IN THE UPPER TRIBUNAL **Case No.** CH/890/2009
ADMINISTRATIVE APPEALS CHAMBER
UPPER TRIBUNAL JUDGE A. LLOYD- DAVIES

DECISION

The decision of the First-tier Tribunal contained an error on a point of law and I set it aside. I remit the cases for rehearing by a differently constituted tribunal.

REASONS FOR DECISION

Background and procedural history

1. This appeal has had a protracted history. It began life as an appeal by Deaconstar Limited purportedly as landlord against a number of housing benefit decisions in respect of two properties at Waldron Street, Bishop Auckland, Durham, made by Wear Valley District Council on a range of dates between 22nd May 2003 and 24th October 2007 (see section 1 of the local authority's original submission to the tribunal). The appeal itself was brought on 1st November 2007.

2. It is not disputed that the background to this appeal was that Deaconstar is a company incorporated on 20th November 2002 by the First Respondent and her husband, who were at the material time the sole shareholders and directors. As I understand the evidence given by the First Respondent at a tribunal hearing on 6th August 2008, she is a nurse who had previously been running her own business of providing residential care for people with learning disabilities as part of an adult placement scheme run by Durham County Council. She did this in the two Waldron Street properties, which were jointly owned by the First Respondent and her husband and one of which was the family home. The accommodation was, it seems, supported accommodation within the definition in paragraph 7(c) of Sch. 1 to the Housing Benefit (General) Regulations 1987, S.I. 1987 No. 1971 and all the accommodation and support costs were paid through transitional housing benefit, meaning that they were paid by Wear Valley District Council. Deaconstar was incorporated in anticipation of the new Supporting People programme, to take effect from 1st April 2003 (or 7th April, in cases in which rent was payable at intervals of a whole number of weeks) under which care, support and supervision for people with learning disabilities were generally to be funded by national resources allocated to the relevant administering authority (in this case, again Durham County Council) and accommodation alone was to be funded by housing benefit. The First Respondent's evidence was that there was insistence, either nationally or from the administering authority, that a company was formed if care, support and supervision were to be provided under the Supporting People programme. Deaconstar therefore took over that part of the First Respondent's business, in which her husband began to work in January 2003. The properties, however, continued to be owned by the First Respondent and her husband as individuals.

3. These arrangements were well known to Durham County Council and were formulated in agreement with the Council. It is said that they were carefully structured to ensure that the First Respondent and her husband made no profit on the accommodation they provided, although there clearly was a profit element in Deaconstar's activities. It is further said that the First Respondent and her husband rent the accommodation under a contract with

Durham County Council under which the Council has an exclusive right to refer tenants (p.38 of the bundle). The tenants who are referred are people with learning disabilities to whom Deaconstar provides care, support and supervision.

4. This background explains why it has never been suggested that there was any impropriety or attempt to take advantage of the housing benefit scheme in the arrangements adopted by the First Respondent and her husband. No criticism of them is implied by what is said in this decision.

5. The change of arrangements did, however, present difficulties from the housing benefit perspective. The definition of "supported accommodation" was removed from paragraph 7 by S.I. 2003 No. 363 with effect from 1st April 2003 and various service charges which had previously been eligible for housing benefit when provided to a claimant in supported accommodation under Schedules 1 and 1B to the 1987 Regulations, including in particular charges for care, support and supervision, became ineligible. Those provisions themselves had been inserted into the Regulations by the Housing Benefit (General) Amendment (No.3) Regulations 1999, S.I. 2734 and under reg. 13 of those Regulations were always intended to cease to have effect on 31st March 2003 (or 6th April, in the case of rent payable by reference to a whole number of weeks). The 1999 Regulations had also allowed such services, on the same transitional basis, to be added to the maximum rent which would otherwise have applied under the provisions of reg. 11 of the 1987 Regulations. The 2003 Regulations altered those dates to 1st April 2003 and 7th April 2003, but otherwise the transitional housing benefit arrangements relating to supported accommodation came to an end as had been intended.

