FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BK/LLE/2019/0002**
Properties	:	**The leasehold and freehold properties which are listed in the application**
Applicants	:	**(1) The Grosvenor Estate Belgravia** **(2) The Trustees of the Second Duke of Westminster Will Trust**
Representative	:	**Mr Ranjit Bhose QC instructed by Trowers & Hamilins LLP**
Respondents	:	**(1) The leaseholders listed in Annex A to the application** **(2) The freeholders listed in Annex B to the application**
Representative	:	**Mr Luke Gibson, Solicitor represented Residential Services Ltd, Inputkey Ltd & Residential Services (Chester Square) Ltd**
Interested Party	:	**Belgravia Residents' Association ("BRA")**
Representative	:	**Mr Anthony Owen, accompanied by other members of the BRA**
Type of application	:	**A determination as to the payability of proposed expenditure in respect of certain drainage, roadway and pavement works to Boscobel Place, London SW1**
Tribunal members	:	**Judge N Hawkes** **Mr T Sennett FCIEH** **Judge N Rushton QC**
Date and venue of hearing	:	**9 May 2019 at 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**30 May 2019**

DECISION

Decisions of the Tribunal

(1) The Tribunal determines, pursuant to section 27A(3) of the Landlord and Tenant Act 1985, that if costs were incurred for the Repairs (as defined below):

a. a service charge would be payable by the Respondent lessees to the First Applicant pursuant to the terms of their leases in respect of each element of the Repairs; and

b. the amount payable by each lessee is to be determined in accordance with the apportionments set out at paragraph 16 of the Applicants' Statement of Case.

(2) The Tribunal determines, pursuant to section 159 of the Commonhold and Leasehold Reform Act 2002, that if costs were incurred for the Repairs:

a. an estate charge would be payable by the Respondent freeholders to the Second Applicant pursuant to the terms of the Scheme (as defined below) in respect of each element of the Repairs; and

b. the amount payable by each freeholder is to be determined in accordance with the apportionments set out at paragraph 16 of the Applicants' Statement of Case.

The application

1. The First Applicant seeks a determination under section 27A(3) Landlord and Tenant Act 1985 ("LTA 1985") and the Second Applicant a determination under section 159(6) Commonhold and Leasehold Reform Act 2002 ("CLARA 2002"), in advance of undertaking certain works to the roadway within Boscobel Place, London SW1 ("Boscobel Place").

2. Boscobel Place is a private mews situated in Belgravia and those contributing to the costs of the proposed works are a mix of lessees and owners of freehold properties, the latter being subject to the Grosvenor Belgravia Estate Management Scheme, approved by Order of the High Court on 5 December 1973, pursuant to section 19 Leasehold Reform Act 1967 ("the Scheme").

3. In terms of the age, character and locality of the various premises, it was not in dispute at the hearing that the capital values of houses are high, one being on the market for £4.75 million when the Application was made.

4. The Applicants informed the Tribunal that they intend to undertake works of repair and improvement to approximately 30 of the mews owned by them in the coming years.

5. Colour photographs of Boscobel Place were provided in the hearing bundle. No party requested an inspection and the Tribunal did not consider that one was necessary.

The hearing

6. The Applicants were represented by Mr Ranjit Bhose QC at the hearing and the Respondents were represented by Mr Luke Gibson, Solicitor.

7. The Belgravia Residents' Association ("BRA"), an Interested Party, was represented by Mr Anthony Owen. Mr Owen was accompanied by three other members of the BRA, namely, Mr George Donath, Ms Helen Black and Mr Ian Stark.

The leasehold properties

8. There are 7 leasehold properties:

   (1) three substantial apartment blocks, known as 33-36 Chester Square, 37-39 Chester Square, and 40-41 Chester Square ("the blocks");
   (2) two mews houses, namely 43 and 48 Boscobel Place; and
   (3) two garages, adjacent to 43 and 48 Boscobel Place.

9. The blocks front onto Chester Square but enjoy access from the rear (including vehicular access) from a highway on Elizabeth Street then over the roadway within Boscobel Place. Access to the blocks from Boscobel Place is then over a downwards ramp. The ramp is demised under the lease for 40-41 Chester Square.

10. It is not in dispute that the leases are in different form but are materially similar so far as concerns the issues arising on this Application.

11. <u>33-36 Chester Square:-</u> the lease is dated 28 August 1962 for a term expiring on 29 September 2057. It confers a right of "ingress egress and regress in over and upon the Mews at the rear of the demised premises called Boscobel Place", together with similar rights over the ramp and access way leading to the block.

