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**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **CHI/40UE/LSC/2013/0100.**

Property : **90 Holyoake Street, Wellington,
Somerset, TA21 8LE.**

Applicant : **David Bartholomew Findlay.**

Representative : **In person.**

Respondent : **Magna West Somerset Housing
Association Limited.**

Representative : **Mr. M Taylor, a solicitor employed by
the Respondent.**

Type of Application : **Determination of reasonableness of
service charges, S27A and S20C of the
Landlord and Tenant Act 1985 (as
amended).**

Tribunal Members : **Judge J G Orme (Chairman)
Mr. S Hodges FRICS (Member)
Mr. M R Jenkinson (Member).**

**Date and Venue of
Hearing** : **18 December 2013.
Lyngford House Conference Centre,
Taunton.**

Date of Decision : **3 January 2014.**

Decision

For the reasons set out below, the Tribunal:

- 1. Determines that the amount payable by the Applicant, David Bartholomew Findlay, to the Respondent, Magna West Somerset Housing Association Limited by way of service charge in respect of heating and hot water for the year ended 31 March 2013 was £281.87 and that the amount payable by way of estimated service charge in respect of heating and hot water for the year ending 31 March 2014 is £2.99 per week.**
- 2. Orders pursuant to Section 20C of the Landlord and Tenant Act 1985 (as amended), that all of the costs incurred by the Respondent in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant.**

Reasons

Background

1. The Respondent, Magna West Somerset Housing Association Limited (“Magna”), is a registered provider of social housing for communities across Somerset. In May 2011 Magna completed the development of a new scheme at Holyoake Street, Wellington. The development consists of 36 flats arranged over 3 floors. 16 flats are contained within an area of sheltered housing. The remaining 20 flats are available to meet general social housing needs.
2. The development meets level 4 of the Code for Sustainable Homes which requires the building to meet stringent environmental and energy efficiency standards. The building has a communal heating and hot water system powered by a bio-mass boiler fuelled by woodchip backed up by gas boilers as required.
3. The Applicant, David Bartholomew Findlay, is an assured tenant of flat 90 Holyoake Street (“the Property”). His tenancy began on 13 June 2011. The Property is within the area of sheltered housing.
4. By an application dated 21 August 2013, Mr. Findlay applied to the Tribunal to determine his liability to pay and the reasonableness of certain service charges demanded by Magna. He asked the Tribunal to determine the charges for heating and hot water for the year ended 31 March 2013 and the estimated charges for heating and hot water for the year ending 31 March 2014. He alleged that the charges were not calculated in accordance with the terms of his tenancy agreement. The application included an application for an order to be made pursuant to section 20C of the Landlord and Tenant Act 1985 (as amended) (“the Act”).

5. On 9 September 2013 the Tribunal issued directions providing for the parties to file and serve statements of case and for the application to be listed for hearing. The parties complied with the directions and the application was listed for hearing on 18 December 2013.

The Law.

6. The statutory provisions primarily relevant to applications of this nature are to be found in sections 18, 19, 20C and 27A of the Act.
7. Section 18 of the 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 of the act provides:
 - 1) *Relevant costs shall be taken into account in determining the amount of the 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.*
 - 2) *Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.*
9. Section 27A provides:
 - 1) *An application may be made to the appropriate 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 amount which is payable,*
 - d) *the date at or by which it is payable, and*

- e) the manner in which it is payable.*
- 2) Subsection (1) applies whether or not any payment has been made.*

Subsections 3 to 7 are not relevant in this application.

