IN THE UPPER TRIBUNAL **Appeal No. CH/257/2019**
(ADMINISTRATIVE APPEALS CHAMBER)

BEFORE JUDGE WEST

DECISION

The decision of the First-tier Tribunal sitting at Liverpool dated 13 September 2018 under file reference SC068/17/06633 involves an error on a point of law. The appeal against that decision is allowed and the decision of the Tribunal is set aside.

The decision is remade.

The claimant is entitled to housing benefit to cover the payments by way of service charge on the property which her late father occupied as his home. The tenancy of the property is a shared ownership tenancy granted by a housing association and is within the exception in paragraph 12(2)(a) of the Housing Benefit Regulations to the prohibition on payment of a rent allowance in respect of periodical payments made under a long tenancy.

The matter is remitted to the Council to calculate the correct amount of housing benefit due to the claimant.

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

REASONS

Introduction

1. This is an appeal, with the permission of Judge Jacobs, against the decision of the appeal tribunal sitting at Liverpool on 13 September 2018.

2. I shall refer to the appellant hereafter as "the claimant". She is the personal representative of the estate of her late father, having taken out a grant of letters of administration to his estate from the Liverpool District Probate Registry in the spring of 2018. The first respondent is Liverpool City Council. I shall refer to it hereafter as "the Council". The second respondent is the Secretary of State for Work and Pensions. I shall refer to her hereafter as "the Secretary of State". I shall refer to the tribunal which sat on 13 September 2018 as "the Tribunal".

3. The claimant appealed against the decision of 25 July 2017 that she was not entitled to housing benefit to cover the full service charge on the property which her late father occupied as his dwelling because the tenancy was not a shared ownership tenancy within the definition in the Housing Benefit Regulations 2006 ("the Regulations") and that it was therefore not within the exception in paragraph 12(2)(a) of the Regulations. The decision was reconsidered, but not revised, on 15 November 2017.

4. The matter finally came before the Tribunal on 13 September 2018. The claimant was on holiday, but her representative was present and the Tribunal considered that it was in the interests of justice to proceed with the hearing. The appeal was refused.

The Statement of Reasons

5. The Tribunal held in its statement of reasons that

> "1. The Appellant in this case was the personal representative for her late father who had appealed the decision dated 25 July 2017 by the local authority that he was not entitled to housing benefit on the basis that the property in which he owned 75% could not be considered to be in shared ownership in accordance with the Housing Benefit Regulations 2006. The appeal in particular related to his eligibility to housing benefit in respect of the service charges paid on the property.
>
> 2. [The Appellant's father] had sadly died on the 16/1/18 but his daughter was his personal representative. The hearing was listed for the 16/9/18. It had been previously adjourned to enable the Appellant to obtain advice as to whether her late father would qualify for payment of housing benefit on the basis of shared ownership. The Appellant had obtained advice and submissions had been put in by the representative who also attended the oral hearing. The Appellant did not attend, and it was explained that she was on holiday but the representative was content to continue as she was the personal

representative for the original Appellant, her father, and the representative was able to give oral submissions. There was no attendance by a presenting officer from the local authority, but they had not indicated in the submission that they intended to appear. The tribunal agreed that it was in the interests of justice to proceed particularly considering the legal nature of the dispute and the evidence before it.

3. The Appellants [sic] submission was on the basis that he occupied his dwelling on the basis of a shared ownership scheme and therefore was entitled to receive housing benefit particularly in relation to the service charge that was payable on the property. Such payments had been made in 2002 but on the 05/01/2004 the local authority had made a new decision revising that original decision and refusing housing benefit payments backdated to the 07/04/03. As no documentation was available the tribunal did not put weight on either the original grant of that housing benefit or indeed the revised decision.

4. The Appellants claim they own 75% of the property and it was on a shared ownership scheme. Reliance is placed on the letter from Redwing Living confirming that they owned 75% and that Redwing Living retained the 25% share but no rent was payable on that 25% (document 94). Document 53-60 confirm [sic] the net charges for the property from the 01/07/97 01/08/17 [sic] to Regenda Homes on a monthly basis. The Tribunal was satisfied that Redwing Living and then Regenda Homes were the effective owners of the other 25% of the property. Redwing Living had provided a copy of the lease for the premises on [sic] document 65 which included in point 3(2)(b) an obligation to pay the service charge in accordance with clause 6 which confirmed what the service provisions consisted of.

5. The representative's submission was also to the effect that the Appellant did not have a long-term tenancy but was under a shared ownership scheme and so he was exempt from the provisions in regulation 12(2) of the Housing Benefit Regulations whereby rental payments and service charges payable under a long tenancy cannot be paid by housing benefit unless it is a shared ownership tenancy.

6. The Respondents had refused the application on the basis that the property on which the Appellant owned 75% could not be considered to be under a shared ownership in accordance with the Housing Benefit Regulations.

Decision

7. The tribunal agreed with the local authority's analysis. In particular the tribunal agreed with the local authority's interpretation of the Upper Tribunal case of *Blackburn with Darwen Borough Council v*

DA (HB) [2014] UKUT 0431 which was a case that both parties had relied on. The local authority deemed that the terms in which the Appellant occupied the property … was under a long tenancy which is excluded as being eligible for payment of housing benefit. The tribunal in essence agreed and found that the appellant's agreement to occupy the premises could not fall within the exceptions of regulation 12(2)(a) and therefore the rent allowance was not payable. The representative challenged the findings of the tribunal in not accepting the statements by Redwing/Regenda regarding the shared ownership scheme and asked for the statement of reasons.

