UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – estate charges – estate management scheme - section 159, Commonhold and Leasehold Reform Act 2002 - whether jurisdiction to vary a variable estate charge – unopposed appeal – observations on power of review under section 9, Tribunals Courts and Enforcement Act 2007 - appeal allowed

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

BETWEEN:

DR PATRICIA M SCRIVEN AND OTHERS	**Appellants**
CALTHORPE ESTATES AND OTHERS	**Respondents**

Re: The Saffrons,
Gillhurst Road
Harborne
Birmingham B17 8PL

Before: Martin Rodger QC, Deputy President

Decision on written representations

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The following cases are referred to in this decision:

Walker v Hampstead Garden Suburb Trust Ltd LON/OOAC/LVE/2007/001
Botterill v Hampstead Garden Suburb Trust Ltd LRX/135/2007
R (RB) v First-tier Tribunal (Review) [2010] UKUT 160 (AAC)
JS v Secretary of State for Work and Pensions [2013] UKUT 100 (AAC)

DECISION

Introduction

1. The short issue raised by this appeal is whether the Leasehold Valuation Tribunal for the Midland Rent Assessment Panel ("the LVT") was correct to hold, in a decision made on 13 December 2012, that it had no jurisdiction to vary an estate management scheme for the Calthorpe Estate at Edgbaston in Birmingham ("the Estate") under section 159 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act").

2. Permission to appeal was granted by the LVT itself.

3. The parties to the appeal all now agree that the LVT was wrong to reach its primary conclusion. They also agree that the decision should be set aside by the Tribunal, and that the application by Dr Patricia Scrivens for a variation of the estate management scheme should be reconsidered on its merits. As the LVT ceased to exist on 1 July 2013, any such reconsideration will be by the First-tier Tribunal (Property Chamber) which succeeded to its jurisdiction with effect from that date.

4. Although uncontroversial, the appeal is timely. It allows the Tribunal to draw attention to important new powers given to the tribunals of the Property Chamber by the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, and to the existing jurisprudence from other Chambers on the scope of those powers.

The facts

5. The Saffrons is a development of 19 substantial houses built in the late 1970s on land forming part of the Estate. Although originally the subject of long leases, the 19 houses have been enfranchised under the Leasehold Reform Act 1967 ("the 1967 Act") and are all now subject to an estate management scheme for the Estate established in July 1974 under section 19 of the 1967 Act ("the Scheme").

6. The first respondent, Calthorpe Estates, administers the Scheme and incurs expenditure on the upkeep of private roads and the provision of other services to The Saffrons which it is entitled to recoup in full from the owners of the 19 houses. The charges payable by the individual property owners vary according to the road on which their property is located. There are four roads and four different levels of contribution.

7. The appellants, who were applicants before the LVT, are the owners of the houses on three of the four roads. The respondents are Calthorpe Estates and the owners of three of the four houses on the remaining road. The owner of the fourth house has not participated in the proceedings.

8. The appellants argued before the LVT that the weighting given to each of the roads under the Scheme was not proportionate to the expenditure incurred for the benefit of the occupiers of the roads. The three householder respondents were said collectively to contribute 36% of the total expenditure on The Saffrons but to benefit from 72% of total expenditure, which is said to relate to their road. The appellants consider that imbalance of benefit and burden is unreasonable and ought to be corrected by the LVT making an order for the variation of the Scheme under section 159(3) of the 2002 Act. The proposed variation would make the residents of each road wholly responsible for the expenditure on their road.

The relevant statutory provisions

9. The statutory power to vary estate management schemes is conferred by section 159 of the 2002 Act. So far as relevant, that section provides 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) …, or
> >
> > (c) …
>
> 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."

The proceedings before the LVT

10. The application for a variation of the Scheme came before the LVT on 13 December 2012. None of the parties were represented by lawyers. Dr Scrivens spoke on behalf of the appellants, and Calthorpe Estates was represented by its managing agents, Lambert Smith Hampton; the other respondents were not professionally represented.

