UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2013] UKUT 0328 (LC)
LT Case Number: LRX/104/2011

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charge – charges for water and sewerage – water consumption of development unreasonably high – Water Retail Order 2006

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE EASTERN RENT ASSESSMENT PANEL

BETWEEN:

MRS DAPHNE MARION WALLACE-JARVIS **Appellant**

(1) OPTIMA (CAMBRIDGE) LIMITED **Respondents**
(2) MR AND MRS KAMRAM KHAZAI

Re: 23 Castle Walk,
Lower Street,
Stansted,
Essex CM24 8LY

Before His Honour Judge Nicholas Huskinson
Sitting at 45 Bedford Square, London WC1B 3AS
on 26 June 2013

The appellant appeared in person
No appearance or representation on behalf of the respondents

There are no cases referred to in this decision

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DECISION

Introduction

1. This is an appeal from the decision of the Leasehold Valuation Tribunal for the Eastern Rent Assessment Panel ("the LVT") dated 24 June 2011 whereby the LVT decided certain matters regarding the amount payable by way of service charge by tenants of the development at Castle Walk, Lower Street, Stansted.

2. In their decision the LVT described the development in the following terms:

> "This case concerns the management of a small mixed development of residential and retail units just off Lower Street, Stansted Mountfitchet. The developer's original intention appears to have been that all units in this small precinct would be commercial (hence the service charge, including water usage, was calculated solely by floor area), but as commercial and retail tenants failed to materialise Mr Khazai persuaded a Chinese restaurant on the first floor to relocate to the ground floor and redesigned both upper floors so that they became exclusively residential. In fact only three of the seven ground floor units are in retail use: two as restaurants and one as a betting shop. The four remaining units are now also let as flats."

In the result the development has at all material times consisted of 23 residential flats, about half of which are one bedroom and the remainder two bedroom, and also three business units, being two restaurants and a betting shop.

3. The freehold of the development is owned by the first respondent. There exists a lease of the upper parts from the first respondent to the second respondents. As a result of the foregoing, any ground floor units are held directly on a long lease by the relevant lessee from the first respondent, whereas any flat on an upper floor is held from the second respondents as lessors upon what is strictly an underlease. A copy of the lease of flat 23 (which is held by the appellant) was before me.

4. It is appropriate at this stage to record certain procedural matters.

5. None of the respondents responded to the appeal or participated in any way in the appeal to this Tribunal. Before me the appellant appeared in person and gave evidence on oath. Her husband, Mr Wallace-Jarvis also gave sworn evidence. The appellant also advanced arguments both in her written documents and orally at the hearing.

6. It is notable that before the LVT the only applicant was not the present appellant but was instead Mrs Rose Haiselden who was the lessee of flat 16, Castle Walk. The LVT noted that Mrs Haiselden was supported by several other leaseholders (who were recorded as being present at the hearing and who included the appellant) but that none of them were formally joint applicants, such that the only applicant was Mrs Haiselden. As explained in its decision, there had to be an

adjournment of the hearing because the respondents had not been all properly joined in the proceedings. However I do not read the LVT's decision as showing that at any stage the present appellant was made a party to these proceedings. It may also be noted that Mrs Haiselden's application originally only concerned the years 2009 and 2010; that once the second respondents had been joined as landlords the years in question were extended back to 2006; but that ultimately in giving a ruling upon the amount of the relevant service charge statements the LVT gave an itemised ruling (in the schedule to its decision) for the years ending 24 December 2009 and 24 December 2010 but did not deal in detail with any earlier period.