10. Section 20C provides:
- 1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, ... or the First-tier Tribunal ... are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.*
 - 2) ...*
 - 3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.*

The Tenancy Agreement

11. The Tribunal had before it a copy of the tenancy agreement dated 13 June 2011 made between Magna as landlord and Mr. Findlay as tenant. By the agreement, the Property was let to Mr. Findlay on an assured shorthold tenancy from 13 June 2011 at a weekly rent of £86.37. The assured shorthold tenancy was converted to an assured periodic tenancy after 12 months. In addition to the rent, Mr. Findlay was obliged to pay a variable service charge. The tenancy agreement provided that the initial service charge was £19.63 per week and the initial support charge was £12.71 per week. No initial personal service charge was shown as being payable.
12. The service charge provisions are set out at clause 1.4 of the tenancy agreement and include the following:
- 1.4.1. The service charge covers your proportion of the costs of services, works, and facilities which we provide to you personally ("a personal service charge"), or to you in common with other tenants, or to your home in common with other buildings or land, such as the following: heating; water; drainage; cleaning communal areas; buildings maintenance and grounds maintenance; maintenance, repair and upgrading of communal facilities; communal energy and insurance; communal television aerials; management fees and/or administration costs; and life-line. These services, works and facilities may be provided by us to you through the usual utility providers, external contractors appointed by us, managing agents or our own staff such as caretakers or wardens. The cost of the services, works or facilities includes all associated costs that are attributable to the services, works or facilities such as vehicle costs, clothing tools and equipment.*

- 1.4.2. *Your proportion of the cost of the services, works or facilities is calculated in accordance with the number of properties that benefit from the services, works or facilities. For example, if a service benefits four properties, your proportion is a quarter of the cost of providing that service. Management fees and/or administration costs are calculated as a percentage of your total service charge, excluding insurance charges, any adjustments as set out in clause 1.4.7, any personal service charges and any income received by the use of the communal facilities. This percentage will be no more than 20% and will reflect the costs of administering the service charges.*
- 1.4.3 *The services, works and facilities for which you pay under the service charge may vary from time to time. You agree to pay for the services, works and facilities that we provide.*
- 1.4.6 *Your proportion of the cost of the services, works and facilities in respect of which service charge is payable and which you have received or benefited from or which have been made available to you will be confirmed to you in an annual statement of account calculated up to 31 March each year.*
- 1.4.7 *The service charge that you pay under this agreement is based on our estimate of what the services, works and facilities will cost us to provide each week and, where applicable, an amount to be contributed to the sinking fund. We can change the amount you must pay by giving you not less than one month's notice in writing. After 31 March in each year we will calculate the amount that has been paid and the actual costs to us in each year of providing the services, works and facilities, and, where applicable, making provision for future services, works and facilities in the sinking fund. If the actual costs to us are more or less than the amount that has been paid, we shall notify you of the difference and make any necessary adjustments to the following year's estimate.*

The Inspection.

13. The Tribunal inspected the Property on 18 December 2013. Mr. Findlay was present in person. Magna was represented by Mr. Michael Taylor, a solicitor employed by Magna, Mr. Tony Murray, a director of Magna and Mr. Matthew Parsons, the financial services manager of Magna.
14. The Tribunal was shown the plant room in the building which contained the store for woodchip, the woodchip boiler, 2 gas fired boilers and the main hot water storage tank. The Tribunal was told that the boilers provide all the heating and hot water for the 36 flats in the building. The Tribunal saw the gas meter which measures the quantity of gas used by the gas boilers. The Tribunal was told that there was no gas supply to any other part of the building.

15. The Tribunal inspected the flat occupied by Mr. Findlay. Inside the front door of the flat is a cupboard which contains the flat's hot water tank. The water in the tank is heated by hot water from the boilers. The flat is heated by under-floor heating using the hot water from the boilers. The level of heat within the flat can be controlled by thermostats on the manifold system. Within the cupboard is a smart meter in the hot water flow pipe which measures the heat consumption within the flat. There is also a water meter which measures the consumption of water (whether hot or cold) within the flat. An immersion heater is provided for emergency back-up heating of water in the event of failure of the main boilers. The Tribunal was shown individual electricity meters for each flat in a cupboard in the communal areas. The tenants contract directly with their electricity supplier for their own electricity supply.
16. The Tribunal noted the communal areas for entrance hall and stairs and inspected the communal meeting room. The Tribunal was told that there was no separate heating in those areas and that they were heated by heat escaping from the hot water supply pipes and by heat from the flats.