6. The consequence of this from the point of view of the First Respondent and her husband was that the sums they had formerly received as transitional housing benefit were very substantially reduced. Not only was the element which related to the provision of support services removed (payment for those services being received by Deaconstar instead), but prima facie the stringent maximum rent provisions of reg. 11 applied. The effect of the various decisions purportedly appealed against by Deaconstar as mentioned in paragraph 1 above was indeed that the housing benefit payable to the various claimants was limited to the maximum amount determined by the rent officer having regard to the rent charged for similar properties in the area. This typically led to a reduction in the contractual rent (excluding any charges for support services) from about £90 a week to about £40 a week.

7. This was not queried by the First Respondent or her husband for some years. Prior to 1st January 1996, however, reg. 11 was in a substantially different, and more generous, form. It was amended by the Housing Benefit (General) Amendment Regulations 1995, S.I. 1995 No. 1644. Those Regulations set out in reg. 10 a number of circumstances in which the old reg. 11 would continue to apply and included the case in which the claimant's home was "exempt accommodation". By 2003 that expression was defined as follows:

> " 'exempt accommodation' means accommodation which is –
>
> (i) …
>
> (ii) provided by a non-metropolitan county council in England …, a housing association, a registered charity or voluntary organisation

> where that body or a person acting on its behalf also provides the claimant with care, support or supervision."

The effect of reg. 1(2)(a) of the 1995 Regulations is that the expression "voluntary organisation" has the meaning given by reg. 2 of the 1987 Regulations, namely:

> "… a body, other than a public or local authority, the activities on which are carried on otherwise than for profit."

In the autumn of 2007 it was suggested to the First Respondent and her husband by a Mr. Nixon, a service improvement officer with Durham County Council, that since they provided the accommodation on a not for profit basis, it fell within the definition of "exempt accommodation" and accordingly the old version of reg. 11 of the 1987 Regulations should apply in determining the level of housing benefit which claimants could receive.

8. Pausing there, it is immediately obvious that whatever the merits of the argument might otherwise be, Deaconstar was not the appropriate appellant, since it was not in any way affected by the decision as to the amount of housing benefit payable: see para. 6 of Sch. 7 to the Child Support, Pensions and Social Security Act 2000 and reg. 3 of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001, S.I. 2001 No. 1002.

9. By February 2008, the First Respondent seems to have been regarded as the Appellant, since there is a record of a hearing on 19th February 2008 in which she is so described (p.120). It is not clear that that was the result of any conscious decision by anyone, but I would not regard that as material of itself. I note, however, that even in her capacity as landlord the First Respondent does not appear to fall within para. 6 and reg. 3. She may in a practical sense be affected by the level of housing benefit payable to the tenants, because it will affect their ability to pay the contractual rent, but generally speaking a landlord is not affected by a determination in a legal sense unless the local authority has determined that an overpayment or excess benefit is recoverable or the decision affects whether or not payment is to be made direct to the landlord. I take this to be why, at the hearing on 19th February 2008, the tribunal directed that appeals from the various tenants were required.

10. That direction led to the bringing of appeals by nine tenants, whose names are listed on p.129 of the bundle and in respect of whom further details are given at pp.124-139. (It is to be noted that after p.223 the bundle numbering starts again at p.124. To avoid confusion, references to the second set of pp.124-223 are prefixed by "(2)".) It looks as if a fresh decision was made in respect of each tenant on 5th March 2008, which was then the subject matter of the appeal, together with all previous decisions affected by the exempt accommodation point. Full documentation in respect of the appeal by one of the tenants, including an application that a late appeal be accepted, appears at pp.143-200 of the bundle. It seems, although the file does not make this entirely clear, that Wear Valley District Council and the First Respondent's representatives (who also represented all the tenants) very helpfully co-operated in taking steps to ensure that the tribunal had, or could proceed as if it had, all necessary documentation in respect of all the tenants before it.

