

RENT ASSESSMENT PANEL FOR SCOTLAND

RENT (SCOTLAND) ACT 1984
NOTIFICATION OF DECISION BY THE RENT ASSESSMENT COMMITTEE

REFERENCE NO.	OBJECTION RECEIVED	OBJECTION
RAC/AB12/373	19 May 2005	Tenant

ADDRESS OF PREMISES
Flat 6, 28 Nigg Kirk Road, Aberdeen AB12 3BF

TENANT
Mrs E Gilbert

NAME AND ADDRESS OF LANDLORD
Grampian H.A.
74 Huntly Street
Aberdeen
AB10 1TD

DESCRIPTION OF PREMISES
Self contained flat circa 1978 with electric heating comprising 2 rooms, kitchen and bathroom.

SERVICES PROVIDED
Open space maintenance, staircleaning, bin cleaning and stair lighting

COMMITTEE MEMBERS

CHAIRMAN	Mr D O'Carroll LLB (Hons) Dip LP
PROFESSIONAL MEMBER	Mr C Hepburn ARICS

FAIR RENT	DATE OF DECISION	EFFECTIVE DATE
£ 2351.62 p.a. Inclusive of services of £173.36 (Non variable)	27 January 2006	4 May 2005

D O'Carroll

Chairman of the Rent Assessment Committee

27 January 2006
Date

Rent Assessment Committee

Statement of reasons in respect of an reference to the RAC following a determination of a fair rent by the rent officer

Introduction

1. This is a reference to the RAC in respect of Flat 6, 28 Nigg Kirk Road, Aberdeen AB12 3BF ("the subjects"). The landlord is Grampian Housing Association ("GHA") and the tenant is Ms E Gilbert ("the tenant"). The tenancy is a regulated tenancy. On 4 May 2005, on the application of the landlord, the rent officer registered a fair rent of £2,469.33 per annum effective from that date. The tenant timeously objected to the registered rent on the grounds that it was too high. Accordingly, the matter was referred to the RAC for determination. Both parties were invited to make written representations, to attend the inspection and to attend a hearing. Both parties made written representations and attended the hearing. The inspection took place on 30 September 2005. The tenant was represented by Mr Emslie, another tenant of the landlord, and GHA by its Director, Neil Clapperton, who was assisted by various senior members of his staff.
2. The hearing first took place on 30 September 2005 in Aberdeen. Unfortunately, during the course of the hearing, one of the members of the Committee, Ms J. Stephen, became ill and the hearing was adjourned to 11 November 2005. By that time, Ms Stephen had resigned from the Rent Assessment Panel for Scotland. The parties were given the choice of continuing the hearing with the remaining members, Derek O'Carroll (chairman) and Colin Hepburn (surveyor member), or of recommencing the hearing with a new third member. Both parties chose the former course of action. The hearing on 30 September 2005 was adjourned on the motion of Mr Emslie as it appeared that he had not been sent a copy of the landlord's letter to the Committee, dated 19 September 2005 upon which the landlord relied for part of its position as regards the fixing of the fair rent. A copy of that letter was sent to him soon thereafter. The hearing resumed in Aberdeen on 27 January 2005, when it concluded.

Submissions of the parties

3. The positions of the parties are set out very fully in the substantial documentation that each produced, and in the very full oral submissions that each of the parties made. The Committee is most grateful to Mr Clapperton and Mr Emslie for the considerable assistance that they each provided to the Committee. While there was substantial discussion and exploration of various issues during the hearing, we understand the following represents a fair summary of the parties' final positions.

4. We deal first with the fixing of what was termed the 'core rent' element of the fair rent (as opposed to the service charge). For the tenant, although Mr Emslie made various submissions on this aspect, the Committee understands that his final position is as follows. For some years, GHA's rent fixing policy was a shambles. In some years, it had unlawfully increased registered rents. There was, and still is to an extent, a significant disparity between rents for similar flats. He had made numerous complaints about various aspects of the management of GHA to a variety of official bodies including Scottish Homes, the Scottish Parliament, the Ombudsman and this Committee. Some of those complaints were upheld. This evidenced the generally highly unsatisfactory way in which the GHA treated its tenants and managed its affairs. He submitted that the appropriate way of setting the fair rent would be by the application of the landlord's own rent setting policy. This was, he said, that the fair rent of a flat like the tenant's should be fixed by taking a baseline figure for that type of accommodation, (in this case £199.30) and then deducting 4% due to the flat not possessing a shower, 8% due to the flat having only partial central heating, and 3% because the bathroom was substandard. That produced a core rent figure of £169.40.

