

Water resale

HLPA 21/9/2016

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1. Water Resale Orders

- Water Resale Order 2006
- Ofwat
- Enabling power s.150 Water Industry Act 1991 (WIA)
- Effective from 31.3.06
- Water Resale Order 2001
- Effective from 1.4.01
- 2001 order identical in terms of when it applies / core provisions re overcharging

2. When they apply?

"5. In this Order

...

"Re-seller" means any person who is **not a Relevant Undertaker** but who:

a) **provides** to any Purchaser **a supply of piped water** which a Water Undertaker has supplied, directly or indirectly, to the Re-seller; or

(b) **provides** to any Purchaser **a sewerage service** which a Sewerage Undertaker has supplied, directly or indirectly, to the Re-seller,

[but does not include any person who uses any Relevant Pipe belonging to any Water Undertaker to transport water already belonging to that first person from a point of connection on any Water Undertaker's supply system.]

...

Purchaser" means a person who occupies any dwelling and who buys from a Re-seller any water or sewerage services.

3. Effect of resale orders?

- Basic principle: unlawful to make a profit from water resale.
- Cl. 6, 2006 order: A reseller's charge to a purchaser may not exceed the amount a reseller is liable to pay the relevant undertaker.
- Save that a reseller may in addition recover from a purchaser an administration charge of up to £5.48 pa (cl. 8).
- As to the amount the reseller is liable to pay the relevant undertaker for the dwelling in question:
 - take total bill;
 - deduct:
 - (a) sums relating to premises for which the Reseller is the end user; and,
 - (b) sums relating to non-residential premises user (cl. 7);
 - the reseller must then apportion the balance between the reseller's purchasers using one of the nine apportionment mechanisms in cl. 6.
- Cl. 9: transparent charging - duty to respond to a purchaser's written request to state the amount the reseller is liable to pay the relevant undertaker for the dwelling; and to explain how calculated including the apportionment method.

4. *Jones v Southwark*: the disputed issue

- The key issue was whether Southwark was/had been liable *under the statutory scheme* to pay Thames Water for the water supply and sewerage services to Ms Jones' home?
- If so:
 - there would be resale, because it would be Southwark who would be Thames Water's "*consumer*" (s.52/54 WIA) and "*customer*" (s.219 WIA), not Ms Jones;
 - and, instead, Ms Jones would be Southwark's "*Purchaser*" (cl 5, 2006 Order) entitled to the protection of the water resale orders.
- Whereas if Ms Jones had been liable to pay Thames Water, then there would not be resale – with Southwark's explanation of why Ms Jones was liable to pay them under her tenancy agreement being that they had been appointed as a billing and collection agent for Thames Water.

5. *Jones v Southwark*: the decision

- Newey J: Southwark was liable to pay Thames Water under the statutory scheme for two reasons.
 - Between 6.3.00 and 22.7.13, due to the terms of a contract between Thames Water and Southwark: [38] - [53].
 - Between 1.4.02 and 31.3.10, because (regardless of that contract) Southwark would have been liable in any event under Thames Water's Charges Scheme: [30] – [37].

6. Route 1: the 2000 agreement

- Default position: it is the “*occupier for the time being*” from whom Thames Water is empowered to demand and recover charges: s.142(1) & s.144(1).
- However, Thames Water may enter into an agreement under which some other person becomes liable.
- The 6.3.00 agreement between Thames Water and Southwark contained a confidentiality clause. Its existence and terms were unknown to Southwark's tenants, until a court order was secured for disclosure and inspection.
- The key provisions are set out within the *Jones* judgment at [8] to [9].

7. Route 1: the 2000 agreement (cont.)

- On the construction of contracts see: *Arnold v Britton* [2015] AC 1619 and *Chartbrook v Permission Homes* [2009] AC 1101. Newey J sets out key principles from both decisions at [39] – [41].
- Also Newey J at [52(xii)]:
How the parties have conducted themselves since entering into the 2000 agreement can be of little or no significance (see eg Lewison, The Interpretation of Contracts, 6th ed (2015), pp 179–189), but, in case it matters, it can be observed that the parties behaviour has not obviously been entirely consistent with an agency relationship.

