**[2022] UKUT 86 (AAC)**

**IN THE UPPER TRIBUNAL** **Appeal No. CH /1324/2020**

**ADMINISTRATIVE APPEALS CHAMBER**

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

**Between:**

**NSP**

Appellant

**-v-**

**Stoke-on-Trent City Council**

Respondent

**-and-**

**GP**

Second Respondent

**Before: Upper Tribunal Judge Poynter**

Decision date: 17 March 2022
Decided on consideration of the papers

**Representation**

| | |
|---|---|
| Appellant: | In person |
| First Respondent | Appeals Officer, Stoke-on-Trent City Council |
| Second Respondent | Did not participate |

## DECISION

The appeal to the Upper Tribunal succeeds.

The First-tier Tribunal made a legal mistake in relation to the claimant's appeal (ref. SC049/19/00670) which was decided at Stoke-on-Trent on 28 January 2020.

I set that decision aside and re-make it as follows.

**1. The appeal is allowed**

**2. The decision issued by Stoke on Trent City Council on 28 January 2019 is set aside.**

**3. The appellant has been overpaid the sum of £575.36 as housing benefit paid under the claim made by the second respondent for the period from Monday 5 September 2016 to Sunday 16 April 2017, both dates included.**

**4. The said sum of £575.36 is recoverable from the second respondent.**

**5. Neither the said sum of £575.36, nor any part of that sum, is recoverable from the appellant.**

## REASONS

### Introduction

1. This appeal arises out of a claim for housing benefit (from now on "HB") made by the second respondent (“the tenant”) in respect of part of a building ("the Building") that is owned by the appellant (the landlord). The Building is in the area administered by the first respondent (“Stoke”).

2. Stoke and the landlord were also parties to the appeal in *NSP v Stoke-on-Trent City Council and AT (HB)* [2020] UKUT 311 (AAC) (“the *AT* case” or simply “*AT*”). The tenant was not. This case raises similar, though not identical, issues.

### Factual background

3. The tenant was born in December 1971.

4. On 5 September 2016, the tenant entered into an assured shorthold tenancy agreement with the landlord.

5. The agreement described the property that was let to the tenant ("Flat 1") as:

> “The flat (number 1) on the floor of the Building (including its garden)”.

The space between the words “the” and “floor ” in that quotation was also left blank in the original.

6. The weekly rent specified in the agreement was £70.

7. The tenant had an existing claim for HB from Stoke and, on 12 September 2016, he attended his local One Stop Shop with a man who, as the Tribunal held, and as the landlord had accepted in correspondence, was the landlord's agent.

8. On that occasion, the tenant completed a change of address form. That form stated that his rent was £70 per week exclusive of service charges and that no-one else had filled the form in for him. He asked for any HB awarded to him to be paid direct to the landlord because he had experienced "bank trouble [and] budgeting problems".

9. The form also asked him to "confirm how many rooms are in your property", to which the tenant replied:

| | **Total** | **For you** | **Shared** |
|---|---|---|---|
| **Living rooms** | 4 | 1 | 0 |
| **Bedrooms** | 4 | 1 | 0 |
| **Bedsit rooms** | *GP | 1 | 0 |
| **Kitchens** | 4 | 1 | 0 |
| **Bathrooms** | 1 | ~~1~~ | 1 |

Despite the initialled asterisk in the answer about the total number of bedsit rooms there were in the Building, it does not appear that any further details were supplied.

10. The form did not require the tenant to make the declarations that had been required of the claimant in the *AT* case, namely that:

> "The details given on the form are true and complete."

and that,

> "I have read this declaration carefully before signing it".

11. Nevertheless, the form did require the claimant to confirm that:

> "I understand that criminal proceedings may be taken against me if:
>
> - I lie to you so that I can get benefit;
> - I give you false documents so that I can get benefit;
> - I do not tell you about any changes that may affect my claim within one month of them happening; or

- I claim benefit when I know that I should not".

12. That summary of the criminal law relating to benefit fraud is, at best, approximate. The first three bullet points are incomplete: for example, an untrue statement can lead to criminal liability without being a deliberate lie. And the fourth is incorrect. What is relevant is whether, when making the claim, the claimant gives accurate information and does not rely on false evidence. The state of the claimant's knowledge of the rules of entitlement to benefit is neither here nor there. A claimant who knows, or thinks he knows, or strongly suspects that, he is not entitled to benefit is still allowed to lay the (true) facts before a decision maker and ask for a decision on the point.

13. Nevertheless, the tenant did confirm that his understanding of the circumstances in which criminal proceedings could be brought against him was as stated.

14. On the same day, Stoke awarded the tenant HB at the weekly rate of £70 and that amount was paid directly to the landlord for a period that ended on 16 April 2017.

15. As will be apparent to those who are familiar with the HB system, the fact that HB was awarded at the same rate as the claimant's contractual rent, namely £70 per week, must have meant that the "eligible rent" used in the calculation was also £70 per week.

16. Stoke had set the eligible rent at that level because they decided from the information in the change of address form, that the tenant was occupying a one-bedroom flat with his own living room and kitchen and a shared bathroom. It followed that the tenant was eligible for the "one-bedroom, exclusive use" rate of local housing allowance.