5. For the landlord, Mr Clapperton openly accepted that in the past (before he assumed his present position) GHA had made some mistakes and that its management methods were found wanting in a number of respects. He accepted that in the past, in error, rents of registered properties had been unlawfully increased. That issue had now been resolved. He explained that the disparity in rental levels was at least partially as a result of some rents being registered, some not being registered and the effects of stock transfer. These problems were being addressed and remedial action was well underway. In particular, the Association had, after substantial and detailed consideration and consultation with tenants, Communities Scotland and others, developed an open, transparent and rational policy for the fixing of rents. This was in the process of being implemented; the final objective being the establishment of a rent structure that was affordable, fair, transparent, and consistent and in which there would be harmonisation of rents for similar properties in similar circumstances. Mr Clapperton's final position as regards the appropriate method of fixing the core element of the fair rent (perhaps unsurprisingly) is that it should be done by the application of GHA's own rent setting policy. He agreed that that Mr Emslie had correctly stated the policy as regards the base figure and the percentage deductions. However, although he accepted that the shower deduction applied, he disputed that the central heating deduction applied (as, he said, the flat had full central heating, not partial) and did not accept that the bathroom was "substandard" (although neither he nor

Mr Emslie were able to explain what was meant by “substandard”). In addition, Mr Clapperton emphasised that an essential part of the rent setting policy was that all rents are reviewed annually, that rents are revised upwards annually by an amount that reflects the rate of inflation of the Association’s actual costs (which this year is 3 ½ %), and that since a fair rent is fixed for three years, any application of the GHA rent fixing policy in the ascertainment of the core fair rent would have to take account of that since otherwise, the fair rent would, after the first year, no longer reflect the application of that policy.

6. As regards the service charge, the parties submitted as follows. The parties were agreed that there were four elements to the service charge: open space maintenance (OSM), stair cleaning, hygiene bin cleaning and stair lighting (electricity) and the tenant was liable to pay a proper proportion of the costs of these services. Mr Emslie could not state with any accuracy what the correct figure should be. However, whatever the correct figure was, it should be less than that submitted by the landlord. This was because not all the services were delivered as often as they should have been (such as certain aspects of cleaning), the tenders were too high, the electricity costs were slightly overstated and the landlord had failed to provide satisfactory evidence of the costs of provision of the services. He also disputed the method adopted by the landlords in apportioning the costs as between owner occupiers and tenants, claiming that the actual charges demanded by the landlord from owner occupiers were higher than the amounts one can deduce from the landlord’s breakdown of charges in its letter of 19 October 2005. He claimed that the VAT element attached to the bills should not be passed onto the tenants in the service charge but should be recovered by the landlord from the HMRC in the usual way (although that submission was not renewed on the third day of the hearing). Mr Emslie also complained that the common stair and common close had not been redecorated since 1992 even though the cyclical maintenance schedule specifies redecoration every 8 years. The stairlighting (electricity) cost were overstated as the light on one building has been on day and night for an extended period without repair. The tenant should not have to pay the cost of that.
7. For the landlord, Mr Clapperton relied on the letter of 19 September 2005 (and attached table and explanations) and the copies of tenders accepted for the services in question and statements of electricity costs. These documents demonstrated, he said, the true cost of the services provided, the method of apportionment as between tenants and owner-occupiers and as between tenants themselves. The management charge applied was 10% of actual costs. Those actual costs included VAT where charged by

the supplier. That charge was irrecoverable by the GHA and had to be included in the service charges. The sole aim of the GHA was simply to recover the actual costs of providing the services without making a profit or loss. The figure revealed a service charge of £167.50 per annum for the tenant, or £13.96 per month. He claimed that account needed to be taken of inflation as well as anticipated cost increases over the three years. He accepted that the service charge would have to be fixed due to the absence of a contractual restriction in the setting of service charges. Taking account of these matters, the service charge should be set at £190.84 per annum or £15.90 per month. He accepted that the common parts had not been redecorated since 1992 and that the schedule referred to specified redecoration every eight years. However, he said that that period was an indicative figure only, that redecoration would not take place unless inspection showed that it was reasonably required, and that in fact, redecoration in the tenant's building was still in good condition and not required and that the GHA had decided not to spend their tenants' money on unnecessary redecoration.

