[2020] UKUT 240 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. CH/1839/2017**

ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

Warwick District Council

Appellant

-v-

Secretary of State for Work and Pensions

First Respondent

-and-

CH

Second Respondent

Before: Upper Tribunal Judge Poynter

Representation

Appellant:	Steve Temple, Warwick District Council Finance Service
First Respondent	Naomi Candlin of Counsel instructed by the Government Legal Department
Second Respondent	Rachel Wilcox, Nuneaton & Bedworth Citizen's Advice Bureau

DECISION

Technically, the local authority's appeal succeeds.

The First-tier Tribunal made a legal mistake in relation to the claimant's appeal (ref. SC015/16/1617) which was decided at Coventry on 12 January 2017.

I set that decision aside.

However, I re-make that decision in substantially the same terms, namely:

1. **The claimant's appeal is allowed.**

2. The decision made by Warwick District Council ("Warwick") on 14 May 2015 and issued on 20 May 2015 is set aside.

3. Regulation 9 of the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006 does not operate so as to exclude the claimant from entitlement to housing benefit under the claim she made on 9 March 2015.

4. Warwick is directed to reconsider the claimant's entitlement (if any) to housing benefit for the period from and including 16 March 2015 on that basis and to notify her of its decision following that reconsideration.

5. If Warwick considers that it is unable to carry out that reconsideration without further information, it may apply to the Upper Tribunal for further directions.

6. If the claimant is dissatisfied with Warwick's reconsidered decision, she may apply to the Upper Tribunal and I, or another judge, will check whether it is correct.

7. To do that, the claimant should write to the Upper Tribunal, preferably by email to adminappeals@justice.gov.uk, but otherwise by post to The Upper Tribunal (Administrative Appeals Chamber), Fifth Floor, Rolls Building 7 Rolls Buildings, Fetter Lane, London EC4A 1NL.

8. That letter or email must:

(a) be *received* no later than two calendar months from the date on which Warwick sent the claimant its reconsidered decision;

(b) be marked "CH/1839/2017 – Application under Liberty to Apply";

(c) enclose a copy of the letter from Warwick notifying her of its reconsidered decision; and

(d) explain why she does not agree with that decision.

REASONS

Introduction

1. Warwick District Council ("Warwick") appeals against the above decision of the First-tier Tribunal.

2. The procedural history leading to that decision was as follows:

(a) the claimant claimed housing benefit on Monday 9 March 2015;

(b) on 14 May 2015, Warwick refused that claim. It decided that the claimant's tenancy was not on a commercial basis and that she was therefore excluded from entitlement by regulation 9(1)(a) of the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006 ("the Regulations");

(c) notice of that decision was sent to the claimant on 20 May 2015 and she subsequently appealed against it to the First-tier Tribunal;

(d) on 12 January 2017, the First-tier Tribunal allowed her appeal; and

(e) on 6 October 2017, Judge Farbey QC (as she then was) granted Warwick permission to appeal against that decision.

3. The factual background is concisely set out in the Tribunal's written statement of reasons as follows:

> "8. I find as facts that the property was bought on a buy to let mortgage by [the claimant's son, J ("the Landlord")] and his siblings, with the intention of providing a secure home for the elderly parents. The rent charged covered the mortgage payment, and an allowance to cover repairs and maintenance. The tenancy agreement was professionally drawn up and the tenancy commenced on 1 April 2000. Until mid-2013 the rent of £500 pcm was paid regularly by the appellant and her husband, until they retired. From that time onwards they started to struggle with the rent. Advice was sought from the CAB, and that was why a claim was eventually made for HB.
>
> 9. Since the start of the tenancy numerous repairs and improvements had been carried out, including new windows, upgrading the bathroom, decorating and others. All had been paid for by the landlord. They also carried out annual checks on the gas and

> electrical installations complying with a landlord's responsibility. No recent improvements had been carried out since rent was not being paid to fund such work. I was told, and I accept, that the siblings were covering the mortgage payments between them pending the appeal, in order to save their parents the stress of any possession proceedings."

The relevant law

4. So far as relevant, section 130 of the Social Security Contributions and Benefits Act 1992 ("the Contributions and Benefits Act") states:

> "**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. Section 137(2)(i) of the Contributions and Benefits Act empowers the Secretary of State for Work and Pensions to make regulations providing:

> "(i) for treating any person who is liable to make payments in respect of a dwelling as if he were not so liable;".

6. That power has been exercised to make regulation 9 of the Regulations, which—so far as is relevant to this appeal—is in the following terms:

> "**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;
>
> (b)-(k) …
>
> (l) in a case to which the preceding 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.

> (2) In determining whether a tenancy or other agreement pursuant to which a person occupies a dwelling is not on a commercial basis regard shall be had inter alia to whether the terms upon which the person occupies the dwelling include terms which are not enforceable at law …"

The First-tier Tribunal's decision

7. Based on the findings set out in paragraph 3 above, the Tribunal decided that the claimant's tenancy was on a commercial basis. The judge's stated reasons for that conclusion were as follows:

> "10. I have no hesitation in finding that this tenancy is on a commercial basis. As required under reg 9(2) HB Regs I have had regard to the fact that there are no unusual or unenforceable terms of the tenancy. All the terms are standard terms I would expect to see in such a tenancy. The landlords have been complying with their responsibilities, and I regard their decision to await the outcome of this appeal before commencing any possession proceedings to be laudable, rather than as an indication that the tenancy is not commercial.
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> 11. WDC are applying the wrong test when placing weight on the reason for the property having been purchased, and the indication that they would not consider renting to anyone else, or the forbearance in not starting possession proceedings while the appeal was outstanding. The test is whether the tenancy is not on a commercial basis. It is not whether the landlord is in business as a commercial landlord. I can see nothing uncommercial in the tenancy, and the actions of the landlord and not pursuing arrears so far as both compassionate, but also makes financial sense, since by winning the appeal his parents would then be in a position to pay the arrears. If prompt action had been taken the purpose of the arrangement would have been thwarted, and the landlord may never have received the rent owing. Indeed [the landlord] may have built up further losses while the property remained on the market for an indefinite period."

