

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL for the
LONDON RENT ASSESSMENT PANEL
COMMONHOLD AND LEASEHOLD REFORM ACT 2002

LON/00AC/LVE/2007/0001

Premises: Hampstead Garden Suburb

Applicant: Mr A Walker

Respondent: Hampstead Garden Suburb Trust Limited

Represented by: Mr A Radevsky (counsel)
Ms K Glanville (Pemberton Greenish, solicitors)

Tribunal: Miss S McGrath
Mr C Kane
Ms S Wilby

Date of Hearing: 21/06/07

Date of Decision: 16/08/07

Decision and Reasons

Decision

The Tribunal lacks jurisdiction under section 159(3) of the Commonhold and Leasehold Reform Act 2002 to vary the estate management scheme in respect of the Hampstead Garden Suburb, and accordingly the application is dismissed.

Introduction

1. This is an application under section 159(3) of the Commonhold and Leasehold Reform Act 2002 for the variation of the estate management scheme operated in respect of the new Hampstead Garden Suburb.
2. The applicant is Mr Angus Walker and the respondent the New Hampstead Garden Suburb Trust Limited. Mr Walker lodged the application with the Tribunal in December 2006. Directions were given in the case on January 30, 2007, on March 29, 2007 and on May 24, 2007. Directions included provision for the notification of other estate charge payers on the estate. Numerous letters of support for the application were received by the Tribunal and by agreement, Mr Walker was named as lead applicant.
3. A hearing of the application was convened on June 21, 2007. Mr Walker lodged detailed written submissions in support of his case and made oral submissions to the Tribunal. The respondent also made written submissions and was represented by Mr Radevsky of counsel. Evidence was given by Mr Mervyn Mandell, Chairman of the Trust. On June 26, 2007, the Tribunal carried out an inspection of the Suburb.

The Statutory Provisions

4. Section 159 of the Commonhold and Leasehold Reform Act 2002 (the 2002 Act) introduces new powers for the Leasehold Valuation Tribunal to make determinations in respect of charges levied under estate management schemes. Section 159(1)-(5) provide:

“(1) This section applies where a scheme ...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”

The Scheme of Management

5. The scheme extends to all enfranchised property in the specified area known as Hampstead Garden Suburb and provides that the rights and powers of management authorised by the scheme shall be exercised by the Trust. The provisions of the scheme for regulating the use, appearance and maintenance of enfranchised property and for the maintenance of property or common parts of the estate are set out in the scheme schedule.

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 more than one such unit

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 value added tax (if applicable) :-

(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 year to 5th April 1980 (which year together with each subsequent year ending on 5th April is hereinafter called "a financial year") the sum of £9.48;
- (c) (i) for the year to 5th April 1981 the sum of £16.57;
(ii) for the year to 5th April 1982 the sum of £12.38;
- (d) (i) for each period of one year following the 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 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 that financial year and rounding up to the nearest 10p....."

7. By paragraph 11 of the scheme:

"11.this Scheme shall be capable of being terminated or varied in whole or in part by the Court whether by reason of a change in circumstances or otherwise upon an application made either (A) by the Trust or (B) by not less than 100 or one-third of the total number of owners of enfranchised property whichever shall be the greater provided that without the leave of the Court no application under sub-paragraph (B) hereof shall be made within one year of this Scheme being approved or varied under sub-paragraph (B)."

The Tribunal's Jurisdiction

- 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.
- 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".
- 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

11. The Tribunal therefore sought submissions from the parties as to:
 - (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.

12. Submissions on behalf of the Trust were made by Mr Radevsky. He answered the Tribunal’s question 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 (ie 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, he contends, 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.

13. Very detailed written submissions on the point were also received from Mr Walker. The Tribunal does not propose to rehearse all of the arguments advanced, but summarises the conclusions in the answers given to the questions posed by the Tribunal:

- (a) The charge is not a “variable estate charge” but is a “charge calculated in accordance with a formula”. Mr Walker contended that the definition given in section 159(2) prevents the charge from being both.

The level of the charge is, he says, 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 element, 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.