Findings of fact

8. The [Appellant's parents] purchased the property in or around the 25/07/1997 when it was registered at the land registry. He and his wife [were] the owners of the property [sic] as the document from the land registry stated that they owned the fee simple with title absolute. He had invested his capital by paying 75% of the value of the property.

9. 25% of that property was retained by the then owners Redwing Living. The scheme was named as a share ownership property by Redwing Living but the scheme restricted ownership to a maximum of 75% of the value of the property and no rent was payable on the remaining 25%.

10. Service charges were payable related to the number of the properties in the close namely 16 and the amount of service charge had no reference to the 75% ownership but was related only to the number of properties in the close.

11. The lease documentation provided by Redwing does not name [the Appellant's father] as a tenant. It does not indicate the terms of the lease although does state at the expiration of the term that he would have to yield up the premises. It also provides that the property cannot be disposed of except to a person aged 55 or older (document 68 to 80). In particular it does not indicate a start date or an address. It appears to be a template. For Housing Benefit purposes it is a long lease tenancy but it is not a shared ownership scheme in the terms of the Housing Benefit regulation.

Reasons

12. Regulation 12(1) of the housing benefit regulations 2006 sets out the categories of payments for which, subject to the regulations, housing benefit can be payable. They include service charges, payment of which is a condition of the occupation of the dwelling concerned.

13. However, some payments by way of rent or rent allowance are excluded including payments under a long tenancy except a shared ownership tenancy and payments made by an owner.

14. An owner is defined as a person who is entitled to dispose of the fee simple whether or not with the agreement of other joint owners.

15. Shared ownership tenancies are defined as a lease granted on payment of a premium calculated by reference to a percentage of the value of the dwelling or the cost of providing it. Upper Tribunal Judge Mesher in the *Blackburn* case took the view in paragraph 8 that ownership has to be given its everyday meaning. He stated "a shared ownership tenancy is one in which the tenant, in the case of a flat, takes a long-term leasehold interest in only part of the dwelling concerned (typically, 25%, 50%, or 75%), while paying rent as a short-term tenant would on the remainder [sic]. The tenant then has a right to buy additional percentages on the long-term basis, when the amount of the short-term rent will reduce proportionately. The essence is that there is a sharing of what would in ordinary language be regarded as the ownership of the dwelling, between the tenant in the case of the long-term tenancy and the landlord in the case of the short-term tenancy aspect."

16. In this case the Appellant was not paying rent on the 25%. He was paying service charge on occupying the dwelling and the representative confirmed he was paying $1/16^{th}$ of that and the paperwork indicated that there was no deduction for the 25% but [sic] he had not purchased. The pro forma lease did not contain any provision for the tenant not having to pay 100% of the service charge applicable to his 1/16 share and the representative confirmed that it remained at a 100%.

17. The tribunal also considered whether he was an owner of the property particularly since the land registry document identified that he held the title absolute (Document 38). That document does include a % sign but no proportion is given and it confirms that it was leasehold land but the propriety [sic] register showed it was title absolute. It is therefore arguable as well that the land registry viewed as [sic] a long tenancy. But equally it could be deemed that they were owners. The document does state that there are restrictions as to the disposal of the property but none are mentioned. However, the pro forma for the tenancy does indicate that this is a property for the benefit of older residents as it cannot be sold to any that are under the age of 55. However that did not have to be decided by the Tribunal considering the other findings made as to the issue regarding the shared ownership as opposed to the long lease.

18. The Appellant had been asked by the Respondents for the original tenancy agreement on the 12/7/17. On the 14/7/17 he attended a one-stop shop and gave in service charge reviews and it was confirmed on [sic] document 41 that was all that was available. The tribunal thought it was not credible that no original lease would have been available as it would have been an important document to retain. The benefit maximisation officer advising the Appellant emailed Redwing Living on the 18/7/17 asking for a copy of the scheme as the council was maintaining it was a co-ownership scheme rather than shared ownership (document 44). The reply from Redwing confirmed that they call it a shared ownership scheme where the ownership is that 75% maximum but no rent is payable [sic]. They also confirmed it was not possible to provide a copy of the lease so again the tribunal did not find it credible that this was a true shared ownership scheme as such (document 45). Document 46 shows that further enquiries were made on behalf of the Appellant to Regenda [H]ousing who confirmed that when 75% is owned no rent is payable in document 47.

