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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AM/LSC/2013/0494**
Property	:	**27 Shoreditch House, Charles Square Estate, London N1 6HL**
Applicants	:	**Darren and Philippa Peters**
Representative	:	**In person**
Respondent	:	**London Borough of Hackney**
Representative	:	**Jonathan Newman (Counsel), instructed by Ms Woode, Hackney Legal Services**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Mr Robert Latham** **Mr Michael Taylor FRICS**
Date and venue of Hearing	:	**6 November 2013** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**11 November 2013**

DECISION

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(1) The Tribunal determines that the sum of £1,556.26 charged in respect of heating and hot water for the year 2011/2 is reasonable and payable.

(2) The Tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

(3) The Tribunal does not make any order in respect of the tribunal fees which have been paid by the Applicants.

The Application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the Act") as to the reasonableness and payability of the sum of £1,556.26 in respect of heating and hot water charges payable for the year 2011/12.

2. On 24 July 2013, the Tribunal gave directions. The Tribunal observed that the Applicants were seeking the Tribunal's consent to them disconnecting their flat from the communal system and installing their own individual system. The Tribunal noted that we have no jurisdiction to make such an order. The Applicants' case was that the charges are excessive. They suggested that they could obtain heating and hot water for some 50% of the sums charged by the Respondent.

3. Pursuant to the directions, the Applicants have served their Statement of case which is at Tab 2 of the Bundle. The Respondent's case is at Tab 5. The Applicants have filed a Response at Tab 8.

4. The relevant legal provisions are set out in the Appendix to this decision.

The Hearing

5. The Applicants appeared in person. Both gave evidence.

6. The Respondent was represented by Mr Newman, Counsel. He adduced evidence from Mr Les Staines, the Respondent's Mechanical Manager, and from Ms Jane Fiagbe, the Respondent's Service Charge Accounts Officer.

7. We are grateful to both parties for the helpful manner in which they presented this difficult case which was listed for a half day. The jurisdiction of this Tribunal is limited. It is apparent that the Respondent is sympathetic to problems relating to the existing heating system. Occupants currently have no ability to control the level of heating within their flats. We were told that the only way to reduce the level of background heat within a flat is to open the windows. This is not acceptable at a time when there is growing concern about the effects of Climate Change.

The Central Heating System

8. 27 Shoreditch House ("the flat") is a two bedroom flat on the 8th floor of a 15 storey block. There are 55 flats within the block, of which 53 have two bedrooms. One has one bedroom, and another three bedrooms. There are 19 lessees. The remaining residents are secure tenants.

9. Shoreditch House is serviced by a block heating system. This was installed in 1964 when the block was built. There is no evidence that this system did not comply with the building regulations which were applicable at the time.

10. The block heating system provides heating and hot water to the 55 flats. Initially, it also served a second block at Vince Court. However, this was disconnected in about 2006. The flats in this block now have individual systems.

11. The system was initially fuelled by oil. The central boiler heats water to 82 degrees centigrade, its maximum efficiency. It is a single pipe system. This means that it is not possible to install individual meters. The radiators in the individual flats do not currently have thermostatic radiator valves (TRVs). The central heating is turned on between October and April. If there is a hot period during these months, it is open to the tenants to request that the central heating be turned off.

12. The system was controlled by a "Jel System". However, this was defective and was replaced in about 1999. Hackney consulted on the replacement control system. The residents expressed a desire for 24/7 hot water.

13. Major works were carried out in 2005/6. In retrospect, it may seem unfortunate that the opportunity was not taken to add additional piping so that each flat had a two pipe system which would have permitted individual metering.

14. In March 2013, the Respondent changed the fuel supply to the boiler from oil to gas. This is significantly cheaper than oil. The estimated reduction is from £1,556.26 pa in 2011/12 to £1,170.94 in the current year.

15. Three of the flats have been disconnected from the block boiler and have been permitted to install their own individual systems. This includes Flat 12, which the Applicants acquired in 2007. This is a two bedroom flat on the fifth floor. In 2010/11, the Applicants paid monthly instalments which varied between £25 and £31, the total cost for the

year being £336. In 2011/12, the monthly instalments varied between £22 and £27, the total cost for the year being £292.

16. Inevitably 24/7 heating and hot water is more appropriate for the elderly or those with young children who spend a large amount of the day in their flats. It is less suitable for young professionals who may be out of their flats for significant periods, whether at work or on holiday. Flats are maintained at the standard heat regardless of whether or not they are occupied. Residents are unable to control the temperature within their flats.

17. The Respondent recognises the inefficiencies of the individual system. TRVs have been installed on a pilot basis in some flats. This is to be rolled out throughout the block. The Respondent are also to ensure that pipes are properly insulated and that water cylinders have appropriate insulation jackets.

18. The basis upon which the lessees are charged for their heating is set out in a letter dated 31 May 2013 (at Tab 8). The overall charge is apportioned between flats according to a "living space formula". However, since most of the flats have two bedrooms, 95% pay the same share. The cost of fuel and maintaining the boiler is apportioned between all the 55 flats. This is a two bedroom flat bears 1.8604% of the total cost. In fact, three of the 19 lessees have their individual systems, so it would have been open to the Respondent to apportion the cost to the remaining 52 flats. The Applicants accept that the approach adopted by the Respondent works to their favour.

19. Some 67% of the flats are occupied by secure tenants. They pay a weekly heating charge of some £12.85pw. This is substantially less than that charged to lessees. However, this is not subsidised by lessees, but rather from the housing revenue account.

