. Thus, the tribunal had concluded that the claimant was not liable, as a matter of law, to make payments to anyone in respect of the premises. That meant, it thought, that she could not have been entitled to the housing benefit which she had been paid. I would add, at this stage, that there was never any dispute between the parties as to the amount of the overpayment nor does it ever appear to have been contended that if there had been an overpayment it was not recoverable. The tribunal went on to add that, given its conclusion that there was no legal liability on the part of the claimant, it was unnecessary for it to consider the respondent's alternative submissions under regulation 9 of the 2006 Regulations. It only referred, in that context, to regulation 9(1)(a) but what it said, if correct, would have been equally applicable to 9(1)(l).

14. There followed an application for permission to appeal to the Upper Tribunal which was refused by a district tribunal judge of the First-tier Tribunal (indeed the same tribunal judge who had dismissed the appeal). The application was renewed with the Upper Tribunal. The claimant has signed the grounds but, given what the tribunal had to say about her level of literacy, it may be that she has had some sort of informal assistance. Be that as it may, the contentions made in the grounds were, in summary, to the effect that she had done nothing wrong, that she must have been liable to pay rent because she was living at the premises, that FZ had been "an agent", that the housing benefit payments had been used for the purpose in respect of which that benefit had been granted and that, following what had been stated in a decision of a Deputy Social Security Commissioner in *CH/2959/2016*, it was possible for those who did not have an interest in land, or authority from an owner, to let premises and to enter into a legally binding agreement with another party. Such an agreement, whilst not being binding on third parties such as an owner, was capable of creating a liability to pay rent. The grounds to the Upper Tribunal then go on to make a number of factual assertions which had not been made before the tribunal to the effect that M knew the claimant was occupying the property and was happy for her to do so, so long as rent was being paid (which might seem unlikely given that she subsequently went on to seek to evict the claimant on a basis other than rent arrears), and that there had been a verbal agreement reached between the claimant and M.

15. Had I limited myself solely to the points raised in the grounds I would not have granted permission to appeal. Only one of those seemed to me to be potentially capable of establishing arguable legal error which was that based on the decision in *CH/2959/2006* but that only went so far as to demonstrate that a legal liability to pay rent might stem from an agreement between someone other than the owner of a property and an occupier. As I pointed out when granting permission, the tribunal in this case had expressly considered that possibility but had decided on the facts that no such liability had arisen in this particular case. But this is an inquisitorial jurisdiction and I did consider it appropriate to grant permission on a point not raised in the grounds. In doing so I said this:

> " 3. Having said the above, I have decided to grant permission to appeal. That is because I consider it to be arguable that the F-tT erred in failing to consider whether, on the facts as found, the applicant was a person who (subject to the possible applicability of regulation 9 of the Housing Benefit Regulations 2006) was to be treated as if she was liable to make payments in consequence of regulation 8(1)(c)(ii) as a person who it was reasonable to treat as being so liable. It may be, though, that there is a counter-argument to the effect that where there has been dishonesty it will never or at least not normally be appropriate to conclude it is reasonable to treat a claimant as liable in circumstances where that claimant would not otherwise be considered to be liable."

16. In saying what I did about "dishonesty" I was aware of what the tribunal had had to say, and which I have set out above, concerning the absence of "fraudulent intent" but was also aware of its findings that a false tenancy agreement had been relied upon when the housing benefit claim had been made and that the amount of rent indicated as part of that claim had not been the figure contained in the tenancy agreement between FZ and M (albeit that it was not very much more). I directed written submissions from the parties.

17. The LA asserted, in its submission, that the tribunal had made correct findings and reached correct conclusions. In particular, it contended that it had been correct in concluding that there was no legal enforceable liability to pay rent. However, the submission did not address the point I had made considering the potential applicability of regulation 8(1)(c)(ii) nor, in consequence, did it address my rider as to whether it would ever be reasonable to treat a person as being liable to make the payments where there had been some dishonesty. The claimant, in reply to the LA's submission, made an assertion to the effect that in a "similar case" involving another member of the claimant's family, a more favourable outcome (from the perspective of the claimant in that case) had been reached by a differently constituted tribunal. Neither party requested an oral hearing of the appeal before the Upper Tribunal.

