

Decision

1. This is an appeal from a decision of the First-Tier Tribunal Property Chamber (Residential Property) (the FTT) dated 26 June 2018 whereby the FTT gave certain decisions regarding the amounts properly payable by way of service charge for the year 2015/16 in respect of various flats at 1 Lloyds Road, London EC1R 4AD.

2. The present appeal only concerns the FTT's decision regarding the amount payable through the service charge in respect of water services and also its decision regarding whether an order under section 20C of the Landlord and Tenant Act 1985 as amended should be made.

3. The original application to the FTT was made by the appellants on 23 June 2016 in respect of service charge years 2011/12, 2012/13, 2013/14, 2014/15, and 2015/16. There was a previous hearing before the FTT which gave a decision dated 6 December 2016 in relation to service charges for the years from 2011/12 to 2014/15. The FTT in that decision did not deal with the year 2015/16 (or more precisely the service charge period commencing on 1 April 2015 and ending 31 March 2016). It may be noted that in that earlier decision of the FTT an order was made under section 20C favourable to the present appellants and reasons for making that order were given.

4. The application became restored before the FTT in 2017. Directions were given dated 7 December 2017 which recorded the fact that the case involved a leaseholders' application for the determination of their liability to pay service charges for the years 2015/16 and 2016/17. The directions recognised that a decision had already been made by the FTT for the years 2011 to 2014/15 inclusive. Various directions were given. In paragraph 11 the following was stated:

“The applicants wished to make a S.20C application, however the landlord has confirmed that it does not intend charging the leaseholders for the costs of this application, and in any event, the previous tribunal made an Order that non[e] of the cost of “these proceedings” could be recovered. It is this tribunal's view that the proceedings have not yet completed, and therefore the S.20C order remains in force.”

5. The decision of the FTT which is the subject of the present appeal, namely the decision of 26 June 2018, dealt with service charges for 2015/2016. The FTT in its decision also examined certain matters relating to service charges for 2016/17, but its substantive decision appears only to have been concerned with 2015/16.

6. The only aspects of the FTT's decision which are the subject of the present appeal are the decision for 2015/16 regarding water charges and the decision not to make an order favourable to the appellants under section 20C.

7. Before the FTT the appellants had made various complaints regarding the amount of the water charges in the service charge for 2015/16. The amount charged was £24,071.65. It was said in a witness statement on behalf of the appellants:

“In summary, the utility bills are unreasonable and far too high. The invoices do not add up and invoices provided have no regular meter readings.”

8. A witness statement from Ellie Desborough on behalf of the respondent was submitted to the FTT. In relation to water charges for 2015/16 the witness stated that the respondent concedes the water charges applied in the 2015/16 accounting period are higher than average. Reference was made to certain late payment charges which the witness said had not been passed on to the tenants. The witness drew attention to Thames Water's website and the guidance on meter charges. She observed that the average service charge costs for water over the period 2011 to 2017 inclusive were £12,603 per year at an average of £393 per flat. She said it was the respondent's case that the average cost of £393 per flat was reasonable and not excessive.

9. It may be noted that in the building there are 32 flats. The flats are of different sizes. However a simple division of £24,071.65 by 32 gives a rate per flat of £752.24.

10. It may also be noted that the water charges for the following year were very much less namely £5048 .07 and the water charges for the previous year were substantially less namely £14,569.93.

11. In the Scott schedule prepared for the FTT (page 218) the appellants stated that they had considered all of the invoices received and that the sum of £12,812.15 had been calculated to be the maximum they should pay. They produced a spreadsheet of costs identifying the invoices provided by the landlord relevant to the period 2015/16. They drew attention to the fact that the respondent had confirmed in an email dated 9 February 2018 that any charge that could not be backed up with an invoice would be refunded.

12. At page 270 there was included the respondent's schedule which had been provided to the appellants together with invoices. The appellants drew attention to the fact that the total amount stated by the respondent to be shown in invoices, namely £24,071.65, was not in fact shown in the invoices produced. The various invoices which had been received for the relevant period were then analysed by the appellants who extracted from each invoice the actual amount for the water charges (both provision of water and wastewater) and they

showed that the total was £12,812.15 which is the sum the appellants contended was the maximum they should be required to pay.

13. That being the state of the evidence before the FTT it is necessary to turn to the analysis by the FTT of this issue.

