IN THE UPPER TRIBUNAL **Appeal No.** CH/2633/2008
ADMINISTRATIVE APPEALS CHAMBER

Before Judge Charles Turnbull

1. This is an appeal by Wandsworth Council ("the Council"), brought with my permission, against a decision of an appeal tribunal sitting at Sutton on 30 November 2007. For the reasons set out below that decision was in my judgment wrong in law and by way of interim decision I set it aside. **The parties must comply with my Direction in paragraph 27 below.**

2. The Claimant is a man now aged 44 who has mild learning disabilities, and who suffers from insulin dependent diabetes and epilepsy. He is in receipt of the highest rate of the care component and the lower rate of the mobility component of disability living allowance.

3. For several years down to November 2006 he lived in accommodation with 24 hour support which he shared with three other persons. However, the view was taken that he would be able, albeit with substantial support, to live independently in his own flat.

4. After various enquiries and discussions a property owned by Golden Lane Housing Ltd ("GLH") was identified as a suitable property to which he could move, and he was granted a tenancy of that property by GLH from November 2006. It is a two bedroomed property, the second bedroom being occupied by a person who provides overnight care and support.

5. GLH is a charity which is a subsidiary of the well known charity Mencap. It provides accommodation for people with learning disabilities throughout the country.

6. The initial rent payable under the Claimant's tenancy was £371.98 per week, but by the decision under appeal to the Tribunal, which was made on 2 March 2007 and revised on 10 May 2007, the Council decided that the amount payable by way of housing benefit was limited to £206 per week, being the local housing allowance rate for a 2 bedroomed property.

7. It is common ground between the Claimant and the Council that the question whether the rent was properly limited to the amount of the local housing allowance rate turned on whether the Claimant's accommodation fell within the definition of "exempt accommodation" in para. 4(10) of Schedule 3 to the Housing Benefit and Council Tax Benefit (Consequential Provisions) Regulations 2006 – i.e. accommodation

> "**provided by a ….registered charity …….where that body or a person acting on its behalf also provides the claimant with care, support or supervision."**

8. It was not contended on behalf of the Claimant before the Tribunal that GLH provides to the Claimant the bulk of the care, support and supervision which he requires in order to enable him to live as independently as reasonably possible in the

property. That is provided by an organisation (also a charity) called Odyssey Care Solutions ("Odyssey"), pursuant to a care plan drawn up by the Council's social services department. The plan provides for the Claimant to have 1 to 1 support/supervision every night of the week and for a total of 36 hours per week during the day. The sleep in service is from 10 pm to 8 am, and the standard hours for the day care are from 8 am to 11am and 5pm to 7pm, although there is scope for flexibility (p.152).

9. It was, however, contended on behalf of the Claimant before the Tribunal that GLH itself – i.e. through its own staff – also provides a significant amount of support to the Claimant, and that the Claimant's accommodation was therefore "exempt accommodation."

10. There was a considerable amount of documentary evidence before the Tribunal relating to the part played by each of the parties involved in making this supported accommodation scheme a success, and relating to GLH's general mode of operation in relation to the many units of accommodation which it lets to tenants with learning disabilities throughout the country. That documentation included witness statements by Mr Dugher, GLH's senior housing consultant (a national role) and Miss Hand (the housing consultant for this region) and a lengthy letter (pp. 192-4) from Mr Barclay, the Claimant's social worker. Mr Dugher and Miss Hand also gave oral evidence to the Tribunal.

11. The Tribunal allowed the Claimant's appeal, finding that GLH did itself provide to the Claimant support of an amount which was more than de minimis.

12. It is relevant to note that in May this year I reheard appeals (having previously set aside the tribunals' decisions) by claimants of three other GLH properties (in Oxford, Sheffield and Hounslow). Those appeals raised the same issue as is raised in this case. I received a substantial amount of documentary and oral evidence as to GLH's general mode of operation and as to the support which had actually been provided by GLH in those three schemes. Both Mr Dugher and Miss Hand gave lengthy evidence before me. In my very long decision of 28 July 2008 (CH/779/2007 and others) I found that in none of the three cases did GLH at the material times provide support to the claimant tenant to more than a minimal extent. However, it by no means necessarily follows that it was not open to the Tribunal, on the evidence before it in the present case, to find that support was not at the material time provided by GLH to more than a minimal extent.

