

8593

MAN/00BP/LSC/2012/0142

HM COURTS & TRIBUNALS SERVICE
LEASEHOLD VALUATION TRIBUNAL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

LANDLORD AND TENANT ACT 1985
SECTION 27A (1) and SECTION 20C

Property: 62, Wimpenny House, Eldon Street, Oldham OL8 1NJ
Applicant: Mr.J.Tomlinson
Respondent: First Choice Homes Oldham
Tribunal: Mrs.C.Wood (Chair)
Mr.J.Rostron
Date of decision: 25 April 2013

DECISION

Background

1. By an application dated 16 October 2012, ("the Application"), the Applicant sought a determination under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") in respect of the reasonableness of, and his liability to pay, that part of the service charge which constitutes the central heating charge for the periods 28 September 2009 – 31 March 2009, 1 April 2009 – 31 March 2010, 1 April 2010 – 31 March 2011, 1 April 2011 – 31 March 2012, and 1 April 2012 to date. The Application was subsequently amended by the Applicant by deleting the periods 28 September 2008 – 31 March 2009 and 1 April 2009 – 31 March 2010.
2. Directions were issued to the parties dated 29 November 2012 in which it was stated as follows:
 - 2.1 that the Application would be limited to the service charge years ended 31 March 2011, 2012 and 2013; and,
 - 2.2 that, in accordance with the parties' wishes as indicated at the date of the Directions, the matter would be determined without a hearing unless either party requested one within 28 days of the date of the Directions. No such request was received from either party.
3. The following written evidence was submitted by the parties:

- 3.1 the Applicant's Statement of Case and supporting documents dated 4 January 2013;
 - 3.2 the Respondent's submissions and supporting documents dated January 2013 ("the Respondent's Submissions");
 - 3.3 the Applicant's Reply to the Respondent's submissions dated 11 February 2013 ("the Reply");
 - 3.4 the Respondent's further submissions dated 15 February 2013, ("the Further Submissions").
4. Paragraph 3 of the Directions required the Respondent to send to the Applicant's representative and to the Tribunal copies of the signed tenancy agreement relating to the Applicant's tenancy:
 - 4.1 by letters dated 6 and 19 December 2012 respectively, the Respondent provided the Tribunal and the Applicant's representative with a copy of an agreement dated 14 September 2010 in respect of a tenancy which commenced on 20 September 2010, and confirmed in its letter to the Tribunal that a copy of the signed page of this Agreement had been sent to the Applicant's representative by letter dated 2 August 2012;
 - 4.2 at the date fixed for determination of the Application, the Tribunal expressed concern that the issue as to the applicable tenancy agreement had not been satisfactorily resolved and, accordingly, by e-mail dated 15 March 2013, the Tribunal sought further clarification from the Respondent. In his e-mail response dated 22 March 2013, Mr.W.Bradley for the Respondent stated as follows:
 - (i) that, in satisfaction of paragraph 3 of the Directions, the Respondent had supplied the Tribunal with a copy of the tenancy agreement dated 14 September 2010;
 - (ii) that this agreement included provisions relating to the costs included in the Applicant's rent for heating at the commencement of his tenancy. In particular, Clause 5 of the tenancy agreement contained the requirement to pay a heating charge.;
 - (iii) that, in November 2010 as part of the proposals for the stock transfer of properties (including the Property) from Oldham Council to the Respondent, the tenants voted in favour of a new tenancy agreement. The stock transfer was completed on 7 February 2011. By letter dated April 2011, the Respondent wrote to all tenants advising them of completion of the stock transfer and enclosing 2 copies of their new tenancy agreement, with a request for them to sign and return one copy, and retain the other for their records. According to the Respondent, the Applicant failed to return a signed copy of the tenancy agreement.