12. By clause 2.(IV) the lessee covenants:

   "… [to] pay and contribute a fair proportion with other lessees interested therein of the expenses of making repairing and scouring all party and other walls gutters sewers and drains belonging or which shall belong to the demised premises or be used jointly with the occupiers of any adjoining or

neighbouring hereditaments And also a fair proportion of the expenses of maintaining repairing cleansing and keeping in good order and condition the private roadway at the rear of the demised premises known as Boscobel Place and of lighting Boscobel Place and further a fair proportion of the expenses of preserving the amenities of the demised premises and adjacent or neighbouring premises by keeping Boscobel Place free from obstruction and maintaining the said road as a private way …"

13. 37-39 Chester Square:- there is a superior lease dated 31 December 1982 for a term expiring on 29 September 2057. It confers similar rights over Boscobel Place and the ramp and access way leading to the block.

14. By clause 2.(V) the lessee to that superior lease covenants in similar terms to clause 2.(IV) of the lease for 33-36 Chester Square save that it refers to:

"… keeping in good order and condition the paving and roadway of Boscobel Place and of the said ramp and access way and also of lighting Boscobel Place …".

15. There is a further lease dated 8 October 2010 for a term expiring on 26 September 2147.

16. By clause 3.33 the lessee to that lease covenants to observe and perform the agreements covenants and stipulations on the part of the "Tenant" contained or referred to in that superior lease. Further, by clause 5.1 the lessee covenants to pay "… an amount equal to … the expenses and outgoings set out in Part 1 of Schedule 5", which includes the following:

"3. All other costs and expenses incurred by the Landlord in performing and observing the covenants on its part contained in the Superior Lease … including …

3.2 a fair proportion of the expenses of maintaining repairing cleansing and keeping in good order and condition the paving and roadway of the said Boscobel Place (and also the surface water system serving Boscobel Place) and the Ramp and Access Way and also of lighting Boscobel Place and

3.3 a fair proportion of the expenses of preserving the amenities of the Building and adjacent and neighbouring premises … by keeping Boscobel Place free from obstruction and maintaining it as a private way"

17. 40-41 Chester Square:- the lease is dated 13 December 1963 for a term expiring on 29 September 2057. The demise includes the ramp from Boscobel Place, and confers a right of "ingress egress and regress in over and upon the Mews at the rear of the demised premises called Boscobel Place".

18. By clause 2.(IV) the lessee covenants in the same terms as clause 2.(IV) of the lease for 33-36 Chester Square save that the opening words of the covenant are as follows

"… on receipt of the Landlords' written demand forthwith pay and contribute to the Landlords a fair proportion with other lessees interested therein of the expenses …"

19. 48 Boscobel Place:- the underlease for this mews house is dated 19 May 2005 for a term expiring on 24 June 2112. Paragraph 1 to Schedule 2 grants "a right of way over the Mews with or without vehicles to gain access to and egress from the Premises".

20. By clause 3.6 the lessee covenants:

"3.6 To pay the Landlord on demand a fair proportion (as determined from time to time by the Landlord) of:

3.6.1 any Outgoings which relate to the Premises and other property and

3.6.2 the costs incurred in providing the services listed in Schedule 3"

21. The Services listed in Schedule 3 include the following:

"1. Maintaining repairing renewing rebuilding replanting lighting cleaning resurfacing as appropriate all drives parking areas surfaces landscaped areas party walls boundaries structures Conduits and other things (whether or not of a similar nature) for which the Tenant is not liable under this Lease the use of which is common to the Premises and any other property

2. Maintaining repairing relaying resurfacing cleaning and keeping in good order and condition the paving and roadway of the Mews and any arch gate bollard or other structure at either end

3. Lighting the Mews

4. Preserving the amenities of the Premises and neighbouring premises … by keeping the Mews free from obstruction and maintaining it as a private way".

22. "Conduits" are defined by Part 1 to Schedule 4 to the lease as including "… sewers drains … gutters … channels … and any other ancillary apparatus"; "Mews" is defined as "the roadway known as Boscobel Place London SW1".

23. In addition to referring to the "maintenance" and "repair" of the roadway, each lease also refers to the keeping of it "in good order and condition".

The freehold properties

24. There are ten freehold properties, nine being mews houses within Boscobel Place (with one, 42 Boscobel Place, including a garage), and the other being 70 Elizabeth Street, which is situated in the mews by virtue of its side elevation (and side entrance) extending 12.89 metres into and along Boscobel Place.

