

UPPER TRIBUNAL (LANDS CHAMBER)



RAP/19/2013

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

PROCEDURE – application for permission to appeal – decisions of first-tier tribunal in rent cases – appeal on point of law only – criteria to be applied – s. 11, Tribunals Courts and Enforcement Act 2007 – permission granted

IN THE MATTER OF AN APPLICATION FOR PERMISSION TO APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER) UNDER S.11 OF THE TRIBUNALS COURTS AND ENFORCEMENT ACT 2007

Applicant: MR J W FISHER

Property: FIRST FLOOR FLAT, 30 PARK CRESCENT MEWS WEST, LONDON W1G 7ER

Decision of the First-Tier Tribunal (Property Chamber) dated 11 July 2013

Permission to appeal is GRANTED for the following reasons

1. The applicant for permission to appeal is the tenant of a residential flat on the first floor of 30 Park Crescent Mews West, London W1 (“the Premises”). He occupies the Premises under a protected or statutory tenancy to which the Rent Act 1977 applies. His landlord is the Howard De Walden Estate (“the Estate”).
2. On 18 February 2013 the Estate applied to the rent officer for the registration of a new fair rent for the premises, proposing a figure of £19,500 per annum. The rent had previously been registered on 18 May 2011 at a figure of £5,212.50 per annum which included £862.50 for services.
3. On 17 April 2013 the rent officer registered a fair rent of £5,748.00 per annum, which did not include any sum in respect of services. That figure was affected by the capping provisions of the Rent Acts (Maximum Fair Rent) Order 1999 (“the 1999 Order”) and the new entry in the rent register recorded that, but for the effect of the 1999 Order, the uncapped rent would have been £12,920 per annum.
4. On 7 May 2013 the applicant objected to the new rent and his objection was referred by the rent officer to the Rent Assessment Committee for determination in accordance with section 70 of the Rent Act. On 1 July 2013 the jurisdictions formerly exercised by Rent Assessment Committees were transferred to the First-tier Tribunal (Property Chamber) (“the F-tT”) which proceeded to consider the application.
5. On 11 July 2013 the F-tT issued a decision that a rent of £5,801.50 should be registered as the fair rent for the Premises with effect from that date.
6. The main dispute before the F-tT concerned the effect on the fair rent of works which had been carried out to the Premises by the Estate in April 2012. The purpose of the works had been to separate water, hot water and heating services which the

Premises had previously shared with an adjoining property and to provide the Premises with independent services for the first time.

7. A fair rent determined under section 70 of the 1977 Act is a market rent for the property discounted for scarcity. Where a fair rent is already registered the amount of any increased rent which may be registered is restricted by the 1999 Order. The maximum fair rent which can be registered is the existing rent for the dwelling plus the percentage difference between (i) the UK retail prices index published in the month preceding the month in which the new determination was made and (ii) the published index for the month in which the previous rent registration was made, plus an uplift of 5%. It is therefore important to establish correctly what the existing fair rent for the dwelling is.
8. The consequence of the separation of the services provided to the Premises was that the applicant became responsible, for the first time, for meeting utility bills for those services. Formerly the cost of heating and hot water had been met by the Estate and the fair rent had included a sum reflecting the value to the applicant of those services. The applicant having become responsible for meeting the cost of the services themselves, it was no longer appropriate for the fair rent to include an element to compensate the Estate for providing them.
9. Before the F-tT, the applicant argued that, as services were no longer provided to the Premises, when it came to ascertaining the maximum fair rent which could be registered, the existing fair rent of £5,212.50 which had been registered in May 2011 should be discounted by the value of the services included in that figure, namely £862.50, in order to provide the base figure which would then be indexed and increased by 5% in accordance with the 1999 Order. The submission on behalf of the Estate was that the rent to be used in the capping calculation should be the existing registered rent in full.
10. In its decision the F-tT first ascertained that the fair rent for the premises before taking into account the effect of the 1999 Order was £12,800. It was satisfied that the effect of the separation of the services did not increase the rental value of the property by more than 15% (which would have resulted in the 1999 Order being disapplied). It considered that the Estate was correct in its contention that the starting point for the indexation required by the 1999 Order was the rent previously registered and that there was no room for that rent to be discounted to a lower figure to take account of the applicant's additional responsibility for the costs of services.
11. On 10 October 2013 the applicant sought the permission of the Tribunal to appeal against the decision of the F-tT (which had itself refused him permission).
12. I take the opportunity presented by this application to note the basis on which rights of appeal have been conferred in relation to decisions concerning residential rents and to make some general observations on the criteria which the Tribunal applies when determining applications for permission to appeal against decisions of the First-tier Tribunal (Property Chamber) under s.11 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act").
13. Before 1 July 2013 appeals from decisions of Rent Assessment Committees lay to the High Court under s.11, Tribunals and Inquiries Act 1992 which allowed for an appeal only "if any party to proceedings is dissatisfied in point of law with the decision of the Tribunal." After 1 July 2013 the right of appeal now lies to the Upper Tribunal (Lands Chamber) by virtue of Article 2 of the Transfer of Tribunal Functions Order 2013 ("the 2013 Order") which transferred the functions of Rent Assessment Committees in England to the F-tT.

14. By s.11 of the 2007 Act provision for the right to appeal to the Upper Tribunal is made in the following terms:

- (1) For the purposes of sub-section (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision.
- (2) Any party to a case have a right of appeal, subject to sub-section (8).
- (3) That right may be exercised only with permission (or, in Northern Ireland leave).
- (4) Permission (or leave) may be given by –
 - (a) The First-tier Tribunal, or
 - (b) The Upper Tribunalon an application by the party
- (5) - (8) ...”