13. The Tribunal's Decision Notice in the present case contains the following by way of explanation for its decision:

> "The Tribunal accepted that the evidence of Mr Dugher and Ms Hand from GLH together with the report from [the Claimant's] social worker establish that actual support is provided to [the Claimant]. Furthermore those landlord functions that are of a general nature are performed in a manner that takes into account the fact that the tenants have learning disabilities and psychiatric illnesses, for example tradesmen undertaking repairs are given special training and DVDs are provided to tenants to explain the tenancy agreement. In addition the landlord has a service level agreement with the agency providing

the care package and attends meetings to review [the Claimant's] needs with other professionals involved in his care. All of these amount to provision of a supportive environment which [the Claimant] benefits from and go beyond mere management of the legal relatiohship of landlord and tenant."

14. In para. 4 of its Statement of Reasons the Tribunal said:

"It is relevant that Alison Hand, the Housing Consultant for GLH, is now a key member of the professional network supporting [the Claimant]. The network consists of a lead community nurse, a consultant psychiatrist, social worker and the organisation providing his care package (Odyssey)."

15. The kernel of the Tribunal's reasoning is set out in paras 7 to 10 of the Statement of Reasons, which are as follows:

"7. The landlord in this case is GLH a registered charity. It provides specialised supported housing throughout the country for people with learning difficulties although often the tenants have additional mental health and physical problems. As is inevitable the cost of providing supported housing to [the Claimant] is more expensive than one would expect in the general commercial market. As a specialised landlord GLH has specialist staff and its procedures are all tailored to take into account the needs of its tenants. For example the legal relationship between Landlord and Tenant is explained to the Tenants by way of a DVD to take into account the inevitable literacy problems of the Tenants.

8. It is not submitted by [the Claimant's] representatives that GLH provides the main package of personal care as that is provided by [Odyssey]. The evidence provided by GLH and Mr Barclay is that there is in fact significant elements of care provided over and above managing the legal Landlord and Tenant relationship. For example there is a housing support line manned by staff 24 hours a day. These staff are especially trained to understand the needs and difficulties of the learning disabled. Whilst this deals with tenancy type issues the evidence given was that it also dealt with generalised anxieties and concerns that one would not expect to be dealt with in non supported accommodation. All tradesmen are especially trained to understand the needs of the Tenants.

9. In [the Claimant's] case GLH is clearly involved in liaising with [Odyssey], the psychiatrist community psychiatric nurse social services. [The Claimant] has used the 24 hour advice service on occasion and it has resulted in a visit to his flat.

10. It is quite clear that GLH provides a supportive environment in which [the Claimant] can live in his own flat. I cannot accept that this is de minimis. It makes a significant difference to [the Claimant] who, according to Mr Barclay and the rest of his professional network would not be able to survive in normal accommodation with a non specialist landlord. If the support, care and supervision was de minimis then it would not matter where [the Claimant] lived

and this is quite clearly not the case. I also doubt whether a Landlord providing non supported accommodation would even accept [the Claimant] as tenant."

16. In my judgment the Tribunal's decision was wrong in law, for the following reasons.

17. In my judgment the Decision Notice and the Statement of Reasons, taken together, really do little more than to state the Tribunal's conclusion that GLH provides more than minimal support to the Claimant. Given the extensive evidence which was before it, the Tribunal did not in my judgment sufficiently explain why it reached that conclusion. The particular matters about which the Tribunal should in my judgment have made more detailed findings included the following.

18. First, the Tribunal should have made detailed findings as to the precise nature of the various categories of support which it found that GLH provided or made available. Secondly, it should have explained why it found that that support was important to the success of the placement, given the support which was available from Odyssey and from social services. Without that information it is impossible to judge whether, for example, the Tribunal treated as "support" activities of GLH which were not capable of amounting to "support", and whether it sufficiently took into account the support which was available from elsewhere.

19. The only specific examples which the Tribunal gave of what it considered to be support provided by GLH were (i) the fact that tradesmen undertaking repairs are given special training by GLH (ii) the DVDs provided by GLH to tenants to explain the tenancy agreement (iii) the fact that GLH attends review meetings with other professionals to review the care and support package (iv) that GLH has a "service level agreement" with Odyssey (v) that GLH has "specialist staff" and (vi) the 24 hour telephone line. The Tribunal found that the telephone line was available not only for tenancy type issues but also to deal with "generalised anxieties and concerns that one would not expect to be dealt with in non supported accommodation" and which it found had been used by the Claimant "on occasion" and which had resulted in "a visit to his flat".