The Tenancy Agreements

5. The tenancy agreement dated 14 September 2010, (" the First Agreement"), contains the following provisions:
 - 5.1 a statement on the first page that "Your rent also includes £8.75 heating and digital TV. The amount that you have to pay for the supply of heating under 5 l i ispence per kilowatt/hour";
 - 5.2 in section 5 entitled "Rent":

- (i) paragraph a: " You must pay the rent which includes...all other charges for the property...(for example, service charges, charges for heating and other services);
 - (ii) paragraph e: " We may change your rent at any time. We will tell you of any change in rent at least four weeks before the change. But we will still change your rent even if you do not receive this notice.";
 - 5.3 section 5 does not contain a paragraph 5 I i as referred to on the signature page;
 - 5.4 the Contents include reference to section 18 Appendices, which are listed as Furniture List, Tenancy Agreement and Direct Debit Form. The Respondent has confirmed to the Tribunal that there was no Tenancy Agreement attached as an Appendix to the First Agreement.
6. The terms of the tenancy agreement which the Respondent has confirmed was sent out to all tenants (including the Applicant) following the stock transfer, (" the Second Agreement"), contains the following provisions:
- 6.1 under the section entitled " Weekly Payments", paragraph 4: Heating and Hot Water Charge (if this applies);
" The weekly charges may be varied as set out in this tenancy agreement";
 - 6.2 under the section entitled "Tenancy Conditions Part A: Rent and Service Charge", paragraph 4.2:
" We will review the cost of supplying heating and hot water to your home quarterly and serve a notice of your new Heating and Hot Water Charge on 31 March, 30 June, 30 September and 31 December. On and from those dates we will increase or decrease the amount you have to pay to reflect your current and projected usage of heating and hot water. The amount you have to pay will be calculated by reference to the cost to us of supplying you with heating and hot water."

The Law

7. Section 18 of the Landlord and Tenant Act 1985 ("the 1985 Act") provides:
- (1) in the following provisions of this Act "service charge" means "an amount payable by a tenant of a dwelling as part of or in addition to the rent –
 - (a) which is payable directly or indirectly for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
 - (b) the whole or part of which varies or may vary according to the relevant costs.
 - (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
 - (3) For this purpose –
 - (a) "costs" includes overheads, and
 - (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

8. Section 19 provides that –

(1) relevant costs shall be taken into account in determining the amount of a service charge payable for a period –

- (a) only to the extent that they are reasonably incurred, and
- (b) where they are incurred on the provision of services or the carrying out of works only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly.

9. Section 27A provides that -

(1) an application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to –

- (a) the person by whom it is payable
- (b) the person to whom it is payable
- (c) the date at or by which it is payable, and
- (d) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3)

(4) No application under subsection (1)...may be made in respect of a matter which -

(a) has been agreed by the tenant.....

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

10. In *Veena SA v Cheong* [2003] 1 EGLR 175, Mr. Peter Clarke comprehensively reviewed the authorities at page 182 letters E to L inclusive. He concluded that the word “reasonableness” should be read in its general sense and given a broad common sense meaning [letter K].

Submissions

11. In its Statement of Case, the Applicant referred to:

- 11.1 the letter dated 29 June 2012 from the Respondent to the Applicant which confirmed that the Applicant’s new weekly heating charge had been assessed at £32.22, and that amended payments should commence immediately. This letter also referred to a previous letter containing details of the new heating charge although a copy of this letter is not attached;
- 11.2 rent statements which show that the rent increased by £22.37 with effect from the week commencing 13 May 2012;
- 11.3 correspondence from the Respondent acknowledging errors that had been made in calculation of the percentage increase in the heating charge, and the method of calculation;
- 11.4 requests for information made by the Applicant’s representative to the Respondent;
- 11.5 certain contractual and statutory requirements which it is submitted are relevant in determining the Application, as follows:
 - (i) whether the Respondent has acted in accordance with the lease terms in relation to the increase in the heating charge;

