

INTERIM DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the Claimant, brought with the permission of the chairman, against a decision of an appeal tribunal sitting at Barnsley on 29 May 2007. For the reasons set out below that decision was in my judgment erroneous in law and, by way of interim decision, I set it aside.

2. I held an oral hearing of this appeal, at which the Claimant was represented by Richard Drabble QC and Sheffield City Council (“the Council”) was represented by Rachel Perez, of counsel.

3. The Claimant is a man now aged 31 who has a severe learning disability. By reason of that disability he is in receipt of the middle rate of the care component and the lower rate of the mobility component of disability living allowance.

4. Until 2 August 2004 the Claimant lived in a registered care home in Sheffield owned and managed by Home Farm Trust Ltd (“HFT”). HFT also provided care, supervision and support to the Claimant under arrangements agreed with the social services department of the Council. However, HFT decided to close that accommodation because it had ceased to be appropriate to meet the needs of the residents (p.152). However, significant problems were encountered in identifying any viable housing options which met the assessed needs of the residents. Golden Lane Housing Ltd (“GLH”) is a company limited by guarantee which is a registered charity established by Mencap in 1998 in order to provide housing for people with a learning disability. As at August 2005 GLH had some 712 tenants in 317 properties around the country. GLH worked in partnership with HFT to secure the appropriate housing needed for each of the residents of the residential home. 38 Grange Crescent (“the Property”) was acquired by GLH specifically for occupation by the Claimant and three other young men. It is a 5 bedroomed semi-detached house.

5. On 4 August 2004 GLH granted to the Claimant an assured shorthold weekly tenancy, commencing on 2 August 2004, of one bedroom in the Property, together with shared use of the living room, dining room, kitchen and bathroom. HFT continued to provide care, support and supervision to the Claimant, under the package agreed with the Council. According to evidence given at the hearing before the Tribunal that package provided for 45 hours care etc. per week, at a cost of some £880 per week, financed by the Council and the Independent Living Fund.

6. The Claimant’s tenancy agreement recited that the Property was used as part of a project designed to provide supported housing for people with learning difficulties, and that the tenancy was granted to facilitate the provision of support for the tenant. By Clause 1(4) of the agreement “the landlord shall provide the services set out in the attached Schedule for which the tenant shall pay a service charge.” That schedule contained five items. The second to fifth items required the landlord to keep clean, so far as practicable, the tenant’s bedroom, the communal parts and the exterior windows and to keep the exterior areas maintained and the gardens in good order. The first item required the landlord “as far as practicable to provide general counselling and support.”

7. The initial rent under the tenancy was stated as being £177.19 per week, which was broken down into £136.72 by way of “net rent”, £40.47 by way of “service charge” and nil in respect of “other charges.” The landlord was empowered to increase the net rent by giving at least one month’s notice in writing. A more detailed breakdown of the rent which was produced by GLH for housing benefit purposes (p.33) showed that no part of the rent was payable in respect of support provided to the Claimant by GLH. GLH has explained (p.63) that “the housing related support GLH provides is currently charged at nil. This is because to date we have funded these activities through our charitable work, Mencap, GLH’s housing investment bond, and fund-raising.”

8. On 2 August 2004 a written agreement (“the Property Management Agreement”) was entered into between GLH and HFT. The agreement recited that GLH had agreed to provide supported accommodation to the tenants and housing management services at the Property, and that “HFT have agreed to provide the care and support services to Tenants occupying Units at the Property on behalf of GLH.” The Agreement contained the following provisions of particular potential relevance:

Clause 11 is headed “management of the Property.” By Clause 11.1 GLH agrees to select prospective tenants in consultation with HFT and taking into account HFT’s views as to the suitability of any nominees. GLH agrees to issue tenants with an assured shorthold tenancy agreement and HFT agrees “as agent for and on behalf of GLH” to ensure that the provisions of such tenancy agreement are explained fully to the tenant. HFT agrees to notify GLH as soon as it becomes aware of any vacancy or of any change in a tenant’s support needs.

By Clause 11.2 HFT agrees to collect the rent and other charges and “in close liaison with GLH to provide the tenants with assistance and advice concerning their entitlement to income support, housing benefit or any other relevant welfare benefit.”

Clause 11.4.1 provides that “in carrying out its obligations to consult with Tenants and involve them in the management of the Property, GLH will also consult with HFT.” By Clause 11.4.2 GLH shall carry out its obligations under each tenancy agreement. By Clause 11.4.3 “HFT will set Project Rules, and will review these from time to time in consultation with tenants and with GLH. HFT will use reasonable endeavours to encourage tenants to comply with the rules and with the terms of their tenancy agreements.”

By Clause 12, if any tenant no longer requires the management, care and support services provided at the Property HFT will use its reasonable endeavours to procure suitable alternative accommodation, and GLH agrees to provide HFT with such reasonable assistance as HFT may reasonably request.

By Clause 13.1 GLH agrees to “carry out all the repairs at the Property” and to redecorate the exterior and interior as often as may be necessary.