19. The tribunal found despite the document dated 03/08/17 on document 94 the arrangement between [the Appellant's father] and Redwing Living/Regenda is not a shared occupancy agreement within the meaning of the housing benefit regulations. Document 62-64 from Redwing Living gives details of the shared ownership scheme which states that shared ownership is the affordable way of buying your own home and the purchaser buys a share in a property that is right for them usually between 25% and 75% of the property's market value and pays rent on the remaining share. However in this case they have confirmed that no rent is payable. That document 62-64 also goes on to explain shared equity and confirms that that is different from share ownership because on that basis no rent is payable it confirms that the benefit to Redwing [L]iving was that they would be entitled to 25% of any growth in the value of the home when it was to be sold. Document 63 talks about leasehold schemes for the elderly and retirement shared equity and then shared ownership for the elderly on [sic] document 64. The latter confirms that the tenant could buy a share in a property worth between 25% and 75% and pay rent on the remaining share. It goes on to provide that more shares could be purchased eventually. It talks about a monthly service charge being payable. The tribunal considered that this arrangement between Redwing and the owners of the properties was more of a shared equity scheme whereby the property owner sold a percentage but retained a percentage and benefited from the increase in value when the property was sold. It was a good investment for them and would provide a good investment and opportunity to the person buying the 75%.

> 20. Accordingly, the tribunal agreed that the Appellant[’s father] had purchased a percentage of the property under the lease scheme for the elderly which in effect was a long lease and so the service charge could not be treated as eligible for housing benefit purposes under the regulations and so the appeal was refused.”

Permission to Appeal

6. Regional Tribunal Judge Clarke refused permission to appeal on 13 December 2018. The claimant sought permission to appeal to the Upper Tribunal on 19 December 2018, which was received 8 days later. On 1 March 2019 Judge Jacobs granted permission to appeal. 2019. The file and the further conduct of the appeal were subsequently transferred to me.

Further Directions I

7. It was apparent that there were no office copy entries of the Register of Title or the registered title plan to the property the tenure of which is the subject of the dispute in the appeal bundle. It was also apparent that the lease under which the deceased held the property had not been fully or legibly copied. The appeal could not be progressed without them.

8. On 2 August 2019 I directed that the claimant’s solicitors were to have 14 days after the date on which the directions were sent to them to provide full and legible office copy entries of the Register of Title and the registered title plan to the property occupied by the deceased (“the property”), which was registered at the Land Registry under Title No. [MS1], together with a full and legible copy of the lease under which the deceased held the property. On receipt of those documents, the file was to be returned to me for further directions.

Further Directions II

9. The required documents were duly provided and on 12 September 2019 and I made further directions for the conduct of the appeal. Before I made the directions, I made certain observations.

10. Notwithstanding the directions given by Judge Jacobs in granting permission to appeal on 1 March 2019, the Council had not put in any submissions on the appeal, despite a further reminder on 9 May 2019 and further letters relating to the appeal on 17 and 24 August 2019.

11. I was satisfied that it was appropriate to join the Secretary of State of Work and Pensions as an additional respondent for her to make submissions on the question of whether ***Blackburn with Darwen BC v. DA (HB)*** [2014] UKUT 431 (AAC) was rightly decided, which was one of general importance to many parties.

12. I made directions for further sequential submissions by each of the parties to the appeal in turn, beginning with the Secretary of State, then the Council and finally the claimant, on the ***Blackburn*** question.

13. So far as material, in the directions I joined **t**he Secretary of State as Second Respondent and gave her six weeks in which to respond to the appeal. The Council had one month thereafter in which to reply. Finally the claimant had one month in which to respond to those submissions.

Further Submissions

14. On 5 December 2019 the Secretary of State provided submissions and supported the appeal (pages 220 to 221). She submitted that the tenancy in this case accorded with the definition of a "shared ownership tenancy" in the Regulations, i.e. a lease granted on payment of a premium calculated by reference to a percentage of the value of the dwelling or the cost of providing it. The definition of shared ownership tenancy made no reference to rent and it did not follow from the legislation that the claimant must be paying rent on the share of the property which he does not own in order for the definition to apply. Similarly, the wording of regulation 12 did not suggest that rent has to be payable. Regulation 12(1) provides that housing benefit is payable in respect of a number of periodical payments, including service charges; these could include rent, but did not have to do so. As the claimant had a shared ownership tenancy there was no exclusion from housing benefit under regulation 12(2)(a); the claimant's rent obligations (or lack thereof) did not affect the question of whether the claimant could satisfy the definition of a shared ownership tenancy. In the ***Blackburn*** case the shared ownership argument arose from one party owning the freehold and the other party owning the leasehold interest. The claimant owned 100% of the leasehold, but Places for People Homes retained 100% of the freehold interest. In the present case the claimant owned 75% of the relevant sub-leasehold interest, with Regenda Homes owning the other 25%. As such the present case could be distinguished on its facts from ***Blackburn***. The Secretary of

State submitted that the appeal in this case should therefore be allowed and was content with a decision without reasons.

15. The claimant had nothing to add to those submissions on 10 December 2019 (page 222).

16. On 6 January 2020 the Council stood by its original submission to the First-tier Tribunal, but otherwise had nothing to add (pages 223 to 225), although it asked for a decision with reasons given the complexity of the decision.

17. None of the parties has asked for an oral hearing and I am satisfied that it is not necessary to hold one in order to decide this appeal. I am, however, satisfied that it is not appropriate simply to allow the appeal and give an unreasoned decision in the manner suggested by the Secretary of State.

Registration

18. Pursuant to my directions dated 22 August 2019, the claimant's solicitors provided full and legible office copy entries of the Register of Title and the registered title plan to the property which is registered at the Land Registry under Title No. [MS1], together with a full and legible copy of the lease under which the deceased and his wife held the property and other ancillary documents.

