

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Upper Tribunal case No. CH/3284/2017

Before: Mr E. Mitchell, Judge of the Upper Tribunal.

Hearing: 9 October 2019, Field House, Bream's Buildings, London.

Attendances:

For the Appellant Mr B: Mr J Bates of counsel, instructed by the National Bargee Traveller's Association.

For the Respondent local authority: Mr S Datta of counsel, instructed by the London Borough of Camden's Legal Department.

Decision: The decision of the First-tier Tribunal (29 March 2017, Enfield, file reference *SC 312/17/00016*) involved the making of an error on a point of law. The Upper Tribunal sets aside the First-tier Tribunal's decision under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. Under section 12(2)(b)(ii) of that Act, the Upper Tribunal re-makes the tribunal's decision as follows:

1. The Appellant Mr B's appeal against the Respondent local authority's decision of 1 December 2016 is allowed.
2. The local authority's decision is set aside. The authority did not have proper grounds for superseding its decision of 21 September 2016 to award Mr B housing benefit.
3. The decision of 21 September 2016 was not superseded by the purported decision of 1 December 2016.
4. Insofar as Mr B challenged the local authority's refusal to supersede the decision of 21 September 2016 in his favour, so as to include additional payments within his eligible rent, his appeal is dismissed. The additional payments in question fell outside the categories of payments that constitute 'rent' under regulation 12(1) of the Housing Benefit Regulations 2006.

REASONS FOR DECISION

The context

1. This decision re-visits the eligibility for housing benefit purposes of payments made by a person whose home is a houseboat.

2. For certain purposes, houseboats are divided into two usage categories – those with a permanent mooring and those without. The latter are conventionally referred to as ‘continuous cruisers’. Use of a houseboat as a continuous cruiser requires a licence, which must be paid for. In this case, a licence was granted to the Appellant Mr B by the Canal & River Trust. As I understand it, the Trust owns and manages most (but not all) of the inland waterways of England and Wales.

3. Existing authority in the form of a Social Security Commissioner’s decision holds that a payment made in exchange for a continuous cruiser licence is not a payment in respect of a licence to occupy a dwelling. On that basis, the payment cannot be ‘rent’ under regulation 12(1)(b) of the Housing Benefit Regulations 2006 (2006 Regulations). I decide that existing authority is incorrect and decline to follow the Commissioner’s decision. I decide that Mr B’s continuous cruiser licence payments were rent for the purposes of regulation 12(1). The Commissioner’s decision did not take account of the fact that, for housing benefit purposes, a dwelling in the form of a houseboat is comprised of not only the boat but also the land used for mooring it. A licence to use land for mooring is therefore a licence to occupy a dwelling. It does not matter that the houseboat itself is owned by a claimant (or someone other than the person who owns or manages the mooring land).

4. For some time, the Social Security Commissioner’s decision that payments in respect of a houseboat licence fell outside regulation 12(1)(b) may not have mattered in practice. This was because the Commissioner also decided that such payments fell within another ‘rent’ category namely regulation 12(1)(d) on the basis that they were payments in respect of use and occupation of a dwelling. On that basis, the payments were eligible to be met by an award of housing benefit. However, Upper Tribunal Judge Jacobs recently decided that such payments could not fall within regulation 12(1)(d) properly construed. I should point out that I am in full agreement with Judge Jacobs’ decision.

5. Judge Jacobs’ decision may well have put houseboat dwellers in a difficult position. The practical result was to eject houseboat licence payments from the housing benefit scheme. It was therefore appropriate to take the opportunity presented by this case to review earlier

authorities about the housing benefit eligibility of payments to secure houseboat licences. The result is effectively to restore the housing benefit eligibility of such payments (at least in the case of licences issued by the Canal & River Trust, which was the only type of licence before me).

Background

History of Mr B's housing benefit claim

6. On 4 March 2016, Mr B completed a Canal & River Trust 'Boat Licence Application Form' (p.32, First-tier Tribunal bundle: subsequent page numbers refer to pages of that tribunal's bundle). In this form Mr B:

- requested a 12-month licence of the 'Canal and River' type, effective from 1 September 2015. In a section about 'Home Mooring', he ticked the box "The boat cruises continuously";
- inserted boat insurance details, stating that his insurance policy expired on 28 January 2016;
- gave details of his current boat safety certificate, due to expire on 3 September 2017.

7. On 28 April 2016, the London Borough of Camden (Respondent in the present proceedings) received Mr B's housing benefit claim form (p.13). This form:

- stated that he was in receipt of a 'passport' benefit namely income-related Employment & Support Allowance;
- gave a 'care of' address because "I am currently living in a boat in Camden which needs to be licensed by the Canal and River Trust";
- argued that his houseboat licence fee amounted to 'rent' for the purposes of the Housing Benefit Regulations 2006 because it was a periodical payment in respect of, or in consequence of, use and occupation of a dwelling.

8. The Canal & River Trust granted Mr B's application. The application form was stamped 'approved' on 12 August 2016 (although the licence at p.36, also stamped 'approved' on 12 August 2016, relates to the period 1 April 2015 to 31 March 2016). The licence states "the Licence is a legally binding contract, subject to the Terms and Conditions contained in this document".

9. On 22 August 2016, the local authority refused Mr B's housing benefit claim, informing him that "to be liable [to make payments in respect of a dwelling] you have to have a mooring license for your boat, which you currently do not have". On 14 September, the National Barge Travellers Association (NBTA) responded on Mr B's behalf arguing that the authority's decision was in conflict with case law that a 'navigation licence' is an admissible housing cost.