The Applicant's Lease

20. The Applicant's lease is at Tab 6. The original lessee acquired their 125 year leasehold interest under the Right to Buy legislation. The relevant terms are summarised in the Respondent's Statement of case at Tab 5. The lessor is required to keep in good and substantial repair installations serving the block for the purpose of supplying water and heating. The lessee is required to pay the cost of this through the service charge.

21. The lessee is obliged to accept the supply of heat and hot water (if any) presently supplied to the demised premises (Seventh Schedule). The lessor may at its absolute discretion discontinue the background central heating and/or hot water and may install individual systems (Clause 8(C)).

22. The Applicants acquired their leasehold interest in June 2007. Through some administrative oversight, the Respondent failed to charge the Applicants for heating costs for the first four years. The year 2011/2 is the first year that a charge has been levied.

23. The Applicants are buy to let landlords. They have never occupied this flat.

24. The Applicants subsequently acquired the leasehold interest in Flat 12. Heating charges were levied in respect of this flat. The Applicants sought, and were granted, the consent of the Respondent to install an individual central heating system. This has led to a significant reduction in the heating costs of at least 50%.

25. In April 2012, the Respondent changed their policy in respect of individual heating systems. Lessees will no longer be permitted to install these for two reasons:

(i) Environmental Reasons: In line with government policy, the Respondent believes that more greenhouse gasses would be emitted were there to be 55 individual boilers, rather than one central boiler.

(ii) Economic: The central boiler would need to be operated until all 55 flats had individual systems. The more flats that opted for individual systems, the less economic it would be to rum the block boiler.

As was noted at the Directions hearing, the Respondent's decision not to consent to the Applicants installing an individual boiler is not a matter within the jurisdiction of this Tribunal.

The Issue in Dispute

26. In substance, the Applicants' case is that they should not have to bear the cost of an inefficient block boiler which denies the occupants the ability to control the level of heat and hot water within their individual flats and charges them a proportion of the total cost of the district heating system regardless of the amount of energy consumed within the individual flat.

27. The Applicants refer to the heating costs in respect of three other flats which they own, namely two bedroom flats at 12 Shoreditch and 39 Wenlock and a three bedroom flat at 12 Marshall House. We accept the argument of the Respondent that the Applicants should have produced the fuel bills in respect of these flats, rather than the monthly instalments charged by the fuel provider. We also accept that two of the flats are not strictly comparable:

(i) 12 Marshall House is served by a modern combined heat and power system. The Tribunal accepts that this may be the best model for the future. However, technology and fuel costs are constantly changing. The best option now, may no longer be appropriate in ten years.

(ii) 39 Wenlock: The costs are distorted by the monthly charges of £20 which seem unduly low. These were increased to £87 giving an annual cost of £1,044.

28. However, the comparison with the similar flat at 12 Shoreditch is highly relevant. We accept that this is a gas fired system, whilst the fuel at the flat in question was oil. However, it does provide cogent evidence that the heating costs from the oil fired district heating system are substantially higher than for a gas fired individual system. Of course, it may be that the residents at 12 Shoreditch are economic in the fuel that they use. They may be out of their flat for substantial periods of the time. However, this supports the Applicants' contention that they consider it unfair that they should have to pay a proportion of the total heating costs, including the costs incurred by heavy users of the system.

29. We regretfully conclude that the real problem that the Applicants face is that of "Caveat Emptor" – "Buyer Beware". When they acquired their leasehold interest in June 2007, they knew or ought to have known, of the heating system for this block. They acquired their interest in the knowledge that they would have to bear their proportion of the total cost of this inefficient system. This system is inherently inefficient since individual residents have no ability to control either the temperature of the central heating or the period of time that hot water is heated within their flat.

30. The Respondent monitors the cost of the fuel. Before choosing a provider, the Respondent undertakes a competitive tendering process to ensure best value. In March 2013 a decision was taken to convert from oil to gas.

31. It is arguable that the landlord's obligation to keeping the system in good and substantial repair extends to ensuring the piping is properly insulated and that the water cylinders have appropriate insulation jackets. To date, the Respondent has responded when complaints have been made. This is sufficient in law. However, we welcome the fact that the Respondent are now going to be more proactive in checking the insulation in individual flats.

32. The Tribunal also welcomes the fact that the Respondent is now to install TRVs. However, this is an improvement, rather than something that it is obliged to do under their obligations to repair.

33. It may be desirable to install a new two pipe system which would permit individual metering. However, the costs of this are likely to be substantial. Scaffolding may be required to install for the new pipework. Works of this magnitude are a matter for the discretion of the landlord.

34. The issue which this Tribunal is required to determine is whether the sum of £1,556.26 charged in respect of heating and hot water for the year 2011/2 is reasonable and payable. We conclude, not without some hesitation, that it is.

Application under s.20C and Refund of Fees

35. At the end of the hearing, the Applicant made an application for a refund of the fees that he had paid in respect of the application/ hearing. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal does not order the Respondent to refund any fees paid by the Applicants.

36. The Respondent has indicated that it does not intend to pass on the cost of this application through the service charge account. Given our findings above, we would not have been minded to make an order under section 20C of the 1985 Act.

37. Either party has the right to appeal to the Upper Tribunal (Lands Chamber) (s.175 Commonhold and Leasehold Reform Act 2002). Permission to appeal is required which should initially be sought from this Tribunal.

Robert Latham
Tribunal Judge

11 November 2013

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(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.

Section 19

(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 provisions 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.

Section 27A

(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.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(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, residential property tribunal or the Upper Tribunal, or in connection with arbitration 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 tenant or any other person or persons specified in the application.

(2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
- (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
- (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
- (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(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 Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Regulation 13

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.