19. The freehold title to the property would appear to be vested in the name of the Council, although it is not clear whether the freehold title is registered.

20. The head leasehold title comprising the property and other parcels of adjacent land is currently registered with title absolute under title no. [MS3] in the name of Regenda Ltd (which was registered as proprietor on 18 May 2017). The head leasehold interest is held under a 999 year lease commencing on 14 November 1995 from the Council to Maritime Housing Association Ltd. It is apparent that the head leasehold interest has subsequently been transferred from Maritime Housing Association Ltd to Regenda Ltd.

21. The sub-leasehold title of the individual property in question is registered with title absolute under Title No. [MS1] in the name of the deceased and his wife (who were

registered as registered proprietors on 25 July 1997). The sub-leasehold interest is held under a 99 year lease dated 1 July 1997 and commencing on 29 January 1997 from the then head leaseholder Maritime Housing Association Ltd to the deceased and his wife.

The Lease

22. The lease itself is dated 1 July 1997 and was expressed to commence on 29 January 1997 for a term of 99 years. From the Particulars and other provisions of the lease the following details appear:

Initial Market Value	£36,950
Premium	£27,713
Initial Percentage	75%
Gross Rent	NIL
Specified Rent	NIL
Initial Relevant Percentage	NIL
Service Charge	£ 688.20

23. In clause 13(13)(b) there is a tenant's covenant not to assign or part with possession of the whole or any part of the premises except (i) to a person of or over the age of 55 at the date of the assignment.

24. In clause 13(16) there is a tenant's covenant not to use the premises other than as a private residence in single occupation for those of or over the age of 55.

25. The 4th Schedule includes staircasing provisions. Clause 1(5) defines "Final Staircasing" as

> "the purchase of such Portioned Percentage as reduces the Relevant Percentage to nil".

26. However, the Portioned Percentage in clause 1(2) is fixed at a ceiling of 75% since it provides that it shall mean

> "a portion of the then Market Value of the Premises up to a maximum of 75% being 25% or a multiple of 25% thereof".

27. In a letter dated 4 June 1997 from the landlord's solicitors to the tenants' solicitors, it was stated that it was integral to the Association's original grant funding for the scheme that at all times it would retain a 25% equity share in the development, although there was no obligation on the tenants to pay rent to the Association in respect of the retained equity share.

The Housing Benefit Regulations 2006

28. Regulation 12 of the Housing Benefit Regulations 2006 provides that

> "12(1) Subject to the following provisions of this regulation, the payments in respect of which housing benefit is payable in the form of a rent rebate or allowance are the following periodical payments which a person is liable to make in respect of the dwelling which he occupies as his home—
>
> (a) payments of, or by way of, rent;
>
> (b) payments in respect of a licence or permission to occupy the dwelling;
>
> (c) payments by way of mesne profits or, in Scotland, violent profits;
>
> (d) payments in respect of, or in consequence of, use and occupation of the dwelling;
>
> (e) payments of, or by way of, service charges payment of which is a condition on which the right to occupy the dwelling depends;
>
> (f) mooring charges payable for a houseboat;
>
> (g) where the home is a caravan or a mobile home, payments in respect of the site on which it stands;
>
> (h) any contribution payable by a person resident in an almshouse provided by a housing association which is either a charity of which particulars are entered in the register of charities established under section 3 of the Charities Act 1993(1) (register of charities) or an exempt charity within the meaning of that Act, which is a contribution towards the cost of maintaining that association's almshouses and essential services in them;

> (i) payments under a rental purchase agreement, that is to say an agreement for the purchase of a dwelling which is a building or part of one under which the whole or part of the purchase price is to be paid in more than one instalment and the completion of the purchase is deferred until the whole or a specified part of the purchase price has been paid; and
>
> (j) where, in Scotland, the dwelling is situated on or pertains to a croft within the meaning of section 3(1) of the Crofters (Scotland) Act 1993(2), the payment in respect of the croft land.
>
> (2) A rent rebate or, as the case may be, a rent allowance shall not be payable in respect of the following periodical payments—
>
> (a) payments under a long tenancy except a shared ownership tenancy granted by a housing association or a housing authority;
>
> (b) payments under a co-ownership scheme;
>
> (c) payments by an owner;
>
> (d) payments under a hire purchase, credit sale or conditional sale agreement except to the extent the conditional sale agreement is in respect of land; and
>
> (e) payments by a Crown tenant.
>
> …
>
> (8) In this regulation, regulation 12B (eligible rent) and Schedule 1 (ineligible service charges)—
>
> "service charges" means periodical payments for services, whether or not under the same agreement as that under which the dwelling is occupied, or whether or not such a charge is specified as separate from or separately identified within other payments made by the occupier in respect of the dwelling; and
>
> "services" means services performed or facilities (including the use of furniture) provided for, or rights made available to, the occupier of a dwelling".

29. So far as material, regulation 2(1) of the 2006 Regulations also provides definitions of "owner", "long tenancy", "shared ownership tenancy" and "co-ownership scheme".

30. For the purposes of the 2006 Regulations "owner" is defined to mean:

> "(a) in relation to a dwelling in England and Wales, the person who, otherwise than as a mortgagee in possession, is for the time being entitled to dispose of the fee simple, whether or not with the consent of other joint owners;
>
> (b) [only applies to Scotland]".

