LRX/135/2007

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT - Estate Charges - Appeal from Leasehold Valuation Tribunal declining jurisdiction –s 159 Commonhold and Leasehold Reform Act 2002 – estate management scheme providing for costs to be certified and then recovered according to a mechanism of division between properties- whether jurisdiction of Leasehold Valuation Tribunal excluded

IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN **ANDREW BOTTERILL** **Appellant**

and

HAMPSTEAD GARDEN SUBURBS TRUST LIMITED **Respondent**

Re: 531 properties within
Hampstead Garden Suburb,
London NW11

Before: His Honour Judge Gilbart QC

Decision made on written representations procedure

The following cases are referred to in this decision:

Coventry City Council v Cole [1994] 1 WLR 398

DECISION

1. The Appellant is one of 531 residents of Hampstead Garden Suburb in North London who are unhappy with the way in which estate charges are levied. Another resident, Mr Angus Henry Walker, made application to the Leasehold Valuation Tribunal ("LVT") to vary the estate management scheme pursuant to section 159(3) of the Commonhold and Leasehold Reform Act 2002. After a hearing on 21st June 2007, and subsequent written representations, the LVT declined jurisdiction by a written decision of 16th August 2007. Mr Walker appealed to this Tribunal with permission of the LVT, being granted on 7th September 2007. The current Appellant has taken over the appeal from Mr Walker, who is now a trustee of the Respondent landlord.

2. The Trust has elected not to take any part in the appeal, although it was represented by counsel before the LVT.

3. I have had regard to the representations made by the Appellant, and to the original decision of the LVT and the submissions made to it.

Factual basis

4. The issue is a short but important one.

5. The Garden Suburb is subject to an estate management scheme, administered by the Respondent Trust. Under that scheme, there are provisions which regulate the use, appearance and maintenance of enfranchised property and which deal with the maintenance of property or common parts.

6. By paragraphs 6 and 7 of the scheme: -

> " 6. There shall be payable to the Trust in respect of every enfranchised property an annual management charge as a contribution to the expenses of the Trust in operating the scheme, the said management charge being payable in respect of each separately rated residential unit or shop where the enfranchised property comprises mire than one such unit.
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> 7. The said Management Charge ("the Charge") shall be a Charge upon every enfranchised property which shall be calculated as follows and shall be subject to VAT (if applicable): -
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> > (a) for each of the first five years of the Scheme and for the period from the 17th January to the 5th April 1979 the sum of £ 2

(b) for the (financial) year to 5th April 1980……the sum of £ 9.48;

(c) ……..to 5th April 1981……£ 16.57;

(d) ……..to 5th April 1982……£ 12.38;

(e) for each period of one year following 5th April 1982, a sum equal to a proportionate part of the expenses of the Trust in operating the scheme in an economical, efficient and consistent manner during that financial year (those expenses to include proper provision for accrued expenses and to take account of any surplus arising from the rounding up of the previous year's charge and the amounts due from the Owners enfranchising during the financial year) as certified by the Trust's auditors, the proportion to be calculated by dividing the said expenses by the number of enfranchised properties on the 6th April in the financial year and rounding up to the nearest 10p…."

7. Clause 11 permits termination or variation of the scheme by the Court, whether by reason of a change in circumstances or otherwise on an application made to it by the Trust or not less than one-third (or 100 whichever is the greater) of the total number of owners of enfranchised property.

8. The original Appellant was supported by numerous other estate charge payers, and was treated by the Tribunal as lead applicant.

9. As a result of its concern over the meaning of section 159 of the Commonhold and Leasehold Reform Act, and its particular concern that it might not have jurisdiction, the LVT invited written representations, which are summarised below. It concluded that it had no jurisdiction under s 159(3) of the Act to vary the Estate Charges. I shall set out its reasons for that decision below.

The statutory provisions

10. Section 159 of the Act reads as follows

"159 Charges under estate management schemes

(1)This section applies where a scheme under—

(a) section 19 of the 1967 Act (estate management schemes in connection with enfranchisement under that Act),

(b) Chapter 4 of Part 1 of the 1993 Act (estate management schemes in connection with enfranchisement under the 1967 Act or Chapter 1 of Part 1 of the 1993 Act), or

(c) section 94(6) of the 1993 Act (corresponding schemes in relation to areas occupied under leases from Crown),

includes provision imposing on persons occupying or interested in property an obligation to make payments ("estate charges").