Permission to appeal

8. Judge Farbey QC gave Warwick permission to appeal for two reasons.

9. First, it was arguable with realistic prospects of success that the Tribunal had failed to take into account a relevant factor, namely that substantial rent arrears had accrued during the period between 1 August 2013 and the date of the housing benefit

claim. This was the ground of appeal that was set out in Warwick's written application for permission.

10. Second, during the hearing of the application for permission to appeal, Warwick developed an argument that, even if the tenancy were originally commercial, the failure to enforce its terms demonstrated that the nature of the tenancy changed and it became a non-commercial tenancy. The judge accepted that this ground also had a realistic prospect of success.

11. In relation to the second issue, Judge Farbey QC also noted a passage in *CPAG's Housing Benefit and Council Tax Benefit Legislation* which suggests, following Mr Commissioner Jacobs (as he then was) in *CH/3008/2002*, that "… it may be possible for an agreement to pass in and out of the scope of" regulation 9(1)(a).

12. Because the second ground raised an issue of more general importance in relation to the interpretation of the Regulations, the Secretary of State was asked whether she wished to be joined as a party to the proceedings. She confirmed that she did so wish and Upper Tribunal Judge Wikeley, subsequently added her as first respondent to the proceedings.

Warwick's submissions to the Upper Tribunal

13. In the notice of appeal and its submissions at the hearing, Warwick treated the two grounds as, in effect, different sides of the same coin.

14. Its case is that the tenancy had changed from commercial to non-commercial because of the events that occurred—or rather didn't—when the claimant ceased to be able to pay the rent on a regular basis. Warwick calculated that during the period of approximately 19 months from 1 August 2013 to the date of the claim for housing benefit on, arrears of £7,500 had accrued. A commercial landlord, it is said, would not have allowed those circumstances to have arisen, but would have taken steps to enforce the liability by bringing eviction proceedings.

15. Further, it is said that the Tribunal was wrong to hold that Warwick had applied the wrong test by asking what a commercial landlord would do. Rather, for the tenancy to be a commercial tenancy it must operate along the lines that would be expected in any other commercial tenancy between non-related parties. The two factors are therefore interlinked: the actions of a commercial landlord are linked to the commerciality of the tenancy.

16. In support of both contentions, Warwick relied on passages from sub-paragraphs 12, 13 and 14 of paragraph 21 of the decision of Mr Jacobs in *CH/3743/2003* to the following effect:

> "… he has been allowed to accumulate very large net arrears and no steps have been taken to enforce the repossession notice issued. … Such forbearance on the part of [his mother] goes well beyond the latitude which a commercial landlord could reasonably be expected to allow a tenant with respect to rent arrears. It is the hallmark of a "truly personal" agreement. … However, should an application not produce a favourable result within a relatively short time – weeks, perhaps, rather than many months as in this case – a commercial landlord could be expected to insist that the tenant either finds other means of paying the rent or leaves. … It was unfortunate from [the claimant's mother's] point of view that the Borough took an exceptionally long time to reach its decision, but that is not a risk which a commercial landlord could be expected to assume."

However, those passages do not record Mr Jacobs' judgment in that case but the Tribunal's statement of reasons. Although Mr Jacobs upheld the Tribunal's decision in CH/3743/2002, he did not accept the reasoning in the quoted passages, so I do not consider them further.

The Secretary of State's representations to the Upper Tribunal

17. In his written representations, the Secretary of State's representative confined himself to the second ground of appeal and submitted on the authority of the *CH/3008/2002* that a tenancy may cease to be on a commercial basis in consequence of actions taken or not taken during the course of the tenancy.

18. At the hearing, counsel for the Secretary of State supported that interpretation of regulation 9(1)(a) and also the manner in which Warwick had applied the law to the facts of this case.

The claimant's submissions to the Upper Tribunal

19. On behalf of the claimant, Nuneaton & Bedworth Citizen's Advice Bureau accept that there may be situations in which a tenancy that was originally commercial can change to being uncommercial if the dominant purpose of the agreement changes. On that basis, it is submitted that it should therefore also be possible for a tenancy to move from being non-commercial to being commercial.

20. The Bureau also submits that commerciality has to be judged in the context of the relationship between the parties as a whole and that where, as here, the landlord's purpose in creating the tenancy was not solely to obtain a commercial return, a failure to pursue arrears of rent should not be compared with the actions that would be taken by a purely commercial landlord.

21. Finally, the Bureau submits further evidence that:

(a) despite the period during which the claimant struggled to pay rent, the landlord was still overall obtaining a return on the property that was at least as good as is often obtained by commercial landlords; and

(b) that the circumstances of both the claimant's husband and also J put the decision not to pursue the arrears in a different light.

The primary issue I have to decide is whether the First-tier Tribunal made a legal mistake and—with one exception—it is not legally incorrect for a tribunal to fail to take into account evidence that is not before it. The exception applies where the reason the tribunal does not have the evidence is a failure to exercise its inquisitorial jurisdiction. That exception does not apply in this case, so I cannot look at the further evidence when deciding whether the Tribunal erred in law. I have, however, taken it into account when re-making the Tribunal's decision: see paragraph 83 below.