- (ii) whether there has been compliance with section 47 of the Landlord and Tenant Act 1987 ("the 1987 Act");
 - (iii) whether there has been compliance with section 21B of the 1985 Act;
 - (iv) whether any of the costs claimed by way of service charge are irrecoverable under section 20B of the 1985 Act;
 - (v) whether there has been compliance with section 20 of the 1985 Act, or, in the alternative, section 20ZA;
 - (vi) whether the costs claimed are reasonable;
- 11.6 the breach by the Respondent of the terms of the lease, the interpretation of which means that the increase in the service charge should not have occurred until 30 June 2012;
- 11.7 the absence of any section 21B notice accompanying the demand, and, in relation to the failure of compliance with section 47, to the decision in Brent London Borough Council v Shulem B Association Ltd [2011] EWHC 1663 (Ch);
- 11.8 as the increase in the service charge is in excess of £100 for the Applicant, the Respondent was obliged to consult in accordance with the Service Charge (Consultation Requirements) (England) Regulations 2003 and the Public Contracts Regulations 2006;
- 11.9 the increase of 46% in the tariff, and the annual heating charges of £1675.44 are not reasonable as required under section 19 of the 1985 Act.
12. In its Submissions, the Respondent made the following submissions:
- 12.1 that the Applicant is an assured tenant of the Property, his tenancy commencing on 20 September 2010;
- 12.2 that, as a result of arrears of rent and service charge, the Respondent had commenced recovery proceedings against the Applicant;
- 12.3 that the Applicant has been an excessive consumer of heat and hot water since the commencement of his tenancy;
- 12.4 that the tariff rate for heating and hot water was 5.5p kWh from April 2009 – April 2012. In view of the Applicant's admission "...that the Service Charge up to 30th March 2010 was reasonable..." as confirmed in a letter dated 4 December 2012 from the Applicant's representative to the Respondent, there was no basis for challenging that same rate for the period from 1 April 2010 until its increase in 2012;
- 12.5 that the communal system for providing heat and hot water to the properties (including the Property) is extremely efficient. Individual consumption is metered;
- 12.6 that the income and expenditure calculations for the Eldon Street Boiler House (which serves the Property) are not externally audited as this would result in additional expenditure which would, in turn, increase service charge costs to tenants, but all statutory returns are independently audited. In 2012/13, expenditure increased to £184,580 from £163,264 in 2011/12;
- 12.7 the increased tariff rate of 8.1p kWh is a subsidized rate which, after consultation, has been agreed should be charged across the Borough of Oldham by the Respondent and Oldham Council operating these communal heating and hot water schemes;
- 12.8 information on then current tariffs obtained from Energy Switch2 (who manage the heating scheme for the Respondent and for a range of other providers) showed that the lowest tariff for heat and hot water is 4.42p, the

median is 7.25p and the highest is 13.44p in respect of communal heating supply. In addition, the Respondent was advised that, unlike the Respondent, many providers make a standing charge;

- 12.9 that a copy of the First Agreement had been supplied to the Applicant's representative on 2 August 2012 and again on 29 November 2012, and that the Applicant has failed to provide a copy of the tenancy agreement it relies upon with the Application and that there remains a lack of clarity regarding this;
- 12.10 that, notwithstanding the references in the Applicant's Statement of Case to a "demand" and a "service charge demand", no demand has been made upon the Applicant, no demand will be made in the future and nor is there any obligation upon the Respondent to make such demand. Accordingly, there is no obligation upon the Respondent to comply with any legislative requirements relating to such demands;
- 12.11 with regard to the Applicant's claims regarding the Respondent's failure to comply with the consultation requirements relating to long-term qualifying agreement, the Applicant has failed to identify the agreement in question; further, the Respondent provides the hot water and heating services "in house" ie there is no 3rd party contractor involved. The Respondent has entered into a contract for the provision of metering services where the annual charge per tenant is about £70 per annum and therefore below the statutory threshold in this respect;
- 12.12 with regard to the reasonableness of the weekly charge, it is estimated that the average consumer of heat and hot water in a one-bedroom property like the Property would pay £8.90 per week. The Applicant's weekly charge took into account arrears as well as ongoing consumption. The Applicant is now on a pre-payment meter and his weekly expenditure is about £7.50 per week;
- 12.13 with regard to the issue of reasonableness, the weekly amount payable by the Applicant is subsidized, and does not include any charge in respect of construction, installation, repair or maintenance;
- 12.14 with regard to the Applicant's claim that the weekly charge is "manifestly excessive and unreasonable", it reflects past excessive consumption on the Applicant's part and his failure to pay. Current weekly consumption at a cost of about £7.50 per week is almost identical to the average consumption across the scheme as a whole.

13. The Reply focused on two points in the Respondent's Submissions as follows:

- 13.1 the question of whether a demand has been served: the Applicant submits that a demand is required under paragraph 4.2 of the tenancy agreement; that the letter of 29 June 2012 was such a demand; that the Respondent had failed to comply with the terms of the tenancy agreement which failure might result in the tenant not being required to make payment: *Leonora Investments Co Ltd v Mott MacDonald* [2008] EWCA Civ 857; the consequence of the error in calculation referred to in correspondence dated 29 October 2012;
- 13.2 whether the communal metering contract is a long-term qualifying agreement.