11. The application was not of a type which regularly comes before leasehold valuation tribunals. Anticipating that it would not receive detailed submissions on the law, the LVT had carried out some preliminary research of its own, which caused it to doubt that it had jurisdiction to consider the application at all. That view was based on a decision of an earlier leasehold valuation tribunal in *Walker v Hampstead Garden Suburb Trust Ltd* (LON/OOAC/LVE/2007/001) ("the *Hampstead* case") in which it had been decided that there was no power under section 159(3) of the 2002 Act to vary an estate management scheme which made provision for a variable estate charge as defined in section 159(2).

12. The LVT recorded in its decision (at paragraph 8) that, in the absence of legal representation for the parties, it had explained the statutory provisions and identified the key issues of law. Copies of the *Hampstead* case were made available, and the LVT adjourned for an hour to allow the parties to consider it. Once the hearing reconvened the LVT explained that the appellants were free to argue that the earlier decision should not be followed but, as it was put in the decision (at paragraph 8), "the broad thrust of the law as explained was not challenged". The argument then focussed on whether the Scheme could be varied on an alternative basis, namely because there had been a change of circumstances since its introduction. Eventually the LVT concluded that there had been no such change.

The decision

13. In its decision the LVT found that the charges provided for by the Scheme were variable estate charges for the purpose of section 159(2) of the 2002 Act (at paragraph 19). It considered that the decision in the *Hampstead* case was correct and that the parties had been right not to challenge it (at paragraph 20). It went on:

> "The phrasing of section 159(3) so closely relates to the phrasing of section 159(2) that the power to vary a scheme only arises when the scheme is not a variable estate charge as defined in section 159(2)."

The LVT therefore concluded (at paragraph 23) that it had no jurisdiction to entertain the application to vary the Scheme under section 159(3) and the application was dismissed.

The appeal

14. Unknown to the LVT when it made its decision, the *Hampstead* case had been the subject of an appeal to the Lands Tribunal. The original applicant, Mr Walker, had initiated the appeal but had later been substituted as appellant by another resident of the Garden Suburb, Mr Botterill. Hence it was under the name and reference *Botterill v Hampstead Garden Suburb Trust Ltd* LRX/135/2007 ("*Botterill")* that the appeal in the *Hampstead* case was considered by the Lands Tribunal (His Honour Judge Gilbart QC) in a decision given on 18 December 2007.

15. In *Botterill* the Tribunal considered the estate management scheme for Hampstead Garden Suburb and decided that section 159(3) conferred jurisdiction to vary an estate management scheme, even if the charges payable under it were variable estate charges. It reversed the decision in the *Hamsptead* on which the LVT relied when deciding that it had no jurisdiction

16. When the appellants became aware of *Botterill* they requested that the LVT grant permission to appeal. On 28 January 2013 the LVT granted permission limited to the *Botterill* point, and indicated that it had not been aware of the case when it made its decision. The LVT was clearly right to grant permission to appeal, and I am sure that if its researches had uncovered *Botterill* before the hearing on 13 December 2012 it would have followed the decision of the Lands Tribunal.

17. In their appeal the appellants argue that the LVT ought to have followed *Botterill* and to have accepted jurisdiction in this case. In a respondent's notices lodged by Calthorpe Estates on 25 June 2013 it did not oppose the appeal and accepted that the LVT had jurisdiction to decide the application for a variation of the Scheme under section 159(3) on its merits. Respondent's notices have also recently been received from the three owners who were respondents to the proceedings before the LVT. None opposes the appeal. All of the respondents make it clear that they continue to oppose the application to vary the Scheme, but accept that the LVT was wrong to decline jurisdiction.

18. Statute first conferred jurisdiction on the LVT in relation to estate charges with the commencement of section 159 of the 2002 Act. Section 159(1) identifies those schemes to which the section applies as schemes made under specified statutory provisions which impose an obligation to make payments on persons occupying or interested in property; included among them are estate management schemes made under section 19 of the 1967 Act in connection with the enfranchisement of leasehold houses. The payments to be made under scheme are referred to in section 159 as "estate charges".

