

10643



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

Case reference : **LON/00BG/LSC/2014/0488**

Property : **73 Morant Street London E14**

Applicant : **The London Borough of Tower Hamlets**

Representative : **Ms Isi Akhigbe**

Respondent : **Ms Barbara Budden**

Representative : **Mr Michael Rush**

Type of application : **For the determination of the reasonableness of and the liability to pay a service charge**

Tribunal members : **Mr Simon Brilliant
Ms Sue Coughlin
Ms Jayam Dalal**

Date and venue of hearing : **23 February 2015
10 Alfred Place, London WC1E 7LR**

Date of decision : **04 March 2015**

DECISION

Decisions of the tribunal

- (1) The tribunal determines that the sum of £2,443.06 is payable by the Respondent in respect of the service charges relating to **boiler fuel** for the communal hot water and heating system (“the communal system”) in the service charge years 2009/2010 to 2012/2013.
- (2) The tribunal determines that the sum of £22.06 is payable by the Respondent in respect of the service charges relating to **boiler fuel management** for the communal system in the service charge years 2009/2010 to 2012/2013.
- (3) The tribunal determines that the sum of £2,073.79 is payable by the Respondent in respect of the service charges relating to **boiler repairs and maintenance** for the communal system in the service charge years 2009/2010 to 2012/2013.
- (4) The tribunal determines that the sum of £57.38 is payable by the Respondent in respect of the service charges relating to **boiler repairs and maintenance management** for the communal system in the service charge years 2009/2010 to 2012/2013.
- (5) We shall for convenience refer to these service charges together as “the boiler costs”.
- (6) Accordingly the total amount of boiler costs in dispute determined to be payable is £4,569.29.
- (7) The Applicant having agreed not to pass any of the landlord’s costs of the tribunal proceedings to the lessees through any service charge, the tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.
- (8) Since the tribunal has no jurisdiction over county court costs and fees, this matter should now be referred back to the Thanet County Court.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 (“the 1985 Act”) as to the amount of the service charges payable to the Respondent:
 - (1) in respect of **boiler fuel** and **boiler fuel management** for the communal system for the service charge years 2009/2010 to 2012/2013.

- (2) in respect of **boiler repair and maintenance** and **boiler repair and maintenance management** for the communal system for the service charge years 2009/2010 to 2012/2013.
2. Proceedings were originally issued in the Northampton County Court under claim no. 3YQ72942. The claim was transferred to the Thanet County Court and then in turn transferred to this tribunal, by order of the District Judge on 23 May 2014. Before us the Applicant's claim is made only in respect of the service charge years 2009/2010 to 2012/2013 as appears from the schedule at page 20 of the hearing bundle.
 3. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

4. The Applicant was represented by Ms Akhigbe, a solicitor, at the hearing and the Respondent was represented by her husband, Mr Rush.

The background

5. The property which is the subject of this application ("the flat") is a top floor flat in a block of 15 flats ("the building") on an estate.
6. Photographs of the building and of the relevant part of the flat were provided in the hearing bundle and at the hearing. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.
7. The Respondent holds a long lease of the flat dated 1 April 2002 ("the lease") which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease will be referred to below, where appropriate.
8. The dispute has arisen because the Respondent became dissatisfied with the communal system and in the autumn of 2009 voluntarily, and without the Applicant's permission, disconnected the flat from the communal system.

The issues

9. At the start of the hearing the parties identified the relevant issues for determination as follows:

- (1) Whether the lease requires the Respondent to continue to pay the boiler charges after the Respondent disconnected the flat from the communal system (“the first issue”).
 - (2) Whether it is reasonable for the Respondent to have to pay the boiler charges after the disconnection (“the second issue”).
 - (3) Whether the actual amount of the boiler charges in each of the relevant years is reasonable (“the third issue”).
10. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

The first issue

11. The tribunal determines that the lease does require the Respondent to continue to pay the boiler charges after the disconnection.

Reasons for the tribunal’s decision

12. When the lease was granted the flat was connected to the communal system. There was a copper cylinder and a header tank in the hall cupboard of the flat.
13. The structure of the lease, where relevant, is as follows:
- (1) The flat included all fixtures and fittings within it (paragraph (e) First Schedule): this would include the copper cylinder and header tank.
 - (2) The Respondent covenanted not to make any alterations to the flat or to cut any of its walls without first having made a written application to the Applicant and having received written consent of the Applicant (clause 3(5)).
 - (3) The Respondent covenanted to renew and keep in good and substantial repair and condition the water, gas and electrical apparatus and all fixtures in the flat (clause 4(1)): this would include the copper cylinder and header tank.
 - (4) The Applicant covenanted to maintain and renew when required any existing central heating and hot water apparatus in the building other than that contained in or only serving the flat (clause 5(5)(g)).
 - (5) The Applicant covenanted to maintain at all reasonable hours

through any system existing at the date of the lease, but not otherwise, an adequate supply of hot water to the building and during certain times of the year to provide sufficient and adequate heat to the radiators for the time being in the flat (clause 5(5)(h)).

