DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 10 April 2017 at Huddersfield under reference SC246/16/02782) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: the claimant is not entitled to housing benefit in respect of payments for his continuous cruiser licence.

I direct the local authority to retain a copy of this decision and serve it on the claimant if he ever makes a claim for housing benefit or for council tax reduction support in the future.

REASONS FOR DECISION

A. The issue and how it arises

1. On 6 March 2015, the claimant bought a cruiser style narrow boat 40 feet in length, 6 feet 10 inches in beam, and 2 feet in draft for £17,450. He purchased a continuous cruiser licence, which allowed him to cruise; he was allowed under the terms of the licence to moor overnight provided he did not again moor within two miles of the same location on the same day. He made a claim to the local authority for housing benefit in respect of the licence fee on 26 October 2016. The authority refused the claim on 28 October 2016, but the First-tier Tribunal allowed his appeal. The tribunal decided that the fee amounted to 'payments in respect of, or in consequence of, use and occupation of the dwelling' that the claimant occupied as his home under regulation 12(1)(d) of the Housing Benefit Regulations 2006 (SI No 213). The issue for me is whether it was right in law to do so.

B. The caselaw

2. There are two relevant authorities.

3. One authority is the decision of Owen J in the High Court in *R v Bristol City Council ex parte Mrs J Jacobs* (2000) 32 HLR 841 The issue was whether water rates were eligible for payment of housing benefit. The judge dealt with 'use and occupation' at 846-847:

> I assess the first task to be the definition of 'use and occupation'; and that is to be followed by a consideration of the qualifying words 'in respect of, or in consequence of use and occupation', which is a phrase of considerable antiquity. The respondent has traced it back to section 14 of the Distress for Rent Act 1737 a statute now repealed. The respondent has also provided me with an excerpt from Chapter 10 of Woodfall on Landlord and Tenant, presumably the latest edition. Woodfall states that:

> '… an award of compensation for use and occupation is a restitutionary remedy, based upon quasi-contract. It arises where a person has been given permission to occupy the land of another without any binding terms having been agreed about payment. In such circumstances [Woodfall continues] the law will imply a promise on the part of the occupier to pay a reasonable sum for his use and occupation of the land.'

It is true that it might be said that a payment in respect of, or in consequence of use and occupation of, a dwelling might be considered to be covered by the words of sub-paragraph (b); that is, payments in respect of an implied licence or permission to occupy the dwelling, since both sub-paragraphs (b) and (d) imply permissive occupation. However, it might be possible to find and illustrate situations which are not covered by one or other. For example, the payments for a licence or permission would normally be fixed, whereas the amount due as compensation under use and occupation would not be agreed, and would generally need determination by the court if there was no agreement before court proceedings.

However, that exercise, which was not carried out before me, is not necessary, since I accept the respondent's argument that the phrase 'use and occupation', has a defined meaning, and it would be odd, indeed, if the draughtsman had intended a different meaning. By including (d) under the general description of rent, the draughtsman had in mind payments to a landlord, or one whom the law says may be treated as a landlord. If the calculation of compensation for use and occupation included a sum for use of water, the draughtsman had in mind exclusion under regulation 10(3). If not, no payment would be due as housing benefit. In my judgment, the respondent council was correct in its ruling as to 'use and occupation'.

I now turn to the words, 'in respect of, or in consequence of'. The applicant's argument amounts to saying that once a tenant can show use and occupation, any payments in consequence, although not to the landlord, must be taken into account. On the tenant's full argument it would be possible to claim payments for water, heating, lighting, television, fuel and even decorating. Logically this was the original conclusion sought by the applicant. I am satisfied that no such conclusion was ever intended. In this connection, it is, I consider, permissible to consider the anomaly which the applicant's construction would produce. A tenant being separately liable for water, sewerage and allied environmental services would be far better off financially, although there is no discernable reason why this should be so.

The respondent points out that grammatically some such words as, 'in respect of, or in consequence of', are necessary and appropriate for a situation where the amount will have to be determined either by agreement or by the court. The intention, it is said, is to cover use and occupation payments when determined or agreed by the court. The calculation by the court would not normally include a water component since rarely, if ever, is there a condition that a tenant shall have water, the calculation being for

compensation. The words used must have some restrictively causative affect. It is not any payment which has any connection with the dwelling which is relevant, but only those payments which the court would include when calculating compensation for use and occupation.

Mrs Jacobs' payments were not in respect of, or in consequence of, her use and occupation; firstly, since she occupied under a tenancy and, accordingly, liability for use and occupation did not arise; secondly, because the water charges payable to a third party cannot be payment in respect of, or in consequence of, use and occupation or, for that matter, her tenancy.