17. However the information given in the claim form was not correct. Flat 1 was in fact a single bedsit room with its own cooking facilities and shared use of the bathroom. The correct level of local housing allowance was the "one-bedroom, shared accommodation" rate, which would have led to a weekly HB award of £52.02.

18. On a date between 12 September 2016 and 15 May 2017, the tenant moved from Flat 1 to was another bedsit room with the same accommodation and facilities ("Flat 4").

**Procedural history**

19. On 15 May 2017, officers from Stoke inspected the Building. They found the tenant occupying Flat 4 with kitchen facilities in the room and shared use of a communal bathroom. At the same time, they noted that Flat 1 was void.

20. Later the same day, Stoke revised the decision awarding the tenant benefit. The effect of the revising decision was that the weekly rate at which the tenant was entitled to HB fell from £70 to £52.02, thereby creating an overpayment of £17.98 per week or £575.36 for the period from 5 September 2016 to 16 April 2017.

21. Stoke notified the landlord of that decision by two computer-generated letters also dated 15 May 2017. Those letters informed him that the overpayment for the period to which they respectively referred:

> "… is recoverable and will be recovered from you from other housing benefit payments you receive. Please refer to your payment schedule for further details of this recovery."

A benefit assessor sent a further letter to the same effect to the landlord the following day.

22. The papers do not contain a copy of any letter notifying the tenant of the overpayment decision although a subsequent letter to the landlord dated 28 January 2019 (following a hearing in the First-tier Tribunal on 10 January 2019) states:

> "We previously informed your tenant that we would be enforcing recovery action against you[,] the landlord, because you had received the payments of Housing Benefit direct from the council."

23. For the reasons I gave in *AT*, a decision to enforce recovery of an overpayment against one of two or more people who are liable to repay it is not the same as a decision identifying the person or people from whom that overpayment is recoverable. There is evidence that Stoke told the tenant at the time that a recoverable overpayment had arisen, but none that he was told it was recoverable from him (even though it would be enforced against the landlord from whom it was also recoverable).

24. The relevant documents do not appear in the papers—even though they should have been included—but it seems that there was an earlier appeal by the landlord against the decision of 15 May 2017. The letter dated 28 January 2019 states that:

> "Further to the appeal hearing of 10 January 2019 District Tribunal Judge Hankey has decided to "set aside" the appeal because the overpayment of Housing Benefit is also recoverable from [the tenant]."

The First-tier Tribunal has no power to set aside an *appeal*. It does, however, have power when allowing an appeal to set aside a *decision* of a local authority without substituting another decision, thereby leaving the local authority free to make a fresh decision itself.

25. I strongly suspect that that is what Judge Hankey had in fact done. Such a decision would have been correct in substance: on any possible view of the evidence, if the overpayment was recoverable at all, it was recoverable from the tenant (even if it was also recoverable from the landlord). Further, setting Stoke's decision aside without re-making it was the correct way to have disposed of the appeal from a procedural point of view. And, finally, it appears from the letter that Stoke considered they had to make a new decision rather than revise or supersede the old one.

26. Taken together with a letter in similar terms to the tenant, the letter of 28 January 2019 communicated a fresh decision that the overpayment was recoverable from both the landlord (as the person to whom the payments had been made) and the tenant (as having made "a false declaration on [his] application form").

27. On 15 February 2019, the landlord made a fresh appeal against the decision dated 28 January 2019 and the appeals centre in Bradford received it from Stoke on 13 May 2019.

28. The appeal was listed for hearing before Judge B on 1 October 2019. Neither the landlord nor the tenant was present and Judge B proceeded in their absence. He decided that the overpayment was recoverable from both the landlord and the tenant.

29. However, on 11 December 2019, District Tribunal Judge A set that decision aside on procedural grounds, specifically a failure of notice to the landlord.

30. Judge A reheard the appeal on 28 January 2020. The landlord attended the hearing but the tenant did not. Judge A decided that the overpayment was recoverable from the landlord.

31. On 6 May 2020, Judge A refused permission to appeal to the Upper Tribunal against that decision. The landlord now appeals to the Upper Tribunal with my permission, given on 4 November 2020.

32. The tenant did not appeal to the First-tier Tribunal against either the decision dated 15 May 2017 or the decision dated 28 January 2019. Neither has he appealed to the Upper Tribunal (although, as Judge A did not find the overpayment to have been recoverable from him, that is not a surprise). However, for the reasons I gave in *AT*, he was second respondent to the appeal to the First-tier Tribunal by operation of law and is similarly the second respondent in these proceedings. I have therefore given directions clarifying his status and giving him an opportunity to respond to the appeal. In particular, I advised him expressly that he will be legally bound by my decision even if he were to chose not to take part in the proceedings.

33. Those directions were sent to tenant, together with a copy of the Upper Tribunal papers, at an address supplied by the Secretary of State for Work and Pensions pursuant to an order under rule 16 of the Tribunal Procedure (Upper Tribunal) Rules 2008. The papers have not been returned undelivered and I am satisfied that the tenant is aware of the proceedings even though, for whatever reason, he has not taken part in them.

## Discussion

*Which scheme?*

34. As the tenant has yet to reach pensionable age, his entitlement to HB—and liability to repay any overpayment—is governed by the scheme for people of working age established by the Housing Benefit Regulations 2006 ("the HB Regulations").