10. On 16 September 2016, the authority revised their original refusal decision and informed Mr B that housing benefit was payable "in respect of Boat Licence fees". On 21 September 2016, the authority determined that housing benefit would be backdated to 15 November 2015, as Mr B had requested, if he were granted a retrospective licence by the Canal & River Trust. This was followed by a decision on 22 September 2016 to make housing benefit payments of £14.53 per week, backdated to 16 November 2015 (p.70).

11. The benefits payments that followed the authority's decision of 22 September 2016 related only to the licence fee cost claimed by Mr B.

12. On 21 October 2016 the NBTA asked the local authority to alter Mr B's award to include costs relating to a Boat Safety Certificate (renewable every four years at an audit cost of £150) and the boat's annual insurance premium of £71.95 (p.85). The NBTA asked the authority to spread the safety certificate cost over 208 weekly payments and the insurance cost over 52 weeks.

13. On 4 November 2016, the authority informed the NBTA that, in their view, neither boat safety certificate nor insurance costs were eligible to be met by an award of housing benefit (p.89). In response, the NBTA argued by email of 8 November 2016 that these costs were 'necessary precursor costs' of the same type as those incurred in securing a boat licence, which a Social Security Commissioner had held to be eligible costs for housing benefit purposes (p.92). The NBTA pointed out that, under section 17(3) of the British Waterways Act 1995, a licence may be refused if a vessel fails to meet the applicable standards or an insurance policy is not in force in relation to the vessel (p.101).

14. In refusing to alter Mr B's award as requested by the NBTA, the local authority re-visited the question whether licence fee payments were eligible to be met by an award of housing benefit. They decided not. On 1 December 2016, the authority informed Mr B that his housing benefit award had been 'cancelled' from 28 November 2016 "because the payments you make are not eligible to Housing Benefit" (p.103). The authority also rejected NBTA's arguments as

to the housing benefit eligibility of safety certificate and insurance costs. An official provided more detailed reasons for the authority's decisions by letter dated 6 December 2016 (p.106):

- in relation to the safety certificate and insurance costs, “I...do not consider that the charges are included in the list of eligible periodical payments specified in regulation 12 of the Housing Benefit Regulations...”;
- in relation to the boat licence costs, “I...do not consider that this liability is covered by regulation 12”;
- “[NBTA] relied on Commissioner’s Decision *CH/844/2002* for the suggestion that the payments are eligible. In that decision the Commissioner expressed the view that a boat licence fee was a payment in respect of, or in consequence of, use and occupation of the dwelling, and the payments were therefore eligible by virtue of regulation 12(1)(d). In their analysis... [CPAG] suggests that the Commissioner’s view was erroneous because it did not take account of the restrictive meaning of ‘payments in respect of, or in consequence of, use and occupation of the dwelling’ – as referred to in the case of *R v Bristol CC ex p Jacobs* (1999) 32 HLR 841. I agree with the CPAG suggestion. The restrictive meaning is as payments by a trespasser for use of land”.

Proceedings before the First-tier Tribunal

15. Mr B appealed to the First-tier Tribunal with some assistance from the NBTA who helped prepare his detailed notice of appeal (p. 115). For present purposes, I need not describe the contents of the notice in detail save to note that Mr B submitted that the tribunal should follow the Social Security Commissioner’s decision in *CH/844/2002* (see below) but, in any event, properly construed the High Court’s decision in *Jacobs* (see below) was not relevant or, if it was, actually supported Mr B’s case.

16. The First-tier Tribunal dismissed Mr B’s appeal. I shall refer to the following parts of the tribunal’s statement of reasons:

- (a) the reasons recount that the parties did not dispute that all three contested payments were capable of constituting ‘periodical payments’ for the purposes of regulation 12 of the 2006 Regulations nor that the boat was a ‘dwelling’ occupied by Mr B as his home;
- (b) the tribunal found that the Canal & River Trust either owned or managed the inland waterways on which Mr B kept his boat;

(c) the tribunal found that Mr B “does not have a mooring for his boat as it was a continuous cruiser”;

(d) *Jones* and the Commissioner’s decision in *CH/844/2002* were in conflict “on the central point I have to decide” (25);

(e) in *Jones*, the High Court interpreted ‘use and occupation’ in “a restrictive legal sense, based on land law definition...restricted to a user and occupier of land which is either owned by another or to which that other has higher title than the occupier”;

(f) in the tribunal’s judgment *Jones* was to be preferred to *CH/844/2002* regarding the meaning of ‘use and occupation’. The regulations had in mind “payments to a landlord, or one whom the law says may be treated as a landlord”. The Canal & River Trust could not be treated as Mr B’s landlord because "there is no interest in land to which the payments can relate" and "the licence fee, audit fee and insurance costs are payable to third parties" not a landlord (28);

(g) the tribunal decided that none of the payments fell within regulation 12(1)(d) of the 2006 Regulations.

Legal framework

Housing Benefit legislation

17. Section 130(1) of the Social Security Contributions and Benefits Act 1992 provides that a person is entitled to housing benefit if (a) liable to make payments in respect of a dwelling in Great Britain which he occupies as his home; (b) an appropriate maximum housing benefit applies; and (c) the person satisfies specified income-related conditions.

18. In section 130(1), “payments in respect of a dwelling” is restricted to “such payments as maybe prescribed” in regulations (section 130(2)).

19. Regulation 7 of the 2006 Regulations relates to the section 130(1) requirement that a person must be liable to make payments in respect of a dwelling occupied as his home. Regulation 7(1) provides:

“Subject to the following provisions of this regulation, a person shall be treated as occupying as his home the dwelling normally occupied as his home –

(a) by himself...

and shall not be treated as occupying any other dwelling as his home.”