Discussion

Trump-card facts and the notional commercial landlord

22. The test that Warwick—and, on appeal, the Tribunal—had to apply was whether the "tenancy or other agreement" pursuant to which the claimant occupied her home was "not on a commercial basis". The quoted words in the previous sentence are those which have been used by the legislator. The surest way for decision makers to make a legal mistake is to rely on a paraphrase of, or to place a gloss on, that statutory wording because it is easier to apply the law as paraphrased, or glossed, in a particular case.

23. Whether or not a tenancy is on a commercial basis is a question of judgment. It is not what lawyers call a "primary fact". That is, it is not something that can be observed about the world. Rather it is a compound, or secondary, fact: an inference of fact drawn by the exercise of the decision maker's judgment from the "constituent facts", namely all the primary facts—and sometimes other secondary facts[1]—that are relevant.

[1] For example, whether or not the tenancy or other agreement contains terms that are not enforceable at law (see regulation 9(2)) is also a conclusion rather than a primary fact.

24. That is not a problem if all the constituent facts support the same conclusion. But in any case in which—as here—there is a serious dispute about whether a tenancy or other agreement is "not on a commercial basis", that will not be so: some of the constituent facts will tend to support the conclusion that the tenancy is commercial and some will tend to support the opposite conclusion.

25. Moreover, the facts of each case will be different and conclusions about commerciality are intensely fact-specific: comparatively small differences of fact can alter the side on which the scales come down. It is therefore not possible to lay down hard and fast rules about the circumstances in which a tenancy will or will not be "on a commercial basis".

26. Faced with the problem of drawing a single inference from competing facts, without the assistance of detailed rules about when one fact should be accorded more weight than another, it is easy for decision makers to rely on what I will describe as a "trump-card fact". That is achieved by seizing on a single fact and holding that its very existence means the tenancy cannot be—or, alternatively, must be—commercial.

27. Unfortunately for claimants, the type of fact that seems to work best as a trump card nearly always tends towards the conclusion that the tenancy is uncommercial.

28. In particular, and moving closer to the facts of this appeal, trump-card facts often involve the decision maker calling in aid the "notional commercial landlord". "No commercial landlord", it is said, "would have let property on terms that would not have been made available to the public as a whole; or would not have taken a deposit; or would have set the rent at that level; or would have omitted subsequently to increase it; or would have allowed arrears of a given level to accrue without taking action; or would have omitted to charge contractual interest etc.; and so this tenancy cannot be commercial".

29. There are a number of problems with that approach.

Weighing all the relevant factors—R(H) 1/03

30. First, relying on one fact as a trump card in this way means that the decision maker does not properly take into account the facts that support a different conclusion. Indeed, the very attraction of the trump-card approach is that it lets the decision maker off the hard work of doing that. As a result the decision maker will probably commit the legal error of failing to take into account relevant considerations.

31. The leading authority on how to approach the issue of commerciality is the decision of Mr Commissioner Jacobs in *R(H) 1/03*. That decision was the first decision of the Commissioner on what is now regulation 9 (formerly regulation 7 of the Housing

Benefit (General) Regulations 1987). It has provided a sound basis for the assessment and explanation of commerciality decisions ever since.

32. As summarised in the head note, *R(H) 1/03* is authority for the following

> "2. the proper approach for an appeal tribunal was to investigate and determine the facts material to the issue [*i.e.*, of commerciality] and then determine as a question of "compound fact" whether as a matter of the proper use of language the arrangement was not on a commercial basis, applying the principles established by the authorities;
>
> 3. in applying those principles …, the tribunal must not reason by analogy from the reported cases and must consider the individual facts of each case in the context of all the others…;
>
> 4. it followed that, if a tribunal had made sufficient findings of the constituent facts, there may be little more that it could usefully say to explain its findings of compound fact;"

33. It may also help if I set out in full what is said about the recommended approach summarised in paragraph 3 of the head note. Having made the point that tribunals should not argue by analogy with reported decisions, Mr Jacobs continued:

> "*Investigation of the facts*
>
> 21. Whether or not an arrangement is on a commercial basis is, in the useful phrase of Jessel MR in *Erichsen v. Last* (1881) 8 Queen's Bench Division 414 at page 416, "a compound fact made up of a variety of things." The proper approach to that type of fact is to begin by finding the constituent facts. The tribunal must begin with an investigation into all aspects of the arrangement on which the claim is based. The authorities indicate in general terms the subject matter for the inquiry. They also give some more detailed suggestions that may be relevant in particular types of case. Having made its inquiry, the tribunal must make and record findings of constituent fact on all relevant matters. Those findings provide the foundation for a finding on the compound fact: was the arrangement on a commercial basis?
>
> *Analysis*
>
> 22. The tribunal must analyse the constituent facts of the case as a composite whole. The significance of each factor cannot be considered in isolation. Each must be considered in the context of all the others. An overall view must be taken. This has an impact on the explanation for a

> decision that it is possible to give to a claimant and on the approach that the Commissioners take on appeal on error of law.
>
> *Explanation and adequacy of reasons*
>
> 23. A claimant is entitled to some explanation of why the tribunal came to the conclusion that it did. There is a limit to the extent that this is possible, because the mental process of making the finding is subconscious. Although the constituent facts and their significance can be isolated and discussed, the final conclusion is based on the complex interaction of factors and impressions that a decision-maker cannot explain. If the tribunal has made proper findings of the constituent facts, there may be little more that can usefully be said to explain the finding of compound fact. At best, it may be possible to identify some of the constituent facts that have particularly figured in the tribunal's deliberation and conclusion, and to explain how and why the tribunal analysed their significance. It may also be appropriate to refer to matters that were particularly emphasised in argument."

