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**RESIDENTIAL PROPERTY TRIBUNAL SERVICE**

**Leasehold Valuation Tribunal  
of the  
Northern Rent Assessment Panel**

**LANDLORD AND TENANT ACT 1985  
SECTIONS 27A**

Case reference MAN/00BP/LSC/2012/0132

Property: 253 Bateson Way, Oldham, Lancashire, OL8 1UT

Applicants: Miss Michelle Cullinane  
Represented by: Pearson Hinchliffe LLP

Respondent: First Choice Homes Oldham Ltd

Tribunal: Mr. M. Hope  
Mrs. H. Clayton

**DECISIONS**

**Service charge ; The service charge is reduced by £100 for each of the service charge years 2011 / 12, and 1012 / 13.**

**Costs : The s20 Costs Application by the Tenant is approved.**

**Application and Preliminaries**

1. By her application to the Tribunal under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") dated the 19 September 2012, Ms. M. Cullinane ("the Applicant") applied to the leasehold valuation tribunal ("the Tribunal") for the determination of liability and reasonableness of the heating and hot water charges made as part of the service charge for her property for the service charge years 2011 / 12 and 2012/13.

2. Ms Cullinane also made an application under section 20C of the Landlord and Tenant Act 1985 requesting an order that the Respondent landlord's costs in connection with the proceedings before the Tribunal should not be regarded as relevant costs for the purposes of any future service charge demanded from the Applicant.

3. The Tribunal issued Directions on 31 October 2012 giving an outline of the information that should be adduced to the Tribunal and the other party, and setting a timetable for the efficient conduct of the case.

### **Inspection**

4. The Tribunal inspected 253 Bateson Way, Oldham, Lancashire, OL8 1UT ("the Property") on the 18 January 2013. The Applicant was in attendance and the Respondent was represented by Mr. A. Huegh, Building Services Manager, and Mr. P. Webb, Gas Services Manager.

5. The property is a two storey centre terrace dwelling built some 40 years ago with brick walls under a pitched tile roof. It has double glazed windows and doors, a central heating and hot water system supplied from a central boiler house serving all of the 253 properties forming the Eldon Street Estate.

6. The accommodation includes a hall, off which were a living room, a kitchen, and a downstairs WC and washbasin. At first floor there are three bedrooms and a family bathroom with shower. The bathroom, downstairs WC and kitchen fittings were all aged. There is a private garden at the rear of the property and an open plan grassed communal area with some tree planting to the front of the terrace of properties. There are a number of communal parking areas along the estate roadways with paved or tarmac paths leading to the front doors of the properties. Some of the properties on the estate comprise low rise apartment buildings, and there is the central boiler house within a low rise slightly detached building a short distance from the subject property.

7. The Tribunal were shown the meter within the subject Property and informed as to how it operated. The Tribunal also inspected the boiler house on the estate having been told by the Landlord's representatives that the estate was served solely by the two boilers in the estate boiler house. There is no inter-connection between the heating system for the Eldon Street Estate and any of the other heating systems operated by the Landlords around Oldham.

### **Lease Terms**

8. The tenant holds the Property on an assured non-shorthold tenancy which commenced on 7<sup>th</sup> February 2011 for a period of one week and thereafter continuing weekly at the initial rent of £75.02 per week. The rent is able to be adjusted on the first Monday in April in each year, although there is a maximum rent that is set by the terms of the Tenancy.

9. Separate charges are also payable for (1) heating and hot water and (2) water rates. The former charge falls within the definition of a variable service charge within section 18 of the 1985 Act. Clause 5.2 of the tenancy agreement permits the landlord to vary the heating and hot water charge as set out in clause 4.2 of Part A of the Tenancy Conditions. This latter provision permits quarterly increases *"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."* Clause 4.4 of Part A provides that *"We can only ask you to pay a reasonable Heating and Hot Water Charge and the service we*

supply must be of a reasonable standard. If you believe that your Heating and Hot Water Charge is unreasonable (in terms of amount charged or standard of supply) you can apply to the Leasehold Valuation Tribunal for a decision as to determine what is reasonable”.