20. Regulation 7 should be read with regulation 2(4), which provides:

“For the purposes of these Regulations, the following shall be treated as included in a dwelling –

(a) subject to paragraphs (b) to (d) any land (whether or not occupied by a structure) which is used for the purposes of occupying a dwelling as a home where either –

(i) the occupier of the dwelling acquired simultaneously the right to use the land and the right to occupy the dwelling, and, in the case of a person liable to pay rent for his dwelling, he could not have occupied that dwelling without also acquiring the right to use the land...

(c) where the dwelling is a houseboat, the land used for the purposes of mooring it...”.

21. Regulations 11 and 12 limit the payments that count as payments in respect of a dwelling. Regulation 11(1) provides, subject to the following provisions of the regulation, that “housing benefit shall be payable in respect of the payments specified in regulation 12(1) (rent) and a claimant’s maximum housing benefit shall be calculated under Part 8 (amount of benefit) by reference to the amount of his eligible rent determined in accordance with (a) regulation 12B”.

22. Regulation 12 is headed “Rent”, a term which defined by regulation 2(1) to include “all those payments in respect of a dwelling specified in regulation 12(1)”. Regulation 12(1) provides:

“Subject to the following provisions of this regulation, the payments in respect of which housing benefit is payable in the form of a rent...allowance are the following periodical payments which a person is liable to make in respect of the dwelling which he occupies as his home –

(a) payments of, or by way of rent;

(b) payments in respect of a licence or permission to occupy the dwelling;

- (c) payments by way of mesne profits...
- (d) payments in respect of, or in consequence of, use and occupation of the dwelling;
- (e) payments of, or by way of, service charges payment of which is a condition on which the right to occupy the dwelling depends;
- (f) mooring charges payable for a houseboat;
- (g) where the home is a caravan or a mobile home, payments in respect of the site on which it stands...”.

Interpretation Act 1978: meaning of “land”

23. Schedule 1 to the Interpretation Act 1978 contains definitions of various words and expressions. By section 5 of the Act, “unless the contrary intention appears, words and expressions listed in Schedule 1 to this Act are to be construed [when used in other Acts] according to that Schedule”. Section 23(1) provides that section 5 applies, unless the contrary intention appears, to subordinate legislation such as regulations.

24. Schedule 1 includes a definition of “land”:

“ “Land” includes buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land”.

Waterways legislation

25. Section 13(1) of the British Waterways Act 1971 declares that it shall not be lawful to moor (amongst other things) a houseboat unless a houseboat certificate is in force with respect to the houseboat.

26. Section 16(1) of the British Waterways Act 1995 provides that a houseboat certificate issued under the 1971 Act shall, unless the certificate, or a document referred to in the certificate, provides otherwise, be subject to the general terms set out in Schedule 1 to the 1995 Act. Schedule 1 includes the following provision:

- (a) for Schedule 1 purposes, “moor” is defined to include “place, keep or maintain”, and “moored” is to be construed accordingly (paragraph 1);
- (b) if the holder of a certificate contravenes or fails to comply with any terms or conditions applicable to the certificate, the Canal & River Trust may give notice requiring the holder to

take action to remedy the contravention or non-compliance (paragraph 6(2)). If the holder fails to do so, the certificate determines on the date on which the notice expires (paragraph 6(3)).

27. Section 17(3) of the 1995 Act permits the Canal & River Trust to refuse a “relevant consent” (which includes a houseboat certificate: see section 17(1)) in respect of any vessel unless:

(a) the applicant satisfies the Trust that the vessel complies with the relevant applicable standards. Compliance with the standards is demonstrated by a boat safety certificate, issued by an authorised person;

(b) an insurance policy is in force in respect of the vessel. Part I of Schedule 2 to the Act specifies the requirements for houseboat insurance policies; and

(c) unless the vessel is to be kept at a mooring or other place, the applicant satisfies the Trust that the vessel “will be used bona fide for navigation throughout the period for which the consent is valid without remaining continuously in any one place for more than 14 days or such longer period as is reasonable in the circumstances”. As I have mentioned, such vessels are conventionally referred to as ‘continuous cruisers’.

28. Section 17(4) of the 1995 Act authorises the Canal & River Trust to give notice to the holder of a houseboat certificate requiring the holder to remedy non-compliance with any of the above requirements within “such time as may be reasonable”. If the holder fails to do so, the ‘relevant consent’ determines on the date the notice expires (section 17(5)).

29. Section 43(3) of the Transport Act 1962 provides as follows:

“the...Canal & River Trust shall...have power to demand, take and recover or waive such charges for their services and facilities, and to make the use of those services and facilities subject to such terms and conditions, as they think fit.”

30. Those services and facilities expressly include “the use of any inland waterway owned or managed by [the Trust]” (section 43(8)).

31. The Trust’s May 2015 general terms and conditions for boat licences, supplied in the present proceedings, state that they are given in accordance with section 43 of the 1962 Act and apply to “any Waterway which we own or manage” (p.232). The terms and conditions include:

- in the case of “Boats without a Home Mooring or ‘Continuous Cruisers’”, condition 4.1 states “you must cruise in accordance with the British Waterways Act 1995”;
- condition 5.1: “The Boat must comply with the Boat Safety Scheme Requirements...at all times”;
- Condition 5.2: “You must have in force an insurance policy for the Boat...The insurance cover must be maintained for the full duration of the Licence...”;
- Condition 6.4: “If the Boat remains on the Waterway unlicensed for any period, whether following expiry or termination of the Licence, we may charge you pro rata the equivalent of the Licence fee for that period (to cover your use and occupation of the Waterway...”;
- Condition 7.11: “The Licence is personal to you in respect of the Boat...”;
- Condition 9.1: “We will do our best to keep the Waterway open for navigation...”. This condition is within section 9 of the terms and conditions, headed “Our obligations”;
- Schedule 1: “The licence allows you to use the Boat on our Waterways including mooring for short periods while cruising. Short period means up to 14 days or less where indicated by us...”;
- Schedule 1 also sets out ‘acceptable evidence’ to demonstrate compliance with boat safety standards;
- Schedule 2 is headed ‘Mooring Information’ and includes:
 - “1. There are no public law provisions concerning moorings along the Trust’s canals. This is entirely a matter for management by the Trust as property owners”;
 - “2...As a land owner, the Trust may impose further conditions over and above those within the license conditions.”