18. It is on the above basis that I must now decide this appeal. I have concluded, first of all, that there need not be an oral hearing before the Upper Tribunal. The parties have had an opportunity to state their respective positions in writing. Neither party has sought an oral hearing. There is nothing to suggest that the holding of one will advance matters.

19. I did wonder whether the tribunal might have erred in not fully utilising its inquisitorial powers when enquiring into the nature of the arrangements between FZ and the claimant. It said that it had asked the claimant what would happen if she had not paid the rent and that she had answered that she would have expected M's agent to take action to recover possession. It is apparent from the tribunal's record of proceedings (its note of what was said at the hearing) that it did indeed ask her what she thought would happen if she stopped paying the rent and that she had responded by stating "the agent would tell me to go". However, assuming I am reading the record of proceedings correctly, it does not appear that any follow-up questions were asked of her. In particular, I suppose, it might be thought that it would have been helpful to have asked her what she thought FZ might have done in the event of M suing her (that is FZ) for the rent which, on the face of it, M would have been able to do on the basis of the written agreement between the two of them. A response to that sort of question might have further informed as to the question of whether there was any legal liability upon the claimant to make the payments in consequence of her arrangement with FZ. However, whilst a different approach might have been taken (and perhaps might be in the future as a result of my decision to remit) I have concluded that although its questioning in this area was limited, the tribunal was entitled to infer from what the claimant did and specifically did not say in response to the

question put to her, that there would have been no other consequences apart from a possession action. As I say, though, the matter can now be probed in somewhat more detail in due course. I also wondered whether the tribunal might have erred in seeming to contemplate that the only possible type of agreement that might exist between the claimant and FZ and which would have generated a liability to pay would have been a sub-tenancy. In looking at the wording it used, it did not seem to contemplate that there might have been, for example, some form of licence arrangement between the two of them under which there might have been a liability. I see no reason, on the face of it, why it should be thought that liability could only stem from a sub-tenancy but, again, I have concluded that the tribunal did not fall into legal error in this regard because its reasoning, in particular as to the lack of any intention to create legal relations could apply to both a sub-tenancy and a licence situation. Again, though, this is something which the new tribunal may care to revisit in due course.

20. I am satisfied though that, notwithstanding the above, the tribunal did err in law. It did so because it did not go on to consider the possibility that the claimant might have been a person falling within regulation 8(1)(c)(ii) of the 2006 Regulations. That is to say it did not ask itself whether, having decided that there was no legal liability upon her, she was some other person whom it was reasonable to treat as liable to make the payments because she had to do so if she was to continue living in her home because the person who was liable to make them (FZ according to the tribunal's findings) was not doing so. I appreciate that neither party appears to have brought this provision to the tribunal's attention but, nevertheless, it was a matter which, in my judgment, it was required to address.

21. It seems to me that the use of the term "reasonable" within regulation 8(1)(c)(ii) is to be regarded as meaning reasonable in all the circumstances and in light of the overall purpose of the housing benefit scheme. That was the way in which I think Commissioner Mesher (as he then was) had approached the matter in *CH/3013/2003* (see in particular paragraph 34 of that decision). Looked at in that way, although I was concerned about the point when I granted permission, it does not seem to me it can properly be said that any dishonesty either on the part of a claimant or on the part of someone intimately involved with the process of claiming (perhaps in this case FZ) should necessarily lead to a conclusion that it would not be reasonable to treat a claimant as being liable. Rather, such might be regarded as one of many factors which may have relevance to that question. In this case, of course, other factors which the tribunal could have legitimately have taken into account would include those set out at paragraph (s) concerning what it found to be the lack of fraudulent intent on the part of the claimant. Had the tribunal considered this particular provision it might have reached a view (I do not say would) that the claimant did fall within the scope of regulation 8(1)(c)(ii) so the error it made, in disregarding the possible impact of that provision, was a material one. Accordingly, and on that basis, its decision must be set aside.