The Tribunal's decision on jurisdiction

14. For the following reasons the Tribunal concludes that the estate management charge in this case is a "variable estate charge" within the meaning of section 159(2) and that it has no jurisdiction to vary the scheme under section 159(3).
15. The Tribunal considered that section 159(2) and section 159(3) must be read together and that to read them disjunctively as suggested by Mr Radevesky was to strain the statutory language.
16. The Tribunal had first to consider what type of charge can be varied under section 159(3). Clearly, the type of charge is one which is either specified in the scheme or is calculated in accordance with a formula.
17. By section 159(2) a variable estate charge is defined as a charge which is neither specified in the scheme nor calculated in accordance with a formula. The statutory language is clear, a variable estate charge is not calculated in accordance with a formula and therefore cannot be varied under section 159(3).
18. In paragraph 7 of his supplementary submissions, Mr Radevesky supports his contention by reference to a difference in the statutory language in sections 159(2) and (3). Section 159(2) refers to a "variable estate charge" and "a formula" whereas section 159(3) refers to an "any estate charge" and "any formula". He argues that a variable estate charge is still an estate charge which does, in this case, include a formula. The Tribunal accepts that the word "any" in subsection (3) seems to be less limiting than the language used in subsection (2), however as a matter of logic, the type of charge that is contemplated by subsection (3) must either be specified in the scheme or calculated in accordance with a formula, and the consequence of subsection (2) is that a charge which is calculated in accordance with a formula cannot be a variable charge.
19. Mr Walker accepts this proposition but argues that the Tribunal does have jurisdiction to vary the scheme because the charge in question should not be classified as a variable estate charge. However, if Mr Walker were correct in his analysis, it is difficult to give any meaning to "variable service charge" at all.
20. The only definition given for the term "variable estate charge" in section 159, is by a negative reference. We know that it is *not* a charge specified in the scheme and we know that this is *not* a charge calculated in accordance with a formula.

This lack of definition can be contrasted with section 18 of the Landlord and Tenant Act 1985 which gives a definition of a service charge subject to regulation under sections 18 to 30 of that Act as an amount (payable in respect of services) “the whole or part of which varies or may vary according to the relevant costs”. Such a charge is commonly known as a “variable service charge”. The contrast between a variable service charge and a “fixed” charge can be found in *Coventry City Council v Cole* [1994] 1 W.L.R. 398.

21. The Tribunal considers that a variable estate charge is a charge that varies or may vary in accordance with costs incurred by the estate managers. In the Tribunal’s view this is the only meaning that could be given to the term used in section 159(2). Where there are a number of estate management charge payers it is inevitable that the final amount that they must pay will be calculated by dividing the charge in accordance with the terms of the scheme. Here the charge is divided by the application of an equal division between enfranchised owners. The provisions in a scheme relating to the division of the charge may be regarded as a “formula”, but it is the Tribunal’s view that this is not the type of formula contemplated by section 159(3).
22. It is the Tribunal’s view that the “formula” contemplated by both section 159(2) and 159(3) is a formula which enables the estate charge to be calculated without reference to the fluctuation of actual costs. Mr Radevsky gives an example of such a formula as being an amount fixed at the outset of a scheme and then increasing yearly by the amount of any increase in the Retail Prices Index. This interpretation allows for a consistent reading of sections 159(2) and (3).
23. It is perhaps helpful to note that section 159 appears to be modelled on the schedule 11 to the 2002 Act, where provision is made for the regulation of “administration charges” as defined. An administration charge is, in effect, a one off charge payable by a tenant for obtaining approvals or information from a landlord or in respect of a breach or failure in respect of the lease. A definition of “variable administration charge” is given in paragraph 1(3) of Schedule 11 as follows:

“1(3) In this Part of this Schedule “variable administration charge” means an administration charge payable by a tenant which is neither –

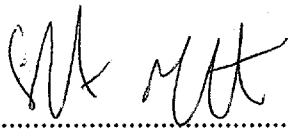
 - (a) specified in the lease, nor

(b) calculated in accordance with a formula specified in his lease”

A variable administration charge is only payable to the extent that the amount of the charge is reasonable (schedule 11, paragraph 2). Provisions equivalent to those contained in section 159(3) in respect of variation are to be found in paragraph 3(1) of Schedule 11 for administration charges.

24. The difficulty found in respect of estate management charges where there will inevitably be more than one person required to make a contribution to the payment of the charge, does not arise in respect of schedule 11 payments, which are made by one tenant or joint tenants in respect of single transactions.
25. Mr Walker submits that a restrictive interpretation of the meaning of the word formula is not justified and that the distributive effect of the formula is precisely one of the things that section 159 is meant to regulate. The Tribunal does not accept this argument and considers that section 159 serves to regulate the amount of an estate management charge as follows:
- (a) If the charge varies in accordance with costs, then the amount of the charge is limited to an amount which is reasonable;
 - (b) 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.
26. The Tribunal considers that this interpretation gives proper effect to the meaning of section 159 and results from a consistent reading of the terms “estate management charge”, “variable estate management charge” and “formula”. The result of this interpretation is that the Tribunal does not consider that it has power to vary the Hampstead Garden Suburb scheme.
27. The drafting of section 159 is not clear and it is with some reluctance that the Tribunal rejects jurisdiction in this matter. The Tribunal are grateful to the parties for their submissions on the point. Any application to vary the scheme in respect of the division of the estate management charge must be made under paragraph 11 of the scheme.

28. The Tribunal decided that it would not be appropriate in these circumstances, to express a view on the reasonableness or otherwise of the formula by which the estate management charge is divided between owners.

Chairman..... 

Date..... 16.8.07.