## The Law

10 Section 18 of the 1985 Act provides that

(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.*

11. Section 19 of the 1985 Act 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.*

12. Section 27A of the 1985 Act 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 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 a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance, or management of any specified description, a service 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 agreed by the tenant... ..*

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

### **Submissions by the Applicant**

13. The Applicant stated that the information given by the Respondent does not provide evidence which deals with the requirements set out in the LVT Directions, and certainly does not give details of how the 8.1 unit charge is constructed, and it is the substantial increase from 5.5p per unit that is the crux of the Applicant's complaint.

14. The Applicant does not accept that the increase is reasonable and points out that in their Statement the Respondent indicates that "*an increase was to allow for investment in other parts of the organisation*", and also "*agreement with Oldham MBC*", and the increase is therefore not due to the operating costs of the communal heating scheme. Moreover, no mention of these factors was given in the undated letter from the landlord to each tenant at the time of the increase which stated that the increase is "*.... due to the rising cost of energy over the years.*" and no other reason was given.

15. The Applicant expresses confusion about whether bad debts are included at the time that consideration is being given to the future unit charges. The Respondent's statement says that they are not, but the Applicant points out that exhibit MC8 by the Respondent shows a "bad debt provision" along with other items as being relevant factors on the income and expenditure sheets.

### **Submissions by the Respondent**

16. The Respondent provided a very basic outline of the heating and hot water arrangements for their properties, and the service charge amounts due from the Applicant for these services. It stressed that the Applicant was a high user of the service over a number of years, and that the use was as much as three times more than the average use measured across all of the Respondent's tenants over the entire communal heating system operated by the Respondent. The systems cover more than 2000 dwellings around Oldham and "... has 54 boiler houses and a very extensive system of pipes where hot water has to travel lengthy distances ...." .

17. The Respondent also mentioned that the excessive use of the heat and hot water by the Applicant had created arrears of some £1,471 on which they were taking action for recovery. They gave great detail of the average consumption relative to the Applicant's consumption and why they thought the higher use was occurring. They stated that they considered the average consumer does not face unreasonable charges, and that they had advised the Applicant on ways to reduce her consumption.

18. The Respondent stressed that their unit charge arrangements for the heat and hot water provided to all of their tenants is all inclusive and does not make a separate standing charge to cover overheads. The unit charge also includes repairs and replacements of any element of the communal heating system including the consumer meter. They also stated that the service charge does not cover the actual total costs of providing and operating the

systems.

19. The Respondent indicated that the communal heating system had been taken over from Oldham Council (who still owned some 900 properties in the area, and also operates a communal heating system for these properties) and the basic charge arrangements had applied since before First Choice Homes Oldham were the Landlords. They also said that the current unit charge of 8.1p per unit was agreed with the council presumably to keep the unit costs for all communal heating system tenants at the same level across Oldham, but that the current unit charge meant the system is operated at a loss.

### **Deliberations by the Tribunal**

20. The only issues to be determined by the Tribunal in respect of the section 27A application are whether the charges for the heating and hot water are payable, and reasonable in amount.

21. Dealing with the payability of the services the Tribunal noted that the Tenancy Agreement provides that a Heating and Hot Water Charge is payable in addition to the rent. The Tribunal therefore determined that such a charge is payable.

22. Turning to the amount payable the Tribunal noted that the copy letter sent by the Respondents to each tenant at the time the new unit charges were introduced refers to the "*rising cost of energy over the years*" as indicated by the Applicant, but a couple of paragraphs down it also refers to the operating loss, by saying "*So that the heating service no longer operates at a loss it must pass on the first increase in five years to tenants so that charges better reflect the current costs of energy*". The Tribunal noted that the final wording again relates the increase in charges to the rise in the costs of energy

23. During the inspection the Applicant suggested to the Respondents representatives that she had noted that her meter (consumer interface unit) was registering consumption when she was not using water nor had the heating on. The Respondent's representatives said they would check this early the following week, and inform the Applicant of their findings. The Tribunal asked for copies of their findings to be sent to the Tribunal office and they would delay their decision until this information was available and the parties had been given time to make submissions if wanted. A timetable would be issued to effect the time needed for such actions.

24. The above tests were conducted and the report passed to the Applicant and the Tribunal who noted that the findings showed no movement of the meter readings during the period that the tests were underway. The Tribunal have therefore determined that the meter unit is functioning correctly. However, the meter was changed late last year and it is not possible to be certain on the situation when the previous meter was in position.