Findings in fact

8. The RAC makes the following findings in fact following its inspection of the subjects, their surroundings, and consideration of all written and oral evidence.
9. The subjects are a flat located on the first floor of a low rise flatted building containing a number of other flats, constructed in the 1960s. The building is within the city of Aberdeen to the south. The building, and the other buildings in the same development, are sited in well-tended grounds, which are mostly grassed over. The paths and road serving the building are in good condition. The building is of rendered concrete block with a tiled roof. The subjects are accessed via a common close and stair. There is a door entry system. There is no lift. The close and stair are clean, in good condition, and good decorative order, having been redecorated in 1992. The landlord does carry out repairs to the flat and common parts however when required. The tenant has a good-sized storage cupboard located off the common stair.
10. The subjects comprise the following. The flat has one bedroom, a living room, hall, kitchen and bathroom. The flat is partially served by off-peak electric central heating utilising storage heating. The bathroom and kitchen do not have storage heating and instead are heated by electric convector heaters operated manually, independently of the central heating system. They operate using on-peak electricity. Therefore, the subjects have partial, not full, *central* heating. The living room has an additional

electric fire. The living room is a reasonable size and is undecorated. A floorboard there is loose and requires attention. The kitchen was refurbished by the landlord 9 years ago and is reasonably modern and is in good condition. The bathroom does not have a shower but has a bath, wash hand basin, and WC. It has been tiled by the landlord but is otherwise undecorated. The bedroom is in good condition. It formerly suffered from condensation dampness on the exterior wall but this problem has long since been rectified. There are no outstanding repairs required to the subjects or the common parts. The tenant is responsible for internal redecoration.

11. The landlord is a not-for-profit housing association registered under the Industrial and Provident Societies Act 1965 and exist to provide housing to those of modest income in housing need. It receives significant amount of public money for this purpose. It does not distribute any surpluses that may be made. It does not seek to make a profit. The rents for its properties are determined by the Association in terms of its rent setting policy. The aim of that policy includes the aim of providing as much housing as possible at an 'affordable rent'. When setting its rents, GHA seeks to keep them as low as possible. The level of the rent fixed is not influenced in any way by the size of demand for its flats. In other words, there is no element of an uplift to reflect scarcity in any of the rents charged. The general level of rents is among the lowest of all providers of similar housing in the area, including other housing associations. Judging by the Committee's general knowledge and expertise in this area, the level of rents charged by GHA is substantially lower than the nearest equivalent accommodation that could be obtained privately in the Aberdeen area. However, the Committee did not have any precise comparables before it, and neither of the parties were able to supply any evidence as regards the comparable level of rents in similar properties, apart from the passing rent in the GHA's own properties. The rents charged by GHA for closely equivalent properties in 2005 range from £186.28 to £205.77 with the vast majority falling with the range of about £196 to £205. The median rent is about £196.05 for such properties. The service charge element included within the figure is either £14.36 (or very close) or £20.57. The reasons for the disparity are those advanced by the GHA as noted above. The GHA's policy is to even out these differences as soon as it can.
12. The services provided by the GHA to the tenants are OSM, stair cleaning, hygiene bin cleaning and stair lighting (electricity). The first three of these are provided by contractors, following competitive tendering. The successful tenders thus represent the actual market price for the provision of the services in those tenders. The services contained in those tenders are

actually supplied to the tenants although the Committee accepts that there may be performance issues as regards the effectiveness or adequacy of the service provided by the contractors. However, there is no dispute that the bulk of the services contracted for are supplied, that the cost is the market price and that the landlord has paid the contractor for the services contracted for. In any event, the Committee finds these facts established. As regards the cost of the stairlighting, which is stated by the landlord to be solely the cost of the electricity, the total annual amount claimed by the landlord is very small. Even if one stair light had been on for an extended period using electricity, the difference that that would make to the tenant's annual share of the electricity costs is negligible. The Committee accepts the landlord's figures for the service charge element as being £167.50 per annum (comprising £70.87 for OSM, £77.66 for stair cleaning, £9.52 for hygiene bin cleaning and £9.45 for stairlighting (electricity)). The RAC also accept that a management charge of 10% is a reasonable estimate of the cost of administering the services, especially as the bulk of them are contracted out. That management charge is included in the figures given above. The Committee also accepts that the inflation element for the cost of providing services to the tenants is likely to be around 3 ½ % per annum.

13. The Committee does not accept that the landlord was obliged to recover the VAT element from the contractors and should not have passed this onto the tenants in the service charge. It accepted that the landlord had sought advice from HMRC on this point and had been told that the VAT was non-recoverable. That also accords with the Committee's understanding of the legal position.
14. The tenancy agreement between the parties provides that the service charge element may be altered by the landlord on notice. It does not stipulate the terms on which this may be done or provide any criteria for the way in which the charge may be altered or provide any protection for the tenant.