R v Bristol City Council (ex parte Jacobs) 32 HLR 841 (Jacobs)

32. The instant issue in *Jacobs* was whether a liability to pay water rates fell within ‘rent’ for the purposes of regulation 10 of the Housing Benefit (General) Regulations 1987 (similar provision is made in the 2006 Regulations). In *Jacobs*, payment of water rates was not a condition of the tenancy granted to a housing benefit claimant. The council’s Housing Benefit Review Board decided that the definition of “rent” in regulation 10 did not include payments

made separately by the tenant for water charges (nor payments for fuel and telephone charges). Further, according to the Board, such payments were not a consequence of, or in respect of, use and occupation within the meaning of regulation 10(1).

33. The claimant argued that (a) her liability to pay water charges fell within what is now regulation 12(1)(d) of the 2006 Regulations, that is “payments in respect of, or in consequence of, use and occupation of the dwelling”.

34. The High Court (Owen J) held that ‘use and occupation’ has “a defined meaning, and it would be odd, indeed, if the draughtsman had intended a different meaning”. What is now regulation 12(1)(d) had in mind “payments to a landlord, or one whom the law says may be treated as a landlord”.

35. Owen J also addressed the claimant’s arguments concerning the meaning of “in respect of, or in consequence of”, as used in regulation 10 of the 1987 Regulations, observing that “on the tenant’s full argument it would be possible to claim payments for water, heating, lighting, television, fuel and even decorating”. The argument was objectionable partly because it would leave a tenant whose liability to pay water charges was not a condition of the tenancy “far better off” for no discernible reason. According to the judge, “the words used must have some restrictively causative effect” and he concluded “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”. The claim failed.

Social Security Commissioner decision CH 844 2002

36. This case concerned a houseboat with a permanent mooring. The claimant was liable to pay both an annual licence fee and a fee for a Mooring Permit. The local authority accepted that the Mooring Permit fee, but not the annual licence fee, was an eligible cost. The claimant successfully appealed to a social security appeal tribunal whose decision the local authority then challenged before a Social Security Commissioner. Commissioner Williams referred to evidence before the appeal tribunal, which seems to have been undisputed, that a Mooring Permit would not be granted without a licence.

37. What is now regulation 12(1)(b) of the 2006 Regulations could not assist the claimant, according to the Commissioner, because “the payment is not a payment to occupy the boat” and “that [regulation 12(1)(b)] would cover a rental payment to an owner of the boat”. However, the Commissioner went on to hold that that (what is now) regulation 12(1)(f) – “mooring charges payable for a houseboat” – was “wide enough to cover a Houseboat

Certificate as well as a Mooring Permit”. However, “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” (i.e. falling within what is now regulation 12(1)(d)). The Commissioner reasoned as follows:

“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 on 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.”

Kirklees MBC v JM [2018] UKUT 219 (AAC)

38. This decision of Upper Tribunal Judge Jacobs was given after the First-tier Tribunal had decided Mr B’s appeal. However, it has featured in the arguments on this appeal because it addressed an apparent conflict between *Jacobs* and *CH 884 2002*.

39. In *JM* a local authority refused a housing benefit claim made by a person with a ‘continuous cruiser’ licence. The claimant appealed successfully to the First-tier Tribunal, which decided that the claimant’s licence payment fell within regulation 12(1)(d). The local authority appealed to the Upper Tribunal. Before the Upper Tribunal, it was argued that *Jones* and *CH 884 2002* were in conflict.

40. In relation to the legal meaning of ‘use and occupation’, Upper Tribunal Judge Jacobs preferred Owen J’s reasoning in *Jacobs* to that of Commissioner Williams in *CH 884 2002*:

“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."

41. The judge's finding, concerning the meaning of 'use and occupation', disposed of the appeal in the local authority's favour and Judge Jacobs held that "the claimant is not entitled to housing benefit in respect of payments for his continuous cruiser licence".

Grounds of appeal before the Upper Tribunal

42. I granted Mr B permission to appeal against the local authority's decision, on grounds advanced on his behalf by Mr Justin Bates of counsel, which in summary were:

(1) *Misdirection in law*. The tribunal should not have relied on Owen J's decision in *Jacobs* since it was not a houseboat case. In any event, Owen J's finding that 'use and occupation' had a defined meaning, namely payments to a landlord or person who in law may be treated as a landlord, was wrong. The regulations do not require payments to be made to a landlord or 'out of the landlord and tenant relationship', only that a person is liable to make payments in respect of a dwelling occupied as the home. Owen J relied on a passage in *Woodfall: Landlord and Tenant*, a leading text, but the passage in question concerned compensation for use and occupation, which is not mentioned in the regulations. Owen J also overlooked that housing benefit is payable outside a landlord/tenant relationship (see, for example, regulation 12(1)(c)'s reference to mesne profits) and that the claimant's payment of water rates had no impact on her right to occupy her property;

(2) *Convention-compatible construction*. If Mr B did not receive the award of housing benefit sought, it was 'overwhelmingly likely' that the Canal & River Trust would take action to remove his boat, which would be an action analogous to a claim for possession (*Jones v Canal & River Trust* [2017] EWCA Civ 135). In the light of this, the tribunal was required under section 3 of the Human Rights Act 1998, insofar as possible, to construe regulation 12 in such a way as to avoid a breach of Mr B's rights under Article 8 of the European Convention on Human Rights. It should have construed regulation 12 so as to render the three types of payment eligible for housing benefit.