34. If the landlord has (say) allowed arrears of rent to accrue, then that may[2] be a factor that supports a decision that the tenancy or other agreement as a whole is no longer on a commercial basis. But it will usually be only one of many factors and must still be weighed against the others in the context of the evidence as a whole. It may even turn out to be the determinative factor, but that is a conclusion that can only be reached *at the end* of the weighing process.

35. By contrast, reliance on a trump-card fact means that the weighing process never even begins. The existence of that fact allows the decision maker to jump directly to a conclusion: because "no commercial landlord would do" whatever it is the landlord in the case has done, the tenancy must be uncommercial.

The legislative context

36. The second problem is that the word "commercial" is capable of describing quite a wide range of arrangements. When it appears in a statutory provision, which of those arrangements are to be regarded as commercial for the purposes of that provision, and which are not, depends on the legislative context.

37. For the purposes of regulation 9, that context is the prevention of abuse. Regulation 9(1)(a) excludes claimants whose tenancies are not on a commercial basis from entitlement to HB because—even if a particular non-commercial tenancy is not

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[2] The balance of authority in the Upper Tribunal holds that it is: see paragraphs 58-60. My reasons for doubting that are set out in paragraphs 61-79.

actually abusive of the scheme—the legislator has made a judgment that non-commercial tenancies in general are *potentially* abusive.

38. However, the overall legislative purpose of the HB scheme is that those who need financial help to meet their genuine and reasonable housing needs should receive it.

39. The word "commercial" in the phrase "not on a commercial basis" in regulation 9(1)(a) must therefore be interpreted with both those legislative purposes in mind. It must not be interpreted so broadly that benefit is only refused in cases where there is actual abuse: to do so would make regulation 9(1)(l) otiose. But equally the word should, if possible, not be interpreted in a way that denies benefit in cases where there is no potential abuse of the scheme.

40. An example may assist.

41. The level of housing benefit payable to a private tenant is not calculated by reference to the contractual rent that the tenant is liable to pay to the landlord, but by reference to the "local housing allowance" (LHA) for property of a size the tenant's household is deemed to require.

42. LHA levels are either fixed by legislation or determined by a rent officer at the 30th percentile of the range of rents for the broad rental market area in which the property is situated: see (in England and Wales) paragraph 2 of Schedule 3B to the Rent Officers (Housing Benefit Functions) Order 1997.

43. In short, HB will only be paid at a rate that will cover the claimant's contractual rent if that rent is in the bottom 30% of the market. It is self-evident that a landlord will get a better return if the property is marketed so as to obtain a level of rent in the other 70% of the market. Renting the property to a housing benefit claimant who has no other income with which to top up the contractual rent significantly restricts the rent that the landlord will receive in practice.[3]

44. In one sense of the word, the very act of renting property to such claimant could therefore be described as uncommercial. One might even say that "no commercial landlord" would ever do it. However, the phrase "not on a commercial basis" in regulation 9(1)(a) cannot be interpreted so as to allow consideration of the fact that landlords could improve their rental incomes by renting to tenants who are not

[3] In passing, the fact that a landlord has charged a low rent is often taken into account as a factor tending to show that the tenancy is uncommercial. Everything will depend on the facts of the individual case, but—putting it at its lowest—there is a tension between the HB scheme saying that it will only meet below-average rents and a local authority or tribunal administering that scheme saying that a landlord who charges a below-average rent is acting uncommercially and that the tenant should be excluded from benefit as a result.

claimants. Such an interpretation would undermine the HB scheme as a whole by excluding most, if not all, claimants' tenancies from its scope and frustrating the legislative purpose that those who need financial help to meet their genuine and reasonable housing needs should receive it.

45. Of course, that is an extreme example. But the principle it illustrates is also applicable to the more nuanced decisions that have to be made when applying regulation 9(1)(a). Adopting a narrow interpretation of "commercial" that excludes claimants from benefit in circumstances where there is no potential for abuse undermines the HB scheme just as much as adopting a broad interpretation that does not exclude claimants where there is potential for abuse.

46. For those reasons, although the word "commercial" in regulation 9(1)(a) is not a term of art, the legislative context in which it is used influences its meaning in ways that do not apply when it is used as part of the phrase "commercial landlord" in sentences with the form, "A commercial landlord would not …" or "No commercial landlord would …". The decisions, actions and omissions of a commercial landlord in the latter sense do not have to take account of a policy objective that people who genuinely need financial assistance with their rent should receive it. Those decisions, actions and omissions are therefore not an infallible guide to whether a tenancy or other agreement is, or is not, on a commercial basis for the purposes of the HB scheme.

Commercial landlords are a disparate group

47. The third, and most fundamental, problem with using the "notional commercial landlord" as an aid to decision-making is that people who are in the business of letting residential property are not a homogeneous group. They are not identically motivated and they do not all set up their businesses—or react to the problems that they encounter in those businesses—in the same way. As Mr Jacobs remarked in *CH/296/2004*, "[Rachman] is not the only model of a commercial landlord"

48. As I said paragraph 44, it is possible to make an argument that no commercial landlord would rent to a tenant who would have to rely on HB because a higher rent would be obtained renting to a tenant who would not. Despite that, thousands of landlords do in fact rent to claimants.

49. Similarly, I have seen examples—sometimes many examples—of commercial landlords who have let property on terms that were particular to an individual tenant; who have not taken a deposit; who have set rents at levels tenants could afford—or that were sufficient to cover the landlords outgoings on the property—and have not subsequently increased them; who have omitted to charge contractual interest; and who have allowed tenants huge latitude in relation to arrears of rent.

