FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/30UG/MNR/2019/0012**
Property	**:**	**36 Milnshaw Gardens** **Accrington** **Lancashire** **BB5 4SE**
Applicant	**:**	**Mr T Gervois**
Representative	**:**	**N/A**
Respondent	**:**	**Accent Housing Ltd**
Representative	**:**	**Mr Mark Forster**
Type of Application	**:**	**Sections 13 Housing Act 1988**
Tribunal Member	**:**	**Deputy Regional Valuer N Walsh**
Time & Date of CMC Hearing	**:**	**12:30pm – 15 May 2019**

CASE MANAGEMENT HEARING NOTE & ORDER

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1. The Tribunal received an application on 18 March 2019 for a determination of the rent of the Property. The application was made by Mr Gervois, the tenant of 36 Milnshaw Gardens, Accrington, Lancashire, BB5 4SE (the Property).

2. The Tribunal wrote to the parties on 12 April 2019 to inform them that there was a preliminary jurisdictional issue which required determination. Mr Gervois requested an oral hearing and a case management hearing was held on 15 May 2019 at Burnley. The Applicant attended in person and was accompanied by a McKenzie friend Mr Keith Howard. The named Respondent was represented by Mr Mark Forster in his capacity as the area manager for Accent Housing Limited.

3. At the start of the hearing the Tribunal checked with Mr Gervois as to whether he required any further adjustments to be made because of his ill-health. He confirmed that he could proceed without any further adjustments being made and the Tribunal advised him that we would be willing to adjourn the proceeding at any stage if he required a short break.

4. The Tribunal explained that it decided to hold a case management hearing because the Tribunal was concerned that it may not have the jurisdiction to determine this application. We outlined that the Tribunal was governed by statute, and that in this instance the relevant statute for the purposes of these proceedings was the 1988 Housing Act ('the Act'). Section 13(1)(b) of the Act makes a specific exclusion:

   "in relation to which there is a provision, for the time being binding on the tenant, under which the rent for a particular period of the tenancy will or may be greater than the rent for an earlier period."

5. The Tribunal considered that paragraph 1(4) of the tenancy agreement was a rent review clause that was binding on both parties and as such, caught by the statutory exclusion as set out with section 13(1)(b). The Tribunal was conscious that this was a matter for legal submissions and neither party were legally represented, nor aware of the lead Court of Appeal case of Countour Homes Ltd v Rowen [2007] 1 WLR 2982 on this issue. Accordingly, the Tribunal informed the parties that it would allow a further 14 days from the date of the hearing for the parties to make written submissions and also provided each with a copy of the Countour Homes decision.

Procedural Issue

6. Mr Gervois opened by objecting to Mr Forster representing the Respondent at the hearing. He outlined that his attendance was irregular because he was in a strategic role and so unable to speak authoritatively about matters relating to the Property.

7. Mr Forster outlined that he was happy for the hearing to be adjourned and have a member of Accent Housing's legal team attend in his place. However, he outlined that he was there in his capacity as the area manager for the Respondent.

8. The Tribunal did not consider there was any reason why Mr Forster should not represent the Respondent in these proceedings and at today's hearing. The preliminary issue under consideration did not require detailed knowledge of the Property but rather legal submissions as to the Tribunal's jurisdiction. The Tribunal could not see how this unfairly prejudiced the Applicant and indeed, as noted later, the Respondent and Mr Forster were in fact supporting Mr Gervois's submission that the Tribunal has the jurisdiction to determine this application. Accordingly, we determined that there were no grounds to adjourn the hearing or to deny the Respondent's right to be represented by Mr Forster.

Oral Submissions

9. Mr Gervois outlined that he considered the use of any "exclusion" stopping him querying the fairness of the rent to be wrong and unjust. He was of the opinion that it was "carpet-bagging" for the Respondent to avoid a section 13 rent determination, to seek to hide behind this statutory exclusion and so evade his concerns about the proposed new rent.