20. In my decision of 28 July 2008, referred to above, I explained why I did not consider that items (i) or (ii) could amount to the provision of "support": see paras. 250 and 26 respectively.

21. As to (iii), I took the view (para. 232) that, generally, the monitoring by GLH of the continued adequacy of the support provided by others and of the accommodation did not amount to "support", and that even if it did it had been of minimal potential benefit to the claimants in those cases (para. 233). That does not of course necessarily mean that such monitoring was of minimum potential benefit in this case, but the Tribunal was wholly unspecific about the content of these review meetings (the minutes were not before the Tribunal), and did not explain why it considered that GLH's contribution to or presence at them went beyond housing management and was of significant benefit to the Claimant.

22. As to (iv), the Tribunal made no attempt to explain why it considered that the existence of the Service Level Agreement amounted to the giving of support by GLH.

The Tribunal did not consider whether GLH had any real function to play in ensuring that Odyssey performed its contractual obligations as regards providing care and support, given that Odyssey's remuneration came from the Council, from the Independent Living Fund and from the Claimant, and given the Council's statutory obligations and its entitlement to monitor Odyssey's performance. In his letter of 21 September 2007 at p.194 Mr Barclay had said that the Service Level Agreement gave GLH "considerable control" over which social care agency provides the support. However, the Tribunal did not attempt to explain why that control amounted to or involved the provision of "support."

23. As to (v), I noted in para. 233 of my decision in CH/779/07 and other cases that, although (see para. 42) all GLH operational staff have been cleared to work with vulnerable adults by the Criminal Records Bureau system and have the opportunity to attend some fairly basic training in supporting people with learning difficulties, they do not in general have qualifications and training which equip them to assess the needs of people with learning disabilities living in supported accommodation.

24. As regards the telephone line, the Tribunal made no specific findings as to the sorts of "generalised anxieties and concerns" which it found the Claimant had actually used the telephone line to inquire about, or which it considered that he might realistically wish to enquire about, nor did it give any explanation as to why the Claimant could not discuss those issues with the carers employed by Odyssey. It did not state what it found was the purpose of the visit to his flat which it referred to. It is therefore impossible to judge whether the matters which the Claimant used the telephone line to discuss went beyond ordinary housing management, and whether they were capable of being considered as amounting the provision of support to more than a minimal extent.

25. In para. 10 the Tribunal stated that the Claimant would not be able to survive in normal accommodation with a non specialist landlord. "If the support, care and supervision was de minimis then it would not matter where [the Claimant] lived and this is quite clearly not the case." The Claimant clearly would not be able to live in general accommodation without the care, support and supervision provided by Odyssey. However, the Tribunal does not attempt to explain why (if it so found) he would not be able to live in a 2 bedroom flat provided by (say) an ordinary commercial landlord if he had care, support and supervision at the level provided by Odyssey. Further, in saying that the Claimant would not be able to live without the "support, care and supervision" which he receives, the Tribunal in my judgment erred in law in that it was not contended that GLH provided any of the care or supervision, as opposed to "support". A similar point can be made in relation to Mr Barclay's letter at p.194, where he said that "GLH do provide care, support and supervision to [the Claimant] that is far greater than any other housing association that I am aware of."

26. In my judgment the Tribunal's statements that GLH provided a "supportive environment" and that this makes a "significant difference" to the Claimant were far too unspecific to be capable of amounting to a satisfactory underpinning of its conclusion that GLH provides "support" to more than a minimal extent.

27. There remain for consideration the questions whether, having set aside the Tribunal's decision, (a) I should (i) remit the appeal for redetermination by another

First-tier tribunal or (ii) determine it myself (b) if the latter, whether (i) I should hold an oral hearing for the purpose of rehearing the oral evidence and receiving oral submissions and (ii) some or all of the evidence which was before me in CH/779/07 and others should be admissible in this case. The Council has invited me to re-make the decision on the basis of the documentary evidence before me. I consider that I should not decide the points which I have raised in this paragraph without brief written submissions from the parties (and in particular the Claimant). I therefore **DIRECT** as follows:-

(1) Within 21 days from the date of issue of this interim decision the parties are to send a further written submission stating their preferences in relation to the matters raised in this paragraph, with brief reasons for their preference.

(2) This Office is to obtain a typed transcript of the Record of Proceedings from the First-tier tribunal.

(Signed on the original)

Charles Turnbull
Judge of the Upper Tribunal

22 December 2008