(2) A variable estate charge is payable only to the extent that the amount of the charge is reasonable; and "variable estate charge" means an estate charge which is neither—

(a)specified in the scheme, nor

(b)calculated in accordance with a formula specified in the scheme.

(3) Any person on whom an obligation to pay an estate charge is imposed by the scheme may apply to a leasehold valuation tribunal for an order varying the scheme in such manner as is specified in the application on the grounds that—

(a) any estate charge specified in the scheme is unreasonable, or

(b) any formula specified in the scheme in accordance with which any estate charge is calculated is unreasonable.

(4) If the grounds on which the application was made are established to the satisfaction of the tribunal, it may make an order varying the scheme in such manner as is specified in the order.

(5) The variation specified in the order may be—

(a)the variation specified in the application, or

(b)such other variation as the tribunal thinks fit.

(6) An application may be made to a leasehold valuation tribunal for a determination whether an estate charge is payable by a person 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.

(7) Subsection (6) applies whether or not any payment has been made.

(8) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of subsection (6) is in addition to any jurisdiction of a court in respect of the matter.

(9) No application under subsection (6) may be made in respect of a matter which—

(a)has been agreed or admitted by the person concerned,

(b)has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which that person 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.

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

(11) An agreement (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a)in a particular manner, or

(b)on particular evidence,

of any question which may be the subject matter of an application under subsection (6).

(12) In this section—
"post-dispute arbitration agreement", in relation to any matter, means an arbitration agreement made after a dispute about the matter has arisen, and
"arbitration agreement" and "arbitral tribunal" have the same meanings as in Part 1 of the Arbitration Act 1996 (c. 23).

The parties' approach

11. The LVT decision contains a comprehensive rehearsal of the parties' respective legal submissions. For the most part, I have adopted the LVT's summary of them.

12. The LVT set out the nature of its concerns about jurisdiction in the matters upon which it invited submissions:

> "8. Submissions on the merits of the application were made during the course of the hearing, however the Tribunal subsequently asked for written representations in respect of its jurisdiction.
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> 9. The Tribunal was concerned that its jurisdiction to vary under section 159(3) may depend upon the distinction between a "variable estate charge" and an estate charge which is "calculated in accordance with a formula" .
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> 10. Section 159(2) describes a "variable estate charge" as a charge which is neither specified in the scheme nor calculated in accordance with a formula. Section 159(3) gives the Tribunal jurisdiction to vary a scheme on the basis either that any estate charge specified in the scheme is unreasonable, or that any formula specified in the scheme in accordance with which any estate charge is calculated is unreasonable
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> 11. The Tribunal therefore sought submissions from the parties as to:
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> > (a) whether the charge in question is a "variable estate charge" or a charge "calculated in accordance with a formula" or whether the charge may be characterised as both; and
> >
> > (b) whether the Tribunal's jurisdiction under section 159(3) to vary the scheme is affected by the characterisation of the charge as a "variable estate charge" or a charge "calculated in accordance with a formula" ; and
> >
> > (c) whether the characterisation of the charge in accordance with paragraph (a) is material to the issue of whether the payability of the charge is limited to an amount which is reasonable.

13. The *Respondent Trust* submitted as follows

> (a) The charge is a "variable estate charge". The amount of the charge varies with the expenses of operating the scheme. It is not a fixed charge (i.e. specified in the scheme), although it was until 1982. It is also not calculated in accordance with a formula so as to fall within section 159(2)(b) of the Act.

(b) The characterisation of the charge as a "variable estate charge" does not affect the Tribunal's jurisdiction to vary under section 159(3). There is no direct relationship between section 159(2) and section 159(3). Section 159(3) refers to "any formula" specified in accordance with which "any estate charge" is calculated. In the absence of limiting words, "any estate charge" will include a variable estate charge. The variable estate charge in this case includes a formula (namely the requirement to divide the expenses by the number of properties) even though what that number is divided into is a total sum which fluctuates from year to year. That construction, he says, aligns with the purpose of the provision, namely to allow a formula to be varied if unreasonable.
(c) Since the charge is a "variable estate charge" its amount is limited to an amount which is reasonable. That is not an issue in this case.

14. The *then Appellant tenant* submitted as follows

(a) The charge is not a "variable estate charge" but is a "charge calculated in accordance with a formula". He contended that the definition given in section 159(2) prevented the charge from being both.