*Where the First-tier Tribunal went wrong*

35. The Form AT37 (*i.e.*, the form that accompanies a HB appeal when it is submitted to HM Courts and Tribunals Service ("HMCTS")) contained the following information:

> "This is an appeal made by [NSP] landlord of [the Building]. The tenant, [GP] is party to the proceedings but is vulnerable and has not responded to any correspondence".

36. Stoke might just as well have saved the ink used to write that passage. HMCTS administered the appeal as if the tenant did not exist. I have seen the relevant entries on HMCTS's GAPS computer system. The only parties registered are the landlord and Stoke.

37. It follows that correspondence was only sent to the landlord and Stoke and that therefore the tenant:

(a) was not sent the standard enquiry form asking whether he wanted a hearing and about his needs in relation to, and availability for, any such hearing;

(b) was not offered the opportunity, to which the Social Entitlement Chamber's own rules—and basic justice—entitled him, to reply to Stoke's response to the appeal;

(c) was not given notice of either hearing;

(d) was not informed of:

(i) Judge B's decision; or

(ii) the application to set it aside; or

(iii) Judge A's decision to set Judge B's decision aside; or

(iv) Judge A's decision on the substantive appeal.

Neither was the tenant sent a copy of the written statement of reasons for Judge A's decision.

38. In the circumstances, the first time the tenant will have known of the proceedings was after the First-tier Tribunal had given its decision and the landlord had appealed to the Upper Tribunal, (*i.e.*, when he received the directions and other documents referred to in paragraphs 32-33 above).

39. I therefore have no alternative but to set aside the Tribunal's decision for a material breach of procedural law and, in particular, its duty to act fairly towards the tenant (and also to the landlord who may have been entitled to a decision that the overpayment was recoverable from the tenant as well as from him).

40. It is doubly unsatisfactory that that state of affairs should have come about when a District Tribunal Judge in the same region had previously drawn attention to the fact that the tenant was a necessary party to the appeal. The responsibility for that state of affairs is to be shared between HMCTS, Judge B, and Judge A.

41. Given the contents of the AT37, HMCTS should have registered the proceedings as a tri-partite appeal with the tenant as second respondent. As I know from first-hand experience, GAPS allows that. The only mitigation I can see is that Stoke had not included the tenant's address on the AT37. But that was scarcely an insuperable problem. It would only have taken the smallest amount of initiative to have picked up the phone and asked Stoke for the missing details. And if that were not possible for some reason, it would have been a straightforward matter to have referred the file to a judge for further instructions. Instead, HMCTS ignored what Stoke had written. That was inevitably going to lead to problems later on.

42. Judge B clearly recognised from his decision that the tenant was a party to the proceedings: he held that the overpayment was recoverable from him as well as from the landlord. However, his decision to proceed in the absence of the parties was untenable.

43. Rule 31 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 is in the following terms:

> "**Hearings in a party's absence**
>
> **31**. If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal—
>
> (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
>
> (b) considers that it is in the interests of justice to proceed with the hearing."

44. The printed record of proceedings form generated by GAPS stated that the hearing date had been notified on 16 September 2019. However, for the reasons given in paragraph 3 above, it only referred to the landlord as an appellant and there was no mention of any second respondent.

45. Judge B then made the following (so far as relevant) manuscript note:

> "Case listed at 10.00 am.
>
> No attendance by Appellants [*sic*] at 10.25 am.
>
> No info in file/GAPS. PO in attendance.
>
> Hearing proceeded in absence of Appellants [*sic*], who have been notified of hearing and it is appropriate to proceed in their absence."

46. Two criticisms can be made of that. The hearing appears to have proceeded on the basis that the landlord and the tenant were both appellants. That was not so. The papers contained nothing to suggest that the tenant had appealed against the decision (and, for the avoidance of doubt, Stoke have subsequently confirmed that he did not do so). For the reasons I gave in *AT*, the tenant was the second respondent to the appeal. Furthermore, the computer-generated record of proceedings did not identify the tenant as an appellant.

47. Which brings me to the second, and more fundamental, criticism. It is correct to say that there was no relevant information on the file. That, however, was not the case for GAPS. If the learned judge had checked GAPS conscientiously, he would have seen at once that the tenant had not been notified of the hearing because he was not even

registered as a party to the appeal. In the circumstances, I do not see how Judge B could properly have been satisfied that the tenant had been notified of the hearing or that reasonable steps had been taken to notify him of the hearing, as required by rule 31(a). On the contrary, a simple check—a check that Judge B has recorded as having been made—would shown that *no* such steps had been taken at all and that, therefore the tenant had not been notified of the hearing.

48. Judge A, on the other hand, noted on the record of proceedings that the tenant was not present, and correctly identified him as second respondent in the heading to the written statement of reasons. However, nothing in the papers suggests that the learned judge considered rule 31 at all (although, at the end of the hearing, he refused the landlord's application for an adjournment so that the tenant could be required to attend).

49. Rule 31 is a well-known and fundamental rule of procedure in the Social Entitlement Chamber and Judge A is a salaried District Tribunal Judge. He appreciated that the tenant was second respondent to the appeal, and he expressly noted that the tenant was not present at the hearing. In those circumstances, it should have been obvious to him that he had no power to proceed with the hearing unless he expressly considered rule 31 and formed the view that both limbs of the rule were satisfied.