The Hearing and the issues.

17. The hearing took place at the Lyngford House Conference Centre, Taunton on 18 December 2013. Mr. Findlay appeared in person. Magna was represented by Mr. Taylor. Mr. Murray and Mr. Parsons gave evidence on behalf of Magna.
18. At the outset of the hearing, Mr. Findlay confirmed that he was not disputing Magna's right to recover a service charge; any item of the service charge other than the charge for heating and hot water; that the cost of heating and hot water is recoverable through the service charge; that the total costs of providing heat and hot water were reasonable; or that Magna is entitled to estimate the cost in advance and charge accordingly on a weekly basis in advance.
19. Mr. Findlay agreed that the sole issue to be determined by the Tribunal was whether the terms of the tenancy agreement allow Magna to charge for the cost of heating and hot water according to the amount used by each tenant.

The Evidence and the Submissions.

20. Mr. Findlay produced a written submission dated 22 October 2013.
21. Mr. Findlay said that for the period from 13 June 2011 to 31 March 2012, the total cost of heating and hot water was divided equally between the 36 flats and that was in accordance with the terms of the tenancy agreement. He alleged that as from 1 April 2012, Magna started to measure consumption of heat energy by each flat using the smart meters and introduced proportional charging based on the individual consumption of each tenant. He said that the terms of the tenancy agreement do not allow such a method of charging.

22. Mr. Findlay produced copies of statements produced by Magna showing his consumption of heat energy during the period from 1 April 2012 to 30 June 2013. The later statements show a charge for usage of gas and woodchip as well as a gas standing charge. He said that he does not use any gas or woodchip.
23. Mr. Findlay said that the provision of heat and hot water to his flat was the provision of a communal service. The heating system serves the other flats and the communal areas. According to the terms of the agreement, such a cost must be divided equally. The standing charge for the gas supply was charged in that way. There was no basis for treating the cost of the gas supply and the supply of woodchip as a personal service charge.
24. He accepted that that might result in him paying more but he said that Magna must comply with the terms of the agreement. His main concern was that the statements produced by Magna showed that the cost of energy could vary from 5p to 12 p per KWh and that Magna was not able to provide any estimate of the future cost of providing a unit of energy. That meant that he was unable to budget for the future and consume the optimum level of heat to suit the conditions and his budget. He might be prepared to pay a charge based on a metered consumption provided that the future cost could be accurately predicted. He wanted to know what cost he was likely to incur.
25. Mr. Findlay said that the only service which was supplied to him personally was the supply of water which was individually metered but which was actually charged to him as part of the service charge on an equal sharing basis.
26. Magna relied on a written statement of case dated 27 November 2013.
27. Mr. Parsons explained how the charges for heat and hot water are calculated. Each quarter a reading is taken from each of the smart meters in the 36 flats to determine the amount of KWhs of energy used by each flat. The total of those readings produces a figure for the total heat energy used in the building. No allowance is made for the communal areas as Magna says that there is no separate heating in those areas. The amount of gas used in each quarter is found using the figures obtained from the gas meter and the bill from the gas supplier. From that information, Magna is able to calculate the amount of heat energy in KWhs produced by the gas boilers. The total KWhs used in the building in the quarter less the amount produced by the gas boilers represents the KWhs produced by the bio mass boiler. The cost of woodchip consumed each quarter is ascertained. The gas standing charge is divided equally between the 36 flats. The cost of the gas and woodchip consumed is split between the flats in the proportion of the amount of KWhs used by each flat divided by the total KWhs used in the building.