By Clause 13.2 GLH agrees to repair etc all fixtures and fittings that are the responsibility of a landlord under section 11 of the Landlord and Tenant Act 1985 “except where such responsibility has been transferred to HFT under this Agreement.”

By Clause 13.4.1 HFT is to notify GLH as soon as it becomes aware of the need for any repair, maintenance, renewal or replacement to the Property or the fixtures and fittings “for which GLH is responsible under this Agreement.”

By Clause 13.4.4 HFT agrees to assist the tenants in reporting any repairs or defects to GLH.

By Clause 13.5.2 HFT agrees to maintain the furniture transferred to it by GLH in a safe and useable condition.

By Clause 15.1 HFT agrees to collect the rent and charges and to “remit from the same the sum of £98.38 per week per tenant to GLH” and to “apply the sums retained from the rent and charges collected to the provision of the support services to the tenants.”

By Clause 15.6 HFT agrees to pay all water and sewerage rates or charges and all charges in respect of gas, electricity, telephone or other services used or consumed at the Property, except any such charges incurred and payable by any of the tenants.

By Clause 16.1 HFT agrees to keep all internal common parts and all external areas and gardens at the Property clean and tidy and to encourage the Tenants to assist them in this undertaking. By Clause 16.3 HFT agrees “at its own expense to repair, maintain, replace or renew as required all fixtures, fittings, floor covering and equipment at the Property””except where this is the responsibility of GLH under clause 13.2 of this Agreement.”

9. On 5 August 2004 the Council received a claim form for housing benefit and council tax benefit completed on behalf of the Claimant. It was stated on the form that no part of the Claimant’s rent was payable in respect of “personal care and support.” On 23 August 2004 the Council received a further claim form, completed by the Claimant’s appointee. In a box for further information it was stated that “[the Claimant] has a learning disability and receives care and support from [HFT]

10. The Council referred the rent to a rent officer, who decided that the “claim related rent” was £50 per week.

11. On 18 October 2004 the Council decided that the maximum rent which could be used in calculating the Claimant’s housing benefit entitlement was £50 per week.

12. Eventually, after considerable correspondence, the Claimant appealed, contending that the rent was not necessarily limited to £50 per week because the Claimant’s accommodation was “exempt accommodation” within the meaning of regulation 10 of the Housing Benefit (General) Amendment Regulations 1995. “Exempt accommodation” was defined in regulation 10(6) of the 1995 Regulations (as subsequently amended) as including accommodation which is

“provided by a non-metropolitan county council 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.”

13. For a summary of the background to this legislation, I refer to paragraphs 18 to 24 of my decision in CH/1246 and 1247/2007.

14. Before the Tribunal the Claimant, supported by GLH, and represented by Mr Simon Ennals, a solicitor specialising in welfare and community law and who instructed Mr Drabble at the hearing before me, contended that the accommodation was “exempt accommodation” on two grounds. The first raised an issue of construction of the definition of “exempt accommodation” in reg. 10(6) of the 1995 Regulations. The contention sought to take advantage of the fact that, although (as appears to have been accepted on behalf of the Claimant) OLD, in providing housing related support to the Claimant, was not acting on behalf of GLH but rather on behalf of the Council, HFT did act on behalf of GLH in managing the Property pursuant to the Management Agreement. The contention on behalf of the Claimant was that under the definition of “exempt accommodation” it was sufficient that (a) HFT acted in some respect on behalf of GLH and (b) HFT provided care, support or supervision to the Claimant. The contention was that it did not matter that HFT did not act on behalf of *GLH in providing care, support or supervision*.

15. Secondly, it was contended that GLH itself provided “support” to the Claimant. At p.154 is a list of 10 categories of support which it was said GLH itself (i.e. by its own employees) provided to its tenants. At pages 155 to 161 are set out specific examples of cases in which support under each of those categories is said to have been provided to tenants of its various schemes around the country. At pages 175 to 178 are set out details of support which it is contended has been provided to, or at any rate has been available to, the tenants of the Property. For example, it is contended (as I understand it) that there have been 54 separate enquiries from tenants of the Property to the “one number” enquiry line operated by GLH. It is further said that there had been at least 13 visits by GLH to the Property to see the tenants, and that there had been an annual “scheme review” to ensure that the support and housing remained appropriate to the needs of the tenants.

16. There were also similar appeals, against decisions of the Council, by the other three tenants of the Property, and by the tenants of two other properties in Sheffield of which GLH was the landlord, making 10 such appeals in total. It was agreed that only one of these appeals, namely that by the Claimant, would proceed to an appeal tribunal in the first instance, and that the remaining appeals would be left to await the outcome in the Claimant’s case.

17. The Tribunal held an oral hearing, at which oral evidence was given by Mr Dugher, a senior housing consultant employed by GLH.