50. Had Judge A considered the rule 31 issues properly, he ought to have become aware of the matters that I have criticised Judge B for having overlooked (*i.e.*, in paragraph 47 above).

51. Although perhaps he would not have done. Judge A will have had access to GAPS when he set aside Judge B's decision on 11 November 2020 and when he refused permission to appeal to the Upper Tribunal on 6 May 2020. On either occasion, he could have taken the opportunity to correct the procedural irregularities that had occurred and avoid the need for an appeal to the Upper Tribunal. But he did not do so. It is ironic that Judge B's decision was overturned because the landlord had not in practice received adequate notice of the hearing despite having been validly served in accordance with the rules, when the failure to serve the tenant with any relevant document went unnoticed.

*The landlord's grounds of appeal*

52. Having set aside the First-tier Tribunal's decision on other grounds, it is unnecessary for me to rule formally on the landlord's stated grounds of appeal. However, in case this matter should go further, I will state that I have considered them but remain unpersuaded.

**Reasons for re-making the decision**

53. The next issue I must decide is whether to remit the case to the First-tier Tribunal with directions for its reconsideration or to re-make the decision myself.

54. I have decided to do the latter. As was the case in *AT*, the evidence only permits one outcome (although there are some additional issues I must consider on the way there). It is therefore expedient that I should give that decision without further delay.

**Reasons for the remade decision**

*Introduction*

55. I should begin by saying that, when I am re-making the decision, section 12(4) of the Tribunals, Courts and Enforcement Act 2007 gives me the same powers (including the power to find facts) that a Judge of the First-tier Tribunal judge would have when hearing the appeal for the first time. In particular, I am bound to consider the evidence afresh and make my decision on the basis of how I weigh that evidence. Therefore, I am not bound either to agree or disagree with what Judge A decided. And, as I have set his decision aside, it is not necessary for me to decide that a particular finding of fact was erroneous in law before I can disagree with it.

*The issues*

56. I say above that the issues in this case, though similar, are not identical to those I the *AT* case. This appeal raises the following additional issues:

(a) In the *AT* case, the person who accompanied AT to make the claim for HB was not the landlord's agent. In this case the person who accompanied the tenant to report complete the change of address form was the landlord's agent.

(b) In the *AT* case, AT signed a formal declaration that the contents of his claim form were true and complete. In this case, the change of address form did not include such a declaration.

(c) In the *AT* case, there was no change in AT's circumstances between the date of his claim and the date of the overpayment decision. In this case, such a change occurred when the tenant moved from Flat 1 to Flat 4.[1]

[1] The exact date on which that move occurred is known only to the landlord and the tenant. However, if (contrary to what I have decided), the change from Flat 1 to Flat 4 had been the effective cause of the overpayment, I would have concluded, in Stoke's favour, that the tenant only occupied Flat 1 for a single benefit week. The landlord was under an unequivocal legal duty to report that change at the

*The law*

57. The law that I must apply when deciding those issues is set out in section 75 of the Social Security Administration Act 1992 ("the Administration Act") and regulation 101 of the HB Regulations. The former provision reads as follows:

> "**Overpayments of housing benefit**
>
> **75**.–(1) Except where regulations otherwise provide, any amount of housing benefit determined in accordance with regulations to have been paid in excess of entitlement may be recovered either by the Secretary of State or by the authority which paid the benefit.
>
> (2) Regulations may require such an authority to recover such an amount in such circumstances as may be prescribed.
>
> (3) An amount recoverable under this section shall be recoverable—
>
> (a) except in such circumstances as may be prescribed, from the person to whom it was paid; and
>
> (b) where regulations so provide from such other person (as well as, or instead of, the person to whom it was paid) as may be prescribed."

and, so far as is relevant, the latter provides as follows:

> **"Person from whom recovery may be sought**
>
> **101**. …
>
> (2) For the purposes of section 75(3)(b) of the Administration Act (recovery from such other person, as well as or instead of the person to whom the overpayment was made), where recovery of an overpayment is sought by a relevant authority—
>
> (a) subject to paragraph (1) and where sub-paragraph (b) or (c) does not apply, the overpayment is recoverable from the claimant as well as the person to whom the payment was made, if different;

---

time it occurred and the tenant may well have been under the same duty. It would not be correct to resolve factual issues for which there is no evidence so as to allow the either to profit from their failure to disclose. Put another way, I would have resolved the doubt against those who had not played their part in the co-operative process that is social security adjudication: see *Kerr v Department of Social Development*, [2004] UKHL 23 (also reported as *R 1/04 (SF)*) at [62].

(b) in a case where an overpayment arose in consequence of a misrepresentation of or a failure to disclose a material fact (in either case, whether fraudulently or otherwise) by or on behalf of the claimant, or by or on behalf of any person to whom the payment was made, the overpayment is only recoverable from any person who misrepresented or failed to disclose that material fact instead of, if different, the person to whom the payment was made; or

(c) in a case where an overpayment arose in consequence of an official error where the claimant, or a person acting on the claimant's behalf, or any person to whom the payment was paid, or any person acting on their behalf, could reasonably have been expected, at the time of receipt of the payment or of any notice relating to that payment, to realise that it was an overpayment, the overpayment is only recoverable from any such person instead of, if different, the person to whom the payment was made.

…"

*Agency*

58. With one qualification, it is impossible to disagree with Judge A's conclusion that the person who accompanied the tenant to the One Stop Shop was the landlord's agent.