31. "Long tenancy" is defined to mean:

> "a tenancy granted for a term of years certain exceeding twenty-one years, whether or not the tenancy is, or may become, terminable before the end of that term by notice given by or to the tenant or by re-entry, forfeiture (or, in Scotland, irritancy) or otherwise and includes a lease for a term fixed by law under a grant with a covenant or obligation for perpetual renewal unless it is a lease by sub-demise from one which is not a long tenancy".

32. "Shared ownership tenancy" is defined to mean:

> "(a) in relation to England and Wales, a lease granted on payment of a premium calculated by reference to a percentage of the value of the dwelling or the cost of providing it;
>
> (b) in relation to Scotland, an agreement by virtue of which the tenant of a dwelling of which he and the landlord are joint owners is the tenant in respect of the landlord's interest in the dwelling or by virtue of which the tenant has the right to purchase the dwelling or the whole or part of the landlord's interest therein".

33. "Co-ownership scheme" is defined to mean

> "a scheme under which the dwelling is let by a housing association and the tenant, or his personal representative, will, under the terms of the tenancy agreement or of the agreement under which he became a member of the association, be entitled, on his ceasing to be a member and subject to any conditions stated in either agreement, to a sum calculated by reference directly or indirectly to the value of the dwelling".

The Application of the Regulations to this Case

I Owner

34. The owner, that is to say the person who is for the time being entitled to dispose of the fee simple, is the Council.

35. The Tribunal was therefore incorrect to say, as it did in paragraph 8 of the statement of reasons (and as it seemed prepared so to hold in paragraph 17), that the owners of the property were the deceased and his wife as the register of title stated that they owned the fee simple with title absolute. They were not and it did not; they were registered as leasehold owners of the property with title absolute. S.10 of the Land Registration Act 2002 provides that

> "**Titles to leasehold estates**
>
> (1) In the case of an application for registration under this Chapter of a leasehold estate, the classes of title with which the applicant may be registered as proprietor are—
>
> (a) absolute title,
>
> (b) good leasehold title,
>
> (c) qualified title, and
>
> (d) possessory title;
>
> and the following provisions deal with when each of the classes of title is available.
>
> (2) A person may be registered with absolute title if—
>
> (a) the registrar is of the opinion that the person's title to the estate is such as a willing buyer could properly be advised by a competent professional adviser to accept, and
>
> (b) the registrar approves the lessor's title to grant the lease".

36. As Mr Commissioner Turnbull (as he then was) explained in ***R(H) 8/07*** in respect of the Housing Benefit Regulations 1987 (which are not materially different on this point from the 2006 Regulations)

> "9… there is no requirement in the definition of "owner" that the claimant should be the proprietor of any long leasehold interest of the dwelling which may have been granted …
>
> 10. It is true that, for most practical purposes, Miss B, rather than the claimant, would be regarded as the "owner" of the flat. She has a lease of it at a rent which is little more than nominal, and the lease still has some 71 years to run. However, as I have said, "owner" is

> defined by reference to the ability to dispose of the fee simple in the dwelling, and not by reference to the ability to dispose of any long leasehold interest in it which may have been granted. The definitions in regulation 2(1) of the 1987 Regulations apply "unless the context otherwise requires". However, it is not in my judgment possible to conclude that the context of regulation 10(2)(c) requires that, where a long leasehold interest has been granted at a low rent, the person with the ability to dispose of that leasehold interest, rather than the person who is entitled to dispose of the freehold, is the owner. Long leasehold interests are of course very common, and indeed regulation 10(2)(a) refers to payments under a long tenancy, which is defined by regulation 2(1) as a tenancy for a term of years certain of more than 21 years. The draftsman of the 1987 Regulations therefore clearly had the possible existence of long leases in mind, and yet the definition of "owner" was framed solely by reference to the ability to transfer the fee simple."

II Service Charges

37. The tenants under the sublease covenanted to pay the service charges (originally £688.20 per annum, but later increased to £997.92, which equates to £83.16 per month, but which varies from year to year) in accordance with clause 6 thereof. Under clause 5(1) if the tenants failed to pay the service charges for 21 days after they fell due the tenancy was liable to forfeiture. The liability to pay service charges is therefore a liability to payment which is a condition on which the right to occupy the dwelling depends.

38. For the avoidance of doubt the sums payable under the lease by way of service charges include the payments in respect of the provision of the reserve fund and the sinking fund.

39. In its original submission the Council sought to argue that the lease was not a shared ownership lease because the service charges levied were not calculated on the percentage of the value of the dwelling or the cost of providing it, but related to a total budget cost of providing services to all of the properties within the development, being split equally sixteen ways and payable regardless of ownership status. That argument is wholly misconceived and confuses the initial premium payable for the grant of the lease, which is calculated by reference to a percentage of the value of the dwelling or the cost of providing it, with the periodical payments due under the lease during its currency for the provision of the services under it. The error, however, carried over into the decision notice of 13 September 2018 which stated that the Tribunal did not find the evidence of the shared ownership tenancy as

being conclusive because no rent was payable and the service charges related to expenses for the property and were not apportioned in any specific way amongst the sixteen properties depending on the percentage owned.