11. Despite the practical advantages of this approach, it has led to the result that in the papers before me there is no schedule identifying all the decisions which the parties regarded as being before the tribunal. It seems to me, having regard to the provisions of regs. 18 and 19 of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations as

they stood at the date of the tribunal's decision on 28th October 2008, that there may have been decisions in respect of which the relevant tenant was out of time even for bringing a late appeal. This does not seem to have been a point taken at any stage in front of the tribunal. In those circumstances, I shall proceed as if all decisions made in respect of any of the nine tenants during the period 1st April 2003 to 5th March 2008 were before the tribunal, but I make no decision on any issue which may subsequently arise as to whether or not the time for bringing any particular appeal which was made late was correctly extended.

12. The local authority's submission on the fully documented appeals appears at p.146 of the bundle and is to the effect that the accommodation was not exempt accommodation because the First Respondent and her husband did not satisfy the definition of a voluntary organisation. That was on the basis that they were not "a body" and separately, as I understand the submission, that although it appeared from their bank statements that they made no profit from the rental of the accommodation, that did not mean that they operated on a not for profit basis.

13. The tenants' representative responded with a submission dated 23rd July 2008 (pp.202-204 of the bundle) asserting that the First Respondent and her husband were "a body" for these purposes and that their activities were carried on on a not for profit basis. The submission annexed at p208 a letter dated 15th April 2008 from Mr. Nixon supporting the First Respondent's case, specifically on the grounds that she and her husband were not making a profit from their housing related services (and had not recharged tenants for some elements of service they would reasonably have been entitled to recharge) and that Deaconstar was their nominated agent to provide care and support. The submission also annexed copies of Mr. Commissioner Jacobs' decision CH/0039/2007 and Mr. Commissioner Turnbull's decision *R(H) 2/07*.

14. The appeals came before the tribunal on 6th August 2008. It seems that immediately beforehand the First Respondent and the tenants sent a copy of a letter dated 12th December 2002 from the First Respondent and her husband to Deaconstar (p.(2)124 of the bundle) setting out what was described as "the detail of the management and relationship" between the First Respondent and her husband on the one hand and Deaconstar on the other. It is clearly an attempt to put the arrangements on a footing of some degree of formality. It includes the following statements:

> " • [the landlords] have come together and agree to purchase property for the sole purpose of providing accommodation to people with learning disabilities
>
> • [the landlords] agree to maintain the properties, issue tenancies and provide housing related support in its own right, or to pass this responsibility to Deaconstar Ltd.
>
> • Deaconstar Ltd. will be responsible for the providing housing and any care related support, as delegated by the Housing provider, and in line with statutory assessments and requirements
>
> …
>
> • The day to day running of this accommodation service will be operated on a not for profit basis

…

- Any profit from the day to day running of the service will be re-invested into the properties for the interests of the tenants, or as deemed appropriate by [the landlords] in accordance with their best interests.”

15. At the hearing the tribunal heard oral evidence from the First Respondent and submissions, but adjourned the hearing on the ground the tribunal was not ready to proceed (p.(2)135 of the bundle). The tribunal further directed that the First Respondent and her husband should produce copies of their tax returns and accounts as landlords for the three years ending April 2007 and should produce audited accounts for Deaconstar for the same period. Those documents were produced and appear to pp. (2)138-248 of the bundle.

16. On 24th September 2008 Wear Valley District Council wrote to the Tribunal Service stating that the First Respondent owned a further property at Howden le Wear which was occupied by three tenants who had similarly appealed against the decision made with respect to their housing benefit on 6th June 2008. Details appear at pp.250-252. The names of the tenants match those of three of the tenants who were already appealing (one of whom was stated to have left her accommodation) and I infer that those tenants had simply moved. There is no suggestion that the new appeals were late. The letter states that the content of the local authority’s submissions would be exactly the same as the submissions already received and asked that they be listed to be heard together with the outstanding appeals. That was accordingly done and was plainly the sensible course.