43. I also granted permission to appeal on a further ground, which I considered it right to introduce myself in order that the Upper Tribunal might consider an issue not previously addressed in the case law about the eligibility of houseboat-related payments. I described this ground as follows in my grant of permission to appeal:

“7. If one used everyday language, a boat licence charge would not be considered a payment in respect of a licence or permission to occupy a houseboat dwelling. However, by regulation 2(1), land used for the purposes of mooring is treated as part of a houseboat dwelling. For this purpose, land includes “land covered with water” (unless it is argued there is a contrary legislative intention in the Housing Benefit Regulations 2006 so that the Interpretation Act 1978 definition would not apply).

8. I note that condition 8 of the British Waterways Boat Licence and Permit Conditions, as quoted in the First-tier Tribunal’s statement of reasons, states “The licence does not allow you to moor your boat in any waterway except for short periods ancillary to cruising”. In other words, the licence permits mooring for short periods. Arguably, therefore, the licence fee is a payment in respect of a licence or permission to occupy a dwelling since Mr [B] is required to make a payment in respect of a licence to occupy the land, including land covered with water, that, while moored, comprises part of his houseboat dwelling.

9. I acknowledge that, in *CH 844 2002*, Social Security Commissioner Williams said, in paragraph 13 of his decision, that the equivalent of regulation 12(1)(b) could not help a claimant because “the payment is not a payment to occupy the boat”. However, while the Commissioner noted the equivalent of regulation 2(4) in an earlier part of his decision, submissions do not appear to have been made to him about the relationship between the two provisions. I am not bound to follow a decision of a Social Security Commissioner but would by convention normally do so unless there is a good reason not to...

11. To conclude, permission to appeal is granted on the grounds advanced on Mr [B]’s behalf as well as the ground that the First-tier Tribunal arguably erred in law by failing to consider whether regulation 12(1)(b) of the Housing Benefit Regulations 2006 applied to some or all of the disputed sums.”

44. The local authority’s written response to the appeal argued that the First-tier Tribunal did consider regulation 12(1)(b) and found it inapplicable. Nevertheless, the authority did not object to the Upper Tribunal’s introduction of a new ground of appeal. In the authority’s view, the regulation 12(1)(b) issue merited consideration by the Upper Tribunal.

45. The local authority submitted that the Secretary of State for Work & Pensions would be in a better position than it to address certain of the issues arising on this appeal, in particular those arising under ground 2 (the ‘Convention compatible’ ground). The Upper Tribunal invited the Secretary of State to apply to be made an interested party. However, the Secretary of State declined the invitation.

The arguments

Mr B

46. Mr Bates, for Mr B, asserts that all three payments - licence, safety certificate and insurance costs – are conditions precedent to Mr B’s lawful occupation of his boat. If any of the three were absent, Mr B could not lawfully occupy his boat and would face having his boat removed from the waterway by the Trust.

47. For housing benefit purposes, a houseboat and the land on which it is moored are to be treated as jointly forming a dwelling (see regulation 2(4)(c) of the 2006 Regulations). A boat licence, such as that granted to Mr B, is a licence that gives permission to occupy the ‘dwelling’ (i.e. the boat and the land used for mooring). Payments in respect of a boat licence therefore fall within regulation 12(1)(b) since they clearly are “payments in respect of a licence or permission to occupy the dwelling”. The licence turns what would otherwise be a trespass into a permitted act. Mr Datta relies on various case law authorities to draw a distinction between a chattel and land but that fails to take into account the extended definition of ‘dwelling’ under the 2006 Regulations.

48. The Social Security Commissioner’s conclusion in *CH 844 2002* that (what is now) regulation 12(1)(b) is restricted to payments to occupy a boat (i.e. rental payments to the owner of a boat) was flawed. The Commissioner failed to take account of the extended definition of “dwelling” under the 2006 Regulations, as read with the definition of ‘land’ provided by the Interpretation Act 1978.

49. On a literal reading, all three payments fall within regulation 12(1)(d) that is they are all “payments in respect of, or in consequence of, use and occupation of the dwelling”. Unless these payments are made, Mr B cannot lawfully use and occupy his boat, as Commissioner Williams effectively accepted in *CH/844/2002* when he found that “you cannot have a mooring permit unless you have a boat licence. And you cannot moor you boat legally on British Waterways property unless you have a mooring permit”. The logical implication is that

a boat licence fee is a payment in respect of, or in consequence of, use and occupation of a boat and the same reasoning renders eligible the other payments.

50. Mr Bates concedes that *Jacobs* and *Kirklees* may be against him in relation to regulation 12(1)(d). He does not dispute the result in *Jacobs* but argues it is not determinative of the present appeal. *Jacobs* is distinguishable because:

(a) Mr B's three payments are qualitatively different to a telephone bill, for example, since they are a condition precedent to his lawful occupation of the boat;

(b) payments of water rates and similar payments are clearly not 'in respect of' use and occupation of a property. They are separate charges for a separate service. Such payments are not 'in consequence of' occupation because there is no necessary link between the services and the right of occupation;

(c) in other words, Mrs Jacobs' right of occupation was not subject to a precondition requiring her to make the payments. In Mr B's case, however, he is subject to such a precondition.

51. Owen J was wrong, submits Mr Bates, to derive support from a passage in *Woodfall*. The passage in question was concerned with *compensation* for use and occupation, which Mr Bates describes as "a quasi-contractual remedy which arises where a party occupies land with permission but without having agreed terms of payment". Advisedly, the drafter of the 20065 Regulations avoided that technical concept and decided instead to use the broader non-technical phrase 'use and occupation'.