59. That qualification is that the papers contain an allegation that the landlord had billed a tenant of another property £55 to have the agent to come in and complete his claim with him.[2] That allegation was not made by the tenant in this case and I do not know whether there is any substance to it. Without the participation of the tenant, it cannot be explored further in this appeal. However, if the tenant was paying for the time of the person who accompanied him, that would tend towards a conclusion that that person was acting as the tenant's agent rather that the landlord's.

60. On the evidence available to me, however, I agree that the accompanying person was the landlord's agent.

61. Given the terms of regulation 101(2), however, that finding is not enough to support a decision that the overpayment is recoverable only from the landlord. Rather the question is what the landlord's agent said and did. Specifically, it would be necessary to conclude either that:

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[2] Although not directly relevant to this appeal, the other tenant also alleged that the landlord threatened him with eviction unless the HB was paid to the landlord and instructed him to lie in response to certain questions on the claim form. I would only say that if there is substance to the other tenant's allegations that would, in my provisional judgment, be sufficient on its own to justify the conclusion that the landlord is not a fit and proper person to receive HB.

(a) (whether fraudulently or otherwise) he misrepresented or failed to disclose a material fact and that the overpayment arose in consequence of that misrepresentation or failure to disclose (regulation 101(2)(b)); or that

(b) the overpayment arose in consequence of an official error and the landlord (or his agent) could reasonably have been expected, at the time of receipt of the payment or of any notice relating to that payment, to realise that it was an overpayment (regulation 101(2)(c)).

That is because, unless either regulation 101(2)(b) or (c) applies the overpayment would also be recoverable from the tenant by virtue of regulation 101(2)(a).

62. I was initially attracted to the possibility that the overpayment had arisen in consequence of an official error. The information provided on the change of address form (as quoted in paragraph 9 above) required further investigation that it did not receive.

63. The point can be made by asking rhetorically just how likely it was that (as he had stated) the tenant was occupying a bedroom, a living room a kitchen *and also a bedsit*. Proper investigation of what, even in the absence if the information about the total number of bedsits in the Building, was a clearly unsatisfactory answer would probably have prevented the overpayment.

64. If I had held that the overpayment arose in consequence of an official error, that would. ironically, have led to the outcome that the overpayment was only recoverable from the landlord.

65. The facts of this case, and the other cases I have seen involving his tenants, lead me to suspect that the landlord actually knew he was being overpaid at the relevant time.

66. But, assuming in his favour that that suspicion is misplaced, it is impossible to avoid the conclusion that he could reasonably have been expected to realise that he was being overpaid. Even if he did not read the computer-generated decision notices and payment schedules that Stoke sent him, he ought reasonably to have done so. It is no answer to say that he had no reason to check them because he was getting the full rent. He ought to have read them in case they showed that, in receiving the full rent, he was being overpaid.

67. Further, I agree with Judge A's rejection of the landlord's evidence that he thought the £70 figure included a discretionary housing payment. The landlord has long experience of the HB system and must know that discretionary housing payments have

their own system of claim and award, with the decision being notified separately from any decision about entitlement to benefit. It is impossible to view his evidence to the contrary as anything other than a direct lie.

68. However, I cannot decide this appeal on the basis that the overpayment was caused by an official error because regulation 100(3) defines "official error" as "a mistake made whether in the form of an act or omission by [among others] a relevant authority;

> "where the claimant, a person acting on his behalf or any other person to whom the payment is made, did not cause or materially contribute to that mistake, act or omission".

In this case, even though Stoke were mistaken in omitting to investigate information provided by the tenant that was apparently incorrect, the tenant clearly contributed to the overpayment: see *Sier v Housing Benefit Review Board of Cambridge City Council* [2001] EWCA Civ 1523 and, in particular, the observations of Simon Brown LJ (as he then was) at [29]-[30].

69. As the overpayment did not arise in consequence of official error, regulation 101(2)(c) has no application in this case. Only regulation 101(2)(b) is potentially applicable.

70. That regulation refers to both misrepresentations of, and failures to disclose, a material fact. Subject to what I say at paragraphs 88–109 below, however, this is not a failure to disclose case: the incorrect information is written on the change of address form. Only misrepresentation is relevant.

71. So what evidence is there that the landlord's agent made any representations, true or otherwise, as to the material facts about the accommodation the tenant occupied?

72. The change of address form contains no representations at all by the landlord's agent. The information it contains is given in the name of the tenant. Only he has signed the form and the form states expressly that no-one else filled it in for him. Further, the form contains a declaration to be completed by anyone other the tenant who fills in the form that:

> "I declare I have asked the person claiming all of the questions on this form and have confirmed that all of the answers given are correct".

That declaration is not signed by anyone.

73. Although it would be bad practice, I suppose it is conceivable that a local authority might award HB on the basis of representations made by word of mouth that were not subsequently reduced to writing.

74. The learned judge found as a fact that the information that the tenant occupied a one-bedroom flat rather than a bedsit was provided by both the tenant and the landlord's agent. However, that finding appears to have been predicated on the judge's earlier statement that the landlord had stated in the letter that the agent "had expressly stated to the housing officer the type of accommodation he [*i.e.*, the tenant] was residing in."