14. In the Further Submissions, the Respondent responded as follows:

- 14.1 The Service Charge (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007, ("the Service Charge Regulations"), do not apply as no demand has been served on the Applicant;

- 14.2 the decision in *Leonora Investments Ltd v Mott MacDonald* is not relevant in these circumstances;
- 14.3 there is no long-term qualifying agreement to which the consultation requirements apply. It was also noted that, in the Reply, the Applicant had correctly identified the annual charge under the metering contract as £52 per annum per tenant, not £70 as suggested by the Respondent in its Submissions.

Determination

15. The Tribunal must apply a three stage test to the application under section 27A:

(1) Are the service charges recoverable under the terms of the Lease? This depends on common principles of construction and interpretation of the lease.

(2) Are the service charges reasonably incurred and/or services of a reasonable standard under section 19 of the 1985 Act?

(3) Are there other statutory limitations on recoverability, for example consultation requirements of the 1985 Act as amended?

16. The Tribunal determined as follows:

- 16.1 in view of the Applicant's admission that the service charge for the period up to 31 March 2010 was reasonable, and, that the tariff rate of £5.05p kWh for hot water and heating was not increased until 13 May 2012, the heating and hot water charges for the service charge year 1 April 2011 - 31 March 2012, and for the period from 1 April 2012 - 13 May 2012 are reasonable and, subject to paragraph 16.3(iv), the Applicant is liable to pay the charge accordingly;
- 16.2 that, having regard to all of the evidence submitted by the parties, the tariff of 8.1p per kWh is reasonable and that, subject to paragraphs 16.3(iv) and (v), the Applicant is liable to pay the Heating and Hot Water Charge as calculated in accordance with this tariff;
- 16.3 notwithstanding the Directions and further requests for information of the Respondent, it is still unclear as to whether the First Agreement or the Second Agreement constitutes the Applicant's tenancy agreement. The Tribunal has therefore considered the terms of both of the agreements and concluded as follows:
- (i) the copy of the First Agreement is incomplete. However, under paragraph 5e of the Section entitled "Rent" the Respondent assumes an obligation to notify the tenant of a change in the rent; and,
 - (ii) under paragraph 4.2 of Part A of the Tenancy Conditions: Rent and Service Charge, the Respondent is obliged to serve a notice of a new Heating and Hot Water Charge on 31 March, 30 June, 30 September and 31 December, such change to take effect from such date;
 - (iii) the letter dated 29 June 2012 from the Respondent to the Applicant is notice under paragraph 5e of the First Agreement, or, in the alternative, notice under paragraph 4.2 of the Second Agreement, and, in both cases, constitutes a demand for the payment of a service charge under section 21B of the 1985

- Act. As such, the demand must be accompanied by a summary of the rights and obligations of tenants in the form prescribed by the Service Charge Regulations;
- (iv) the Respondent's failure to comply with the Service Charge Regulations entitles the Applicant to withhold payment of the charge in accordance with section 21B(3) of the 1985 Act;
 - (v) under clause 4.2 of the Second Agreement, the earliest date upon which the change in the tariff could take effect is 30 June 2012, and not 13 May 2012;
 - (vi) it appears to the Tribunal that, if compliance were made by service of a further demand, section 20B(2) of the 1985 Act would apply and recoverability of the charges would not be limited under s20B(1) of the 1985 Act;
17. in respect of the demand dated 29 June 2012, there appears to be no failure of compliance with section 47 of the 1987 Act entitling the Applicant to withhold payment. No evidence of non-compliant demands was presented to the Tribunal relating to the service charge years ended 31 March 2011 and 31 March 2012;
 18. there is no long-term qualifying agreement requiring consultation in accordance with section 20 of the 1985 Act, nor an application for dispensation under section 20ZA of the 1985 Act;
 19. in view of the Tribunal's determination in paragraph 16.3(iv), it is just and equitable in all the circumstances to grant the Applicant's application under section 20C of the 1985 Act.

Catherine Wood
Chair
25 April 2013