7. The LVT did not give any decision in respect of any period after 24 December 2010. The present appellant did not purchase her flat until February 2011. There exists therefore this apparent curiosity, namely that the appellant was not a party to the proceedings before the LVT and was not a tenant at any date during the period considered by the LVT. The appellant said that she viewed herself as a spokesperson for other lessees in the block and there is in the bundle before me a statement from Mrs Haiselden, apparently dated in June 2012, written in support of the present appeal, although she herself is not formally a party to the appeal. I was concerned as to the procedure whereby this appeal came to be before the Upper Tribunal. However in this connection the following points must be noted:

(1) After the LVT had issued its decision the appellant applied to the LVT for permission to appeal. The LVT refused permission by a decision dated 25 July 2011 in which it listed the applicants as being not merely Mrs Rose Haiselden but also four other persons including the appellant. The LVT responded to the appellant telling her that her application for permission had been refused. The LVT did not say that her application must be refused because she was not a party to the proceedings. Instead the LVT treated her as a party to the proceedings or at any rate as having sufficient status to seek permission to appeal.

(2) Further, the appellant did apply for permission to appeal to the Upper Tribunal and was granted permission (limited to the question of water charges) by the President of the Upper Tribunal by a decision dated 20 October 2011.

(3) Also I was told that the respondents have not at any stage submitted final demands for the relevant years but have instead merely been demanding on account payments. In consequence if and when final demands are made for the relevant years these could potentially be recoverable from the lessees of the various flats who were in place as lessees at the time that any valid demands were made, which could include the appellant.

8. In these circumstances I conclude that the appellant is directly interested in the outcome of the appeal; that I must treat her as being a party to these proceedings; and that her appeal is properly before the Upper Tribunal. The foregoing procedural curiosities however confirm me in the conclusion that I should limit my decision solely to dealing with the appellant's case that the LVT's decision regarding water charges for the years 2009 and 2010 were wrong so far as they affect her flat, namely flat 23. During the course of the hearing the appellant sought to suggest that I could and should decide wider matters, including questions regarding the service charge (including in particular the charge for water) for periods after the 2010 service charge year and that I could also consider

questions under Section 20B of the Landlord and Tenant Act 1985. It would however be wrong for me to consider these wider matters.

9. The appellant holds flat 23 pursuant to a lease dated 21 July 2000 between the second respondents and her predecessor in title (namely Linda Clutterbuck). By this lease flat 23 was demised for a term of 125 years from 1 January 1999 at the rents thereby reserved, which included a service charge which was reserved by way of further rent. The lease contains a covenant by the tenant to pay to the landlord without any deduction the service charge. The Third Schedule makes provision for the service charge. It is not necessary to set out in detail the provisions regarding the calculation of the service charge. In summary the service charge is defined as meaning an amount calculated on the basis of the gross square footage of the flat in relation of the gross square footage of the building – the calculation being performed by applying the relevant percentage to the "expenditure on services" which means what the landlords expend in complying with their obligations in the Fourth Schedule. There are provisions for payment on account and for balancing payments to be made once the final amount for a particular year has been calculated. The lease contemplates that the service charge year would end on 31 January, but it seems from the LVT's decision that the accounts have been calculated on a yearly basis ending on 24 December. The Fourth Schedule makes provision for the landlord's expenses and outgoings etc which could be recovered through the service charge. These items include in paragraph 4:

> "All charges assessments and other outgoings (if any) payable by the Landlord in respect of any parts of the Building."

The lease defines the expression "the Building" as being the Landlord's premises known as Castle Walk Shopping Precinct, Stansted, Mountfitchet, Essex.

The LVT's decision

10. The LVT decided certain matters regarding the amount of service charges which related to matters other than the water charges. Permission has only be granted to challenge the LVT's decision regarding water charges. As regards water charges the LVT concluded that the cost of installing the water meters should not have been recovered through the service charge and was to be reimbursed, but otherwise the LVT limited its conclusions regarding water charges (and indeed regarding the service charge statements) to the years ending 24 December 2009 and 24 December 2010. In paragraphs 31, 34 and 35 the LVT stated as follows:

> "31. However, while the bills are high, in the absence of any hard evidence that other users off the development are taking water through the main meter (such as the houses to the rear and the public toilet in the station car park – which the tribunal was told is soon to be removed) they are prima facie payable. The tribunal notes Mr Hughes' statement that if any such discovery is made the bills will be unpicked and a claim made against Veolia, the current water supplier.
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> 34. The total payable for 2009, the largest element by far being water charges, is £33,379. The total for 2010 is £38,685.