4. The other authority is the decision of Mr Commissioner (later Upper Tribunal Judge) Williams in *CH/0844/2002*. That decision involved a houseboat. The local authority had accepted that the cost of the claimant's mooring permit was eligible for payment of housing benefit. The issue for the Commissioner was whether the boat licence authorising the claimant to use the waterways was also eligible. He decided that it was:

12 Those conditions confirm the view taken by the tribunal after hearing from the claimant and a witness. You cannot have a Mooring Permit unless you have a Boat Licence. And you cannot moor your boat legally on British Waterways property unless you have a Mooring Permit 'except for short periods ancillary to cruising'. On the basis of those terms, my starting point is to agree with the tribunal in its view of the Boat Licence:

> 'Starting with a concession that mooring charges are payable however, it would make a nonsense if any payment which had to be made as a pre-condition of being granted a mooring licence was excluded'.

13 Do the terms of regulation 10 exclude that view? I think not. I agree that neither regulation 10(1)(b) nor (e) help the claimant. The payment is not a payment to occupy the boat. That would cover a rental payment to an owner of the boat. Nor is it a service charge (though it is analogous to one). Regulation 10(1) (f) refers to 'mooring charges' rather than to anything more specific. In my view that is wide enough to cover a Houseboat Certificate as well as a Mooring Permit, as defined in the *Boat Licence and Permit Conditions*. Such a view might be justified as the equivalent of regulation 10(1)(g) for caravans. An alternative and better view is to accept the Boat Licence fee as a 'payment in respect of, or in consequence of, use and occupation of the' boat (regulation 10(1)(d)). I reject the argument of the Department of Social Security noted above, and of the Council, on this point. The Boat Licence for a houseboat is a licence both to put the boat on the water and to live in the boat once it is on the water. The *Boat Licence and Permit Conditions* make it clear that it would be a breach of law for someone to live in a boat on British Waterways property without the appropriate boat licence. The analogy with vehicle licences is not a good analogy. A vehicle licence does not entitle the holder to sleep in the car or truck on the public highway as if it were a dwelling, nor does it allow the holder to obtain a permit to do so.

C. The First-tier Tribunal's reasoning

5. The tribunal recognised that those decisions were in conflict and preferred that of Mr Commissioner Williams. This is how the judge explained his decision:

> I prefer the decision of Upper Tribunal Judge Williams as he now is on the basis that without payment of the licence [the claimant] is not lawfully entitled to have his boat on the canal. In my view the fact that the licence he seeks is a continuous cruiser licence as opposed to a licence to moor is not relevant. The fact is that [the claimant] lives on his boat and his boat must be somewhere.

D. The tribunal should have followed Owen J

6. Faced with conflicting decisions of equivalent authority, the First-tier Tribunal was entitled to follow whichever it preferred. The issue for me is different. I have to decide which is right. My conclusion is that the decision of Owen J was right.

7. The starting point is that the Commissioner did not address the question whether 'use and occupation' was limited to its established, specialist meaning that Owen J accepted. As far as his decision shows, this was not put to the Commissioner, and Owen J's decision seems not to have been cited. As always, it is necessary to consider the statutory context. Regulation 12(1) prescribes the periodical payments in respect of which housing benefit is payable. The first five are in summary: (a) rent; (b) licence payments; (c) mesne profits; (d) payments for use and occupation; and (e) service charges. Subparagraph (d) is surrounded by expressions that have an established meaning in property law. I would expect in that context that it would bear that meaning. The remaining five, again in summary, are: (f) mooring charges; (g) site payments for caravans and mobile homes; (h) contribution by the resident of an almshouse; (i) rental purchase payments; and (j) payments for croft land in Scotland. These share the characteristic of being narrow in their scope and specific to particular contexts. If a charge for being on a waterway were included as an eligible payment, I would expect to find it among this miscellaneous collection, not nestling between mesne profits and service charges. In other words, there appears to be a logical structure and sequence to the structure of regulation 12 and the Commissioner's interpretation subverts it.

8. That is not sufficient to dispose of the case in the local authority's favour. As I have said, the context is always important and so far I have only considered the words 'use and occupation' in the context of the structure of regulation 12(1). I have not yet taken account of the words 'in respect of, or in consequence of' that precede those words. Owen J discussed them, pointing to the anomalies that would otherwise arise and to the explanation that the payment is a remedy the amount of which would be fixed by the court. I am not sure that I agree with the second point, which could be said also of mesne profits which are not

accompanied by those qualifying words. But the anomalies support the judge's conclusion. This case may concern only a houseboat, but the language of the regulation has to be applied more widely and the examples that the judge set out test the application of the language to payments such as the fee in issue in this case to destruction.

9. That is why I have set aside the First-tier Tribunal's decision and re-made it to confirm the local authority's decision.

E. Subsequent events

10. On 24 October 2016, the county court at Leeds ordered the claimant to remove his boat from canals and inland waterways under the control of the Canal and River Trust on 7 November 2016 at the latest. As that was after the date of the local authority's decision, it is not relevant to this case.

11. The claimant has lost contact with the Upper Tribunal. I have directed the local authority to serve this decision on him if he ever makes a claim from the authority in the future. If he contacts the Upper Tribunal, he will be sent a copy.

Signed on original
on 02 July 2018

Edward Jacobs
Upper Tribunal Judge

Corrected on 30 January 2019