15. It is important to note that appeals under s.11(1) are “on any point of law arising from a decision made by the First-tier Tribunal ...” That limitation did not apply to the rights of appeal formerly existing in respect of decisions of residential property tribunals and leasehold valuation tribunals under section 175 of the Commonhold and Leasehold Reform Act 2002 and under 231 of the Housing Act 2004, each of which provided for appeals to the Upper Tribunal (Lands Chamber) without restriction other than as provided by the Tribunal’s own practice directions.

16. When the functions of the rent assessment committees, residential property tribunals and leasehold valuation tribunals were transferred to the First-tier Tribunal on 1 July 2013 the former basis of appeals from the different tribunals was preserved. Thus, a new section 176(B) of the 2002 Act provided for a right of appeal in connection with certain specified enactments on any basis other than on a point of law; attention was instead directed by section 176(B)(2) to s.11 to the 2007 Act as the statutory basis for appeals on points of law. The enactments to which this general right of appeal applies are the Commonhold and Leasehold Reform Act 2002; the Leasehold Reform Act 1967; the Landlord and Tenant Act 1985; the Landlord and Tenant Act 1987; the Leasehold Reform, Housing and Urban Development Act 1993 and the Housing Act 1996. Additionally a new section 231C inserted into the Housing Act 2004 by the 2013 Order provides for a similar right of appeal on any grounds other than on a point of law from decisions of the First-tier Tribunal made under or in connection with the Mobile Homes Act 1983, the Housing Act 1985 and the Housing Act 2004. Thus all of the jurisdictions exercised by the Leasehold Valuation Tribunal, and all of those formerly exercised by the Residential Property Tribunal attract rights of appeal which are not restricted to points of law only.

17. The position in relation to the functions formerly carried out by the rent assessment committees is different. When the First-tier Tribunal exercises its jurisdiction in relation to fair rents under the Rent Act 1977 or rents under the Housing Act 1988 the only right of appeal is on point of law under s.11 of the 2007 Act.

18. The Tribunal’s current Practice Directions (promulgated in November 2010) do not yet distinguish between the different bases of appeals. For that reason it may be helpful if we indicate, in general terms, the type of challenges to decisions of the First-tier Tribunal which will amount to an appeal “on any point of law”.

19. In appeals from tribunals, the concept of an error of law or a point of law has been widely interpreted. In *Railtrack plc v Guinness Limited* [2003] EWCA Civ 188 at paragraph 51 Carnwath LJ summarised the principles applicable to an appeal on a point of law from a specialist tribunal (in that case the Lands Tribunal), as follows:

“This case is no more than illustration of the point that issues of "law" in this context are not narrowly understood. The Court can correct "all kinds of error of law, including errors which might otherwise be the subject of judicial review proceedings" (*R v IRC ex p Preston* [1985] 1 AC 835, 862 per Lord Templeman; see also De Smith, Woolf and Jowell, *Judicial Review* 5th Ed para 15-076). Thus, for example, a material breach of the rules of natural justice will be treated as an error of law. Furthermore, judicial review (and therefore an appeal on law) may in appropriate cases be available where the decision is reached "upon an incorrect basis of fact", due to misunderstanding or ignorance (see *R (Alconbury Ltd) v Secretary of State* [2001] 2 WLR 1389, 2001 UKHL 23, para 53, per Lord Slynn). A failure of reasoning may not in itself establish an error of law, but it may "indicate that the tribunal had never properly considered the matter...and that the proper thought processes have not been gone through" (*Crake v Supplementary Benefits Commission* [1982] 1 All ER 498, 508).”

20. In the *Railtrack* case the issue was whether the Lands Tribunal had misunderstood some complicated expert evidence, resulting in a double counting in the valuation. The Court of Appeal accepted that, in principle, that was a permissible ground of appeal where the right of appeal was limited to questions of law, but held that the ground was not made out on the facts.

21. Some errors of law will be easily identified, as where a statute or document which the F-tT is called upon to interpret has been misconstrued. As the decision of the Court of Appeal in *Railtrack* indicates, however, the concept of appeal on a point of law is widely understood, particularly in appeals against decisions of tribunals. It is not possible or desirable to provide any sort of exhaustive list, but the following examples illustrate the breadth of the concept:

- (1) A procedural irregularity or manifest unfairness which causes the decision of a Tribunal to be unjust.
- (2) A decision based on a finding of fact for which there is no supporting evidence (*British Telecom v Sheridan* [1990] 1RLR 27).
- (3) A finding of fact which is so obviously wrong as to be perverse (*Dobie v Burns International Security Services UK* [1985] 1WLR 43).
- (4) A failure to provide adequate reasons for a decision (*English v Emery* [2002] 1 WLR 2409).
- (5) A failure to resolve a conflict of evidence or opinion which is central to the fair resolution of the issues in a case (*Lloyds v Hayward* [2002] EWCA Civ 1813).
- (6) An over-reliance on the burden of proof as a means of avoiding the resolution of competing expert opinions (*Cooper v Floor Cleaning Machines* [2002] EWCA Civ 1649).
- (7) A mistake of fact giving rise to unfairness in the decision (*E v Secretary of State for the Home Department* [2004] EWCA Civ 49).

22. Returning to this application for permission to appeal, the applicant's contention concerning the proper application of the 1999 Order clearly raises a point of law. I

am satisfied that the appellant's contention is arguable and that the point is potentially important. I therefore grant permission to appeal under s.11(1) of the 2007 Act.

23. The applicant's application for permission to appeal and the accompanying grounds of appeal may stand as the applicant's notice of appeal and statement of case. If the estate wishes to participate in the appeal it should file and serve a respondent's notice and statement of case within six weeks of the date of this decision.

Martin Rodger QC
Deputy President

14 April 2014