35. In each case, as demands were either not sent out (despite Butsons' records to the contrary) or were mostly issued in the name of the wrong landlord (Optima instead of Mr and Mrs Khazai) the appropriate shares of the above annual totals are payable when properly demanded by or on behalf of the correct landlord."

11. In granting permission to appeal the President observed:

"The LVT concluded in relation to the water bills that, although they were high, in the absence of hard evidence that other users were taking water through the main meter, they were prima facie payable. It is clearly arguable that the correct approach, since the water charges were so high, would have been to treat them as prima facie not having been reasonably incurred, with the onus on the landlord to justify them."

The President granted permission to appeal confined to the issue of the water charges. He ordered the matter to be dealt with by way of a rehearing. It was this rehearing which came before me.

Evidence produced by the appellant

12. The appellant confirmed that she purchased the lease of flat 23 in February 2011. She said that on any basis the LVT's figures regarding water charges as contained in the LVT's schedule were wrong. The LVT had recorded that £20,785 was claimed for 2009 (all of which was allowed) and that £28,453.09 was claimed and allowed for 2010 (but subject to a qualifying footnote). The appellant pointed out that if the actual water bills as submitted to the respondents by the water undertaker were examined it would be seen that a smaller amount was actually billed for these two years, namely £12,369 for 2009 and £20,376 for 2010. However even on the basis of these smaller figures she submitted that the element of her service charge which represented water charges was plainly excessive and unreasonable.

13. The appellant said that the accounts served by the respondents in respect of 2009 were unsatisfactory and that no accounts had been served regarding 2010.

14. The appellant stated that she had monitored the volume of water usage in flat 23 between 11 March 2011 and 23 March 2013, during which the meter in her flat showed the consumption of 131 cubic metres in just over 2 years i.e. about 65 cubic metres per year. She stated that the meter reading on 11 March 2011 said 579 cubic metres . There was no evidence as to exactly when the meter first started working or whether it was set at zero to begin with when first installed. However the appellant drew attention to documents in the bundle (page 23b) showing that the meters were installed in or about July 2006.

15. The appellant stated that she had carried out research into what might be described as normal or average water consumption for residential properties. On page 68 of the bundle there is a document issued by the Consumer Council for water dealing with metering and with how much water an average person/household uses. This document makes clear that water usage varies

enormously and it is difficult to give a specific answer to the question as to how much water an average person or household may use. The document seeks to provide an approximate guide as to how much water different types of household might use and is a rough guide only. The document suggests that for two persons living at home the annual water usage in cubic metres might be expected to be 55(low), 110(average) and 136(high). Flat 23 is a one bedroom flat. There was no clear evidence before me as to whether there was one person or two persons living in it during the service charge years 2009 and 2010.

16. The appellant stated that all of the properties, namely all the flats and also the commercial units, had got a water meter installed. These meters worked. The problem was merely that they could not be read remotely through radio signal.

17. In summary the appellant drew attention to what she submitted was a remarkably high level of water use at the respondents' development; to the fact that nothing was done by the respondents to investigate or cure such problems as existed; and to the fact that therefore this unreasonably high level of water consumption continued. It was as a result of this that the water charges were so high.

18. The appellant in the bundle produced copies of the water bills as submitted by the relevant undertaker to the respondents being bills submitted in the years 2008, 2009 and 2010.

19. The appellant submitted that something must have gone wrong regarding the water consumption at the development. There may have been some leak(s), or perhaps water was being drawn through this meter by properties outside the development, or perhaps a combination of these reasons, or perhaps some other reason. However the appellant's point was that something plainly had gone wrong, but the respondents did nothing to cure the problem and the large water charges continued to accrue. The appellant drew attention to a large water leak (generating a very substantial charge for water to the respondents) in 2012. This is of course outside the relevant time period with which this case is concerned. However the appellant referred to this matter as serving to confirm what was already she submitted clear from earlier material, namely that there was a problem which needed curing regarding water consumption at the development.