10. The Applicant averred that section 13 did not apply to his tenancy, which was more akin to a licence. Mr Gervois likened his situation to WH Smith occupying a shop within an NHS hospital and paying rent to the hospital. It was necessary to ensure that the operation being run by WH Smith was not exploitative. Without this check, he contended that it would be equivalent to a 'Rackman' scenario. He considered it must be wrong that a devise or instrument could be used to avoid setting a fair rent or exclude appropriate legislation such as the Protection Against Eviction Act 1977.

11. Mr Gervois considered that the legislation was being inappropriately used and that he had made an honest application. He contended that the 1988 Housing Act was in any event the wrong legislation for residential domestic property. Mr Gervois accepted that the Landlord had the right to increase the rent but he simply did not believe the proposed rent increase was fair and reasonable.

12. Mr Forster, representing the Respondent, outlined that it had nothing to hide, wished to be completely transparent and was very happy to justify the basis on which the increased rent had been assessed. Accordingly, it supported the Applicant's application being determined by the Tribunal and considered that the Tribunal had the jurisdiction to determine the appropriate rent under the Act. Although he admitted that on the basis of a cursory review of the Contour Homes decision the Tribunal may indeed lack the jurisdiction to make such a determination.

Written Submissions

13. Mr Gervois's written submissions were conveyed to the Tribunal on 20 May 2019 via e-mail by the Respondent. The Applicant referred the Tribunal back to and drew particular attention to the second paragraph of the covering letter to his application, which is reproduced below for completeness:

> "To the best of my knowledge and belief the proposed charges admit, to persons untainted by vested interest, opportunistic carpet-bagging, rogue-trading and reverse fraud on, in the first instance, vulnerable people."

14. Written representations were also received from Mr Ian Ormondroyd, the senior litigation solicitor within the Legal and Governance Team of Accent Group Limited. Mr Ormondroyd advised that this jurisdictional issue had arisen previously and the Tribunal, then accepting that it had jurisdiction, determined the rent in 2014 in accordance with the Act. He outlined that the Respondent was aware of the decision of Contour v Rowen. Following this decision, it took advice in 2014 from Mr Andrew Dymond of Arden Chambers as to the wording at paragraph 1(4) of Mr Gervois's tenancy and the effect that this may have upon the Tribunal's jurisdiction. Helpfully Mr Ormondroyd has forwarded extracts from Counsel's advice in 2014 and on the basis of this advice, he contends that the Tribunal has the jurisdiction to determine Mr Gervois's application.

15. In his advice, Mr Dymond submits that paragraph 1(4) in Mr Gervois's tenancy agreement differs substantially from the tenancy agreement considered within the Countour Homes decision and that it is not caught by the statutory exclusion as set out with section 13(1)(b). His reasons for reaching this conclusion are summarised and set out in the following extracts from Mr Dymond's advice:

- "the crucial difference is that the tenancy agreement in Rowen did not mention referring the notice to the rent assessment committee. In contrast cl.1(4) specifically refers to disputes being referred to the rent assessment committee."
- "… this indicates that the intention of the parties was that the procedure under ss. 13 and 14, 1988 Act, would apply. …… Put another way, cl1(4) is merely restating in plain language that the statutory procedure applies. It is not seeking to establish a separate contractual procedure."
- "If I am wrong on that, without the possibility of referring the notice to the committee/Tribunal, cl.1(4) would contain no limit on the rent increase and would therefore be void as an unfair term. Note that, if that were the case, there would be no 'provision', for the time being binding on the tenant relating to rent increases for the purposes of s.13(1)(b), so that Accent would be able to use the statutory procedure in any event."

Conclusion

16. We have the unusual situation here where we have both parties arguing for the same outcome. A further and interesting nuance is that irrespective of the Tribunal's decision, between them, the parties have the power to, by agreement, amend or even more simply to delete paragraph 1(4) from the tenancy agreement altogether and so clearly confer jurisdiction upon the Tribunal. This has not happened and so the Tribunal must confine itself the present position as it currently stands.

17. While we note that both parties consider that the Tribunal has the jurisdiction to determine this matter, we do not agree. We do not accept their submissions that the statutory exclusion set out with section 13(1)(b) does not apply nor that the decision in Contour Homes is not on point with the facts in this case.