17. On 20th October 2008 Wear Valley District Council produced a further submission (pp. 255 and 256 in the bundle), in effect asserting that the First Respondent and her husband did not have the structure of a body and that they did not satisfy the not for profit requirement, in particular because the properties could be regarded as an investment and they would receive the profits on any sale.

18. The tenants’ representative responded with a submission dated 27th October 2008 (pp.257-259) asserting that the First Respondent and her husband were a body and that “the properties are not owned by the profit making wing of the [landlords’] business” (para.12); the local authority “has failed to show that [the landlords’] activities as landlords are carried out for a profit” (para. 13). The submission also said, in para. 7:

> “[the landlords] have been involved at every stage, from the acquisition of the properties to their ongoing management. As with the company described in CH/0039/2007, property and support services are separated but provided by the same group of individuals.”

19. The hearing on 28th October 2008 seems to have begun with the handing in by the local authority’s representative of guidance to local authorities on dealing with claims from those living in supported accommodation (pp.261-280) and an extract from HB/CTB Circular A7/96 (pp.281-282). (The bundle contains no pp.283-288.) The typed record of proceedings at p.308 of the bundle shows that there was an adjournment to enable the tribunal and the tenants’ representative to read the guidance to local authorities and to enable Wear Valley District Council to read the tenants’ latest submission. As far as the record shows, little further was said, but the local authority’s representative made clear that there was no

suggestion of a scam by the First Respondent and her husband and that the local authority accepted that Deaconstar provided care, support or supervision to occupiers of the properties on behalf of the landlords.

20. The decision of the tribunal, expressed in the decision notice to apply to all 12 appeals, was that the accommodation provided was exempt accommodation.

The law

21. It is helpful to have the law in mind before one turns to the issues and arguments on the present appeal. The secondary legislation which was in force at the time when the Supporting People programme was introduced had been consolidated in new regulations by the time the appeals were brought. I therefore set out below the material provisions by reference to the new regulations.

22. Under para. 4 of Sch. 3 to the Housing Benefit and Council Tax Benefit (Consequential Provisions) Regulations 2006, S.I. 2006 No. 217:

> "(1) Subject to the following provisions of this paragraph, the eligible rent of a person –
>
> (a) …
>
> (b) who is liable to make payments in respect of a dwelling occupied by him as his home, which is exempt accommodation,
>
> shall be determined in accordance with –
>
> (i) regulations 12 (rent) and 13 maximum rent) of the Housing Benefit Regulations …
>
> as set out in paragraph 5."

23. "Exempt accommodation" is defined in para. 4(10) in the same words as are set out in paragraph 7 above.

24. Para. 5 of the Regulations provides:

> " (2) For the purposes of paragraph 4(1), regulation 13 of … the Housing Benefit Regulations … is as follows:"

The text of reg. 13 under that provision is the same, so far as material as the text of the old and more generous reg. 11 of the 1987 Regulations, referred to in paragraph 7 above. (Reg. 13 as it appears in the Housing Benefit (General) Regulations 2006, S.I. 2006 No. 213, which has itself been the subject of further amendment since the consolidation, may be regarded for present purposes as the equivalent of the new and more restrictive reg. 11.)

26. The Consequential Provisions Regulations contain no definition of "voluntary organisation". Under reg. 1(2) of the 2006 Housing Benefit Regulations, however, the former are to be read with the latter where appropriate and in my view it must follow that definitions

I the latter Regulations apply, in the absence of any contrary provision, to the former Regulations as well. Reg. 2(1) of the Housing Benefit Regulations defines "voluntary organisation" in the terms set out in paragraph 7 above.

27. These provisions, in either their original or their consolidated form, have been the subject of detailed consideration by the Social Security Commissioners and, more recently, the Upper Tribunal. Several of the relevant decisions were not available to the tribunal. The following decisions clarify when reg. 4(1)(b) of the Consequential Provisions Regulations will apply.