- (6) The Respondent covenanted not to disconnect any of the apparatus relating to the communal supply of hot water or heating in the building and not to permit the same to fall into disrepair (clause 4(5) and paragraph 24 Fourth Schedule): this would include the copper cylinder and header tank.
 - (7) The Respondent covenanted to pay the service charge at the times in the manner provided in the Fifth Schedule (clause 4(4)).
 - (8) The Fifth Schedule includes within the definition of the total expenditure of the service charge the boiler charges arising from the services summarised in subparagraphs (4) and (5) above. The Respondent is required pay a reasonable proportion of the total expenditure as is attributable to the flat.
14. By 2008 the communal boiler system was no longer working satisfactorily. In one respect it had always had shortcomings. The heating was either turned on or off and there was no way to control it, so it sometimes remained on during hot days, and off during cold days. But by 2008 it had started breaking down altogether so that the Respondent and Mr Rush were frequently left without hot water.
 15. In 2009 the Respondent removed the copper cylinder and header tank without having applied for or having obtained the written consent of the Applicant. A combi boiler was installed in its place, which provides hot water and heating only to the flat, and the flat was disconnected from the communal system. The disconnection is confirmed by Mr Fitzgerald, Tower Hamlet Homes' Mechanical Projects Officer, who gave evidence on behalf of the Applicant and who inspected the flat on 2 February 2015. We were shown photographs taken by Mr Fitzgerald demonstrating that the flue has been taken out through an external wall, and through the roof covering of an external balcony
 16. Mr Rush frankly accepts that the problem which led to disconnection from the communal system arose in the copper cylinder within the flat. Mr Rush did contact the Applicant prior to the disconnection to complain about the absence of hot water, and was told, correctly, that since the problem arose from apparatus within the flat itself, it was the Respondent's responsibility.
 17. Mr Rush was told by his contractor that it would be very expensive to replace the copper cylinder (it was the Respondent's obligation under

the lease to replace it) because it would involve the fitter working with asbestos around the header tank. He therefore did a cost benefit analysis and chose to install a combi boiler, rather than replace the copper cylinder, because it gave him full control over the heating and hot water, was more efficient and freed up some cupboard space. He also considered that the boiler costs were very expensive for a one bedroom flat.

18. Although, as we have said, Mr Rush did not ask for permission to remove the copper cylinder and header tank before doing so, he did write to the Applicant informing them of the work after he had done it.
19. The Applicant also called Mr Brown, a Leasehold Services Manager for Tower Hamlets Homes, who was unable to find any record of this letter. But he told us that it is the general policy only rarely to permit a lessee from disconnecting from a communal boiler because of technical problems caused by balancing, loading and flow problems. There is also a risk of a disproportionate share of boiler costs falling on those lessees remaining on the communal system. We were also told that where disconnection had been permitted, it was done by the Applicant according to their standards and the Applicant was unable to agree to retrospective consent in this case.
20. The proportion of the total expenditure in respect of the boiler charges charged to the flat is one fifteenth. As already stated that are 15 flats in the building. The boiler maintenance is charged on a GRV basis. The boiler fuel is charged on a points basis, based on the number of radiators and hot water points in a particular flat, but the figure used is still one fifteenth. Mr Rush has removed two of the five radiators which were originally in the flat.
21. The decision to disconnect the flat from the communal system was carried out unilaterally and in breach of the lease. We do not consider that the disconnection in these circumstances can remove the Respondent's obligation under the terms of the lease to continue to contribute to the cost of the communal system through the service charge.

The second issue

22. The tribunal determines that it is reasonable for the Respondent to continue to pay the boiler charges after the disconnection.

Reasons for the tribunal's decision

23. We have set out above the circumstances in which the disconnection took place and we have some sympathy for the Respondent's argument on the second issue. We find that Mr Rush acted in good faith at the

time and in the mistaken belief that he was free to do what he did. He has also drawn our attention to the findings of an audit carried out by external accountants, Beever and Struthers, dated 6 May 2011, which recommended communal boiler systems should be decommissioned wherever less than 25 units are supported because the costs to individual residents become excessive.