25. By clause 22 of the Scheme, each freehold property owner (therein described as "Owner"):

"… shall on receipt of the Landlord's written demand forthwith pay and contribute to the Landlords a fair proportion with the other owners or lessees interested therein of the expenses of making repairing and scouring all party and other walls gutters sewers and drains belonging or which shall belong to the enfranchised property or to be used jointly with the occupiers of any adjoining or neighbouring properties such proportion (if in dispute) to be determined by the Estate Surveyor whose determination shall be final and binding on the Owner"

26. Clause 24 provides that Part 2 of the First Schedule shall apply in respect of every enfranchised property which is situated in one of the mews specified in Part 1 of the First Schedule. Some 48 Belgravia mews are there listed, including Boscobel Place. So far as material, paragraph 2 to Part 2 of the First Schedule provides as follows:

"The Owner shall on receipt of the Landlords written demand forthwith pay and contribute to the Landlords a fair proportion (such proportion if in dispute to be determined by the estate surveyor whose determination shall be final and binding on the Owner) of the costs and expenses of:

(i) maintaining repairing re-surfacing cleansing and keeping in good order and condition the paving of the Mews;

(ii) the lighting of the Mews; and

(iii) keeping the roadway of the Mews free from obstruction and maintaining the same as a private way …"

The Proposed Works

27. The Applicants state that the principal reason for undertaking the proposed works to the roadway in Boscobel Place is that the granite sett road surface is in a state of disrepair and/or is not in a good order or condition.

28. The Applicants rely upon an Appraisal Report of Hurst Pierce & Malcolm Llp ("HMP") and the accompanying photographs and state that there are numerous defects, including localised settlement in many areas, trip hazards, unevenness

and irregular surfaces, concrete patching, poor pointing, cracking in concrete fill, and irregular previous repairs and other defects.

29. HMP arranged for loading tests to be carried out to the sub-base below the roadway surface in two trial holes, the setts having been removed for the purposes of this testing. The tests were undertaken in the form of the Californian Bearing Ratio (CBR), the CBR value being a comparison of the ground 'on site' against a benchmark high quality crushed stone material which would have a CBR value of 100%. The test results in the instant case were just 1.8% and 6.1%. The Applicants note that the road currently plays host to all types of modern motor vehicles, including refuse vehicles and removal vehicles.

30. In Section 7.0 of the report, HMP discuss their findings and give recommendations. They note that Boscobel Place is nearly 200 years old and state as follows:

> *"7.9 The extent of the poor condition of the mews surface is such that we can see no alternative but to carefully lift the granite sets, remove any obviously loose granular sub-base, check local depressions for soft spots in the sub-grade and then reinstate with new sub-base, laying / bedding course, re-laying the salvaged granite setts supplemented with new where appropriate to create a regular surface profile carefully graded to fall to grating outlet positions and ensure surface run off drains quickly."*

31. The Applicants state that they are following this advice. At the same time as renewing the roadway, the Applicants also propose to undertake certain works of improvement, including the installation of new ultrafast broadband under the road surface, and new planted areas.

32. The Applicants recognise that the payment towards works of improvement are outside the scope of the Respondents' obligations under the leases or Scheme, and intend to pay for these works themselves. They state that they are, however, under no legal obligation to anyone to undertake and pay for any works of proposed improvement.

33. It is not disputed that the works which are chargeable to the Respondents are as follows ("the Repairs"):

    (1) the taking up and disposal of surface water drainage gully frames and gates and the bed and brickwork for those frames;

    (2) the removal and disposal of service valves and manhole and other covers;

    (3) saw-cutting to the concrete surface course at the interface with the ramp, and the picking up and retaining of granite kerbs for re-use;

    (4) the reconstruction of the brick corbelling on existing surface water drainage gullies, together with the installation of new frames and grates;

(5) the installation of new drainage manhole frames and covers, including refurbishment of an original Thomas Crapper cover, installation of new iron Thames Water valve covers, and other new utility covers etc.;

(6) adjustment of the corbelling around manholes, of the levels of reinforced manholes, and a CCTV survey of drainage runs under the roadway;

(7) earthworks, including the excavation and disposal of unacceptable material, picking up cleaning sorting and retention of existing granite setts for re-use etc.;

(8) re-laying of the kerbs, York stone footways and carriageway itself – including procuring bespoke stone and reclaimed setts;

(9) making good and painting the guard rail and rendering the retaining wall; and

(10) necessary preliminaries associated with the above works.