28. Mr. Commissioner Jacobs' decision in CH/0039/2007, which has at times been heavily relied on by the tenants' representatives, was principally a decision on whether the rent liability of the claimant tenants had been created to take advantage of the housing benefit scheme. The facts were that the claimants were provided with both accommodation and support by a not for profit organisation called, in the decision, SIL. These activities had formerly been carried on by Mr. C., who was a consultant to SIL. SIL leased the accommodation from a company called SMS, of which Mr. C was "the main controlling mind". He clearly stood to gain both from his activities as a consultant and from his position as a director of SMS.. As can be seen, however, on the face of it the accommodation provided to the claimants was clearly exempt accommodation, SIL being accepted to be a not for profit organisation which provided both accommodation and support. It was presumably for that reason that the local authority sought (unsuccessfully) to argue that the liability had been created to take advantage of the housing benefit scheme. Once the facts are understood, the case does not assist on this appeal, where there is no such contention.

29. *R(H) 2/*07 was the first of a series of decisions by Mr. Commissioner Turnbull which have done much to clarify the scope of reg. 4(1)(b). In that case, accommodation was provided by what was admittedly a voluntary organisation, called "Rivendell". The question was whether care, support or supervision was provided by or on behalf of that organisation, as required by reg. 4(1)(b). The support services were admittedly provided <u>by</u> an entirely separate body, called "CF". There was, however, a written agreement in place between the owner of the accommodation, Rivendell and CF, and the local authority had drawn up care plans for the claimants which assumed that accommodation would come from Rivendell. It was argued that CF acted <u>on behalf of</u> Rivendell. Mr. Commissioner Turnbull, in rejecting that argument, drew attention to the following:

(1) Rivendell was not under any contractual or statutory obligation to the claimants to provide them with support services;

(2) CF did not provide its services under a contract from Rivendell to do so and Rivendell did not provide CF with any remuneration for its services.

He regarded the tribunal's findings as tantamount to a finding that it was the local authority, not Rivendell, who engaged CF to provide the care. Further, he expressed the view that the written agreement was in the nature of a joint venture agreement under which each party agreed, as principal, to play a defined part. While he accepted that it might be that the statutory requirements could be satisfied without the care provider being strictly the agent of the landlord, he regarded it as at least necessary that the landlord should have engaged the care provider to provide the care: see para. 52.

30. A refinement of this approach emerged in Mr. Commissioner Turnbull's decision in *R(H) 7/07*. In that case the landlord was called Reside and the care provider was called Regard. Reside was admittedly a housing association. The local authority' decision was appealed to the tribunal on two bases: first, that Regard was providing its services on behalf of Reside; secondly, that Reside was itself providing support. The first ground was abandoned after the decision in *R(H) 2/07*. The tribunal rejected the second ground, stating that the definition of "exempt accommodation" required the landlord to be the main provider of the relevant care. Mr. Commissioner Turnbull held that that was an error of law and rejected an alternative submission that any care provided by the landlord had to be pursuant to a contractual or statutory obligation. He did, however, hold that the support services provided by the landlord had to be more than *de minimis*, a test which he found on the facts Reside failed to satisfy.

31. In *R(H) 6/08* an attempt to argue that the definition was satisfied if the support services provider acted on behalf of the landlord in some respect, but not necessarily as respects the provision of support services, was firmly rejected by Mr. Commissioner Turnbull.

32. The question what might amount to support services provided by the landlord arose again in *Chorley Borough Council* v. *IT* [2009] UKUT 107 (AAC), [2010] A.A.C.R. 2. It was another case in which accommodation was provided by the landlord, called CHA, and care, support and supervision were provided by a care provider, called Dawaking. It was argued that the care, support and supervision were provided by Dawaking on behalf of CHA; alternatively, that both CHA and Dawaking were commissioned by the local authority to provide their respective services and that accordingly both services were provided on behalf of the local authority (another route to exemption); and in the further alternative, that although Dawaking provided the bulk of the care, support and supervision, CHA provided sufficient support itself to satisfy the definition of "exempt accommodation".