25. Despite the Tribunal requesting and receiving further submissions with more detailed information and accounts, the Tribunal did not find the evidence submitted by the Respondent easy to follow, especially as to the build-up of the current consumer charge of 8.1p per unit for heat and hot water. However, whilst it was clear that the basic overheads of repairs, maintenance, central administration and staff costs, etc., were included somewhere in the unit charge rate, the evidence did not specify what these costs were. However, the method

of charging clearly results in a high consumption user paying a much greater amount to the central overheads than a low user. However, in the experience and opinion of the Tribunal the costs of the overheads to a low user are basically the same as a high user as they use the same pipes, pumps, boilers, staff, repairs, maintenance, etc.. There may be some very small extra cost from a high user because they will require the boiler and circulation pump to be operating for slightly longer than is the case for a low user, but the actual costs of repairs, replacements and maintenance, staff, etc. are all minimal because the boilers and pumps are industrial units designed for huge through-put so that they operate efficiently even if every one of the 253 dwellings connected to the Eldon Street community heating scheme is using heat and hot water at the same time.

26. Section 19 of the 1985 Act provides that the costs incurred by the landlord must be reasonably incurred and the services must be of a reasonable standard. But that is as far as it goes. Section 19 does not permit the Tribunal to decide how the charge should be apportioned amongst the tenants. That is a matter for the tenancy agreement. In the present case the Applicant's share of the costs is initially a sum specified in the tenancy and then subject to variation under clause 4.2 of Part A of the tenancy conditions. The agreement does not specify how the initial sum had been apportioned. Nor does the agreement specify how a notified increase to an individual tenant has come about save that *"any increase will reflect your current and projected usage of heating and hot water"* and that *"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 tenancy does not provide any formula for how that calculation is to be made.

27. However, Clause 4.4 of Part A provides that *"We can only ask you to pay a reasonable Heating and Hot Water Charge and the service we supply must be of a reasonable standard. If you believe that your Heating and Hot Water Charge is unreasonable (in terms of amount charged or standard of supply) you can apply to the Leasehold Valuation Tribunal for a decision as to determine what is reasonable"*. This suggests that an individual tenant's charge must be reasonable. The question then is whether the method of apportionment which the Respondent has chosen to adopt, and which is not prohibited by the tenancy agreement, is unreasonable.

28. The Tribunal considers that the present charging system and available information given to Tenants is extremely unclear and shrouded in the use of general costing terms, making it nigh on impossible for Tenants to be able to identify how their service charge is calculated, let alone consider whether the charges are reasonable.

29. The Tribunal could not see why the Respondents considered that they thought that agreeing costs for the heating and hot water with Oldham Borough Council could have any relevance. It is the reasonableness of the charges for the Applicant that is under consideration and third party charges or costs should not be taken into account

30. The Tribunal considers that the system of charging a fixed base cost and then a unit usage for consumption would be a more equitable way to cover the respective costs incurred in providing the heat and hot water to the dwellings. This would fairly distribute the overheads amongst all users (it could be taken at higher percentages / amounts for three bed properties compared to that for two bed and even less for one bedroom properties), but these amounts would be known and there would be no need to change the percentage values of the whole heating scheme and yet it allows for changes in the costs of the overheads to be covered by the service charges. .

31. The fuel consumption whether it be gas, bio-mass or whatever can then be charged on a kWh basis calculated on the actual costs of the fuel. Obviously high users will pay greater fuel consumption costs than a low user and that seems equitable and reasonable. This fairness is no doubt why the vast majority of energy organisations make a standing charge and a charge based on the consumption of energy consumed at a rate per kWh.

32. The Tribunal carried out some paper exercises on the differences the charging of a standing charge and then fuel consumption would make to the overall costs for each dwelling. These are shown in the appendices attached to this letter. It can be seen that the extra cost for a low user is in the order of £ 24 per annum while to a high user such as the Applicant, the reduction is in the order of £ 152 per annum, and that is achieving the same total income to the Respondent as currently occurs.

33 The Tribunal considered whether it had jurisdiction to reach a decision which apportioned the charges on a fairer and more transparent charging basis. It noted that as mentioned in paragraphs 25 and 26 hereof section 19 of the Landlord & Tenant Act 1985 indicates that such jurisdiction is not given as it is a matter for the Lease (Tenancy Agreement) but this Tenancy Agreement does not provide a service charge calculation basis other than saying it must be reasonable. However, the intention of the legislation was probably to prevent new apportionments unless the current method is so manifestly unreasonable that no reasonable person would undertake such a basis for service charge calculations.