75. However, what the landlord actually wrote was as follows:

> "To claim housing benefit they [*i.e.*, the tenant and a tenant of a different part of the Building] attended the housing benefit office to claim with my agent [name redacted] (who has done this job for 5 years). …
>
> The housing benefit officer was informed by [the agent] that [the tenant] had one room in his bedsit and [the other tenant] had two rooms, a bedsit and a large kitchen. They were informed by the housing officer that they would both get the full housing benefit of £70 what I was charging for the accommodation."

76. The landlord's evidence on those points is worthless. He was not present at the events he describes; he has a vested interest in the conversation having been as he describes; and it is inherently implausible that the officer would have said that both tenants would be awarded the full £70 rate if the correct information had actually been given. I attach no weight to it.

77. However, it was a travesty of that evidence for Judge A to have glossed it (*i.e.*, as set out in paragraph 74 above) to make it appear that the landlord had accepted that the agent had given incorrect information. The landlord did not so accept: his evidence was directly to the contrary.

78. The landlord also said that he would attend the tribunal hearing "with my witness and agent". However, the agent did not in fact attend the hearing before Judge A. The learned judge could, of course, have adjourned to call the agent and also the housing officer who received the change of address form to give evidence in person. He did not do so, and I make no criticism of him for that. Such evidence was unlikely to have shed any additional light on the issue.

79. In those circumstances, the evidence to which I attach weight does not permit me to make a finding that the landlord's agent misrepresented any material fact by word of mouth while at the One Stop Shop on 12 September 2016.

80. Moreover, even if the landlord's agent had made such a misrepresentation, the evidence establishes that the overpayment did not arise "in consequence of" it. The papers contain a helpful file note by the council officer who made the award of benefit. It reads as follows:

> "CL[aimant] [at] O[ne] S[top] S[hop] to do a C[hange] o[f] A[ddress]. Completed COA form and provided tenancy. Moved 05/09/16. Cancelled prev[ious] property and input new property. New property he has his own bedroom, kitchen and living room but the bathroom is shared. Therefore CL ent[itled] to 1 bed rate so amended bedroom assessment as such.
>
> Paid to l[and]lord as CL has a history of arrears, debts and poor budgeting."

The landlord's agent is not mentioned in that note. Neither does the note suggest that the decision was based on anything other the "completed COA form". Which is what one would expect.

81. For all those reasons, I conclude that the overpayment did not arise in consequence of the landlord, or anyone on his behalf, misrepresenting a material fact. Therefore regulation 101(2)(b) does not operate so as to make him solely liable to repay the overpayment.

82. I would add that, even if I had reached the contrary conclusion, there would still be the consideration that the tenant had made the same misrepresentation as the agent and that the overpayment would therefore have been recoverable from both the landlord and the tenant rather than (as the learned judge decided) the landlord alone.

*The absent declaration*

83. I have referred at paragraph 10 above to the fact that, although the change of address form required the tenant to declare that his understanding of the criminal law was as set out in Stoke's approximate and partially inaccurate summary (see paragraphs 11 and 12 above), it did not require him to declare that what he had told Stoke was "true and complete" or even that it was "true".

84. In those circumstances, a question arises as to whether even the claimant made any misrepresentations to Stoke. Although he included untrue and incomplete

information on the change of address form, he did not expressly represent to Stoke that it was anything other than untrue. And the information he gave was obviously not complete: the initialled asterisk in the answer to the question about how many bedsits there were in the Building as a whole establishes that.

85. Stoke's failure to include a proper declaration on the form is incomprehensible. I have nevertheless come to the conclusion that, even in the absence of such a declaration, the tenant's answer about the accommodation he occupied amounted to a representation and, as it was untrue, was a misrepresentation. I find as a fact that that is the case.

86. It is not possible to give more than the briefest explanation for that conclusion. The tenant was asked the question on an official form. He replied to the question and submitted the form. In so doing he represented that the answer to the question was as he had stated. Although the evidence does not permit me to conclude that it has occurred in this case, it is possible to make a misrepresentation by word of mouth. If the tenant had read his answer aloud to the housing officer he would have been making such a misrepresentation: it therefore cannot be the case that he did not make a misrepresentation when he submitted the form in writing. That is so even though the form did not include a formal declaration that the contents were true.

87. Pausing there, the situation is that, even though the original payment of HB was made to the landlord, the overpayment arose in consequence of a misrepresentation of a material fact by the tenant. As it has not been established that the landlord or his agent made any misrepresentation, the conclusion must be that—subject to the change of circumstance issue—the overpayment is recoverable from the tenant instead of the landlord: see regulation 101(2)(b) and my decision in the *AT* case.

*The change of circumstances*

88. As I find at paragraph 18 above, the tenant moved from Flat 1 to Flat 4 on a date that cannot be identified precisely from the existing evidence.

89. That was a change in circumstances that "might [have affected] the claimant's right to, the amount of or the receipt of" HB. I say that because the change not only might have affected, but actually did affect, the tenant's right to HB.

90. Before the change, that right was an entitlement to HB in respect of Flat 1, which ended when the tenant vacated that bedsit. Any subsequent entitlement was a different right, namely to HB in respect of Flat 4. In those circumstances it is irrelevant whether the change also might, or might not, have affected the amount of, or the receipt of, HB.