14. After stating that the respondent sought £24,071.65 and that the appellants were offering £12,812.15 the FTT continued as follows in paragraphs 16 and 17:

“16. The appellants expressed similar concerns over the failure by the supplier and/or respondent to take accurate and timely readings of water consumed at the building. The Tribunal was similarly informed by increased reading of the water meter by the landlord now and in the future

17. The applicant sought a greater transparency of billing and wanted the installation of individual water meters for each property. This was not a matter that the Tribunal could determine. Metering would continue to be done centrally and the cost shared as per each lease.”

In paragraph 23 of its decision, under the heading of “Presentation of water and energy bills” the FTT made a reference to a part of the Scott schedule and then stated that the appellants were acknowledging that there was no challenge to either the water or energy charges made in the year. The FTT observed that there was nothing for it to determine as reasonable and payable. In its brief paragraphs dealing with its actual decision the FTT determined that £24,071.65 was reasonable and payable for the water supply. No reasons or analysis were given.

15. The Upper Tribunal granted permission to appeal on the basis that the FTT did not appear to have given any reasons for its decision and did not address the arguments of the appellants when dealing with the question of the amount payable through the service charges for water supply. It was ordered that the appeal would be a rehearing of the application.

16. The respondent has chosen not to participate in this appeal. The matter has been ordered to be decided upon the papers without a hearing. Also the matter has now been ordered to be dealt with by way of a review of the FTT’s decision. There is before me a substantial bundle which I understand constitutes the bundle which was before the FTT.

17. Bearing in mind the matters set out in paragraphs 7 to 12 above I conclude that the FTT erred in law in omitting to consider and give a reasoned decision upon the appellants’ case regarding the charges for water supply for 2015/16. Its decision upon this point cannot stand. I must decide the matter afresh upon the documents before me.

18. Section 19 of the Landlord and Tenant Act 1985 provides that relevant costs shall be taken into account in determining the amount of the service charge payable for a period only to the extent that they are reasonably incurred. The amount payable is to be limited accordingly.

19. There is before the tribunal a copy of the lease held by the first named appellant. By this lease flat 31 is demised to her by way of a long lease at a low rent. The lease contains in clause 7 a covenant by the tenant to pay to the landlord the service charge. There is a provision for payment on account with a further provision in clause 7.5 for the calculation of the actual expenditure and the identification of any shortfall or excess in the payment made on account. The costs to be included within the overall costs which make up the service charge include the costs of supplying water and drainage services (if individual occupiers are not separately assessed or charged – which was the case).

20. I am only concerned with the charges for water – namely the provision of water and the receiving of wastewater.

21. The first question, quite apart from any question of whether charges are reasonably incurred, is the question of what charges the respondents in fact incurred which were relevant to the service charge year 2015/16.

22. The respondent had the opportunity to give full details of these matters to the FTT. The bundle before the FTT did indeed contain at page 273 a summary of water costs said by the respondents to have been incurred which showed the total of £24,071.65. Pages 274 to 312 are copies of invoices from Thames Water which the respondents provided. These are the only such invoices included.

23. These invoices do not match the alleged invoices set out on the landlord's document at page 273.

24. The appellants analysed the invoices and looked to see what was actually charged by way of water usage and wastewater disposal in these invoices. This analysis is done at pages 270 and 271 of the bundle. I have examined this analysis against the invoices in the bundle and I conclude that this has been accurately prepared. Leaving aside something noted as “£1 accrual” the total is £12,811.15

25. Even if one includes the entire sum of £7239.50 shown on the first invoice (which shows £6750.48 apparently owing from an earlier invoice) rather than merely the sum of £489.02 shown for actual water charges in this first invoice, the total shown on the invoices comes to £19,561.63. This is substantially less than the respondent's claimed £24,071.65. Accordingly I conclude that in any event the charge of £24,071.65 cannot be justified.

26. However no (or certainly no sufficient) explanation has been put forward by the respondent to justify the inclusion of this earlier sum of £6750.48 from a previous invoice. Also it may be noted that the earliest invoice in the bundle dated 19 May 2015 is based upon a meter reading (an actual reading rather than an estimate) which had been made on 20 April 2015. Accordingly it was only the first 19 days of April which had elapsed during the relevant service charge year which had not been charged for by way of actual water usage within the accounts which are before the tribunal. Thus despite the fact that the water charges are for actual water usage subsequent to an actual meter reading on 20 April 2015 there is the unexplained carryover charge of £6750.48 in respect of the first 19 days of April and query what else.