52. Mr Bates describes *Kirklees* as superficially similar to the present case since it concerned an application for housing benefit where a cost claimed was that for a continuous cruiser licence fee. However, the Upper Tribunal did not hear argument as to the correctness of *Jacobs*. Further, Judge Jacobs did not address the applicability of regulation 12(1)(b) or (f), nor was he presented with any argument under the Human Rights Act 1998.

53. Mr Bates accepts there is force in the Upper Tribunal's *Kirklees* in that it draws attention to property law concepts that surround regulation 12(1)(d). However, if 'use and occupation' bears its narrow, technical property law meaning, it adds nothing. The case of occupation under an incomplete agreement is covered by regulation 12(1)(b). Cases where a person occupies without permission or holds over following expiry of a tenancy are covered by mesne profits.

54. In relation to regulation 12(1)(f), Mr Bates notes that ‘mooring charges’ is not defined in the 2006 Regulations. He submits that, in the case of a continuous cruiser, no mooring permit is required nor is the boat dweller required to pay any specific mooring charges. Instead, the boat licence enables the boat to be moored for short periods ancillary to cruising. As such, a boat licence must be considered a mooring charge to the extent that the licence authorises mooring for short periods of time. If there is any doubt, regulation 12(1)(f) should be construed as including boat licence payments in order to avoid the absurd consequence that housing benefit would only be payable in respect of permanent mooring permits but not boat licences that authorise short-term moorings.

55. At the hearing, Mr Bates submitted that the boat safety certificate and insurance payments constituted periodical payments because they fall due annually. In any event, it was not disputed before the First-tier Tribunal that all three payments were in the nature of periodical payments.

56. If Mr B does not receive housing benefit, Mr Bates submits it is “overwhelmingly likely” that his boat will be removed by The Canal & Rivers Trust. Indeed, Mr B has previously faced an action brought by the Trust for removal of his boat from the waterway. Such an action is akin to a claim for possession (*Jones v Canal & River Trust* [2017] EWCA Civ 135; [2017] HLR 25) so that Mr B’s rights under Article 8 of the European Convention on Human Rights are engaged. Regulation 12 should be interpreted, insofar as possible, in a way that is compatible with Mr B’s Convention rights (section 3 of the Human Rights Act 1998) and “as such, it must be construed to permit the payment of housing benefit in respect of a boat licence, boat insurance and boat safety certificate”.

57. Mr Bates describes Mr Datta’s argument that Mr B could not use his boat as a dwelling without breaching his licence, since it is said to lack an engine, as his overarching submission. Mr Bates emphasises that there has been no finding of fact to this effect and it is difficult to reconcile with the fact that the Trust entered into a county court consent order under which they were prepared to grant Mr B a licence (a copy of the consent order is in the First-tier Tribunal’s bundle).

The local authority

58. The authority’s written submissions argue that a ‘boat licence’ is “a licence in respect of a particular object not a particular person” and “does not licence or permit a person to occupy a dwelling”. The waterways of England and Wales, including the land beneath and alongside them, are not dwellings. A dwelling must provide shelter from the elements, which waterways

and land do not. All a boat licence does is permit use of a vessel on particular travel routes. The permission granted to a ‘continuous cruiser’ does not amount, nor is it equivalent, to permission to a person to occupy a dwelling. It permits use of a boat as a navigable chattel but not as a dwelling. Mr Datta, for the local authority, emphasises condition 4.1 of the general licence terms and conditions, which require a licence holder to cruise in accordance with the 1995 Act.

59. Mr Datta argues that Mr Bates incorrectly assumes that Mr B’s licence authorises short-term mooring. The evidence before the First-tier Tribunal was that Mr B’s boat had no engine. He could not therefore have fulfilled the requirements of the general terms and conditions and associated guidance. Mr B’s licence did not permit the usage presumed by Mr Bates’ submissions. Further, Mr B’s boat could not be considered capable of ‘mooring’ because any purported mooring would soon result in a breach of the licence terms and conditions. In any event, Mr B’s licence permitted only navigation not use of a boat as a dwelling.

60. The term ‘payments in respect of, or in consequence of, use and occupation of a dwelling’ have been consistently interpreted in a restrictive fashion, by reference to established property law concepts. The Upper Tribunal in *Kirklees* correctly discerned an intelligible structure within regulation 12(1) in which regulation 12(1)(d) falls amongst provisions that also deploy technical property law concepts, such as ‘mesne profits’. In any event, the payment for a boat licence cannot be considered a payment for a person to use and occupy a dwelling. All a licence does is permit *use* of a boat on a waterway. It does not permit occupation.

61. *Kirklees* was on all fours with this case, since it also involved a continuous cruiser, and should lead to the same result.

62. Mr Datta disputes that ‘use and occupation’ in regulation 12(1)(d) must have a meaning that goes beyond the technical land law concept in order to perform any meaningful function. It caters for the equivalent of mesne profits but in the case of former licensees as opposed to former tenants.

63. Regulation 12(1)(f) cannot assist Mr B, submits Mr Datta, because, lacking a home mooring, he is not liable to pay mooring charges. Mr B’s licence cannot be construed as akin to a mooring charge since all it permitted him to do was leave his boat in a neighbourhood or locality for up to 14 days. A continuous cruiser licence is better described as a charge for not mooring than a charge for mooring.

64. Mr Bates' arguments, if accepted, would mean a plethora of costs ancillary to boat ownership were eligible for housing benefit, for example the cost of repairs necessary to obtain a boat safety certificate. And, if the argument were accepted, why should various motor home costs be excluded from benefit? Insurance, road tax and MOT certificates are all necessary in order to use a motor home lawfully.