91. As a person with long experience of receiving HB, the landlord (at least) might have been reasonably expected to know that.[3]

92. In those circumstances, regulation 88(1) of the HB Regulations placed the landlord (at least) under a duty to notify the change of circumstances to Stoke. He did not do so. That failure was potentially[4] criminal: see section 115D of the Social Security Administration Act 1992.

93. But in order to visit the landlord with the sole liability to repay the overpayment, it is not enough that he has failed to notify a change in circumstance. Given the terms of regulation 101(2)(b), that failure must also amount to a "failure to disclose a *material* fact" (my emphasis).

94. The change from Flat 1 to Flat 4 was, of course, a fact, and a primary one. It was something that could be observed about the world.

95. But whether any given fact is *material* is a conclusion, not an observation and that conclusion is made by applying criteria to the observable facts. Those criteria are contained in the case law about what "material" means in this context.

96. Before the present system of decision-making and appeals was introduced in July 2001, the Administration Act established a system whereby existing decisions could be changed by a process called "review". As is the case for supersession, on of the grounds for review was that "the … decision[5] was made in ignorance of, or was based on a mistake as to, some material fact": see regulation 79(1)(b) of the former Housing Benefit (General) Regulations 1987 (which was in similar terms to section 47(1) of the Administration Act (as it stood before it was repealed) in relation to the medical benefits administered by the Secretary of State).

97. In *Saker v Secretary of State for Social Services* (CA) The Times, 16 January 1988; [1988] 1 WLUK 494, the Court of Appeal (Lloyd, Nicholls & Staughton LJJ) held that for the purposes of section 110 of the Social Security Act 1975 (the immediate predecessor to section 47), a material fact is "a fact to which [the decision maker] would have wished to direct its mind". In other words it was a fact that *might* have made a difference. The Secretary of State's submission that a material fact was a fact that

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3 Whether the tenant might reasonably have been expected to know it, would depend on an analysis of what information he had been given about the rules of the HB scheme. My decision on the other issues means that it is unnecessary for me to embark on that analysis.

4 The only circumstance that prevents it from having been actually criminal is that the failure to disclose was not the cause of the overpayment: see paragraph 108 below.

5 The ellipsis glosses over the former distinction between "determinations" (which were made by a local authority) and "decisions" (which were made by a Housing Benefit Review Board). That distinction is irrelevant to the current discussion.

*would* (definitely) have made a difference to the outcome was rejected by the Court. So under regulation 79, it was possible for a local authority to review an earlier decision on the ground that a previous decision had been made in ignorance of a fact that was material (*i.e.*, because it might have affected the outcome) but decide not to change the decision (because, on examination, it did not actually affect the outcome).

98. If the former regime were still in effect, the failure to notify that the tenant had moved out of one room and into another, would therefore have been a failure to disclose a material fact.

99. But the former regime is no longer in effect. Under the regime introduced for social security benefits by the Social Security Act 1998, and for HB by the Child Support, Pensions and Social Security Act 2000, the grounds of supersession and revision establish "outcome criteria", rather than "threshold criteria": see the decision of the majority of the Court of Appeal in *Wood v Secretary of State for Work and Pensions* [2003] EWCA Civ 53 (also reported as *R(DLA) 1/03*).

100. The difference between the two types of criteria may be explained as follows.

101. If the grounds for supersession established *threshold* criteria, then a fact would be "material" if it *might* make a difference to the earlier decision. Such a fact would get the maker of a superseding decision over the "threshold" of being able to look again at the decision even though it is final. She could then look again at all the aspects of the decision and supersede it even if it turned out that the change she had relied on to get over the threshold did not in fact make a difference, but other changes did.

102. *Outcome* criteria work differently. Under the law as it now stands following *Wood*, it is not possible to revise or supersede a decision without changing the outcome; and any change in the outcome decision must follow the ground of revision or supersession. Therefore a fact is only material for the purposes of deciding whether there are grounds for revision or supersession if it actually does lead to a change in the outcome: see the decision of Upper Tribunal Judge Jacobs in *CIS/3655/2007* in relation to social security benefits, and *CA v Secretary of State for Work and Pensions and TB (CSM)* [2020] UKUT 205 (AAC) (in which I followed Judge Jacobs' decision in relation to the child support scheme).

103. Deciding from whom a recoverable overpayment of HB is recoverable under regulation 101(2)(b) is not the same as identifying whether a ground for revision or supersession exists under regulations 4 or 7 of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001. At first blush, it might be possible for the words "material fact" to mean one thing in the former context and another in the latter.

104. But the two contexts are not as far apart as it might initially appear. That is because, as I explained in the *AT* case, the early stages of the process of raising an overpayment of HB in which the original decision is revised or superseded are often hidden.