20. In summary the appellant submitted that the level of water charges incurred by the respondents in 2009 and 2010 were not reasonably incurred. To the extent that they were not reasonably incurred they could not be recovered through the service charge by reason of Section 19 of the Landlord and Tenant Act 1985.

21. Separately from the foregoing the appellant also drew attention to a publication entitled "A Guide to Water Retail" issued by OFWAT and to the Water Retail Order 2006.

Discussion

22. This appeal is only concerned with the charges included within the service charge in respect of water and sewerage charges. Also, having regard to the procedural matters recorded in paragraphs 7 and 8 above, I conclude that I must limit my findings to the years 2009 and 2010, which were the only substantive years dealt with by the LVT in respect of the charges for water. Also I should record that this decision is only a decision in the appeal by the appellant Mrs Wallace-Jarvis in respect of the water charges payable in respect of flat 23. She is the only appellant to the Upper Tribunal. She has appeared in person. The respondents have not participated in the appeal.

23. I consider first the recoverability of the water charges as claimed in the accounts dealt with by the LVT, leaving on one side for the moment the impact of the Water Retail Order 2006.

24. Section 19 of the Landlord and Tenant Act 1985 as amended provides, inter alia that relevant costs shall be taken into account in determining the amount of a service charge payable for a period "only to the extent that they are reasonably incurred."

25. The respondents have incurred relevant costs during each of the relevant service charge years by way of payment to the relevant undertaker for the water and sewerage services supplied to the development. Prima facie such charges constitute a charge or other outgoing within paragraph 4 of the Fourth Schedule and can therefore form part of the expenses recoverable through the service charge.

26. It appears however that there has for a substantial period been clear reason for concern regarding the high level of water usage at the development. I note that individual meters were installed in about July 2006. The charges have been running at a level which was substantially higher that could have reasonably have been expected. I take by way of example the earliest bill in the bundle before me, namely that submitted by Three Valley Water (page 67 of the bundle) which shows readings taken at the meter on 7 December 2007 and 22 January 2008, which reveals a consumption of 1,380 cubic metres for a period of 46 days. This involves consumption at the rate of almost 11,000 cubic metres per annum. It is necessary to make an adjustment by way of subtraction for the water consumption shown on the sub meter. The subtraction for the sub meter is to allow for the fact that, it appears, water measured by the sub meter was going to properties outside the development – a fact recognised by the water undertaker by deducting a charge in respect of this water. This sub meter shows 185 cubic metres used during 84 days, equating to an annual rate just over 800 cubic metres. Accordingly this bill which was submitted in early 2008 showed a rate of consumption of over 10,000 cubic metres per annum for this development of 26 units. Information given on later bills in 2008 indicates that 1 cubic metre (which is 1,000 litres or 220 gallons) is equivalent to approximately 500 kettles, 12 baths or 30 standard showers. 10,000 cubic metres would therefore be equivalent to 300,000 showers or over 11,500 showers per year for each of the 26 units at the development (three of which are of course commercial units and have different water usage).

27. I notice the document from the Consumer Council for Water submitted by the appellant, which shows that even allowing for high usage (rather than low or average) the annual rate of usage which might reasonably be expected for certain households is as follows, namely for one person in the

household 100 cubic metres; for two persons 136 cubic metres; and for three persons 175 cubic metres. Some of the units are only one bedroom. However supposing that every unit contained two persons, and therefore adopting 136 cubic metres per annum, 23 residential units could therefore reasonably be expected on high usage to consume about 3,128 cubic metres per annum. This would leave a rate of consumption of almost 7,000 cubic metres per annum for two restaurants and the betting shop i.e. more than twice as much as consumed by 23 residential units.