34. The Applicants confirmed to the Tribunal that Repairs and (non-chargeable) improvements will be the subject of a competitive tender, as required by the LTA 1985, and prior to the second stage of the statutory consultation. The Applicants stated that the costings in the Bill are budget costings only, designed to provide an indication of likely charges although these may well increase, given the passage of time and the buoyant state of the Central London construction market.

The Applicants' proposed voluntary contributions

35. The Applicants informed the Tribunal that they have decided, in their discretion, that they will contribute 38% of the total costs of the proposed Repairs and improvements to Boscobel Place. They state that this was explained to the lessees in the notice of intention to carry out qualifying works.

36. The total budget costs amount to £394,000 and 38% of this sum is just under £150,000. The Applicants state that, based on the budget costings, their voluntary contribution will pay for all of the proposed works of improvement, which total approximately £108,000, plus an additional £42,000 contribution towards the Repairs (which it is not in dispute that the Respondents are legally bound to pay for).

37. This voluntary contribution is to be made from monies which are held by the Applicants in their "Hoardings Fund". The Hoardings Fund is an account which has been built up over a number of years, formed of payments made by individual developers and/or property owners who have wanted to erect hoardings on the Applicants' freehold property to facilitate their developments.

38. No party to the proceedings asserts that either the voluntary contributions to be made by the Applicants, or their operation of the Hoardings Fund policy, is within the Tribunal's jurisdiction under either of the relevant statutory provisions. The BRA states in its Position Statement that the "… BRA is content to receive such clarifications setting out the Applicants' position in relation to the use of the Hoarding Fund".

39. Mr Donath of the BRA made some submissions, in his personal capacity, concerning the issue of jurisdiction. However, he was unable to point to any legal authority in support of the proposition that matters concerning the Applicants' Hoardings Fund are within the jurisdiction of this Tribunal.

40. In any event, following a short adjournment in order to enable Mr Donath to enter into discussions with Mr Owen, Mr Donath was content not to pursue his submissions on the basis that (with the Applicants' agreement) the Applicants' position would be formally recorded as follows:

"The Applicants intend to undertake works of repair and improvement to approximately 30 of the mews owned by them in the coming years. As matters stand, they propose to make similar, 38% voluntary contributions from these private realm monies towards the costs of the works of repair and improvement to each of those 30 future schemes. This particular percentage has been settled upon because the Applicants consider that, taking into account future licence fees to the Hoardings Fund, this is a percentage contribution rate which will mean there is enough money to go around for all these schemes (and not just the first few schemes). They consider that this is the fairest, and most reasonable, course for them to take – given the hundreds of owners and lessees of properties in all of these mews. This percentage will necessarily be kept under review, because its continuing appropriateness depends on (a) the quantum of future licence fees (b) the scope of the repairs and improvements on individual future schemes and (c) the costs of those future schemes."

The Tribunal's determinations

41. The jurisdiction of this Tribunal to determine the First Applicant's application under section 27A(3) of the LTA 1985 is clear and no submissions were made concerning this issue.

42. Section 159(6) of CLARA 2002 provides:

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.

43. The Second Applicant submits that the Tribunal has jurisdiction to determine the Second Applicant's application under section 159(6) of CLARA 2002 because, under the Scheme, an estate charge is "payable" even though nothing may yet be due for payment.

44. The Second Applicant asserts that the jurisdiction is one of principle so that, if the Tribunal considers that nothing is payable under the Scheme, it can make a determination to this effect. The Second Applicant referred the Tribunal to *Drewett v Bold & Sossi LRX/90/2005, Lands Tribunal,* in particular, paragraph 36. The Tribunal accepts the Second Applicant's submissions on the issue of jurisdiction, which were not disputed by the Respondents or by the BRA.

45. None of the Respondent freehold owners have served any response or objection to this application and the owners of 34, 35, 45 and 47 Boscobel Place have stated they are content with what is proposed. The BRA does not put forward any positive case.

46. No party disputes that the costs of the Repairs are chargeable to the lessees and to the freeholders and, having carefully considered the Applicants' evidence and submissions:

    (i) The Tribunal determines, pursuant to section 27A(3) of the Landlord and Tenant Act 1985, that if costs were incurred for the Repairs, a service charge would be payable by the Respondent lessees to the First Applicant pursuant to the terms of their leases in respect of each element of the Repairs.