III Long Tenancy

40. The tenancy is a long tenancy because it is a tenancy granted for a term of years certain exceeding twenty-one years.

41. The Tribunal was therefore correct so to hold in that regard. However, now that its full terms have been produced, it is apparent that the Tribunal was wrong to say, as it did in paragraph 11, that the lease did not name the tenants, state its terms, indicate a start date or an address and appeared to be a template.

IV Grant by Housing Association

42. The lease was granted by a housing association, namely Maritime Housing Association Ltd. By s.1(1) of the Housing Associations Act 1985 a housing association

> "… means a society, body of trustees or company—
>
> (a) which is established for the purpose of, or amongst whose objects or powers are included those of, providing, constructing, improving or managing, or facilitating or encouraging the construction or improvement of, housing accommodation, and
>
> (b) which does not trade for profit or whose constitution or rules prohibit the issue of capital with interest or dividend exceeding such rate as may be prescribed by the Treasury, whether with or without differentiation as between share and loan capital".

V Co-Ownership Scheme

43. At one point in paragraph 18 of the statement of reasons, the Tribunal referred to the Council maintaining that the arrangement was a co-ownership scheme. That is not what the Council was saying, but the argument is wrong in any event.

44. A co-ownership scheme is defined in one in which a scheme under which the dwelling is let by a housing association and the tenant will under the terms of the tenancy agreement or of the agreement under which he became a member of the association, be entitled, on ceasing

to be a member and subject to any conditions stated in either agreement, to a sum calculated by reference directly or indirectly to the value of the dwelling. There is no such provision in the lease under which the claimant's late father and his late wife held the property from the housing association. Nor is there any evidence that there was such a provision in the agreement under which they became members of the association. In its letter of 11 September 2017 the Council sought to rely on undated literature from Redwing Ltd or Regenda Homes to demonstrate that the scheme was a co-ownership scheme (or shared equity scheme as it put it), but the key document on which it needed to rely (but which it did not produce) was the 1997 terms of the agreement with the then head leaseholder, Maritime Housing Association Ltd. In addition, it is not the terms of the brochures or popular literature which is decisive of the question of the classification of the arrangement, but the terms of the Regulations themselves.

45. This is not therefore a case of payments under a co-ownership scheme under regulation 12(2)(b).

VI Shared Ownership Lease

46. The lease was a lease granted on payment of a premium calculated by reference to a percentage of the value of the dwelling, namely 75% thereof.

47. That, it seems to me, must follow from the particulars of the lease cited in paragraph 22 above and recital (5) which states that

> "The Landlord has agreed to grant to the Leaseholder a lease upon payment by the Leaseholder of the Premium representing the Initial Percentage of the Initial Market Value of the Premises and upon payment of the Specified Rent representing the Initial Relevant Percentage of the Gross Rent of the Premises with provision to enable the Leaseholder from time to time to pay for a further percentage of the Market Value of the Premises (up to a maximum of 75%) followed by a corresponding reduction of the percentage of the Gross Rent payable PROVIDED ALWAYS that in the event of the Leaseholder's staircasing to the maximum percentage of 75% the minimum rent payable hereunder shall be a peppercorn".

48. The question was therefore whether it was a shared ownership lease.

49. The First-tier Tribunal Judge rightly considered that he was bound by the decision of the Upper Tribunal in ***Blackburn with Darwen BC v. DA (HB)*** and therefore held that the tenancy was not a shared ownership tenancy.

50. In ***Blackburn*** Upper Tribunal Judge Mesher held, so far as material, that

> "8. The only issue that needs further brief consideration is whether the claimant has a "shared ownership tenancy". The literal words of head (a) of the definition might seem to apply, in that under the right to buy legislation the claimant would have received a percentage discount on the value of the flat and in that sense paid a premium for the grant of his 125 year lease calculated by reference to a percentage of the value of the flat. It would, though, be extraordinary, and in my view could not possibly have been contemplated when the 2006 Regulations were drafted, if payments under all long tenancies granted under the right to buy legislation (where by definition there would have been a discount) were brought back into the scope of housing benefit through the definition of "shared ownership tenancy". In my judgment, the literal words of paragraph (a) of the definition must be qualified by reading in some element of sharing of ownership and, for these purposes, ownership must be given its everyday meaning. A shared ownership tenancy is one in which the tenant, in the case of a flat, takes a long-term leasehold interest in only part of the dwelling concerned (typically, 25%, 50% or 75%), while paying rent as a short-term tenant would on the remainder. The tenant then has the right to buy additional percentages on the long-term basis, when the amount of the short-term rent will reduce proportionately. The essence is that there is a sharing of what would in ordinary language be regarded as the ownership of the dwelling, between the tenant in the case of the long-term tenancy element and the landlord in the case of the short-term tenancy aspect. The claimant here did not share the ownership of his flat in that sense, and neither would anyone else who acquired a long tenancy of the dwelling as a whole under the right to buy legislation. His ownership under the 125 lease was not shared with the landlord in that sense, even though there was still a split between the freehold interest of the landlord and his leasehold interest. Therefore, the ordinary application of regulation 12(2)(a) of the 2006 Regulations to long tenancies was not excluded in the claimant's case. That conclusion is in my view confirmed by the terms of head (b) of the definition of "shared ownership tenancy" applying to Scotland. There would be no rational reason for applying a different practical policy to the scope of the application of regulation 12(2)(a) as between Scotland and England and Wales."