8. Route 1: the 2000 agreement (cont.)

- Newey J's reasons for concluding the 2000 agreement was a sale agreement (i.e. an agreement under which LBS assumed liability for the charges) and not an agency agreement are at [52(i) to (xiii)].
- These included:
 - (i) Clause 2.1 of the 2000 agreement provided for Southwark to pay for "all of the provider's charges ... in respect of the services provided to the unmeasured premises" reflecting a recital to the effect that Southwark would "pay for the services in respect of the premises". It is common ground that Southwark was thereby obliged to pay the provider's charges regardless of what (if any) sums it received from its tenants. The alleged principal (Thames Water) was to have no interest in moneys collected by its alleged agent (Southwark).*

9. Route 1: the 2000 agreement (cont.)

- As to *Lambeth LBC v Thomas* (1997) 30 HLR 89:
 - (xi) In the Lambeth case ... the focus appears to have been on whether Lambeth was acting on behalf of the water company for the purposes of paragraph 20 of Schedule 1 to the Water Consolidation (Consequential Provisions) Act 1991 rather than on whether a relationship of agency in the strict sense existed. In any case, it is not entirely clear what issues were taken ...*
- As to *Rochdale v Dixon* [2012] PTSR 1336:
 - Rix LJ [in Rochdale] thought that the relationship between Rochdale and UU was probably one of agency. However, the agreement at issue before him pointed much more clearly in that direction than the one with which I am concerned. The features that Rix LJ listed in para 41 of his judgment (quoted in para 47 above) are almost entirely lacking from the 2000 agreement.*

10. Route 2: the Charges Scheme

- s.142(1) is the source of Thames Water's powers to fix, demand and recover charges for its services and facilities.
- One constraint on the exercise of the s.142(1) powers is that they must be exercised either in accordance with a Charges Scheme or "*in accordance with agreements with the persons to be charged*": s.142(2).
- Each undertaker has to produce a Charges Scheme annually. Each Charges Scheme must be approved by Ofwat.
- From 1.4.02 and 31.3.10 Thames Water's charges scheme stated:

Person Chargeable

...

(c) Where the relevant premises to which the supply is made is let on a tenancy of less than 12 months or licence, the owner of the premises shall be regarded as the occupier and be liable for charges except where some other person has paid the charges or is liable by agreement with Thames Water.

11. Route 2: the Charges Scheme (cont).

- Southwark's position: this part of its Charges Scheme was unenforceable because the statutory scheme does not permit a Charges Scheme to impose liability on an owner in place of the occupier.
- That issue of statutory construction was determined against Southwark:
36. On balance, however, I none the less take the view that a charges scheme can properly provide (as Thames Water's charges schemes formerly did) for the owner of premises to be chargeable where they are let on a tenancy of less than twelve months or licence. In such a situation, the owner might be said to be a person to whom the undertaker provides services or in relation to whom it carries out trade effluent functions (within the meaning of section 142(1)(b) of the WIA) even if the occupier is also to be treated as receiving the services under section 144(1). Where that is so, it will, I think, be possible for a scheme to determine which of those to or in relation to whom services are being provided is to be responsible for the charges. After all, section 142(2) provides for the powers conferred by subsection (1) to be exercisable by or in accordance with a charges scheme and section 143(4) enables such a scheme to make different provision for different cases and contain supplemental and consequential provision.

12. *Jones v Southwark*, subsequent developments

- Southwark is not appealing.
- Instead, Southwark accepted a Claimant's Part 36 offer made at an earlier stage in the proceedings to resolve the whole of the claim on the basis that there was a declaration that Southwark was a water reseller from 6.3.00 to 22.7.13.
- By accepting this offer, Southwark avoided the second, unresolved issue being determined at a follow-up hearing in the High Court; namely to determine whether a deed of variation between Thames Water and Southwark on 23.7.13 was effective.

13. *Jones*, subsequent developments (cont.)

- If 2013 deed effective, Ms Jones conceded it changed the relationship from one of resale to one of agency.
- However, Ms Jones denied it was effective, Newey J at [14]:
Miss Jones contends that the 2013 deed is invalid because Southwark failed to follow its key decision procedures and to consult its tenants under section 105 of the Housing Act 1985. As, however, Thames Water stands to be affected by any ruling on the 2013 deed but is not a party to these proceedings and has not agreed to be bound by their result, I have adjourned that aspect of the case.
- The breach of the key decisions procedure was admitted by Southwark; however Southwark disputed that this invalidated the deed.
- If raised in defence to possession claims, Southwark will need either to confront this issue or write-off the relevant arrears in each such claim.

14. *Jones*, subsequent developments (cont.)

- Tenants entitled to:
 - repayment of 22.1% differential between tenant's liability to Southwark and Southwark's liability to Thames Water
 - plus interest on sums overpaid: cl. 10 of 2006 order
 - minus the £5.48pa permissible administration charge
- 7.4.16: Southwark announce they will repay tenants for period April 2010 to July 2013 only.
- 7.6.16: announce will repay from 1.4.01 to 23.7.13; estimated total refunds £28.6 million; payments to 31,070 current tenants and 43,358 former tenants

15. *Jones*, subsequent developments (cont.)