65. Mr B's human rights arguments are misconceived. Any action taken by the Canal & River Trust would not be a consequence of a housing benefit decision, it would be a consequence of Mr B's failure to comply with section 17 of the 1995 Act. In any event, such a failure to comply would not be an inevitable consequence of housing benefit being refused. Typically, the outgoings of a boat dweller are far less than those of a householder. Mr B's benefits income is such that, even after meeting licence-related liabilities, he would be likely to retain more disposable income than a home owner on Employment and Support Allowance who did not live on a boat. Furthermore, Mr B stated when applying for housing benefit that he was unaware he could claim the benefit when he purchased his boat. He must therefore have anticipated meeting licence-related costs from his benefit income.

Conclusions

Why this appeal succeeds

66. I shall deal firstly with regulation 12(1)(b). The authority argue that regulation 12(1)(b) was considered by the First-tier Tribunal but, if that is the case, it did not give any reasons for finding it inapplicable. On the basis the tribunal's decision involved an error on a point of law. It is possible that the tribunal did not address regulation 12(1)(b) directly because it had found "there is no interest in land to which the payments can relate. Mr [B] cannot occupy the water. He is the owner of his boat". In my judgment, those findings were inadequately reasoned because they failed to take into account the extended definition of 'dwelling', in regulation 2(4), that applies to dwellings in the form of houseboats, as read with the definition of "land" provided by the Interpretation Act 1978.

67. The First-tier Tribunal's error would only be material if regulation 12(1)(b) could have applied on Mr B's claim. If *CH 844 2002* correctly holds that regulation 12(1)(b) does not apply unless a claimant makes a rental payment to the owner of a boat, the tribunal's error would be immaterial.

68. I do not accept that, in a houseboat case, regulation 12(1)(b) can only apply if rental, or similar such payments, are made to the owner of a boat. The provision refers to payments in

respect of a licence to occupy a dwelling and, for the time being, I shall assume that, here, ‘licence’, rather than meaning a type of statutory permission, has its land law meaning that is “an agreement which merely makes an act (such as trespass) lawful that otherwise would be unlawful, and does not properly alter or transfer any estate or interest in the property to which it relates” (*Halsbury’s Laws* (2016), Vol. 62, paragraph 1.(2)6). In my judgment, there was evidence on which the First-tier Tribunal could have held that the ‘licence’ granted to Mr B by the Canal & River Trust was, at least in part, a contractual licence. I rely here on the features of the licence described in paragraph 80 below.

69. By virtue of regulation 2(4) of the 2006 Regulations, a ‘dwelling’ is comprised of more than simply the houseboat. It includes the land used for the purposes of mooring it. When a houseboat is moored, the dwelling is comprised for housing benefit purposes of the houseboat itself, the canal or river bank used for mooring and, probably, also the land beneath the vessel (given the Interpretation Act 1978 definition of land, which includes land covered by water). If someone other than the person dwelling in the houseboat owns the land comprised within the houseboat dwelling, the owner in principle is free to licence its use, for mooring purposes, to that person. And so, in my judgment, the tribunal’s error cannot be considered immaterial. There was evidence on which the tribunal could have found that Mr B was liable under a contractual licence to make payments to the Canal & River Trust in respect of that part of the houseboat dwelling comprised of land owned or managed by the Trust. Ground 3 is therefore made out insofar as it relates to the licence fee aspect of this case. The First-tier Tribunal’s decision is set aside.

70. The next question is whether Mr B’s payments relating to a boat safety certificate and boat insurance were capable of falling within regulation 12(1)(b). It is not disputed that Mr B needed to make such payments in order to obtain a Canal & River Trust licence. In my judgment, these payments were not capable of ranking as payments in respect of a licence to occupy the dwelling comprised, when moored, of a houseboat and associated land. The payments were not made in respect of the licence itself. They were made in respect of services necessary in order for the conditions for grant of a licence to be satisfied.

71. Given my conclusions regarding regulation 12(1)(b), it is not strictly necessary for me to consider whether the tribunal erred in law in holding that Mr B’s licence fee payments fell outside 12(1)(d). However, the point has been argued before me and there also remains the question whether the tribunal erred in law in holding that the safety certificate and insurance payments fell outside regulation 12(1)(d).

72. I do not agree with Mr Bates that Owen J, in *Jacobs*, and, in turn, Upper Tribunal Judge Jacobs in *Kirklees* misconstrued regulation 12(1)(d) by failing to give ‘use and occupation’ its

ordinary meaning. I find the reasoning of the Upper Tribunal in *Kirklees* compelling. Why, within a set of provisions replete with technical terms drawn from landlord and tenant law, would the legislator suddenly decide to take a confusingly different approach? There is no reason why. The legislative intention was that ‘use and occupation’ should bear its the technical land law meaning. The First-tier Tribunal did not err in law in rejecting Mr B’s case in relation to regulation 12(1)(d).

73. Given the above conclusions, I need not consider whether the tribunal erred in law by determining that Mr B’s licence fee payment fell outside regulation 12(1)(f) (mooring charges). Mr Bates’ arguments in this respect were subsidiary to his main arguments on regulation 12(1)(b) and (d).

74. I think it is fair to say that Mr Bates did not pursue his Article 8 arguments as vigorously as he did those arguments based on domestic principles of statutory interpretation. Indeed, before the First-tier Tribunal, Article 8 appears not to have been relied on. The detailed ‘statement of case’ presented to that tribunal, beginning at p.114, did not advance human rights-based arguments. An email from the NBTA to the Canal & River Trust, in connection with boat removal proceedings, at p.63, stated “Mr [B] lives on his boat. His Convention rights under Art 8 ECHR are thus engaged. Please be advised”. But that, as I have said, was written in connection with boat removal proceedings not the housing benefit claim. It is not therefore surprising that the First-tier Tribunal’s statement of reasons did not address Mr B’s Article 8 rights. I think Article 8 was first mentioned (by the NBTA) when they sought on Mr B’s behalf the First-tier Tribunal’s permission to appeal to the Upper Tribunal (p.204).