34. In view of the Tribunal considerations indicated in paragraph 32 it determined that it was not able to alter the basis on which the service charges are currently calculated.

35. Notwithstanding the determination in paragraph 33 the Tribunal has already determined that the charges for 2011/12 and 2012/13 are excessive and unreasonable as they impose a disproportionate charge for the overhead costs (maintenance and replacement of the infrastructure items ; office staff ; etc.) on high consumption users and that a reduction in the amounts charged to the Applicant is required. The Tribunal's paper exercises indicate an overcharge of up to £150 per annum but as this calculation is based on weak data supplied by the Respondents it is possible that the amount could be more or less. The Tribunal decided that it should err on the side of caution and adopt a lower reduction than may be justifiable.

## **DECISIONS**

### **SERVICE CHARGE**

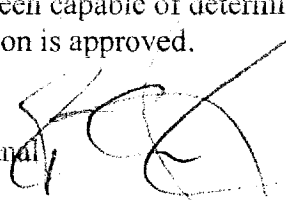
36. The Tribunal determines that for the above reasons the service charges made against the Applicant are unreasonable and that the amount overcharged for each of the two years under consideration amounts to £100. £100 should therefore be credited to the Applicant's account for the year 2011/12 and another £100 for the year 1012/13

### **COSTS**

37. Ms Cullinane made an application under section 20C of the Landlord and Tenant Act 1985 requesting an order that the Respondent landlord's costs in connection with the proceedings before the Tribunal should not be regarded as relevant costs for the purposes of any future service charge demanded from the Applicant.

38. The Tribunal determined that the service charges levied by the Respondent are unreasonable and excessive, and that the lack of cooperation by the Respondent in being able to identify and provide details and copies of the relevant costs resulted in the case being brought. If the accounting procedures of the Respondents was more transparent and simple to understand the matter should have been capable of determination between the parties. Accordingly the s20 Costs Application is approved.

signed by the Chairman of the Tribunal,



date \_\_\_\_\_ 2013

**APPENDIX - Communal Heating- First Choice Homes Oldham**  
 (Source- Respondents Submissions, 19<sup>th</sup> November 2012, Appendix B2)

**Income and Expenditure Accounts 2011/2012**

**Calculation of Overheads – costs not dependant on the level of consumption of kWh's**

Total Expenditure		£	666,516
Less			
Gas	432699		
Electric	<u>72020</u>		<u>(504,719)</u>
Add			
5% of all Costs for Management Costs		<u>33,326</u>	
Total Overheads for the year			£ <u>195123</u>

Total number of homes = 2385  
 Therefore overhead per property =  $\frac{195123}{2385} = \text{£}81.81$

**Calculation of costs for Average Consumer of Heating and Hot**

**Water Average Consumption per Household 5771 kWh**

**Calculation of Variable Cost of Heating and Hot Water within Current Scheme**

		£	
Cost 5.5p/kWh x 5771kWh	=	317.41	
Less overhead per property		<u>(81.81)</u>	
Variable Cost		<u>235.60</u>	

Variable Cost of Heating and Hot Water per kWh =  $\frac{\text{£} 235.60}{5771 \text{ kWh}} = .041\text{p/kWh}$



## Calculation of Applicants Heating and Hot Water Costs

### Under Current System

Consumption for year 16663 kWh x 5.5p = £ 916.46/ year

### Costs If calculated using a Fixed Charge to cover Overheads incurred by all Households

Service Charge 81.81  
 16663 kWh x .041p/kWh 683.18 = £ 764.99/ year

Saving per year £ 151.47

## Comparative Costs for Households with Differing Consumption Levels

### Present System

### System with Overheads charged per Household

<u>Consumer</u>	<u>kWh</u>	<u>Rate</u>	<u>Total Cost</u>	<u>Consumer</u>	<u>kWh</u>	<u>Rate</u>	<u>Variable</u>	<u>Over</u>	<u>Total</u>
							<u>-Costs</u>	<u>-Heads</u>	
Average	5771	5.5p	317.41	Average	5771	4.1p	236.61	81.81	318.42
applicant	16663	5.5p	916.47	Applicant	16663	4.1p	683.18	81.81	764.99
Low (say)	4000	5.5p	220.00	Low	4000	4.1p	164.00	81.81	244.00 (est)