19. Section 159(2) then identifies a sub-category of estate charges, the "variable estate charge". Such a charge is payable only to the extent that the amount of the charge is reasonable. A variable estate charge is an estate charge which is neither specified in the scheme, nor calculated in accordance with a formula specified in the scheme. An estate charge would be "specified in the scheme" in the sense intended by section 159(2) if the sum payable was specified, and not merely the obligation to pay a sum or the method by which that sum was to be ascertained. A sum would be "calculated in accordance with a formula specified in the scheme" if the ascertainment of the sum payable is a matter of arithmetical calculation (as where a sum specified is to be varied by reference to

an index). All other estate charges as "variable estate charges" and are payable only to the extent that they are reasonable.

20. Section 159(3) creates an entitlement of a different type. The sub-section applies in terms to "any person on whom an obligation to pay an estate charge is imposed" by a scheme and permits an application to be made to the LVT for an order varying the scheme. The reference to "*any* person" might suggest that the section is intended to be of general application, and to apply to schemes of both varieties i.e. those making provision for variable state charges and those described in section 159(2)(a) or (b). That was the construction given to section 159(3) by the Tribunal in *Botterill*, which is accepted by all of the respondents to this appeal. The Tribunal held that a scheme which divided the expenses incurred in providing services by the number of enfranchised properties could be the subject of an application under section 159(3)(b), because that method of allocating liability was a formula specified in the scheme.

21. Despite the consensus in this case, I must acknowledge a doubt in my own mind over the Tribunal's decision in *Botterill*. It is striking that the grounds identified in section 159(3) as those which must exist before the LVT can make an order varying a scheme, are couched in terms so similar to those used in section 159(2) to identify charges which are not variable estate charges. Although the draftsman has not said in terms that section 159(3) does not apply to variable estate charges, there is a respectable argument that that is the effect of the sub-section because a variable estate charge will not possess the features necessary to satisfy either of the grounds which must exist before an application can be made to vary the scheme. That was the approach taken by the LVT in the *Hampstead* case and again in this case. The contrary argument might be thought to create difficulties which were not explored in detail in *Botterill* (where the parties had agreed at first instance that the LVT had jurisdiction and where, as in this case, the appeal was unopposed).

22. As no party opposes the appeal I have heard no argument concerning the proper construction of section 159. For that reason I do not consider that this is an appropriate case in which to reconsider the Tribunal's decision in *Botterill,* which I therefore propose to follow.

23. In the unusual circumstances that the appeal is unopposed, and no party suggests that *Botterill* ought to be reconsidered, I allow the appeal.

24. It is regrettable that the final resolution of the issues in the original application has been delayed by the time taken for the appeal to be prepared and lodged, and for the respondents to be given the opportunity to comment on it. The parties have so far been delayed by at least 6 months. The LVT did what it could under the rules then in force to facilitate the bringing of the appeal by giving its permission promptly; there was at that time nothing more that the LVT could have done when it realised that it had made its determination in reliance on reasoning which had already been overruled on appeal to the Tribunal which it was duty bound to follow.

25. Had the LVT been asked to grant permission to appeal after 1 July 2013 the procedural tools now at its disposal would have enabled it to take a very different approach. From that date the LVT became part of the Property Chamber of the First-tier Tribunal and, for the first time, acquired the

power to *review* its own decisions. Because of the significance of that new power, although it was not available in this case, I take this opportunity to highlight and comment on it.

Review by the First-tier Tribunal – the statutory provisions

26. The statutory basis of the First-tier Tribunal's power of review is section 9 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") and The Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("the 2013 Rules"), which came into force on 1 July 2013.

The 2007 Act

27. Section 9(1) and (2) of the 2007 Act provides as follows:

> "9 **Review of decision of First-tier Tribunal**
> (1) The First-tier Tribunal may review a decision made by it on a matter in a case, other than a decision that is an excluded decision for the purposes of section 11(1) (but see subsection (9)).
>
> (2) The First-tier Tribunal's power under subsection (1) in relation to a decision is exercisable -
>
> (a) of its own initiative, or
>
> (b) on application by a person who for the purposes of section 11(2) has a right of appeal in respect of the decision."