75. In my judgment, there is no proper basis on which I could find that the First-tier Tribunal’s decision unjustifiably interferes with Mr B’s rights under Article 8 of the European Convention on Human Rights. Since the argument was not put to the tribunal, its findings of fact were not made with Mr B’s Article 8 rights in mind. On the evidence before me, I am not in a position to make the findings of fact that Mr B would need to establish in order to make out a *prima facie* case that denial of housing benefit would result in an unjustified interference with Mr B’s Article 8 rights. In particular, the evidence would not permit me to make a finding that, following a denial of housing benefit, the Canal & River Trust would bring an action for removal of Mr B’s boat from the waterway. Ground 2 does not succeed.

Re-making the First-tier Tribunal’s decision

76. I am in as good a position as the First-tier Tribunal to re-decide Mr B’s appeal against the decisions of the local authority to (a) remove (i.e. supersede) his award of housing benefit

which, as explained above, related only licence fee payments and (b) refuse to supersede that award so as to include payments in respect of boat safety certificate and insurance costs.

77. It should be clear from the above discussion that, in my judgment, Mr B's payments in respect of a boat safety certificate and insurance fell outside regulation 12. They are not payments of rent within the meaning of regulation 12(1). The local authority therefore correctly refused to supersede Mr B's housing benefit award so as to include the payments. Mr B's appeal against the authority's refusal to supersede fails. The remaining issue on the appeal Mr B made to the First-tier Tribunal is whether the authority correctly removed his housing benefit award insofar as it related to boat licence fee payments.

78. I shall begin by addressing the nature of Mr B's licence. The waterways legislation does not, in terms, require Mr B to hold a licence. What is required, by section 13(1) of the Waterways Act 1971, is for a 'houseboat certificate' to be in force with respect to his houseboat.

79. It may well be the case that the Canal & River Trust consider licences, such as that granted to Mr B, to constitute houseboat certificates under the waterways legislation. I do not know for certain and, for present purposes, do not need to find out. A single document, such as the licence document issued to Mr B, is capable of performing a dual function that is to (a) embody a houseboat certificate and (b) evidence grant of a licence to use land owned or managed by the Trust, for mooring a houseboat. Whether or not Mr B's 'licence' is intended to have such a dual function does not need to be determined. For present purposes, all I need to decide is whether this document evidences the grant of a contractual licence, that is an agreement for the use of land which would otherwise constitute a trespass. I am satisfied that it does. The document does not use 'licence' simply as an alternative way of referring to a 'houseboat certificate'.

80. In arriving at the above conclusion, I rely on the following features of Mr B's licence document:

(a) the (presumably) standard licence application form requires the applicant to "confirm that I have read, understand and accept the licence terms and conditions". Arguably, such conformation would be unnecessary if the licence were really only a houseboat certificate. That is because the terms and conditions attached to a certificate are provided for by section 16(1) of the 1995 Act. There is no question of anyone agreeing to those terms and conditions since they apply automatically. In the case of a contractual licence for the use of land, however, agreement as to terms and conditions would be required;

(b) the general terms and conditions begin by stating “in accordance with section 43(3) of the Transport Act 1962, boat licences are subject to the conditions which apply to the use of a boat on any Waterway which we own and manage”. Those introductory words suggest that the Trust, in granting a licence, is exercising powers that are only available in relation to inland waterways that it owns and manages. Section 43(3) & (8) permits the Trust to demand charges for the use of any inland waterway owned or managed by them and to make such use subject to terms and conditions;

(c) condition 6.4 provides for the Trust, in the case of expired licences, to impose a *pro rata* charge equivalent to the licence fee “to cover your use and occupation of the waterway”. Here the Trust is acting in the manner to be expected of a (former) contractual licensor dealing with its own land;

(d) Schedule 2 to the general terms and conditions includes:

“1. There are no public law provisions concerning moorings along the Trust’s canals. This is entirely a matter for management by the Trust as property owners”;

“2...As a land owner, the Trust may impose further conditions over and above those within the license conditions.”

81. These factors strongly suggest, and I so find, that the Trust, in granting Mr B a licence, was acting in its capacity as a landowner (or manager of land) rather than solely in the exercise of its statutory regulatory functions.

82. I therefore conclude that payments made by Mr B to the Canal & River Trust were payments in respect of a licence to occupy that part of his houseboat dwelling comprised of land owned or managed by the Trust. It is not disputed that the payments are periodical in nature nor that they are made in respect of a dwelling occupied by Mr B as his home. The payments therefore fall within regulation 12(1)(b) of the 2006 Regulations and constitute ‘rent’ for the purposes of that regulation.

83. It follows that the local authority, acting on 1 December 2016, did not establish a proper statutory ground for superseding Mr B’s award of housing benefit. The authority’s decision is set aside. For entitlement purposes, the result is that the authority’s actions on 1 December 2016 had no effect on Mr B’s existing housing benefit award. That is the effect of the decision given before the start of the reasons for this decision.

84. I apologise for the time it has taken to give this decision the result of my absence from duty for health reasons. And, finally, I wish to end these reasons by thanking both counsel for the skilful assistance they gave me both at the hearing of this appeal and in written submissions.

Mr E Mitchell

Judge of the Upper Tribunal

28 March 2020

**(authorised for issue: 10 May
2020)**