18. We are satisfied that the agreement between the parties is an assured periodic tenancy. This is clearly evidenced by the terms of the tenancy and indeed the title heading 'Assured tenancy agreement' on the document. I cannot accept Mr Gervois's assertion that this agreement is a licence and as such falls outside the Act. In fact, if that were the case, then he could not rely on the provisions within the Act enabling him to refer the rent to the Tribunal for determination, nor indeed would the Tribunal have any jurisdiction to determine his application.

19. Mr Gervois's other submissions outline more his moral indignation at being potentially excluded from challenging the proposed new rent. He considered this to be unjust and unfair. While we can understand the Applicant natural desire to assure the reasonableness of the new rent being proposed, the Tribunal is bound to follow the statute as Parliament specifically legislated for such an exclusion. The rights or wrongs of ss.13(1)(b) is not a matter for the Tribunal to comment on. Our role is simply to interpret and correctly apply the legislation as Parliament intended.

20. Turning next to the Respondent's legal submissions. We are unconvinced that paragraph 1(4) is merely restating the statutory procedure open to the parties. The first line in the review clause clearly states:

> "The Association may increase or reduce the Rent by written notice to the Tenant specifying the rent proposed."

> The requirement is only that the notice is in writing and it specifies the rent. This clearly constitutes a mechanism to review the rent. It is not simply describing the statutory means of instigating a rental increase under the Act. If it were, one would expect it to clearly state that the Landlord may serve a section 13 notice in the prescribed format. It does not.

21. As Arden LJ states in Contour Homes:

"..this exclusion applies..... in cases where the tenancy agreement merely provides machinery for increasing the rent."

22. Paragraph 1(4) provides the 'machinery for increasing the rent' and it is upon written notice but not necessarily that which follows the prescribed notice within the Act. This interpretation is reinforced by L J Arden's conclusions in the two further statements contained within the judgement:

18 "In my judgement, the wording used is apt to include a provision of the kind we have here which provides that the rent may be increased if certain events occur, in this case the service by the landlord of a notice."

19 "This supports the view that in the context of these tenancies Parliament wished to uphold the freedom of the parties to agree their own provisions for increases in rent."

23. Similarly, we do not accept that a crucial difference between the review clause in this case and Contour Homes is the fact that Mr Gervois's tenancy explicitly states that tenant has the right to refer the rent to the rent assessment committee for a market determination. The decision in Contour Homes is clear on this point:

"The jurisdiction of a rent assessment committee is entirely statutory. As a matter of law, statutory jurisdiction cannot, unless statute so provides, be reduced or enlarged by parties by consent."

24. Mr Dymond's final contention in his advice is that the rent review term is unfair because if the Tribunal does not have the jurisdiction to determine the market rent, there is no means of challenging the rent being demanded by the landlord. Accordingly, in his view, this would void the rent review clause as an unfair term under the Unfair Terms in Consumer Contracts Regulations 1999 and therefore it could not binding on the tenant, and so contrary to the 'binding' qualification in ss.13(1)(b) of the Act.

25. While this is a somewhat circular argument, it is nevertheless an arguable one. The difficulty would however be that it would be rather perverse for the Tribunal to confer jurisdiction upon itself because of its lack of jurisdiction in the first instance. We would suggest however that the appropriate action, if the Respondent wishes to take this point, would be for the Respondent to pursue separate proceedings in the courts to obtain such a declaration.

26. For the above reasons we are satisfied that paragraph 1(4) constitutes a mechanism to review the rent within the meaning of ss. 13(1)(b) and so excludes the Tribunal from having jurisdiction to determine this application.

ORDER

Having determined this preliminary jurisdictional issue, the Tribunal strikes out the application for lack of jurisdiction under rule 9(2)(a) of The Tribunal Procedures (First-tier Tribunal) (Property Chamber) Rules 2013.

Signed: Deputy Regional Valuer Niall Walsh

Dated: 29 May 2019