28. The level of charge for water as contained within the service charge account is on the face of it unreasonably high. The respondents have not appeared before the Upper Tribunal and I have received no evidence from them. There is before me the bundle of material submitted to the LVT, which includes at pages 102-104 a statement on behalf of the respondents made by Richard Hughes, a director of Portman Property Management Limited who were the then managing agents. In the course of this reply Mr Hughes states at paragraph 9:

> "It is clear from the consumption and the invoices made available that the ongoing costs of the residential meter water supply are higher than would be anticipated for a similar supply."

29. In all the circumstances of the present case there is therefore prima facie evidence that the water consumption (and the consequent charges for water and sewerage) was unreasonably high. In such circumstances it is in my view for the respondents to show that the costs included by way of charges for water within the service charge are costs reasonably incurred by the respondents. The respondents have not produced any evidence in support of such a contention. The evidence submitted on behalf of the appellant leads me to conclude that the amounts expended by the respondents by way of payment for water charges were not reasonably incurred during the relevant service charge years. This is because the excessive water consumption was (or should have been) clear to the respondents substantially prior to the commencement of the 2009 service charge year i.e. substantially prior to 25 December 2008. Despite this however the respondents appear to have taken no (or no effective) steps to tackle this problem and to investigate what was going wrong until well after the end of the relevant service charge years. I conclude that the respondents could and should have taken (but did not take) earlier effective steps to investigate why the water consumption was so high and to reach some solution to the problem with the water undertaker and/or with the assistance of an independent expert in such matters. At all material times there existed water meters in respect of each unit – this was accepted on behalf of the respondents in a document submitted by Portman Property Management Limited to the LVT (page 37 of the bundle). It would appear to have been a simple step to have had each meter read manually over a certain period and to have compared the total of the readings with the volume of water recorded by the undertaker as having been consumed through the main meter (with due allowance being made for any deduction for water used through the sub meter).

30. The tenant of flat 23 was required to pay through the service charge the appropriate percentage (based upon square footage) of such amount for water charges as was reasonably incurred. I conclude that the amounts recorded by the LVT as having been paid during the relevant service charge years (£20,785 for the year ending 24 December 2009 and £28,453.09 for the year ending 24 December 2010) were in excess of an amount reasonably incurred. I conclude that the water charges incurred by the respondents (which included a sewerage cost) were only reasonably incurred up to a cost representing a reasonable consumption. A question therefore arises as to what

this reasonable consumption should be taken to be. I am concerned with flat 23. The meter reading on 11 March 2011 was 579 cubic metres. There is evidence that the meter was installed, or at least the order for installation was given on the work sheets, in July 2006. Supposing therefore that 579 cubic metres were consumed in flat 23 over a period of just over four and a half years (say, 4.6 years) this gives a rate of consumption of about 125 cubic metres per annum. This is the consumption for flat 23, which constitutes a certain percentage of the square footage development (I understand this to be 2.409%). Assuming that the other units consume water at the same rate per square foot as did flat 23 the outcome is that the amount that should have been included within each of the service charge years 2009 and 2010 for water charges in respect of flat 23 is an amount based on the cost of consumption at the rate of 125 cubic metres per annum together with a contribution towards the standing charge and administration. In fact therefore the conclusion I reach as to the proper amount chargeable for water through the service charge provisions, on a proper application of Section 19, comes to the same amount that I conclude is the amount payable through the wholly separate analysis dependent upon the Water Retail Order 2006 (supposing that Order applies) to which I now turn. The financial quantification of the amount payable is given in the course of my analysis under this Order.

31. The Water Retail Order 2006 was made by the Director General of Water Services in exercise of the powers conferred upon him by Section 150 of the Water Industry Act 1991. The Order came into effect on 31 March 2006. The Order sets out rules limiting the amount a person may be charged for water supplied to a dwelling (being a dwelling which is occupied by a person as his only or principal home) if that person pays a landlord (or mobile home site owner or other person) for water or sewerage services, rather than paying the water company direct. A "reseller" is someone who charges domestic tenants (or others) for water or sewerage services which the reseller purchased from a water or sewerage company. The maximum retail price is the most that anyone can charge another person for supplying water or sewerage services that they have bought from a water or sewerage company.