28. Section 9(3) makes provision for Tribunal Procedure Rules. Section 9(4) to (11) then provide -

> "(4) Where the First-tier Tribunal has under subsection (1) reviewed a decision, the First-tier Tribunal may in the light of the review do any of the following -
>
> (a) correct accidental errors in the decision or in a record of the decision;
>
> (b) amend reasons given for the decision;
>
> (c) set the decision aside.
>
> (5) Where under subsection (4)(c) the First-tier Tribunal sets a decision aside, the First-tier Tribunal must either -
>
> (a) re-decide the matter concerned, or
>
> (b) refer that matter to the Upper Tribunal.
>
> (6) Where a matter is referred to the Upper Tribunal under subsection (5)(b), the Upper Tribunal must re-decide the matter.
>
> (7) Where the Upper Tribunal is under subsection (6) re-deciding a matter, it may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-deciding the matter.

(8) Where a tribunal is acting under subsection (5)(a) or (6), it may make such findings of fact as it considers appropriate.

(9) This section has effect as if a decision under subsection (4)(c) to set aside an earlier decision were not an excluded decision for the purposes of section 11(1), but the First-tier Tribunal's only power in the light of a review under subsection (1) of a decision under subsection (4)(c) is the power under subsection (4)(a).

(10) A decision of the First-tier Tribunal may not be reviewed under subsection (1) more than once, and once the First-tier Tribunal has decided that an earlier decision should not be reviewed under subsection (1) it may not then decide to review that earlier decision under that subsection.

(11) Where under this section a decision is set aside and the matter concerned is then re-decided, the decision set aside and the decision made in re-deciding the matter are for the purposes of subsection (10) to be taken to be different decisions."

29. Section 11(5)(d) of the 2007 Act provides that a decision of the First-tier Tribunal under section 9 is an "excluded decision" against which there is no right of appeal on a point of law to the Upper Tribunal. Section 11(5)(e) makes it clear that a decision of the First-tier Tribunal which has been set aside under section 9 is also an excluded decision.

The 2013 Rules

30. Part 6 of the 2013 Rules makes provision for correcting, setting aside, reviewing and appealing decisions of the First-tier Tribunal. Section 53 is concerned with the consideration of applications for permission to appeal:

"53(1) On receiving an application for permission to appeal the Tribunal must first consider, taking into account the overriding objective in rule 3, whether to review the decision in accordance with rule 55 (review of a decision).

(2) If the Tribunal decides not to review the decision, or reviews the decision and decides to take no action in relation to the decision, or part of it, the Tribunal must consider whether to give permission to appeal in relation to the decision or that part of it."

31. Rule 55 is concerned with the review of decisions. It provides:

"55(1) The Tribunal may only undertake a review of a decision—

(a) pursuant to rule 53 (review on an application for permission to appeal); and

(b) if it is satisfied that a ground of appeal is likely to be successful.

(2) The Tribunal must notify the parties in writing of the outcome of any review, and of any right of appeal in relation to the outcome.

> (3) If the Tribunal takes any action in relation to a decision following a review without first giving every party an opportunity to make representations, the notice under paragraph (2) must state that any party that did not have an opportunity to make representations may apply for such action to be set aside and for the decision to be reviewed again."

32. Rule 53(1) directs the First-tier Tribunal to take into account the overriding objective to deal with cases fairly and justly when considering whether to review a decision on receiving an application for permission to appeal.

Discussion

33. Since there was no question of the power of review being exercised in this case (as it was not yet available to the LVT) this is not an occasion for the Tribunal to consider the effect of the statutory provisions in detail. Valuable guidance is already available in two decisions of the Upper Tribunal (Administrative Appeals Chamber) in whose jurisdictions the power of review has been exercisable since 2008.

34. *R (RB) v First-tier Tribunal (Review)* [2010] UKUT 160 (AAC) is a decision of a three-judge panel of the Upper Tribunal, including Lord Justice Carnwath SPT, which considers the purpose of the review power and warns that it should not be used in a way which usurps the Upper Tribunal's function of determining appeals on contentious points of law, or otherwise subverts the integrity of the appeal process. The Tribunal also emphasised that the review power is flexible and involves a large element of judgment or discretion.