50. And I have also seen submissions that "no commercial landlord would do" each of those things.

51. So who is the notional commercial landlord who does none of these things?

52. It is possible that he is intended to exemplify a Platonic ideal of perfect, unalloyed, profit-maximising commerciality. I suspect, however, that the answer is more prosaic. It is that the notional commercial landlord is a self-fulfilling rationalisation: he is merely a person who—notionally—would not do the thing that the landlord this particular case has done. Rachman may not be the only model of a commercial landlord but, whenever local authorities or tribunals summon the notional commercial landlord to help with commerciality decisions, it is invariably Rachman or one of his successors who turns up.

Conclusions on the "notional commercial landlord"

53. For all those reasons, I judge that the Tribunal was correct to hold that:

> "The test is whether the tenancy is not on a commercial basis. It is not whether the landlord is in business as a commercial landlord",

and I reject Warwick's submission that:

> "… for the tenancy to be a commercial tenancy it must operate along the lines that would be expected in any other commercial tenancy between non-related parties. The two factors are therefore interlinked: the actions of a commercial landlord are linked to the commerciality of the tenancy."

Rather a tenancy is "not on a commercial basis" if, having taken into account *all* the relevant facts, and applied the principles set out in the authorities, it can be concluded that, as a proper use of language, it is not on a commercial basis.

54. For the reasons set out at paragraphs 61-79 below, I have doubts about the extent to which the implementation of a tenancy can properly be taken into account when considering whether it is on a commercial basis.

55. However, assuming—contrary to those doubts—that a decision not to take action to evict may be relevant to that issue, the correct way to approach it is not to ask "Would a commercial landlord have done this?" but rather "Why did *this* landlord do this in the particular circumstances of *this* case?" If, taking into account all the facts of the case, the reason was not a commercial one then that is *a* fact that must be taken into account in the process described in *R(H) 1/03*. It will not be the only such fact and it does not

automatically trump the other facts, although in some cases it may turn out to be determinative once everything has been taken into account.

Can the nature of a tenancy change?

56. All the parties to this appeal submit that a tenancy that was once on a commercial basis can cease to be so. Ms Wilcox also submits that a tenancy that had ceased to be on a commercial basis can subsequently become commercial again.

57. Stated in those terms, I have no difficulty in accepting those submissions. What is more problematic is the question of how and when such changes can come about.

58. There is comparatively little direct authority on the point. In *CH/3008/2002*, Mr Jacobs said:

> "9. The local authority maintains that this head [*i.e.*, what is now regulation 9(1)(a)] applies to the claimant. Its case is based on the way in which the tenancy has been operated by the sisters. However, what matters is whether 'the tenancy or other arrangement pursuant to which [the claimant] occupies the dwelling' is on a commercial basis.
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> 10. The key question is: under what tenancy or arrangement does the claimant occupy the dwelling? There are two possibilities.
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> 11. *One possibility* is that she did not surrender her assured contractual tenancy or take other action to terminate it. If this is what happened, the claimant's tenancy became a statutory periodic tenancy. I cannot understand how a tenancy that is created by law cannot be on a commercial basis. However, the failure by the claimant's sister to take advantage of the provisions allowing for an increase in rent under the tenancy or for recovery of possession for failure to pay rent may be relevant. The landlord has power to seek increases in rent under section 13 of the 1988 Act. It is possible that the failure by the landlord to avail herself of this possibility had the effect that the tenancy ceased to be on a commercial basis. Also, the landlord could seek possession for failure to pay rent or for persistent delay in paying rent under section 7(3) and (4) of, and Grounds 10 and 11 in Schedule 2 to, the 1988 Act. Again, the failure to make use of these provisions may have had the effect that the tenancy ceased to be on a commercial basis.
>
> 12. *The other possibility* is that the arrangements between the sisters around the time when the assured contractual tenancy came to an end may have had the effect of bringing the tenancy to an end by the action of the tenant/claimant. If the tribunal finds that this was what happened, it must decide what tenancy or arrangement was put in its place. It must apply regulation [9](1)(a) to that."

59. Subsequently, in *R(H) 10/05*, Mr Commissioner Turnbull (as he then was) quoted paragraph 11 of *CH/3008/2002* with emphasis on the second sentence and continued:

> "15. It seems to me that the words which I have emphasised may be capable of misleading. It may be that it was clear in that case that the contractual tenancy (granted by someone other than the claimant's sister) had been on a commercial basis, and that in reality questions as to non-commerciality only arose after the claimant's sister had become the landlord and at some time after the tenancy had become statutory. However, the emphasised words would appear to mean that a statutory tenancy cannot, at the point when it arises, be non-commercial and that it can only become so by virtue of factors subsequently occurring (eg the sorts of events which the Commissioner went on to mention). That is in my view plainly not correct. The statutory periodic tenancy arising under the 1988 Act has essentially the same terms as those of the preceding fixed term tenancy (section 5(3)(e) of the 1988 Act). Further, it arises simply by reason of the termination of the previous contractual tenancy. If that contractual tenancy was not on a commercial basis, then it is likely that the statutory one will also not be so. For example, if, by reason of the relationship between the parties, the terms of the contractual tenancy are very unusual, those terms will be carried over into the statutory tenancy. It is true that either the landlord or the tenant can under section 6 of the 1988 Act serve a notice proposing different terms, in which case in the event of dispute a rent assessment committee is to fix such terms "as might reasonably be expected to be found in an assured tenancy". A failure to use those provisions might be an additional factor pointing to non-commerciality, but the mere fact that the tenancy had arisen by force of the statute would not mean that it would be necessary to point to such a failure, or to some other matter arising subsequent to the arising of the statutory tenancy, in order to demonstrate non-commerciality."