- Why the charge of heart?
- Limitation Act 1980: only imposes time limits for *bringing* actions; whereas "a defence, properly so called, can never become time-barred": *Henriksens Rederi A/s v T. H. Z. Rolimpex the Brede* [1974] Q.B. 233 at 245.
- Limitation Act 1980 s.32:
 - (1) ... where in the case of any action for which a period of limitation is prescribed by this Act, either—
 - (a) [fraud] ...
 - (b) **any fact relevant** to the plaintiff's right of action has been **deliberately concealed** from him by the defendant; or
 - (c) the action is for relief from the consequences of a **mistake**;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it

16. Jones, subsequent developments (cont.)

- 25.4.16: LB Southwark to DJ Zimmels at Lambeth CC: *"confident that the amount due ... will not exceed £618.07 ... when presenting the Defendant's rent account at the hearing, the Council will deduct £618.07 from the arrears"*
- 27.6.16: LB Southwark to DJ Zimmels: *"will seek adjournments of all possession hearings in cases potentially affected ... maximum liability due to each household..."*. The following table then appears in LBS's 27.6.16 letter:

No of bedrooms	Maximum water refund
Bedsit	£1,158.18
1	£1,182.88
2	£1,296.17
3	£1,878.50
4	£1,777.49
5	£1,619.30
6	£1,736.73
7	£1,999.22

- LBS were aware for many years before this of the potential breach of the water resale provisions; hence 2013 deed seeking to avoid its effect. Yet possession claims continued.

17. Jones, subsequent developments (cont.)

- Southwark has consulted on terminating 2013 agreement; final decision Nov 2016?
- Benefits to tenants:
 - Remedy for arrears:
 - If resale or agency: non-payment > possession proceedings
 - If direct customer: cannot be cut off; simply > CCJ
 - Discounted charges:
 - If resale: no control
 - If agency: control but probably unaware
 - If direct customer:
 - Default is unmetered charge, based on rateable value.
 - Metered charge: right to demand meter / metered charging.
 - Assessed household charge (if meter installation too difficult): eg Thames Water 2016/17 - single occupier: **£239**; 1 bed **£295**; 5 bed or more: **£414**
 - Watersure tariff: income-based benefit and either 3 kids or more under 19 & in f-t educ. or medical condition requiring use of "a lot of extra water"; eg Thames Water 2016/17 - fixed amount: **£411**

18. Wider implications: in Thames Water region

- Newey J:
15 Miss Jill Jones explained that Thames Water has what she called commercial agency arrangements in place with 69 local authorities and housing associations. These arrangements, she said, cover some 375,000 properties.
- Jill Jones' witness statement treated these 69 other agreements as being materially identical to the Southwark agreement.
- Thames Water / Tower Hamlets agreement produced to court & was identical, save that the % difference between price to tenants and Tower Hamlets' liability to Thames Water was redacted.
- As at the date of the Jones trial, none of the other 69 social landlords had followed Southwark's 2013 decision to enter into a different type of agreement with Thames Water.
- In any event, from 1.4.02 and 31.3.10 there will have been resale due to terms of the Thames Water charges scheme.
- If in TW region but outside of Southwark & the 69 other LAs/HAs areas? Tenants liable to / billed by Thames Water in same way as owner occupiers.

19. Wider implications: outside TW region

- Since 1.4.01 (when first resale order effective), have water/sewerage charges been payable to landlord rather than water/sewerage company?
- If yes:
 - Seek disclosure of agreement between landlord and water/sewerage company; should this be construed as a resale agreement (as in Jones), or merely as an agreement to bill and collect on behalf of the water/sewerage company?
 - Review charges schemes in force during that period; were tenants liable to pay the water/sewerage charges or was the owner of the premises?

20. Funding

- Exceptional case funding for a Part 7 claim mirroring Jones.
- Judicial review, but significant procedural disadvantages.
- In defence to possession claims, on the back foot/will settle
- Complaint to LGO: see *Report on an investigation into against London Borough of Hammersmith and Fulham* 14 January 2014 (ref. 12 012 460). Press summary:

as a result of the LGO investigation, the council identified that it had been charging residents more than it had paid Thames Water. This is not in accordance with the Water Resale Order. ... The council has since written to tell all affected tenants that they are owed money for overcharged water rates between 1 April 2008 and 31 March 2013. The woman who brought the complaint has been refunded £798.99 and the council is in the process of refunding all other tenants who have been overcharged.