105. What I said was as follows:

> "41. … [as] was explained by Mr Commissioner Powell (as he then was) in a passage quoted by Upper Tribunal Judge Wikeley in *SS v North East Lincolnshire Council (HB)* [2011] UKUT 300 (AAC):
>
> > "5. The benefits system, as Mr Commissioner Powell … explained in Social Security Commissioner's decision CA/1020/2007 (at paragraph 12), is a "decision based" system:
> >
> > > "What is meant by this is that the system proceeds, or is based, on formal decisions being given. If a benefit is awarded it must be awarded by a formal and identifiable decision. If that decision is to be altered by, for example, increasing or decreasing the amount involved, it can only be done by another formal and identifiable decision. Likewise a decision is required if the period of the award is to be terminated, shortened or extended. If a payment of benefit is to be suspended, leaving the underlying entitlement in being, a formal decision is again required.""
>
> 42. It follows that, even when a local authority only seeks to recover an overpayment from a landlord, every overpayment decision involves—even if only implicitly—a decision that the tenant/claimant was not entitled to HB during a period for which it had previously been awarded to him.
>
> 43. For benefits that are administered by the Department for Work and Pensions, the decision-making process makes that clearer. Under section 71(5A) of the 1992 Act, a recoverable overpayment cannot arise "unless the determination in pursuance of which it was paid has been reversed or varied on an appeal or has been revised …or superseded". Appeals involving overpayments of DWP benefits therefore usually involve two separate decisions. The first, which is known as the "entitlement decision", revises or supersedes the earlier decision to award benefit so as to reduce or extinguish entitlement to benefit from a date in the past. The second, the "overpayment decision", first quantifies the amount of benefit that has been overpaid in the light of

> the entitlement decision and then decides how much of that overpayment is recoverable and from whom.
>
> 44. Even though section 75 of the 1992 Act … contains nothing equivalent to section 71(5A), the same process has to be followed where a local authority wishes to recover an overpayment of HB. Confusion sometimes arises because some software used to administer HB elides the two stages of the process.
>
> 45. It nevertheless remains the case that, subject to the local authority's powers to revise or supersede its earlier decisions, decisions to award HB are final. A claimant who has been awarded HB for a period continues to be entitled to it for that period, unless and until the decision that made the award is either revised or retrospectively superseded so as to remove the entitlement. And, following Mr Powell in *CA/1020/2007* and Judge Wikeley in *SS*, removal of entitlement can only occur as the result of a "formal identifiable decision".
>
> 46. Regulation 99 (see paragraph 28 above) defines an overpayment as an "amount which has been paid by way of housing benefit and to which there was no entitlement". As an entitlement to HB persists until the awarding decision has been revised or superseded, there can be no overpayment, let alone a recoverable overpayment, until revision or supersession has taken place."

106. Applying those principles in this case, before Stoke could properly decide that an overpayment had arisen, it must have decided to revise its original decision on the ground that it had been made in ignorance of the material fact that the tenant was only occupying a bedsit, as opposed to a one-bedroom flat. The overpayment arose in consequence of Stoke's ignorance of that material fact and Stoke was ignorant of it because the tenant misrepresented it.

107. With that in mind, it cannot be the case that regulation 101(2)(b)—which establishes from whom the *very same overpayment* is recoverable—is referring to some other material fact or means something different by "material". Apart from anything else, the regulation only has effect if the overpayment "arose in consequence of a misrepresentation of or a failure to disclose a material fact" and that can only be true of material facts that amount to grounds for revision or supersession.

108. In this case, the tenant's change of circumstances was a fact, but was not material. The change of circumstances should have been disclosed to Stoke, but that failure did not cause the overpayment. The accommodation that the tenant occupied in Flat 4 was neither more nor less extensive that that he occupied in Flat 1. If the original award had been correct, the change of circumstances would (if reported) have led to no change in the amount of HB payable. Rather the reason that benefit was overpaid (and

continued to be overpaid after the move to Flat 4) was that the original award had not been correct.

109. The reason the original award was incorrect was that the extent of the accommodation occupied by the tenant had been misrepresented on the change of address form. It was the tenant—and no-one else—who made that misrepresentation. The effect of regulation 101(2)(b) is that it is the tenant—and no-one else—from whom the resulting overpayment is recoverable.

**Conclusion**

110. My decision is therefore as set out on pages 1-2 above.

**Coda**

111. I understand Stoke's sense of grievance that a landlord can receive a direct payment of HB which he knows, or ought to know, is incorrect without being under any liability to repay it. However, as I said in *AT*:

> "65. Stoke argued before the Tribunal that the Landlord ought to have known at the time that he was being overpaid. The Landlord denies that but, even if it were so—and although the result is counter-intuitive—it would be irrelevant. Whether a relevant person "could …, at the time of receipt of the payment or of any notice relating to that payment, reasonably have been expected to realise that it was an overpayment" is only relevant in cases where the overpayment has been caused by an official error: see regulations 100(2) and 101(2)(c). The overpayment in this case was not so caused. Regulation 88 does not impose a generic duty on those by whom payments of HB are receivable to notify a relevant authority if they ought reasonably to have realised that the award is wrong.

112. That, however, does not mean that Stoke are without remedy.

113. I am not aware of any law under which Stoke are obliged to allow tenants claiming HB to be accompanied by the landlord's agent, if they consider the presence of the agent to be unhelpful.

114. And if a tenant is so accompanied, I can see no reason why Stoke should not either:

(a) take a separate statement about the extent of the accommodation at the property—signed under a formal declaration that the information given is true and complete—from the agent;

or, if the agent declines to give such a statement,

(b) ask the landlord himself to confirm what accommodation is occupied (say) by reference to a plan of the property.

On the contrary, given the number of disputes that have arisen between Stoke and the landlord over this and similar points, it seems to me that there is every reason why Stoke should seek such clarification.

Authorised for issue
on 17 March 2022

Richard Poynter
Judge of the Upper Tribunal