27. Also it is notable that most of the bills are based on estimates. It is puzzling why the respondent was unable to make appointments with Thames Water so as to obtain more regular actual readings. There is only one other actual reading which was made on 11 September 2015 and is dealt with in the bill dated 27 October 2015. All the other bills are based on estimates.

28. It is necessary for me to decide how much the respondent actually and reasonably incurred by way of charges during the year 2015/16 in relation to the cost of supplying water and drainage services.

29. I accept that it is not a requirement under the lease (and would probably be impracticable anyway) for the respondent to ensure that during a relevant service charge year commencing on 1 April the water supply is metered for and charged for and paid for precisely in accordance with the amount of cubic metres of water consumed within that service charge year. I accept that a charge may properly be incurred in one service charge year (and be properly a part of the service charges for that year) even though part of the water being paid for in that charge was consumed before the beginning of the year.

30. However the position is as follows. The respondent had the opportunity both before the FTT to produce evidence and documentation to show what it incurred by way of water charges for the year 2015/16. The respondent put in a document at page 273 showing charges of £24,071.65. A total charge in this sum is not made out on the submitted bills from Thames water. Accordingly I conclude that a charge of £24,071.65 is not properly to be included within the service charge.

31. No or no adequate explanation has been given by the respondent regarding why there was a large amount, namely £6750.48, apparently outstanding from some earlier indebtedness to Thames Water which was brought in on the first invoice during the relevant year. In the light of the prima facie position, namely that water charges which included this amount (whether by inclusion in 2015/16 or by addition to the previous year) would give rise to unusually high and arguably unreasonable charges for water supply, it is not proper for me to assume in the respondent's favour that this unexplained amount was indeed a proper charge

for previously enjoyed water supply. While I accept the evidence of the respondent's witness that late payment charges were not passed on, the fact remains that this large and unexplained charge has arisen in circumstances there had been issues between the respondent and Thames Water.

32. The bills actually submitted in relation to the relevant year show actual water usage so far as concerns meter readings or estimates in the sum of £12,811.15. This is in respect of water usage from an actual meter reading on 20 April 2015 up to an estimated meter reading on 11 February 2016. As the bill dated 12 February 2016 (based on this estimated reading on 11 February 2016) is the last bill provided by the respondent for the relevant service charge year, the respondent will no doubt have paid for water consumed after this at some date which will have been relevant to the 2016/17 service charge year and the respondent will have been able to claim the cost of that water in that way. However if the figure of £12,811.15 is adopted without any adjustment there will have been no charge for any water consumed during the first 19 days of April 2015.

33. Doing the best I can on the material before me to allow for this I reach the following conclusion. I will treat the estimate on 11 February 2016 as being accurate. Accordingly £12,811.15 was incurred by way of actual water charges for the period from 20 April 2015 to 11 February 2016. Turning that into a rate per day, I proceed on the basis of 297 days giving £43.14 per day. Applying this rate to the first 19 days of April 2015 gives (rounding) £820.

34. I therefore conclude that the proper amount chargeable in respect of water supply for the year 2015/16 is £12,811.15 plus £820 making £13,631.15.

35. I now turn to the question of whether the FTT should have made an order under section 20C.

36. The FTT in its decision dated 6 December 2016 did consider the principles and did make an order favourable to the appellants under section 20C. I refer also to the matters set out in paragraph 4 above. In these circumstances I consider the FTT was wrong in declining, without giving any reasons, to make an order under section 20C. Accordingly I also quash that part of the FTT's decision and I make an order under section 20C to the effect that the costs incurred by the respondent in connection with the proceedings before the FTT are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenants. I consider it just and equitable to make this order. I consider it also just and equitable to make a similar order in respect of the costs incurred by the respondent in connection with these proceedings before the Upper Tribunal.

37. In the result therefore I allow the appellants' appeal. I find that the amount properly to be included in the service charges for 2015/16 in respect of water charges is £13,631.15. I make the section 20C orders as mentioned in paragraph 36 above.

A handwritten signature in black ink, appearing to read 'Nicholas Huskinson', with a long horizontal flourish extending to the right.

His Honour Nicholas Huskinson

13 May 2019