22. I have considered whether I should go on to remake the decision myself. However, I have concluded that I do not have sufficient material before me to enable me to justly do that. Although I have concluded that the tribunal did not fall into legal error in its failure to enquire further into what the position might have been had the claimant defaulted upon her rental payments, it does seem to me that that might be a fertile area for further exploration and further consideration in light of whatever additional evidence the claimant herself and perhaps, if she sees fit to attend the hearing, FZ might give. Of course, though, it will be open to the tribunal to reject any such evidence so long as it can rationally do so and so long as it adequately explains why. Thus far, the new evidence which I envisage might be obtained will

relate to the question of whether there is a genuine liability (in this case between the claimant and FZ) to make payments in respect of "a dwelling" (the premises). However, if it is properly concluded that there is no such liability further information, in addition to that already contained in the preserved findings, might be relevant to the 8(1)(c)(ii) test. As to that test, at first glance, it might seem that all a claimant has to demonstrate is that he/she is making the payments because the liable person is not doing so. However there is the important wording "has to make the payments if he is to continue to live in the home". So, it is necessary for there to be an exploration not merely as to whether the liable person is actually not doing so but what the liable person would do if the claimant were to cease to pay. That is because if it were concluded that if a claimant ceased to make the payments then the liable person would respond by starting to do so, it could not properly be said that claimant had to make the payments in order to continue living in the home. In applying that to the facts of this case, there has been no exploration as to whether if the claimant did not pay FZ would do so in accordance with her legal liability, perhaps because she would not wish to be sued or perhaps out of some family duty.

23. In light of all of that a proper decision cannot be made without a further hearing of some sort. I did consider, therefore, holding a hearing before the Upper Tribunal involving the taking of evidence along the lines just indicated in order to supplement the preserved findings. However, it does not seem to me obvious that a hearing before the Upper Tribunal could be arranged any more speedily then could a remitted hearing before the First-tier Tribunal. Given that and the fact that the First-tier Tribunal is an expert fact-finding body, I have decided that, as already indicated, the most appropriate course of action is remittal. That will perhaps necessitate only a relatively short hearing because there would appear to be a need to make only a relatively small number of further findings on the basis of certain discreet issues.

24. So, the new tribunal's starting point will, as already indicated, be the preserved factual findings. It will hopefully be able to receive evidence concerning the further issues I have referred to above. Given that the claimant attended the last hearing and gave extensive oral evidence, it does seem likely that she will attend the further hearing. I would stress to her, though, that it will be no part of the new tribunal's function to reopen the preserved findings.

25. The tribunal will, first of all, have to decide whether there is a genuine liability. If it decides there is then, unless the LA indicates that the alternative arguments are no longer maintained, it will have to go on to consider the possible applicability of regulation 9(1)(a) or (l). If it decides there is no actual liability then it will have to consider whether the test in regulation 8(1)(c)(ii) is or is not met. In such circumstances, and without seeking to decide this in a manner which will be binding since I have not had argument on the point, it seems to me it will not be necessary, if that is resolved in favour of the claimant, to then consider the possible application of regulation 9 in respect of the deemed liability. That is because, according to the wording of 9(1), the matters contained therein and which might cause a person to be treated as not liable to make payments only relate to a person "who is liable to make payments". However, it also seems to me that any factors which might otherwise have been considered relevant to the regulation 9 criteria might also be relevant to the question of reasonableness within regulation 8(1)(c)(ii).

26. This appeal to the Upper Tribunal, therefore, is allowed on the basis and to the extent explained above.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated: **21 December 2016**