60. The issue of whether a tenancy that arises by operation of law can be non-commercial does not arise in this case (although the fact that *R(H) 10/05* is a reported decision means that Mr Turnbull's view should be followed in preference to that of Mr Jacobs). What is important, however, is that Mr Turnbull accepts Mr Jacobs' view that a tenancy can become uncommercial by reason of "factors subsequently occurring".

61. At least where the factor subsequently occurring is forbearance by a landlord in relation to rent arrears or similar matters, I have the misfortune to doubt whether that is correct.

62. Particularly as *R(H) 10/05* is a reported decision, I should follow it and *CH/3008/2002* as a matter of comity. Strictly that only applies to the *ratio* of the decision and it is arguable that whether forbearance over rent can lead to a tenancy becoming uncommercial does not form part of that *ratio*: Neither Commissioner appears to have heard argument on the point. But even if that is the case, I would not decline to follow a

reported decision unless I was sure it was wrong (which I am not quite) and the appeal before me turned on the point (which, for the reasons given at paragraphs 84-94 below, this appeal does not). Further, I cannot ignore that the same view has been assumed to be correct in other decisions of the Commissioner and the Upper Tribunal

63. I will therefore confine myself to expressing my doubts while leaving the issue to be decided if it affects the outcome of a future case.

64. What has to be assessed under regulation 9(1)(a) is whether the "tenancy or other *agreement*" pursuant to which the claimant occupies the dwelling is not on a commercial basis. In my view, the emphasised word "agreement" throws light on the interpretation of the word "tenancy" earlier in the phrase. The regulation excludes the claimant from benefit if *what she has agreed with the landlord* is uncommercial. And that is so whether that agreement amounts in law to a "tenancy" or to some "other" form of agreement such as a contractual licence.

65. So, for the purposes of the regulation, it is *what the parties have agreed* that is or is not commercial, not what they have subsequently done or omitted to do.

66. In my judgment that conclusion is strengthened by regulation 9(2). What the decision maker has to have regard to under that provisions is whether the terms upon which the claimant occupies the dwelling include terms which are "not *enforceable* at law". The regulation does not tell the decision maker to have regard to whether all the terms of the agreement have in fact been enforced, but only whether there are terms which are unenforceable. On its own, that does not mean that actual enforcement (or lack of it) are irrelevant. But it does suggest that (at least) the main focus of the enquiry required by regulation 9(1)(a) is on *the terms that have been agreed* between the landlord and the tenant.

67. Given those considerations, it seems to me that there are two broad sets of circumstances in which a tenancy or other agreement that was once on a commercial basis can cease to be so.

68. The first is where the terms of the tenancy do not change but what can be said to be commercial does.

69. A common example of the first is, of course, a prolonged omission to increase the rent. A rent that was commercial in 1995 may no longer be so in 2020. If so, I agree with Mr Jacobs in *CH/3008/2002* that that may be a factor suggesting that the terms of the tenancy or other agreement have become uncommercial (although it will still need to be weighed against all the other material facts and it will be necessary for the decision maker to take into account why the rent was not increased).

70. By the same reasoning, I judge that if the landlord then secures an increase in rent to a level that is commercial, the tenancy may cease to be non-commercial and become commercial again (subject again to the caveats set out in the previous paragraph).

71. But in the second set of circumstances, as regulation 9(1)(a) is addressed to the terms of the tenancy or other agreement (by which I mean the whole agreement pursuant to which the claimant occupies the property and not just those terms that are written down), I believe that those terms actually have to change before a commercial agreement can become uncommercial.

72. Absent such a change, I do not believe it is sufficient that either or both of the parties to the tenancy have begun to conduct themselves differently in relation to it.

73. That is not to say that the conduct of the parties after the tenancy has been agreed is irrelevant. It may show that what appears to be the agreement between them does not accurately record what was in fact agreed; or, more probably, that it does not record *everything* that was agreed.

74. It may also provide a basis for inferring that what was previously agreed has changed, or been added to, even though there has been no change to the written agreement between the parties.

75. Suppose, for example, that my agreement with my landlord allows me to keep a wheelie bin in a specified place in the front garden of my home. A new tenant needs a wheelchair ramp to access his flat and my bin is blocking the only place it can sensibly go. During the installation of the ramp, my landlord removes my bin from the specified space and places it elsewhere in the garden. I then continue to use the bin in its new position and make no attempt to move it back. After a while—possibly a very short while—it will be possible to infer that the terms of my agreement have changed and that, even though we have not even discussed it, what has now been agreed is that I have a right to keep my bin in the new position.

76. Repositioning a wheelie bin is unlikely to affect the commerciality of a tenancy. Suppose, however, that a family who are letting accommodation to an aged parent subsequently arrange for HB to be paid into an account in the joint name of the parent and her daughter (who is one of the landlords). The HB then accrues in that account—without regular payments of rent to the landlords—and intermingles the with the parent's state pension credit that is used to defray the parent's non-housing expenses. Although there has been no change to the terms of the written tenancy agreement, the subsequent conduct of the parties shows that that agreement has been supplemented by the way in which the joint account is operated and the rent is not regularly paid and that the terms pursuant to which the parent occupies the property, taken as a whole, have changed.

77. Forbearance by a landlord, however, seems to fall into a different category. A mere omission to sue for rent arrears, or to seek eviction because of them, does not alter the terms that were agreed between the landlord and the tenant. In such circumstances, the landlord does not waive any rights. He remains entitled to the rent and the tenant remains liable to pay it. At least until such time as the claim becomes statute-barred, a landlord who forbears to sue for arrears and possession of the property today, may do so tomorrow without any adverse consequences other than, perhaps, a small delay in obtaining judgment. If the tenancy or other agreement did not previously contain terms that are not enforceable at law, it will still not contain such terms, despite the landlord's forbearance.