51. It would suffice to allow the appeal and to remake the decision which should have been made by the Tribunal that the ***Blackburn*** case is distinguishable from the facts of this case in the way suggested by the Secretary of State. In the ***Blackburn*** case the shared ownership argument arose from one party owning the totality of the freehold interest and the other party owning the totality of the leasehold interest; the claimant owned 100% of the leasehold, but Places for People Homes retained 100% of the freehold interest. In the present case the claimant owned 75% of the relevant sub-leasehold interest, albeit that the 75% interest was a ceiling from the outset which could never be increased to 100% by a further staircasing (see paragraphs 25 to 27 above), with Regenda Homes owning the other 25%.

52. It seems to me, however, that there is a question as to whether ***Blackburn*** was rightly decided. On a literal wording of the definition of a shared ownership lease, the lease granted to the deceased and his wife was a lease granted on payment of a premium calculated by reference to a percentage of the value of the dwelling and therefore fell within the exception in regulation 12(2)(a).

53. Judge Mesher put a gloss on the literal meaning of a shared ownership tenancy by stating that

> "In my judgment, the literal words of paragraph (a) of the definition must be qualified by reading in some element of sharing of ownership and, for these purposes, ownership must be given its everyday meaning."

54. But was the gloss put on the legislation by Judge Mesher justified? If so, on what basis of statutory construction? Was it in fact contemplated when the 2006 Regulations were drafted that payments under all long tenancies granted under the right to buy (or similar) legislation (where by definition there would have been a discount) would be brought back into the scope of housing benefit through the definition of "shared ownership tenancy"?

55. The conclusion that "ownership" should in this content be given its ordinary meaning does not sit particularly easily with the decision of Mr Commissioner Turnbull in ***R(H) 8/07*** (paragraph 36 above) where the fact that, for most practical purposes, Miss B, rather than the claimant, would be regarded as the "owner" of the flat, did not in fact make her the "owner"

of it for housing benefit purposes since "owner" has a particular and limited meaning for the purposes of the Regulations.

56. Moreover, under Judge Mesher's definition of "shared ownership tenancy", the lease to the deceased and his late wife in this case would not have been within the definition because here the 75% ceiling was imposed at the outset and could not be increased by further staircasing and no rent was payable in respect of the remaining 25% share, whereas in his view

> "A shared ownership tenancy is one in which the tenant, in the case of a flat, takes a long-term leasehold interest in only part of the dwelling concerned (typically, 25%, 50% or 75%), while paying rent as a short-term tenant would on the remainder. The tenant then has the right to buy additional percentages on the long-term basis, when the amount of the short-term rent will reduce proportionately."

57. However, as the Secretary of State, rightly in my judgment, said in her submission, the definition of "shared ownership tenancy" makes no reference to the payment of rent and it does not follow from the legislation that the claimant must be paying rent on the share of the property which he does not own in order for the definition to apply. Similarly, the wording of regulation 12(1) does not suggest that rent has to be payable. Regulation 12(1) provides that housing benefit is payable in respect of a number of periodical payments, including service charges; these could include rent, but do not have to do so. As the claimant had a shared ownership tenancy there was no exclusion from housing benefit under regulation 12(2)(a); the tenant's rent obligations (or lack thereof) did not affect the question of whether the claimant could satisfy the definition of a shared ownership tenancy.

58. I am therefore satisfied that (contrary to the Council's submission of 22 June 2018) for a shared ownership tenancy to exist, it is not necessary for the tenant with a leasehold interest in only part of the dwelling concerned (whether 25%, 50%, 75% or otherwise) to be obliged to pay rent as a short-term tenant would on the remainder and that it is not necessary that the tenant then has the right to buy additional percentages on the long-term basis, when the amount of the short-term rent will reduce proportionately.

59. If it were required that, for a shared ownership tenancy to exist, it was necessary for the tenant with a leasehold interest in only part of the dwelling concerned to be obliged to pay rent as a short-term tenant would on the remainder and that it was necessary that the tenant then had the right to buy additional percentages on the long-term basis, when the amount of the short-term rent would reduce proportionately, that would lead to a further difficulty. If the tenant took, say, an initial 25% share, paying rent on the remainder and with the right to buy additional percentages on a long-term basis, when the amount of the short-term rent would reduce proportionately, the tenancy would be a shared ownership lease. However, when the tenant reached the ceiling of the staircasing provisions (say, as in this case, 75%), his right to buy additional percentages would be exhausted and there would be no further prospect of a rent reduction on the remainder share. Indeed, once the staircasing had been exhausted, the obligation to pay rent itself might fall away (essentially as here given the 75% ceiling from the outset of the lease). The tenancy, which at its inception was a shared ownership tenancy, could hardly cease to be a shared ownership tenancy at that point in time because the existence of the shared ownership tenancy as defined in the Regulations is fixed at its inception by reason of the premium originally paid on its grant, not by the impact of subsequent events.

60. There is, in my judgment, no material difference between a tenancy in which as a result of their subsequent exercise the staircasing provisions have been exhausted and the rent obligation falls away and one in which the staircasing provisions were exhausted at its inception and the rent obligation never arose.

