



**FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER (RESIDENTIAL  
PROPERTY)**

**Case Reference** : **LON/00AC/LLE/2019/0003**

**Property** : **1-10 Heath Close, London, NW11 7DX**

**Applicant** : **Hampstead Garden Suburb Trust**

**Representative** : **In Person**

**Respondent** : (1) **Waterlow Court Residents Association Ltd**  
(2) **Mrs Markwick (No 1 Heath Close)**  
(3) **Mr & Mrs Johnson (No 2 Heath Close)**  
(4) **Dr & Mrs Kaplan (No 3 Heath Close)**  
(5) **Mr & Mrs Davies (No 4 Heath Close)**  
(6) **Mr & Mrs Hyland (No 5 Heath Close)**  
(7) **Mr & Mrs Kyriakides (No 6 Heath Close)**  
(8) **Mr Langley & Ms Carter (No 7 Heath Close)**  
(9) **Mr & Mrs Rivlin (No 8 Heath Close)**  
(10) **Mr & Mrs Rubens (No 9 Heath Close)**  
(11) **Mr & Mrs Silverman (No 10 Heath Close)**

**Representative** : (1) **RLS Law (1<sup>st</sup> Respondent)**  
(2) **Mr Rivlin (numbers 2, 4, 5, 6, 8, 9, and 10 Heath Close)**

**Type of Application** : **Liability to pay estate management charge**

**Tribunal** : **Judge Amran Vance**

**Date and Venue of Hearing** : **8 May 2019**  
**10 Alfred Place, London WC1E 7LR**

**Date of Decision** : **19 June 2019**

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## DECISION

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### Decision

1. The tribunal has no jurisdiction to determine the application as presented to the tribunal; and
2. Permission to amend the application is refused.

### Background

3. Hampstead Garden Suburb (“the Suburb”) is subject to an estate management scheme (“the Scheme”), approved under the provisions of s.19 Leasehold Reform Act 1967 (“the 1967 Act”) on 17 January 1974, and amended on 17 February 1983. The Scheme is administered by the applicant (“the Trust”) which maintains Heath Close, a private road located in the Suburb.
4. The first respondent, Waterlow Court Residents Association Limited (“WCRAL”) is the registered proprietor of the freehold land known as Waterlow Court, Heath Court, upon which is located a block of 53 flats (“the Block”). A small section of Waterlow Court abuts on to one edge of the Close.
5. The second to tenth respondents are the owners of 10 houses that front or abut Heath Close, which provides the only means of vehicular and pedestrian access to those houses. The fifth respondents, Mr J & Mrs M Davies, are the long leasehold owners of 4 Heath Close, the landlord of which is the Trust, and who pay a fixed percentage contribution towards the Trust’s costs of repairing Heath Close. The remaining respondents are the freehold owners of numbers 1-3 and 5-10 Heath Close.
6. On 20 December 2019, the Trust made an application to the tribunal seeking a determination under s.159(6) as to whether the costs of future repairs to Heath Close would be payable by the respondents as an estate charge, and in what apportioned shares. In its application it stated that it wishes to carry out repairs to Heath Close, but that these have not been undertaken as queries have been raised concerning the apportionment of such costs between the respondents.
7. Directions were issued on 14 February 2019, and the application was listed for a paper determination in the week commencing 13 May 2019. However, on 29 March 2019, at my request, the tribunal notified the parties that I was concerned that the tribunal may lack jurisdiction to make a determination under Section 159(6) where the amount of an estate charge, or at least an anticipated amount, has not been identified. I directed that if the applicant wished to maintain its application, despite

the concerns identified in that notification, the application would proceed to a jurisdictional hearing. The applicant subsequently confirmed that it wished to proceed and a jurisdictional hearing took place on 8 May 2019.

### **The hearing**

8. At the hearing, the Trust was represented by Mr Nick Packard, the Trust Manager, Ms Lauren Marsh, the Assistant Estate Manager, and Ms Jane Horder, the Estate Manager. Also present were members of WCRAL's board, Mr Arnold Linden and Mr David Davidson as well as Mr Geoffrey Rivlin, one of the two ninth joint respondents, who represented the owners of numbers 2, 4, 5, 6, 8, 9, and 10 Heath Close.

### **The applicant's case**

9. Mr Packard sought permission to amend the Trust's application to enable it to pursue a determination based on grounds advanced in a statement of case dated 16 April 2019, in which it addressed the tribunal's concerns over jurisdiction. In summary, Mr Packard argued that the tribunal had jurisdiction to decide how costs should be apportioned between the respondents by making a determination as to the payability of a previously incurred historic cost or an estimated future cost.
10. As to the historic cost, he suggested utilising a previously incurred cost of £156.96 for road sweeping carried out in November 2017, that was apportioned 33.33% to WCRAL and 6.66% to each of the remaining respondents, all of whom paid in full.
11. In respect of an estimated future cost, he proposed that the tribunal could make a determination based on the estimated costs of road sweeping for the period 6 April 2019 to 5 April 2010 amounting to £221.40 (inclusive of VAT).

### **WCRAL's case**

12. WCRAL's position is that the tribunal has no jurisdiction to entertain the application as originally presented. Alternatively, if it has jurisdiction, it should strike out the application under rule 9 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. It also opposes the applicant's application to amend its application.