28. Mr. Parsons said that this method had been applied since 2011 and that there had been no change on 1 April 2012 although for the purpose of the estimate in 2011, as there was no historic evidence of usage, an equal division had been used. Magna considered that this was a fair method of apportionment which reflected the individual usage of heat and hot water. Magna considered that, as it had the technology available to apportion usage accurately, it would be unfair to divide the cost equally resulting in someone who may consume large amounts of energy by keeping his flat very hot and having 4 baths a day paying the same as someone who consumes much less energy by keeping his flat cooler and only having a shower a day.
29. Mr. Taylor submitted that this method of apportionment was permitted by the terms of the tenancy agreement. He said that each flat benefitted from the heating service and that as it was possible to determine how much energy was used by each flat, it was treated as a personal service charge and the actual cost could be apportioned to each flat. Clause 1.4.1 was drawn widely enough to enable Magna to say that where it was able to determine the actual cost to each flat, it was entitled to charge that amount and it should do so.
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30. Magna was unable to explain why the tenancy details attached to the agreement showed no sum payable as a personal service charge. In the service charge schedules showing the breakdown of the estimated and actual service charges, personal energy and personal water are shown as personal charges. Mr. Murray explained that the charges for supply of water are divided equally between the flats as Magna is not confident that the individual water meters in the flats are accurate.
31. Mr. Taylor confirmed that the total costs incurred in producing the heat and hot water consumed in the building are set out in the 5th column of the table at paragraph 31 of Magna's statement and that if the Tribunal decided that the cost had to be divided equally, it was that total cost which was to be divided by 36.

Conclusions

32. In order to establish that Mr. Findlay is liable to pay the service charge demanded by Magna, Magna must show that it is entitled to recover the service charge under the terms of the tenancy agreement. Mr. Findlay accepts that he is liable to pay a service charge in respect of the costs of supplying heat and hot water but he says that Magna has not calculated the service charge in accordance with the terms of the agreement. The Tribunal must therefore construe the terms of the agreement and clauses 1.4.1 and 1.4.2 in particular.
33. In construing the terms of the agreement, the Tribunal must use the ordinary natural meaning of the words used. If there is an ambiguity, then that ambiguity is construed against the landlord.
34. Clause 1.4.1 opens with the words "*The service charge covers your proportion of the costs of services, works and facilities which we*

provide to you personally ("a personal service charge"), or to you in common with other tenants, or to your home in common with other buildings or land." Those words anticipate that the landlord may supply a service to the tenant personally or to him in common with other tenants.

35. Clause 2.1.1.7 of the agreement contains a covenant by Magna to repair and maintain the installations for space heating (including central heating) and water heating.
36. The Tribunal inspected the system for providing heat and hot water to the building. It was clearly a communal system which provides heat and hot water to Mr. Findlay in common with other tenants. Magna accepts in its statement of case that the building has a communal heating and hot water system. Magna is obliged to provide and maintain systems for provision of heating and hot water. It has chosen to do so by providing a communal system. Having chosen to provide the service in that way, the tenants have the choice as to how much of that service they consume by adjusting their individual controls. The Tribunal finds as a fact that the heating and hot water system is a service provided to Mr. Findlay in common with the other tenants.
37. The tenants may choose how much of that service they wish to consume but that does not change the nature of the service. The provision of heat and hot water is not a service which is just supplied to Mr. Findlay and to no other tenant or a selection of tenants. It is not a service which is supplied to Mr. Findlay personally.
38. Having identified the service which is provided and the flats to which it is provided, Clause 1.4.2 states that Mr. Findlay's proportion of the costs of the service "*is calculated in accordance with the number of properties that benefit from the services*". There are 36 flats which benefit from the provision of heat and hot water and therefore the total cost must be divided between those 36 flats. It is the number of properties benefiting from the service which is the relevant factor, not the amount used by each property. If it had been intended that the cost should have been divided in proportion to user, it would have been a simple matter to provide for such a method of apportionment.
39. The Tribunal's finding is reinforced by the fact that Magna sees fit to divide the gas standing charge equally between the flats rather than apportion it according to user. The standing charge is part of the total cost of provision of heat and hot water. There is nothing in the agreement to suggest that part of the cost of a service is to be shared equally and another part is to be treated as a personal service charge.
40. The fact that Magna is able to measure the amount of heat consumed by each flat does not change the nature of the service provided. It merely identifies the amount of the service consumed by each flat. Further it does not entitle Magna to say that it is providing that amount of heat and hot water to Mr. Findlay and therefore, under clause 1.4.2,