The law

15. The Committee is bound to fix a fair rent for the subjects by applying the terms of the Rent (Scotland) Act 1984, and in particular section 48. It is required to have regards to all the circumstances. There is no single or preferred method for the fixing of a fair rent. While various methods are used to reach a final figure, it is for the Committee to determine, based on the evidence before it, the best method to fix the fair rent. The fair rent fixed should be fair to the landlord and fair to the tenant. In terms of section 48(2) of the Act, the Committee is bound to disregard various

factors, including any element attributable to 'scarcity'; that is, excess of demand over supply of the accommodation in question. Where the rent includes an element in respect of charges for services, in terms of section 49(6) of the 1984 Act, the amount to be registered may only be registered as variable if the terms as to variation are reasonable. If the Committee is not so satisfied, the Committee registers a fixed service charge. In terms of section 60 of the Act, in a housing association tenancy, the rent fixed takes effect from the date of the original determination by the rent officer.

The decision

16. The RAC does not accept the determination of the fair rent by the rent officer. The RAC determines that a fair rent for the subjects, determined in accordance with Part V of the Rent (Scotland) Act 1984, is £2,351.62 per annum, (about £195.96 per month), inclusive of a fixed service charge of £173.36 per annum (about £14.45 per month) with effect from 5 May 2005.

Reasons for the decision

17. Despite the length of the hearing and the volume of submissions, there was substantial agreement between the parties on certain key facts. Both parties were agreed that the rent comprised two elements: the core rent and the service charge element. Both parties were agreed that, in principle, the application of the landlord's recently revised rent fixing policy was the best and fairest way of fixing the core rent element. Both parties were agreed what services were provided. There was no dispute as regards the cost of most of the services or that most of the services were provided. There was no challenge to the reasonableness of the landlord's 3 ½ % inflation figure. Much of the remaining submissions made by Mr Emslie concerned various grievances that he, or other tenants had had against the landlord in the past. Although it appeared that at least some of his complaints were well-founded, they were now of only historical interest or were not in any event relevant to the task before this Committee.
18. As far as the method of fixing the core rent was concerned, the Committee agreed with the parties that the fairest method of ascertaining that part of the fair rent was by the application of the landlord's own policy. The Committee accepted that in the context of a non-profit making landlord which exists solely for the purpose of providing good quality housing at an affordable level for those who are in housing need, both the formulation of the policy (as conceived in this case), and the application of that policy was likely to lead to a fair result for both the landlord and the tenant. It seemed to the Committee that given the agreement of the parties on this method, that the landlord's policy was on the face of it fair and reasonable, and that neither the base figure relied on in the policy, nor the

policy itself, incorporated any element of 'scarcity' or other disregarded factors, the application of the landlord's rent fixing policy would be likely to produce a reasonable assessment of that part of the fair rent.

19. The Committee however first considered whether to adopt a method relying only on comparable rents; not least because it was bound to take these into account. The only rent comparables available to the committee were the previous registered rent figures for some of the landlord's own properties and the non-registered rents for closely similar properties. As regards the registered rent comparables, there were only two *contemporaneous* comparables available to the RAC. Of these, one was for a different size flat. Neither had been determined by a RAC after inspection and a hearing. Furthermore, the rent officer has apparently accepted that the service charge is variable, a conclusion that the Committee found surprising in the light of its findings below. The Committee did not consider that these were good evidence of what a fair rent for the present subjects would be. As for the non-registered rent comparables, since these rents were themselves fixed by reference to the landlord's rent fixing policy, it seemed to the Committee that rather than use those figures as comparables, a more accurate and precise method would be to apply the same policy to the subjects themselves. This is especially so since the non-registered rent comparables flats may have differences as regards condition or facilities.

20. The application of the landlord's rent-fixing policy to the subjects is done in the following way. All figures were applicable as at May 2005. The base rent is £199.30 per month according to the parties. From this is taken certain deductions. The central heating is partial which leads to an 8% deduction. In this regard, we agree with the tenant and not the landlord due to the findings in fact made above. There is no shower, which leads to a 4% deduction. The bathroom is otherwise in good condition and the Committee could find nothing substandard about it, whatever that term may mean exactly; so there is no additional 3% deduction. In that regard, the Committee agrees with the Association and not with Mr Emslie. The resultant figure is £175.38 per month. The Committee agreed with the landlord as regards the condition of the decoration of the common stair and agreed that it would not have been reasonable to have redecorated the common stair in this case as it was in a good condition and was unnecessary to redecorate. No deduction is made therefore in this regard from the core rent.