32. Paragraph 6 of the Order provides:

> "6.(1) Subject to paragraph 8, if the water supply to the Purchaser's dwelling is metered, the Re-seller shall not recover from the Purchaser more than –
>
> (a) what the Purchaser would pay for the measured service, charged at the volumetric rate paid by the Re-seller to the Relevant Water or Sewerage Undertaker or licensed water supplier, provided that in any case the rate charged may not exceed the Relevant Undertaker's standard domestic volumetric water or (if appropriate) sewerage service tariff; and
>
> (b) an amount representing any standing charge paid by the Re-seller to the Relevant Undertaker or licensed water supplier, divided by the number of Purchasers supplied by the Re-seller from the service to which that standing charge applies."

Paragraph 8 provides for the re-seller to be allowed to charge an administration charge which must not exceed 2.5p per day for each purchaser whose service is metered.

33. There do not exist any actual meter readings for flat 23 for the service charge years ending 24 December 2009 and 24 December 2010. There is however the evidence already referred to above that the meter at flat 23 was installed in about July 2006 and read 579 cubic metres on 11 March 2011. Repeating the calculation already mentioned above, 579 cubic metres in 4.6 years comes to about 125 cubic metres per annum. Doing the best I can I conclude that this rate of usage should be adopted for flat 23 for each of the two relevant years.

34. The next question which arises is what is the rate of charge to be applied. This rate is to be the volumetric rate paid by the re-seller (i.e. the respondents) to the relevant water or sewerage undertaker or licensed water supplier. As shown by the bills included in the bundle, the rates charged were not static throughout this period of two years, namely the service charge years 2009 and 2010. During this period the charges were initially £0.8752 for water and £0.5193 per cubic metre for sewerage, making a total per cubic metre of £1.3945. At one stage during the period the prices increased to a total of £1.4698, but they then decreased to £1.4436. I propose to adopt a price of £1.44 throughout. Accordingly a charge at this rate for 125 cubic metres is £180 per annum. As regards the standing charge this was at one stage £180 per quarter but then increased to £188 per quarter and decreased to £184 per quarter. Taking an average of £184 per quarter, the yearly charge £736, which when divided by the number of units (namely 26) comes to £28.30. As regards the administration charge, 2.5p per day comes to £9.12. Adding these three figures together (namely £180 plus £28.30 plus £9.12) this comes to £217.42 per annum.

35. For the Water Retail Order 2006 to apply in respect of the supply of water and sewerage to flat 23 during the service charge years ending 24 December 2009 and 2010 it would be necessary that flat 23 constituted a "dwelling" within the Order, ie was a dwelling occupied by a person as his only or principal home. There is no evidence before me one way or the other as to whether or not this was the case. If the Order did apply there are two separate strands of reasoning (namely that set out in paragraph 30 above and that based on the Order) which each independently lead me to conclude that only £217.42 per annum was properly to be included for water and sewerage charges as part of the service charge for the years ending 24 December 2009 and 24 December 2010. If the Order did not apply I reach the same conclusion, but only on the basis of the strand of reasoning in paragraph 30 above.

Conclusion

36. In the result I conclude that, with respect, the LVT was wrong in its approach in paragraph 31 of its decision. There was evidence that the bills were unreasonably high. There was evidence that the respondents could have (but had not) done something effective about this comfortably prior to the commencement of the 2009 service charge year. Also the amounts charged were more than could properly be charged pursuant to the Water Retail Order 2006 (if that Order applied), to which its seems the LVT was not referred.

37. Accordingly I allow the appellant's appeal and I find that the element for water and sewerage charges which was properly to be included in the service charge for the years ended 24 December 2009 and 24 December 2010 was in each year £217.42.

Dated: 11 July 2013

His Honour Judge Nicholas Huskinson