78. For those reasons, I doubt whether Warwick was entitled to rely on the fact that the claimant's children had neither evicted her nor sued her for arrears of rent as a material fact tending to show that her tenancy had become uncommercial.

79. However, as other Upper Tribunal Judges take a different view, I will decide this appeal by assuming, in Warwick's favour that the contrary is the case.

Reasons for setting aside the Tribunal's decision

80. On that basis—and on the basis that *R(H) 10/05* is binding on the First-tier Tribunal even if a Judge of the Upper Tribunal might be free to depart from it—the rent arrears that had accrued before the claim for HB were a factor that the First-tier Tribunal should have taken into account separately from any arrears that accrued afterwards. The HB claim did not include a claim for backdating, and given the finances of the claimant and her husband, there was a real question as to whether those arrears would ever be cleared. The fact that arrears had been allowed to develop during that period was a factor that the written statement of reasons should have addressed directly and the failure to do so was an error of law

81. As the Tribunal's decision might have been different if it had taken into account the fact that the arrears might well not be repaid even if the HB claim were ultimately successful, the error is a material one. I have therefore exercised my discretion under section 12 of the Tribunals, Courts and Enforcement Act 2007 to set it aside.

Reasons for the re-made decision

82. Having set the First-tier Tribunal's decision aside, I must then decide whether to remit the case to that Tribunal with directions for reconsideration or re-make it myself. I have decided to do the latter.

83. In doing so, I am entitled and obliged to have regard to the additional evidence that the claimant put forward at the hearing before me.

84. What I have decided is that, even making the assumption set out at paragraphs 78 and 79 above, the claimant's tenancy did not cease to be commercial during the period when rent arrears were accruing prior to the HB claim.

85. I remind myself that the context for my decision is that—to the extent that the phrase "not on a commercial basis" allows—potentially abusive arrangements should not give rise to entitlement to HB, but arrangements where there is no potential for abuse should be assessed under the normal rules for eligibility.

86. There is no potential for abuse whatsoever in the present case. The tenancy had been in place for more than 15 years when the claim for HB was made and the rent had been paid in full for over 13 of those years. The fact that the claim was not made until the claimant had consulted the Citizen's Advice Bureau suggested that neither the claimant nor the landlord even knew of the existence of HB for the overwhelming majority of that period: there cannot have been any subjective intention to abuse the scheme. I accept that abuse does not require subjective bad faith, but even looking at things objectively, this was an ordinary tenancy in which a couple who required housing paid rent for it. The Landlord may not have been looking to make his fortune from the arrangement but the rent had been set at the level necessary to pay his outgoings on the property and to provide a moderate surplus.

87. That is the background. The starting point for the decision itself is that, had the claim for HB been made in August or September 2013, as soon as the claimant ceased to be able to afford the rent, there would not have been the slightest doubt that the tenancy was on a commercial basis. The factors that might have suggested the contrary (*i.e.*, the relationship between the parties and fact that the rent had remained the same for over 13 years) would have been overwhelmingly outweighed by the facts that the terms of the tenancy agreement were all enforceable at law; that there was a genuine liability to pay rent and that there was a consistent history of rent being paid.

88. What changed was:

(a) that in September 2013 the claimant and her husband ceased to be able to pay the rent on a regular basis; and

(b) subsequently the Landlord took no steps to evict them for non-payment.

I have described the second change as failing to evict, because merely suing for a money judgment for the arrears would have been pointless. As the Landlord must have

been aware, if the claimant and her husband had the money to satisfy a judgment, they would have paid the rent. Money judgment or no money judgment, the arrears of rent were never in practice going to be paid without an improvement in the finances of the claimant's husband: see paragraph 90. Suing for the arrears without also seeking possession of the property would have been a waste of time, effort and a court fee. I am tempted to say that no commercial landlord would have done it. The choice facing the Landlord was eviction or nothing.

89. The claimant stopped paying rent regularly because she could no longer afford to do so. She did not suddenly decide that she no longer intended to treat her legal obligations as binding. On the contrary, she continued to make irregular payments when she could.

90. The Tribunal found that the reason she was unable to make regular payments was that she had retired. The further evidence, which I accept, shows that it was not quite as simple as that. Although the claimant had retired, her husband, who is younger, continued to work part-time as a self-employed engineering consultant. He works in a specialist field and going into detail would tend to identify him. However, I am satisfied from his statement and the documents I have seen that until September 2015—after the date of the HB claim—there was a realistic prospect of a very large government-financed order for a product that he had developed. Had it been received, that order would have restored his finances to a state in which he could have settled the arrears of rent.

91. Those were the circumstances in which the Landlord had to decide whether to evict his parents. He was told that the claimant and her husband expected an improvement in their finances and he took no steps to evict in the hope that the improvement would occur.

92. In my judgment, given all the circumstances of the case, that was a commercial decision. Commercial decisions are often about managing risk and the landlord had to weigh the risk that the rent arrears would continue to accrue and would never be paid off against the possibility (which I accept would have seemed a strong possibility at the time) that the order would be received and the arrears paid. He made a commercial choice in favour of the second option. If the order had been received and the arrears repaid, that would not be in dispute. With hindsight, it can perhaps be said[4] that he made the wrong decision and that he might have been better off cutting his losses sooner. But that does not change the nature of the decision he took. There is a difference between a *bad* commercial decision and an *uncommercial* decision.

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[4] Or perhaps not. The eventual failure of the negotiations for the order took place after the decision to refuse HB. Warwick therefore cannot have had regard to it and it is that it is a circumstance that the First-tier Tribunal could not take into account by virtue of the "down-to-the-date-of-the-decision" rule in paragraph 6(9)(b) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000.