### **Reasons for decision**

13. Section 159 Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") applies to an estate management scheme approved pursuant to section 19 of the 1967 Act, where the scheme imposes obligations on persons occupying, or interested in property, to make payments ("estate charges").
14. Section 159(6) provides as follows:

- (6) An application may be made to the appropriate 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.
15. Section 159(7) provides that subsection (6) applies whether or not any payment has been made.
16. Paragraphs 13 and 14 of the Schedule to the Trust's Scheme read as follows:
- “13. Where any enfranchised property fronts or abuts onto or has the use in common with others of an unadopted or private road or way...the said property shall be liable to the Trust for and be charged with a fair proportion according to the number or users of any costs and expenses reasonably incurred by...the Trust in making up or maintaining such road or way or close....”
14. Where any enfranchised property enjoys by way of easement or otherwise any rights over or in respect of the property or land...the said enfranchised property shall be liable to the Trust for and be charged with its fair proportion according to the number of other properties enjoying the like or similar rights of any costs of expenses reasonably incurred by....the Trust in respect of such maintenance...”
17. The obligations on the respondents to pay towards the estate charges described in paragraphs 13 and 14, therefore only apply to costs and expenses that have been reasonably incurred by the Trust. Costs in respect of works are not *incurred* until the liability to pay for such works crystallises, which may, depending on the facts, be when they were paid, or when an invoice or other demand for payment was submitted by the supplier or service provider. There is no provision in the Scheme that imposes a payment obligation on the respondents in respect of anticipated future or budgeted expenditure.
18. As the provisions of s. 159 of the 2002 Act only apply to estate charges, and as anticipated future costs are not estate charges under the Scheme, it follows that the Trust cannot seek a determination under s.159(6) in respect of anticipated costs. The tribunal therefore has no jurisdiction

to determine the application as originally presented by the applicant, which requested a determination as to how potential future costs should be apportioned. For the same reasons, the tribunal would have no jurisdiction to determine the estimated future cost of road sweeping for the period 6 April 2019 to 5 April 2010.

19. Nor do I consider there is merit in allowing the applicant to amend its application to enable it to seek a determination as to the how the sum of £156.96, for the costs of road sweeping carried out in November 2017, should be apportioned.
20. I am sympathetic to the Trust's desire to obtain certainty as to how the costs of these road repairs should be apportioned between the respondents before it incurs substantial expenditure in carrying out such works. Mr Packard explained that the Trust's view is that it would not be the best use of its charitable funds to incur such costs without first having the benefit of such a determination.
21. It is also clear that whilst the respondents have previously contributed towards costs incurred by the Trust in road sweeping, without any apparent demur, based on a historical apportionment of 33.33% to WCRAL and 6.66% to each of the remaining respondents, there is currently substantial disagreement between them as to how the major cost of road repairs should be apportioned. WCRAL has suggested that their liability should be 10% of the costs incurred, whereas the other respondents suggest that its contribution should be 50%.
22. However, in my judgment, the entitlement to make an application under s.159(6) does not extend to a situation where there is no dispute about the payability of an estate charge, and where the charges have been paid in full. This is because the wording of that subsection refers to the ability to seek a determination as to whether an estate charge *is payable*. I recognise that subsection (7) states that subsection (6) applies whether or not any payment has been made, but in my view, subsection (7) is intended to preserve the right of the payee of an estate charge to pursue an application for a determination by this tribunal regardless of whether the charge has been paid. I do not consider it entitles the recipient of that payment to pursue an application after the estate charge has been paid in full and without protest or demur by the payees, as appears to be the case with the November 2017 road-sweeping costs, and where there is no current dispute regarding payability of those costs.
23. If I am wrong in that conclusion, I would still refuse permission to the applicant to amend its application because I see no practical benefit to the Trust or to the respondents in the tribunal determining how the costs of £156.96 should be apportioned. This is for the following reasons:
  - (a) a determination as to apportionment of that sum would not bind a future tribunal, whose decision would be based on the factual circumstances surrounding the application before it. In that context, it is important to note that the obligation in

paragraphs 13 and 14 of the Schedule to the Scheme is to pay a “fair proportion” of an estate charge. What amounts to a fair proportion may vary according to the factual circumstances in which the charges are incurred;

(b) the amount is, in any event, too small as to be any practical use in identifying how the proposed major costs of road repairs should be apportioned and too remote from such major costs;

24. I understand the Trust’s reluctance to incur major costs without having some clarity as to how such costs are to be apportioned. However, the way the Scheme is drafted only imposes an obligation on the respondents to pay towards incurred costs, not anticipated future expenditure, and until costs are incurred, s.159(6) is not engaged.

25. The Trust can, of course, incur the costs in question, seek payment from the respondents in accordance with what it considers to be a fair proportion, and pursue an application to the tribunal if the apportionment is disputed. It could also make an application under s.196(6) before demanding any payment from the respondents, provided that the costs have been incurred.

26. It may also wish to consider making an application to the tribunal once some of the preliminary costs of the proposed road repairs have been incurred. For example, Mr Packard estimated that the costs of an independent surveyor are likely to be in the region of £3,000- £4,000. Whilst what amounts to a fair apportionment of estate charges is always going to depend on the factual circumstances in play at the time, clearly the closer the factual nexus between the preliminary costs and future major costs, the more helpful a tribunal’s determination regarding the apportionment of the preliminary costs is likely to be.

27. Finally, the Trust may wish to consider seeking a variation of the Scheme under clause 11 of the Scheme and s.19(6) of the Leasehold Reform Act 1967 in order to provide for a method of apportionment.

**Name:** Amran Vance

**Date:** 19 June 2019

## **Appendix - Rights of appeal**

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).