35. *JS v Secretary of State for Work and Pensions* [2013] UKUT 100 (AAC) is a more recent decision of a three-judge panel of the Upper Tribunal on an appeal relating to a claim for a disability living allowance. It contains a detailed consideration of the scope of the power under section 9(4)(b) to amend reasons in consequence of a review; in particular it warns of the danger that, in amending the reasons already given for a decision, "the judge will drift into justification to such an extent that the tribunal changes from a decision-maker into an adversary in the appeals process".

36. The following comments are therefore intended simply to highlight the existence and principal features of the new power of review. The power is important and valuable and its exercise in appropriate cases has the potential to achieve significant savings for parties and tribunals by avoiding expensive and time consuming appeals. It should therefore be kept in mind when a First-tier Tribunal is invited to grant permission to appeal.

37. The purpose of the power of review conferred on the First-tier Tribunal by section 9 of the 2007 Act was described by the Upper Tribunal (Administrative Appeals Chamber) in *JS v Secretary of State for Work and Pensions* [2013] UKUT 100 (AAC) (at paragraph 28) as being, self-evidently "to allow the First-tier Tribunal to avoid the need for an appeal to the Upper Tribunal in the case of clear errors".

38. The power is discretionary and is exercisable by a tribunal on its own initiative or on application by any party. Rule 55(1) of the 2013 Rules limits the circumstances in which a review may be undertaken to the occasion described in rule 53(1), namely when the First-tier Tribunal receives an application for permission to appeal. There is therefore no power to review a decision at any other time.

39. The First-tier Tribunal may only "undertake a review of a decision" (to use the language of rule 55(1)) if it is satisfied that a ground of appeal is likely to be successful. In context, the reference to undertaking a review must here mean taking action in consequence of a review, rather than embarking on the process of considering whether to review. The power should therefore be used only in cases where a decision is clearly wrong. As the Tribunal explained in *R (RB) v First-tier Tribunal (Review)* (at paragraph 24) it cannot have been intended to enable the First-tier Tribunal "to take a different view of the law from that previously reached, when both views are tenable".

40. The steps which may be taken consequent on a review are those specified in section 9(4) of the 2007 Act. The First-tier Tribunal may correct accidental errors in the decision, amend the reasons given for the decision, or set the decision aside; it may also, of course, decide that no action is required, in which case it is required by rule 52(2) to go on to consider whether to grant permission to appeal. In either case, the parties must be notified of the outcome of the review and of their right to appeal. Where the outcome of a review is that a decision is set aside, the First-tier Tribunal will then either re-decide the matter under section 9(5)(a) or refer it to the Upper Tribunal for it to re-decide under section 9(5)(b).

41. Before exercising any of the power's conferred by section 9(4), the First-tier Tribunal should consider whether it is appropriate to give notice to every other party to the proceedings that an application requesting a review has been received or that it proposes to carry out a review of its own initiative. Where the First-tier Tribunal is considering making any significant change to its decision, fairness, transparency and convenience would all seem to require that it first allow the parties to make representations on the proposed change, if they have not yet had an opportunity to do so. Prior notification may not be essential and a more robust approach may be permissible, as rule 55(3) provides safeguards for parties who are not heard at this stage, but where the consequence of a review may be to deprive a successful party of the benefit of a decision in its favour, the fairer and more efficient course is likely to be allow representations to be made at the outset.

42. If the First-tier Tribunal takes any action following a review without first giving all parties the opportunity to make representations, rule 55(3) obliges it, when giving notice of the outcome of the review, to inform any party that did not have an opportunity to make representations of its entitlement to apply for the action to be set aside and for the decision to be reviewed again.

This case

43. Had the LVT in this case received an application for permission to appeal its decision after 1 July 2013, on the grounds that it had overlooked the binding decision of the Tribunal in the *Botterill* case, this would have been a clear case in which the power to review the decision and set it aside

could swiftly have been exercised by the LVT. The delay and expense of this appeal would have been avoided, and the merits of the application could promptly have been reconsidered by the same tribunal.

44. For the reasons already given, and with the agreement of all parties, the appeal is therefore allowed and the case is remitted to the LVT for determination.

Dated: 25 September 2013

Martin Rodger QC
Deputy President