24. However, the lease which both parties agreed to in 2002 makes no provision for the installation of a wholly different system arising from the decommissioning of the existing system. The lease clearly provides, as explained above, for the Applicant to be responsible for the system in the building outside the flat and the Respondent to be responsible for the system in the flat itself. The Applicant is under no obligation to give permission to a tenant to decommission the existing system, and, as explained above, will not do so on policy grounds because it leads to an unfair burden on those who remain connected to the system.
25. Although Mr Rush alleged that the communal boiler was at the end of its useful life, there is no evidence before us that the communal boiler was responsible for any difficulties with the supply of hot water and heating to the flat. Indeed, the Applicant's evidence was that the communal boilers had been replaced in 2004.
26. Since the lease does not provide for the decommissioning of the communal boiler, we do not consider that the Respondent can argue that the continuing costs of the communal boiler are not reasonably incurred within the meaning of section 19(1)(a) of the Landlord and Tenant Act 1985.

The third issue

27. The tribunal determines that:
 - (1) The sum of £2,443.06 is payable by the Respondent in respect of the service charges relating to **boiler fuel** for the communal hot water and heating system ("the communal system") in the service charge years 2009/2010 to 2012/2013.
 - (2) The tribunal determines that the sum of £22.06 is payable by the Respondent in respect of the service charges relating to **boiler fuel management** for the communal system in the service charge years 2009/2010 to 2012/2013.
 - (3) The tribunal determines that the sum of £2,970.25 is payable by the Respondent in respect of the service charges relating to **boiler repairs and maintenance** for the communal system in the service charge years 2009/2010 to 2012/2013.

- (4) The tribunal determines that the sum of £57.38 is payable by the Respondent in respect of the service charges relating to **boiler repairs and maintenance management** for the communal system in the service charge years 2009/2010 to 2012/2013.

Reasons for the tribunal's decision

28. At the hearing Mr Rush accepted that the boiler fuel charges were supported by the invoices produced by the Applicant. Accordingly, the amount payable in respect of boiler fuel for the service charge years 2009/2010 to 2012/2013 is £2,443.06 being the total of the four sums on page 20 of the hearing bundle. The amount payable for boiler fuel management is £22.06.
29. Mr Rush contends that the boiler repair and maintenance charges are far too high. He drew our attention to criticisms in the audit prepared by Beever and Struthers, particularly that a number of tenant repairs are being included in the costs.
30. According to this report the repair and maintenance charges are made up of (1) servicing costs, (2) contractual repair costs which in 2008/2009 were £60.90 per unit per year and (3) non-contractual repairs relating to replacement of boiler parts, not covered under the contract.
31. The Applicant was unable to give us much assistance about the repair and maintenance charges. We were only shown a list of actual repairs for the year 2010/2011 which had been submitted by the Respondent. We refused an application made half way through the hearing by the Applicant to admit a breakdown of other years. The amended directions required the bundle to be served in the week before the hearing and it would have been unfair on Mr Rush to have expected him to deal with new material with no time to read or analyse it. Moreover, the breakdowns did not really assist us in the absence of the details of the contractual arrangement giving rise to the charges.
32. Mr Fitzgerald explained that the servicing would include major and minor services, plant checks and monthly safety checks. Major services were carried out twice a year with minor services in the intervening months so that the system was checked every month. He informed us that the minor services were complex and would take about an hour to complete. He could not explain the 2010/2011 charges.
33. We are of the opinion that the monthly servicing costs are inexplicably high and do not understand how the routine service inspection can amount to £339.56. We propose to reduce the servicing by 30%.

34. The twelve monthly services in the year 2010/2011 amount to £5,756.21. A 30% reduction amounts to £1,726.86.
35. We also find that a total of £161.25 on page 206 of the hearing bundle were call out charges and no explanation was provided as to why these had not come within the contractual charges of £955.05. We have therefore disallowed these charges. So the total deduction is £1,888.11.
36. In the year 2010/2011 the total cost of boiler repair and maintenance is put at £8,081.11. The total deduction is approximately 23% of that figure. We propose to apply that deduction to the other years as well. This results in the following figures.

2009/2010	£659.02
2010/2011	£414.83
2011/2012	£505.74
2012/2013	£494.20
Total	£2,073.79

37. Applying a similar deduction to the boiler repairs and maintenance management charges for 2010/2011 and 2012/2013, the amount is reduced to £57.38.

Application under s.20C

38. At the end of the hearing, the Applicant agreed not to pass any of the landlord's costs of the tribunal proceedings to the lessees through any service charge, so the tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

The next steps

39. The tribunal has no jurisdiction over county court costs. This matter should now be returned to the Thanet County Court.

Name:

Simon Brilliant

04 March 2015

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 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.