it may divide by one the cost of providing that amount of service to Mr. Findlay so as to arrive at the service charge payable by Mr. Findlay. What Magna is doing is to provide a communal service and then to ignore the provisions of clause 1.4.2 because it believes that it can arrive at a fairer solution by measuring the consumption of energy individually.

41. In the circumstances, the Tribunal concludes that the provision of heat and hot water is a service provided by Magna to Mr. Findlay in common with 35 other tenants and consequently, the total cost of providing that service must be apportioned in accordance with clause 1.4.2 and should be divided by 36.
42. According to the table at paragraph 31 of Magna's statement, the total cost of providing heat and hot water to the building for the period from 1 April 2012 to 31 March 2013 was £10,147.46. When that total is divided by 36, the amount payable by Mr. Findlay for that period amounts to £281.87. The Tribunal will determine the service charge for heat and hot water in that sum.
43. For the year from 1 April 2013 to 31 March 2014, Magna has demanded a payment on account of heat and hot water amounting to £2.99 per week. That amounts to £155.48 for the year. As that is less than the actual expenditure for the previous year, the Tribunal concludes that it is reasonable as an estimated amount. Obviously, if, at the end of the year, Magna calculates that Mr. Findlay's share is greater than that sum, an adjusting figure will be payable by Mr. Findlay in accordance with the terms of the agreement.
44. The Tribunal has reached this decision with considerable reluctance. The Tribunal considers that the system operated by Magna is a fair one which results in tenants paying for heat and hot water according to their individual consumption. It also encourages tenants to be economical in their use of heat and hot water as it results in a direct financial benefit to them. However, the Tribunal is unable to construe the terms of the agreement in a way which allows Magna to do so. The Tribunal appreciates that its decision may work to the disadvantage of some of the tenants including Mr. Findlay.
45. As the Tribunal was not asked to determine the service charge payable for the period ended 31 March 2012, there is no need for the Tribunal to determine whether or not there was a change in the way in which the heat and hot water charge was determined as from 1 April 2012 and the Tribunal does not do so. Equally, although there appears to be some confusion as to the figures for service charge entered in the details part of the tenancy agreement, there is no need for the Tribunal to make any finding in that respect.

Section 20C

46. Mr. Findlay applied for the Tribunal to make an order under Section 20C of the Act. He says that he was forced to make his application

because Magna was not complying with the terms of the agreement. He says that he has not acted vexatiously and that the issue needed to be determined.

47. Magna said that it would not seek to recover its costs and did not oppose the making of an order.
48. The Tribunal has found in favour of Mr. Findlay. Mr. Findlay appears to have acted out of a desire to have the agreement operated in accordance with its terms rather than out of a desire for personal gain. The Tribunal considers that it is just and equitable to make such an order and it will do so.

Right of Appeal

49. Any party to this application who is dissatisfied with the Tribunal's decision may appeal to the Upper Tribunal (Lands Chamber) under section 231C of the Housing Act 2004 or section 11 of the Tribunals, Courts and Enforcement Act 2007.
50. A person wishing to appeal this decision must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with this application. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit. The Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal and state the result the party making the application is seeking.
51. The parties are directed to Regulation 52 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 SI 2013/1169. Any application to the Upper Tribunal must be made in accordance with the Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010 SI 2010/2600.

J G Orme
Judge of the First-tier Tribunal
Dated 3 January 2014