21. The rent fixing policy specifies that the rent will increase each year by an amount to compensate for inflation. For non-registered rents, that would

mean an increase next for the next three years of 3 ½ % each year, assuming costs in the housing association sector continue to rise at current levels. However, a fair rent is fixed for three years. If the rent were fixed at £175.38, that would mean that in years two and three, the registered rent would fall behind the rents of equivalent non-registered flats. That shortfall would not be recovered when the registered rent next falls to be reconsidered. Thus, failing to take account of inflation in the fixing of the fair rent would mean that the landlord would get less than it could reasonably expect, and the tenant would pay less than her neighbours for similar property. That would not be fair to both the landlord and tenant. Neither would it be an accurate reflection of the intended effect of the landlord's rent fixing policy, a policy accepted as fair by the tenant. Accordingly, there should be one year's inflation built into the fair rent figure. (This is the same way in which non-variable service charges are fixed for fair rent purposes: see below). That means that over the whole of the three years, during which the rent is fixed, and may not be altered, the tenant will pay about the same as her neighbours. That appears to the Committee to be fair. It also meets the central complaint of the tenant in her application to this Committee: that her rent was much higher than for similar properties on the same site. Applying the 3 ½ % inflation figure for one year only produces a total of about £181.52 core rent or £2178.26 per annum.

22. As regards the service charge element, the landlord accepted that the service charge might not be registered as variable as the terms relating to the variation, in its standard lease provided to all tenants, are insufficiently precise and detailed. The Committee agrees. The Committee takes the view that in the absence of a sufficiently detailed and fair contractual service charge policy (which need not be in the lease itself), the fair rent hereby fixed contains a fixed service charge element only. The Committee accepted the landlord's figure for the current rate of the service charge. The Committee, having heard from Mr Clapperton and his senior colleagues, and having seen the plentiful vouching in the papers, accepts that the figures claimed by the GHA in respect of service charges are fair, reasonable, accurately calculated, accurately apportioned as between the tenants and others, and accurately assessed as regards the tenant.
23. As regards the submissions made on behalf of the tenant, the Committee accepts that there may well have been occasions when the services actually provided have been provided inadequately. It also accepts that some services may seem to be quite costly. It is also possible that on occasion, contractors may not have done what they were contracted to do. Such things are probably inevitable, at least on occasion. However, there is no

doubt that the services were contracted for and paid for. The Committee accepts the evidence of the GHA that where such issues are brought to its attention, they will deal with such complaints. It accepts the GHA evidence that it directly employs staff to monitor contract compliance. GHA claims however that there were no complaints made to it of the type referred to by Mr Emslie at the time that the lack of service was said to have occurred. That was not disputed. It was not able therefore to investigate and rectify and any shortcomings.

24. As regards the stairlighting (electricity) issue, the effect on the tenant's rent is *de minimis* (minimal) and it is therefore unnecessary to attempt to investigate that matter and ascertain the effect of any landlord shortcomings, should they be proved. As regards the complaints that the landlord had failed to properly apportion the charges as between tenants and owner-occupiers, it was the Committee's view that even if Mr Emslie was right in this regard, the error was one that favoured the tenant, not the owner-occupier. The associated submission, that owner-occupiers were being over-charged in some other way, was not for this Committee and irrelevant to the tenant. As regards the apportionment among the tenants themselves, the Committee was amply satisfied that the method adopted by the GHA, as explained in its letter and table of 19 September 2005, was sound, fair, logical and reasonable. The Committee preferred the submissions and evidence of the landlord in this regard.
25. The Committee did not however accept the contention of the landlord in said letter that the figure for the service charge element be increased by the rate of inflation for three years. The conventional method for the fixing of a non-variable service charge is to add one year's inflation only, so that over the three years during which the service charge is fixed and cannot be increased, the landlord will receive, across the piece, roughly the same as if the service charge has increased each year by the appropriate rate of inflation. That is an appropriate method in this case in the view of the Committee.
26. Thus, the Committee took the current annual service charge element and added 3 ½ %, being the sector specific inflationary increase, which produces a figure of £173.36 per annum.
27. The annual fair rent thus fixed is calculated by adding the core rent element of £2178.26 to £173.36, producing a total of £2351.62 per annum or about £195.96 per month. This figure is backdated to 4 May 2005 in terms of section 60. It is slightly less than the amount fixed by the rent officer.

The landlord is therefor obliged to refund any amount paid by the tenant in excess of this figure since that date.

D O'Carroll

Derek O'Carroll, Advocate, LLB (Hons); DipLP.

Chairman of the Rent Assessment Committee

30 January 2006.