33. The first argument failed; Judge Turnbull (as he had become) followed his own previous decision in *R(H) 2/07*. The second argument failed; the judge decided that in the context of para.4(1)(b) accommodation was provided by the person who would have the right to possession of the property but for the grant of the relevant licence or tenancy and who was entitled to receive payment, not by a person, however important its role in the process overall, who had no proprietary right in the accommodation. The third argument, however, was successful on the facts, since it had been contemplated and intended when the arrangements were made with the local authority that CHA would undertake works of repair and maintenance which either went beyond the tenancy agreements or which it would not have had to undertake if the tenants had been without disability, and that CHA would give advice and assistance in relation to welfare benefits. Those items of support provided some significant benefit and were more than minimal. The decision incorporates relevant parts of Judge Turnbull's decision in *R(H) 4/09* and together they offer very helpful illustrations of the circumstances in which support offered by a landlord may bring the landlord within the definition of "exempt accommodation", although the main care provider is a different body.

34. Finally, I draw attention also to Judge Turnbull's decision in *Bristol County Council* v. *AW* [2010] UKUT 109 (AAC), accepting as a satisfactory test for determining whether support is *de minimis* the question whether the support provided is likely to make a real difference to the claimant's ability to live in the relevant property: see para. 31.

35. A common feature in the various decisions, particularly the more recent ones, is the detailed examination given not only to the contractual and other arrangements between the local authority, the support services provider and the landlord, but also to the needs of the individual tenants, the level of support offered to them and specifically the nature and level of support offered by the landlord. I note also that there appears to have been a tendency for specialist landlords to refine the terms of their agreements, both with local authorities and with tenants, so that there is a greater emphasis on support offered by the landlord. As a result of both these features, sometimes a landlord who was unsuccessful in one decision has been successful in another, having regard to the particular needs of the tenant and the nature of the support provided.

36. It is to be noted that in none of those decisions was there an issue whether or not the landlords were a voluntary organisation. They were in fact all bodies corporate.

The present appeals

37. The tribunal's statement of reasons gets off to an unfortunate start in that in paragraph 1 it is said that the First Respondent was the appellant and in paragraph 5 the appellant is identified as the First Respondent on behalf of herself and her husband. As I have said at paragraph 9 above, the First Respondent and her husband, as landlords, had no right of appeal. The correct appellants were the various tenants. That point, however, is not essential to the tribunal's reasoning, since the decision did not turn on facts which might be specific to a particular tenant, although for the purposes of the statement of reasons the tribunal considered the issues in respect of accommodation provided to a tenant to whom I shall refer as Mr. R.

38. The essence of the tribunal's decision appears from paragraph 2:

> "The Tribunal find as a fact that the accommodation provided is exempt accommodation under the regulation referred to above [para. 4(1)(b) and (10)]. The accommodation … provided to [Mr. R] was provided by a voluntary organisation, that is to say the appellant and [her husband] were a voluntary organisation in circumstances where Deaconstar Ltd., a limited company acting on behalf of the appellant and her husband provided care, support or supervision to [Mr. R]."

39. The tribunal summarised the local authority's arguments against the First Respondent and her husband's being a voluntary organisation in paragraphs 7 to 9. Those arguments were essentially that in order to identify a voluntary organisation for the purposes of the definition of "exempt accommodation", the tribunal should consider whether the organisation had some sort of formal written constitution and whether it would profit from its operations or from an ultimate disposal of assets. The tribunal summarised the evidence from the First Respondent at paragraph 10, making no reference to any evidence about a formal written constitution, but noting that if the properties occupied by the tenants were to be sold, the proceeds of sale would belong to the First Respondent and her husband.