The level of the charge is governed by the application of a formula, namely the mechanism by which the amount to be charge to each enfranchised owner, is ascertained. Formulae can include variable elements, here, for example, costs may vary from year to year. The variation in expenses does not mean that any particular charge derived from them is a "variable estate charge".

Any unreasonableness in a "variable estate charge" can be remedied without modifying the Scheme of management whilst the unreasonableness of a fixed charge, or a charge calculated in accordance with a formula must be remedied by a variation in the scheme.

(b) Section 159(3) provides no jurisdiction over a "variable estate charge". The Trust's management charge must be deemed to be calculated in accordance with a formula since otherwise there would be no "charges" under the scheme of management to be determined.

(c) However any charge is characterised, the Tribunal has powers to enable it effectively to determine that the charge may be limited or totally disallowed. The characterisation of a charge determines only what remedies are available.

Leasehold Valuation Tribunal's approach

15. It approached the issue in the following way.

a. Sections 159(2) and (3) must be read together

b. Section 159(3) only gives power to the LVT to vary an estate charge specified in the scheme, or calculated in accordance with a formula;

c. The definition of " variable estate charge" is framed negatively, by contrast with the definition of " variable service charge" in s 18 Landlord and Tenant Act 1985. It can be contrasted with the definition of a variable service charge to which ss18-30 of that Act apply. It noted the distinction between fixed and variable charges drawn by the Court of Appeal in *Coventry City Council v Cole* [1994] 1 WLR 398 which was a case on the meaning of the right to buy provisions of the Housing Act 1985(as amended)

d. The fact that a variable estate charge will be collected by means of a formula does not bring it within the definition of a " formula" in section 159(3). In both sections 159(2) and (3) the formula in question is one where the estate charge is calculated without reference to the fluctuation of actual costs; for example a charge which varies during the life of the scheme according to the application of the Retail Prices Index to an amount fixed at the outset.

e. S 159(2) follows closely the statutory scheme for administration charges in Schedule 11 of the 2002 Act, where " variable administration charge" is defined in the same way as appears in s 159(2). It too is only payable if reasonable (Schedule 11 paragraph 2) and the provisions for variation are also equivalent (paragraph 3(1))

f. Section 159 regulates the amount of an estate management charge as follows

   (i) If the charge varies in accordance with costs, then the amount of the charge is limited to an amount which is reasonable;

   (ii) If the charge is specified or is calculated in accordance with a formula (so that it can be objectively ascertained without reference to actual costs) then that charge will be regulated by a variation in the scheme if the sum specified or the sum produced by the formula, is unreasonable.

g. This approach gave proper effect to the terms of section 159, and resulted from a consistent reading of the terms " estate management charge", " variable estate management charge " and " formula".

h. The LVT therefore reluctantly concluded that it had no power to vary the scheme, and any application to vary the scheme had to be made under paragraph 11 of the scheme.

Grounds of Appeal

16. The original and current Appellants argue as follows

a. The charge in question was not a " variable estate charge". There are other charges in the Scheme which vary by nature, level, date, and the person to whom they are charged. Those are " variable estate charges" unlike the Management Charge (the one in question), which is uniformly calculated

b. Alternatively, if it was, one should adopt a purposive construction of s 159(3) and construe it as giving the LVT jurisdiction over any charge calculated in accordance with any formula specified in the Scheme of Management. They draw attention to the wide powers of the LVT under sections 159(3)(b), (4) and (5), and to the Explanatory Notes to the Act. Although not set out in full in their submissions, and while of course recognising that they only have the status of Explanatory Notes, it is worth recording what paragraph 21 of the Notes says:

> "21. This Part of the Act also provides greater protection for leaseholders against unreasonable service charges and other payments. It will enable leaseholders to resolve a wider range of disputes before a LVT. It will strengthen the existing requirements for landlords to consult leaseholders about major works and extend them to cover any contract for works or services lasting more than 12 months. It will provide new rights for leaseholders of houses who are required to insure their property through an insurer nominated or approved by the landlord. It will simplify and strengthen the existing requirements for accounting and safeguarding service charge monies. It will provide that charges levied by landlords under estate management schemes are to be subject to a test of reasonableness to be determined by the LVT. It will extend the scope of the right to apply to a LVT for the appointment of a new manager and make it easier to vary defective leases……."

c. The effect of the route of using paragraph 11 of the Scheme would be very cumbersome, and involve canvassing 3500 individuals, and obtaining the support of 1100 of them.

d. The LVT has misinterpreted sections 159(2) and (3). In particular giving too restricted a meaning to the word " formula", so that its decision excluded a formula for collection of the type in question here, which ascribes the same management charge to the owner of a house worth £175,000 house as it does to the owner of one worth £ 20 million.

e. Wrongly referring to an authority` without giving the parties the opportunity to make submissions upon them. In any event *Coventry City Council v Cole* relates to different provisions in a different statute.