93. To sum up, as matters stood immediately before the claim for HB, the factors which suggested that the claimant's tenancy were on a commercial basis were as follows:

(a) the assured shorthold tenancy pursuant to which the claimant occupied the property did not contain any terms that were unenforceable at law. An agreement that only contains enforceable terms is more commercial than one that does not. And as this is the only factor to which the legislator has specifically directed me to have regard, I weigh it as being strongly in favour of the tenancy being on a commercial basis;

(b) the claimant continued to be under a legally enforceable liability to pay rent. This factor also tends to suggest that the tenancy is commercial. I judge that it is a factor that attracts less weight than the previous one because, by the opening words of regulation 9, that regulation only applies in cases where there is such a liability. The regulation clearly contemplates that there may be cases in which a tenancy is not on a commercial basis despite there being a legally enforceable liability to pay rent. Nevertheless a liability to pay for goods or services received is an important part of any commercial agreement and the claimant is entitled to have some weight attached to it;

(c) the claimant had paid the rent due under the tenancy for more than 13 years without reliance on public funds before becoming unable to do so. I weigh this factor as tending to show strongly that the tenancy is commercial.

(d) although considerable arrears had been allowed to accrue, they arose for two reasons. The first was the claimant's inability to pay rather than her refusal to do so and the second was that the Landlord had made a decision not to evict the claimant that—in all the circumstances of the case including in particular the realistic prospect that the arrears would in due course be repaid in full—was a commercial one. I attach no weight to the first of those reasons. It does not tend to support either the conclusion that the tenancy was on a commercial basis or the contrary conclusion. However, the fact that the landlord made a commercial decision not to evict supports the conclusion that the tenancy was commercial.

The factors tending to suggest that the tenancy was not on a commercial basis were as follows:

(e) the claimant was the landlord's mother. In all the circumstances of this case I attach little weight to this circumstance. If the tenancy agreement had included unusual terms or had been operated in an unusual way, the relationship between the parties might have informed the way in which those factors were weighed. But the terms of the tenancy in this case were standard and the way in which the was

operated was that the claimant and her husband lived in the property and paid rent for it. That is not unusual;

(f) the tenancy was part of an arrangement, the overall purpose of which was to provide the claimant and her husband with a home, and would not have been extended to the public as a whole. In the circumstances of this case, I attach virtually no weight to this factor. The tenancy was part of a family arrangement, but it was a commercial part of that arrangement. It was the mechanism by which the arrangement could be paid for and was successfully operated as such for over 13 years;

(g) the rent had not been increased for 15 years. I attach some weight to this factor. However, in a case like this, that weight is less than might perhaps be attached if the tenancy were between unrelated parties. The purpose of the agreement was not to maximise the Landlord's profit but only to ensure that he could meet his outgoings on the property over time. If the rent, although low, remained sufficient for that purpose, there would have been no particular reason to increase it. It must also be remembered that the Landlord and his siblings can expect to receive a substantial capital gain that would be advantageously taxed when the property is eventually sold, so that a return on the property could be expected even if rental income was not maximised;

94. Overall, I judge that—even though I have made an assumption about the law that is favourable to Warwick—the factors that suggest, as at the date of the HB claim, that the claimant's tenancy was on a commercial basis significantly outweigh those that tend to suggest it was not. I have therefore re-made the decision in the terms set out on pages 1 and 2. I have directed Warwick to reassess the claimant's entitlement from Monday 16 March 2015 rather than from the date of claim because, under regulation 57(1) of the Regulations, entitlement to HB commences from the beginning of the benefit week following that in which the claim is made.

95. And even if I had weighed those factors differently and concluded that the tenancy had become uncommercial, there is one further factor that would have led me to make the same decision.

96. In those circumstances; on the particular facts of this case; and making the assumption (contrary to what I believe to be the law) that subsequent conduct can cause the status of a tenancy to change for the purposes of regulation 9(1)(a) even if it does not change the terms of what has been agreed; I would have held that *the very fact of making the claim for HB* tipped the balance in the other direction and caused the tenancy to change from being uncommercial to commercial.

97. Given the history of the tenancy before August 2013, all the reasons for believing that the tenancy had become uncommercial stemmed from the fact that the claimant was no longer able to pay the rent. By claiming HB, the claimant was reaffirming her (commercial) responsibilities under the tenancy agreement and facing up to those responsibilities by seeking an additional income stream that would put her in a position to pay. I judge that in doing so, she was acting commercially just as she would have been if she had sought employment (had she been of working age).

98. I conclude by stressing once again how fact-specific commerciality decisions can be. I have not, for example, held that every decision not to evict for rent arrears is a commercial decision and to be weighed in favour of the commerciality of the tenancy. I am well aware that failure to evict is more normally weighed against commerciality and that sometimes the only commercial decision open to a landlord will be to evict. However, I judge that in the circumstances of this case, the decision not to evict fell to be weighed as set out above.

99. Similarly, I am not saying that every claim for HB will cause a previously uncommercial tenancy to become commercial: it will not. I have only said that where, as here, the primary reason for supposing a tenancy to be uncommercial is that the claimant cannot afford to pay the rent—and on the legal assumption that I have made in favour of Warwick—the claimant taking a step to acquire funds to pay the rent is a factor—not the only factor and not necessarily the determinative factor, but a factor—that supports a conclusion that the tenancy is on a commercial basis.

100. Finally, I must apologise to the parties that this decision has not been issued sooner.

Signed (on the original)
on 28 July 2020

Richard Poynter
Judge of the Upper Tribunal