    (ii) The Tribunal determines, pursuant to section 159 of the Commonhold and Leasehold Reform Act 2002, that if costs were incurred for the Repairs an estate charge would be payable by the Respondent freeholders to the Second Applicant pursuant to the terms of the Scheme in respect of each element of the Repairs.

47. The only issue in dispute is between the Applicants and the lessees of the three blocks, namely, Residential Services Limited, Inputkey Limited and Residential Services (Chester Square) Limited. These lessees are represented by Mr Gibson and they challenge the proposed method of apportionment of the charges.

48. The lessees of the three blocks assert that all 17 contributing lessees and owners should pay the 5.88% each. In support of this proposition, Mr Gibson relied upon the following submissions:

"It is the Respondents' position that the suggested apportionments are not fair and reasonable as prescribed by the terms of the lease.

The Applicant suggests that the square footage of each property's frontage is a fair and reasonable way of assessing the apportionments, the Respondents respectfully disagree.

For instance, the works that have been proposed do not directly impact a number of properties whose frontage is not directly on the Mews, such as repairs to the drainage system and enhancement to the property frontages has no benefit to them.

We therefore request that the Tribunal determine that the apportionments are not fair and reasonable, and an alternative is adopted.

The Respondents propose that all properties mentioned at paragraph 16 of the Applicant's Application should pay an equal percentage."

49. The Applicants' case is that the costs should be apportioned between all lessees and freehold owners by taking the length of each property's frontage onto Boscobel Place as a percentage of the total lengths (rather than on the basis of "square footage").

50. In the instant case, the rear elevations of the three blocks are not directly contiguous with Boscobel Place, but with the service area which lies between their rear elevations and Boscobel Place. The Applicants have therefore measured the 'frontage' of the blocks with Boscobel Place (being essentially the length of the railings and the entrance to the ramp, beyond), which is 51.44 metres. They have then measured the lengths of the rear elevations to each block to the longer service area (a total of 76.83 metres) and pro-rated between the three of them, to arrive at their respective percentages.

51. The Tribunal was informed that this linear method of apportionment is the method of apportionment which the Applicants apply to each of the 52 odd mews they own, without any known challenge. It is a method which they have (to the best of the recollection and the knowledge of current employees) always used where costs within mews are to be apportioned.

52. The Tribunal notes that the lessees and freehold owners may not have considered it cost effective to challenge any previous charges which were significantly lower than the budget costings in the present case. Accordingly, the Tribunal has not placed any significant weight upon the evidence concerning the past history.

53. The Applicants submit that the chosen method of apportionment is a predictable, fair and reasonable basis for apportioning the costs of the Repairs to this private road. They state that it is correct that each block attracts a higher apportionment than does any house (11.36%, 9.9% and 12.79% respectively, against the largest house apportionment, being 8.53% for 70 Elizabeth Street). However, each block is a very substantial building, with a number of storeys, and each contains a number of substantial residential apartments worth many millions of pounds.

54. The occupants of each of these apartments have rights of way over Boscobel Place. This includes rights of way on foot and also rights of way for vehicular access for cars (there are some garages at the foot of the blocks), delivery vans, tradespeople, and refuse vehicles serving the blocks.

55. The Applicants state that the lessees' case that all 17 contributing lessees and owners should pay the same would result, for example, in each lessee of the single garages at 43 and 48 Boscobel Place paying the identical sum as the lessee of each of these multi-apartment blocks. The Applicants state that there is nothing fair or reasonable about the lessees' proposed apportionment and that it is put forward for no reason other than that it will reduce the relevant lessees' contributions.

56. The Tribunal accepts the Applicants' submissions. The Tribunal finds that the Applicants' proposed method of apportionment is fair and reasonable and that the amount payable is to be determined in accordance with the apportionments set out at paragraph 16 of the Applicants' Statement of Case.

57. Applying the three lessees' proposed method of apportionment, the owner of one garage would be charged the same sum as the lessee of a residential block of flats, containing 8 garages as well as 14 flats (including a porter's flat). In all the circumstances, the Tribunal is not satisfied that the proposal put forward by the lessees who are represented by Mr Gibson is either fair or reasonable.

<u>The expenses of making this application</u>

58. The Applicants informed the Tribunal that the costs and expenses of making this Application will be borne by them, and not passed to any of the Respondents by way of service charge or estate charge.

Name: Judge N Hawkes **Date:** 30 May 2019

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).