17. The Respondent has not responded to the appeal.

Discussion and conclusions

18. The arguments that were raised by, and developed before, the LVT flow from the way in which this estate charge has been defined. I therefore start by considering the concept of an " estate charge" and " variable estate charge" in section 159.

19. In my view the starting point is to address what one may expect will occur under a management scheme. Costs will be incurred of various kinds. In the context of management of an estate of this kind, management encompasses activities and responsibilities which will include expenses which cannot be quantified in advance. The approximate scale of many of them could be anticipated - e.g. the costs of maintenance of common parts or of accountancy- but others may be one off items of capital expenditure. Any sums expended will then have to be recouped. One may therefore have two kinds of situation

a. Fixing a sum in advance in the scheme, which is then collected from tenants according to a defined formula;

b. Setting up a method of payment whereby the costs of maintenance and management, once ascertained, can then be collected from tenants according to a defined formula.

20. In my judgment it can be appropriate for a scheme to decide not to identify the level of costs more than a few years in advance, and the adoption of a method of certification and then collection according to a formula is entirely to be expected. That is on any view an " estate charge."

21. It follows that disputes could arise on (a) the amount of expenses which has been certified and (b) the terms of the formula by which it is collected from individual property owners. It is apparent that a major area of dispute in this matter relates to the terms of the formula by which it is collected, and in particular to the fact that it does not draw any distinction between types or sizes of properties, but simply divides up the overall bill between the total number of houses. I express no view at all on the merits of the arguments, but simply note the existence of the issue.

22. A " variable estate charge" is defined in section 159 (2) so as to *exclude* from its definition a figure which is calculated in accordance with a formula specified in the scheme. But the payments in question here are calculated in accordance with just such a formula. The fact that the inputs to the formula are themselves unknown until after certification does not deprive the formula of its quality as a formula specified in the scheme. After all, this formula (which is actually simply $x / y = z$) , where z is the amount certified as payable and y is the number of properties, is just as much a formula whether x is known in advance or not.

23. I therefore regard the starting point of the LVT as the inappropriate one. As both parties had submitted it did, section 159 (3) gave jurisdiction.

24. The exclusion in section 159 prevents a landlord from obtaining payments whose amount is unreasonable. That is a different question from a dispute on whether the mechanism by which charges are recouped is unreasonable (see s 159(3)(b)).

25. Indeed, it would be remarkable if section 159 did not give jurisdiction. If so, it would mean that no householder in a scheme which used the very commonplace method of expenses being certified and then allocated according to a formula could ever challenge the formula except by resisting proceedings in court taken by the landlords for failure to make the payments, and then arguing that the payments were not payable by virtue of s 159(2), or by assembling the very large numbers required under paragraph 11. That would be to undermine the purpose for which section 159 was enacted, and compel the County Court to do the job for which the LVT was designed. It would render s 159(3)(b) simply otiose in all cases save those where the formula was of a particular kind where an adjustment was made to a known sum, of the type where one uses an RPI adjustment of defined figures, as referred to by the LVT. There is nothing in section 159 which allows or requires one to adopt so restrictive an interpretation.

26. I have derived no assistance from *Coventry City Council v Cole* which relates to a different statutory code. However I do record my view that if the LVT were intending to rely on it and had heard no submissions upon it, the LVT should have sought representations from the parties , which could have been in writing.

27. Given my conclusion that this was not a variable estate charge as defined in section 159(2), the other points raised do not arise for decision. I determine that the LVT had jurisdiction to deal with the application before it. I express no view on what findings the LVT could or should reach on the issue of the formula, or any other matter falling within section 159, save those conclusions of law set out above.

28. This appeal is allowed. There will be no order as to costs.

(signed)

His Honour Judge Gilbart QC

18th December 2007