18. The Tribunal rejected the first argument put forward on behalf of the Claimant (i.e. that which I referred to in paragraph 14 above). The Tribunal held that, as a matter of construction of reg. 10(6), where care, support or supervision provided by someone other than the landlord itself is relied upon, the care, support or supervision must be provided on behalf of the landlord.

19. As regards the argument that GLH itself provides some “support”, the Tribunal in its Statement of Reasons summarised the oral evidence of Mr Dugher and then set out its conclusions as follows:

“Although I accept that GLH acts as a landlord in a different way to that of an ordinary commercial landlord, for example by providing a DVD of the tenancy agreement and providing documents in accessible format, the actual care, support or supervision provided, does not in my view extend beyond a minimal amount. It seems to me that GLH would be willing to act as a backup if necessary but the main care, support and supervision is provided by HFT. In reality it seems to me that GLH has adapted its procedures in order to enable it to respond as a landlord to the usual array of tenants’ requirements and complaints but from a landlord’s point of view rather than providing care, support or supervision for the benefit of the tenant.”

20. As regards the construction issue, in my judgment the Tribunal’s conclusion was correct, for the reasons which I set out in paragraphs 18 to 33 of my decision in CH/1246 and 1247/2007, the appeals in which were heard before me at the same time as this appeal.

21. However, in my judgment the Tribunal’s brief reasoning, set out in paragraph 19 above, in relation to the argument that GLH itself (i.e. by its own employees) provided support to the Claimant did involve a number of errors of law.

22. First, the Tribunal in my judgment did not make sufficiently detailed or precise findings as to the support provided by GLH and available from GLH properly to explain its conclusions that the support “did not extend beyond a minimal amount” and that GLH was acting “from a landlord’s point of view rather than providing care, support or supervision for the benefit of the tenant.”

23. Secondly, it is in my judgment unclear what the Tribunal meant by the second sentence set out in the passage quoted in para. 19 above, and in particular it is unclear what significance the Tribunal attached to its statement that “the main care, support and supervision is provided by HFT”. One interpretation is that the Tribunal considered that the fact that (as was common ground) HFT were the main provider of care, support and supervision meant that GLH were not providing “support”, within the meaning of reg. 10(6). If that is what the Tribunal meant, that was in my view wrong: see para. 21 of my decision in CH/3811/2006. If that is not what Tribunal meant, it is not clear precisely what significance it attached to the fact that GLH were not the main provider of support.

24. Thirdly, as regards the last sentence in the quoted passage, the assumption seems to be that if a landlord, owing to the disabilities of its tenants, acts in a manner which is in fact more supportive to its tenants than an ordinary commercial landlord would feel it necessary to act, the landlord’s so acting will not amount to “support” if the landlord is so acting in its own interest rather than in order to benefit the tenants. I would make two points in relation to that. First, I very much doubt whether the landlord’s motives are relevant. It seems to me that the question whether the landlord provides “support” to the tenants must be answered by reference to what the landlord actually does, rather than by reference to its motives for doing it. Secondly, and in any event, it does not seem to me that the Tribunal came close to justifying its finding that GLH’s procedures had been “adapted” “from a landlord’s point of view” (i.e. presumably in its own interests) rather than in order (or at any rate partly in order) to support the tenant. In a case where the landlord is a charity with the objects of (or which presumably include) providing accommodation for people with learning difficulties, a conclusion that the landlord was not acting at least partly in the interests of its beneficiaries, but in its own interests, would require clear justification.

25. The Tribunal's decision must therefore be set aside. It is not appropriate that I attempt, on the material before me, to substitute my own decision. I indicated at the hearing before me that I would not be doing so, and therefore heard no argument directed to what my substituted decision should be. One reason why I so indicated is that two days before the hearing the Council produced copies of the substantial documentation evidencing the contractual arrangements between the Council and HFT. I agree that the extent of the support required to be provided by HFT under those arrangements is potentially material in deciding whether GLH itself provided support. However, it is doubtful whether the Claimant's advisers had had a proper opportunity to consider this documentation by the time of the hearing before me, and Mr Dugher had not of course been asked any questions about it in his evidence to the Tribunal. Another reason was that by way of interim decisions I have also set aside (a) the appeal tribunal's decision CH/1246 and 1247/2007 (relating to a GLH property in Oxford and (b) an appeal tribunal's decision in a similar case relating to GLH property in the London Borough of Hounslow (CH/779/2007). The evidence as to the scope of the support which GLH is able to and does provide is fuller in some of these cases than others. It is in my judgment appropriate, on grounds of consistency and efficiency, that all three sets of appeals should be redetermined after a joint hearing. For that reason, and also because I am now familiar with all three sets of appeals, I also consider that the rehearings of all these appeals should be before me in London, with a view to my substituting my own decision, rather than by one or more fresh appeal tribunals. The decision which I have made in paragraph 1 above is therefore merely an interim decision setting aside the decision of the Tribunal.

26. I am giving directions in the three sets of appeals in a separate document.

(signed on the original)

Charles Turnbull
Commissioner
17 October 2007