40. There is no real summary of the arguments put forward on behalf of the First Respondent, her husband and the tenants; it is simply stated in paragraph 11 that it was submitted that the landlords were happy to have their investments locked, allowing them to honour their contracts with Durham County Council and Supporting People. "Indeed," said the tribunal, "their core business is entirely dependent on these properties being occupied."

41. The definition of "voluntary organisation" was set out in paragraph 12. The tribunal then concluded as follows:

> " 13. That [the First Respondent and her husband] are not incorporated is beside the point. [The representative for the local authority] confirmed to the Tribunal that there was no suggestion of a financial scam. Nor indeed were there other similar cases known to [the representative], apart from those involving the appellant. It was fully accepted that Deaconstar Ltd. provide care support or supervision to Mr. R [the decision refers to the representative, but the intended reference must plainly have been to Mr. R] and also similar care support or supervision to the other tenants.
>
> 14. The Tribunal is satisfied that the arrangements made by the appellant, along with the care support or supervision provided to tenants by Deaconstar Ltd. on behalf of the appellant and her husband were not contrived arrangements merely to take advantage of Housing Benefit. The object of the arrangements was to provide accommodation to persons with learning disabilities, not to make a profit in respect of the dwellings. It is the case that profit can be made on the sale of properties. Sometimes losses can be made. The potential for receiving a sum of money greater than originally expended when a property, no longer required, is disposed of, would not in the circumstances of this case change the dominant purpose of the appellant. That purpose is the provision of accommodation for persons with learning disabilities."

42. In my view, it necessarily follows that the decision of the tribunal contained an error of law. The tribunal did not grapple with the arguments advanced on behalf of the local authority as to the indicia of a voluntary organisation. The most that can be said is that it is implicit in the tribunal's conclusion that it took the view that the fact that on an eventual disposal of property any profit will accrue to those alleged to constitute the organisation does not mean that the organisation's activities are not carried on otherwise than for profit. Instead, the tribunal seems to have proceeded as if the argument was that the arrangements were contrived arrangements, despite the disclaimer by Wear Valley District Council of any suggestion of a scam and although no such argument had ever been advanced. It is therefore plain that the tribunal failed to give adequate reasons for its decision.

43. An argument along the above lines is contained in the grounds of appeal relied on by Wear Valley District Council which accompanied its application for permission to appeal made on 2nd February 2009, the statement of reasons having been sent under cover of a letter dated 31st December 2008. Permission to appeal was given on or about 3rd March 2009 and an appeal form was submitted on 6th April 2009. By the time the appeal was brought, the former Wear Valley District Council had from 1st April 2009 become part of a unitary authority, Durham County Council, another emanation of which, ironically, had encouraged the First Respondent to bring the appeal. The change of authority may have led to the slight delay in bringing the appeal; in any event, I extended the time for making the appeal on 26th May 2009 when giving case management directions.

44. Although the appeal must be allowed for the reasons given in paragraph 42 above, it is right that I briefly record the further procedure in the Upper Tribunal. I granted a request made on behalf of the Secretary of State for Work and Pensions to be joined as a party (see page 411). The Secretary of State supported the local authority's appeal – see pages 416-18.

Following a further submission on behalf of the First Respondent the matter came before me for determination. I then realised (for the reasons given in my direction at 426-428) that the tenants should be respondents to the appeal and that I would have to be satisfied either that they had a capacity to act or that they were acting through a person who had appropriate authority to act on their behalf. That direction joined the tenants as respondents and subsequently the solicitors for the First Respondent provided appropriate authorities, the last which was received on 8 November 2010. I regret the subsequent delay in giving this decision.

45. As I have stated above this appeal must be allowed for the reasons given in paragraph 42. I have considered whether or not I should substitute my own decision. Neither the local authority nor the Secretary of State has suggested that I should do so. In the circumstances I consider that the cases should be remitted to a differently constituted tribunal for determination and I so direct.

(Signed on the Original)

A Lloyd-Davies
Judge of the Upper Tribunal

1 February 2011