61. That consideration fortifies the conclusion which I reached in paragraph 58, namely that for a shared ownership tenancy to exist, it is not necessary for the tenant with a leasehold interest in only part of the dwelling concerned (whether 25%, 50%, 75% or otherwise) to be obliged to pay rent as a short-term tenant would on the remainder and that it is not necessary that the tenant then has the right to buy additional percentages on the long-term basis, when the amount of the short-term rent will reduce proportionately.

62. If it is the case that it is not necessary for the tenant with a leasehold interest in only part of the dwelling concerned to be obliged to pay rent as a short-term tenant would on the remainder and that it is not necessary that the tenant then has the right to buy additional percentages on the long-term basis, when the amount of the short-term rent will reduce proportionately, there is no

difference in principle in the situation if the tenant owns 25,% 50%, 75% or 100% of the leasehold interest in the dwelling. The difference is only one of quantum of the interest. All that is required to constitute a shared ownership tenancy is, as the Regulations provide, that a lease is granted on payment of a premium calculated by reference to a percentage of the value of the dwelling or the cost of providing it.

63. I have not found any evidence to support the assertion that it could not possibly have been contemplated, when the 2006 Regulations were drafted, that payments under all long tenancies granted under the right to buy legislation (where by definition there would have been a discount) would be brought back into the scope of housing benefit through the definition of "shared ownership tenancy". In any event, if that were the case, the answer is to amend the legislation in the proper manner, not to gloss its meaning to make up the deficiency in the statutory definition.

64. Judge Mesher found confirmation for his gloss on the definition of a shared ownership tenancy in the terms of head (b) of the definition of "shared ownership tenancy" as applied to Scotland, stating that there would be no rational reason for applying a different practical policy to the scope of the application of regulation 12(2)(a) as between Scotland and England and Wales. There is, however, a very different definition of "shared ownership tenancy" in England and Wales on the one hand and Scotland on the other and I do not in fact find that the Scottish definition does support what Judge Mesher said in any event.

65. In Scotland a shared ownership tenancy is one in which there is

> "an agreement by virtue of which
>
> (i) the tenant of a dwelling of which he and the landlord are joint owners is the tenant in respect of the landlord's interest in the dwelling
>
> *or*
>
> (ii) the tenant has the right to purchase the dwelling or the whole or part of the landlord's interest therein"

66. As a matter of statutory interpretation, those would appear to be alternative and not cumulative conditions since one *or* other is required to be fulfilled. Fulfilment of one or other condition would therefore appear to comply with the definition of "shared ownership tenancy".

67. On the assumption that it is appropriate to import the Scottish definition into the position in England and Wales at all, I consider that the lease granted to the deceased and his wife was not an agreement by virtue of which the tenant of a dwelling of which he and the landlord were joint owners was the tenant in respect of the landlord's interest in the dwelling (since "owner" has a particular meaning for housing benefit purposes and is not to be construed in the popular sense and the tenants were not for the time being entitled to dispose of the fee simple).

68. However, the tenant under the agreement in this case did have the right to purchase part of the landlord's interest in the dwelling, albeit that the ceiling to that provision was fixed at 75% at the outset of the tenancy rather than exhausted by its exercise during the currency of the tenancy.

69. Moreover, the terms of the second limb of the Scottish definition seem to me to undermine Judge Mesher's reliance on the Scottish provision as support for his gloss since it specifically allows for the tenant to have the right to purchase the dwelling *or the whole* or part *of the landlord's interest therein*. That seems to me to be wholly contrary to an argument that the literal words of paragraph (a) of the definition of a shared ownership tenancy must be qualified by reading in some element of sharing of ownership (in its everyday meaning) with the tenant takings a long-term leasehold interest in only part of the dwelling concerned (such as 25%, 50% or 75%) while paying rent as a short-term tenant would on the remainder. On the contrary, the second limb of the Scottish definition specifically envisages the extinction of the landlord's interest in the leasehold interest in the property, which would bring to an end the element of sharing of ownership under the ***Blackburn*** interpretation.

70. Although therefore it would suffice to allow the appeal and to remake the decision which should have been made by the Tribunal to conclude that the ***Blackburn*** case is distinguishable from the facts of this case in the way suggested by the Secretary of State, for the reasons set out above I am satisfied that Judge Mesher's gloss on the meaning of "shared

ownership tenancy" in ***Blackburn*** was not correct and, if otherwise unable to distinguish it, I would not have followed it.

Conclusion

71. The decision of the First-tier Tribunal sitting at Liverpool dated 13 September 2018 under file reference SC068/17/06633 involves an error on a point of law. The appeal against that decision is allowed and the decision of the Tribunal is set aside.

72. The decision is remade.

73. The claimant is entitled to housing benefit to cover the payments by way of service charge on the property which her late father occupied as his home. The tenancy of the property is a shared ownership tenancy granted by a housing association and is within the exception in paragraph 12(2)(a) of the Housing Benefit Regulations to the prohibition on payment of a rent allowance in respect of periodical payments made under a long tenancy.

74. The matter is remitted to the Council to calculate the correct amount of housing benefit due to the claimant.

Signed **Mark West**
Judge of the Upper Tribunal

Dated **22 January 2020**