UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2015] UKUT 0145 (LC)
UT Case Number: HA/15/2014

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – enforcement action – service of improvement notice requiring work to common parts of building – building under management of RTM Company – whether notice to be served on landlord, lessees or RTM Company – ss 262-263 and paras 1 to 5, Part 1, Schedule 1, Housing Act 2004 - appeal dismissed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

HASTINGS BOROUGH COUNCIL

Appellant

and

BRAEAR DEVELOPMENTS LIMITED

Respondent

Re: 33 Kenilworth Road,
St Leonards on Sea,
East Sussex
TN38 OJL

Before: Martin Rodger QC, Deputy President

Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL
on
25 March 2015

Hugh Flanagan instructed by the Borough solicitor for the Appellant
Justin Bates instructed by Coole and Haddock, solicitors, for the Respondent

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The following cases are referred to in this decision:

Pollway Nominees Limited v Croydon London Borough Council [1987] 1 AC 79

Triplerose Limited v Derby City Council BIR/00FK/HIN/2010/0020

R v Lambeth LBC, ex.p Clayhope Ltd [1988] 1 QB 563

DECISION

1. Where a converted block of flats is under the management of an RTM Company, on whom may a local housing authority serve an improvement notice under s. 11 of the Housing Act 2004 requiring work to the common parts of the building in order to remedy a category 1 hazard?

2. That question arises in this appeal against a decision made on 14 April 2014 by the First-tier Tribunal (Property Chamber) ("the F-tT") in which it decided that the appellant, Hastings Borough Council, should not have served an improvement notice requiring work to the common parts of 33 Kenilworth Road, St Leonards on Sea, on Braear Developments Limited, the owner of the freehold interest in the building. On 14 May 2014 the F-tT granted permission to appeal.

The Facts

3. 33 Kenilworth Road ("the Building") is a five-storey mid-terrace Victorian house which has been converted into 5 self-contained flats.

4. As originally constructed access to the upper floors of the Building was by means of an internal staircase. Following the conversion of the building to flats, access to the basement flat is by means of a door from the front garden. The remaining flats are reached through the main entrance door at raised ground floor level. The ground floor flat itself is entered through the common hallway. Access to the upper floors is only available by passing through the ground floor hallway, and exiting the Building at the rear to reach an unenclosed, external steel staircase, which has to be ascended to reach the flats on the first, second and third floors, each of which has its own door opening onto the staircase.

5. The freehold interest in the Building belongs to the respondent. Between August 1987 and February 1989 predecessors in title of the respondent granted long leases of the five flats in the Building, each for a term of 99 years. The leases of the flats on the first, second and third floors granted rights to the lessees to pass through the common hallway, emerge onto the flat roof of the rear extension and gain access to their respective flats by means of the external staircase. No other means of access to those flats is possible.

6. Entries in the Land Register show that the basement flat and the ground floor flat are owned by Mr Peter Rochford; the first and third floor flats are owned by a company named Hyfield Estates Limited; the second floor flat is owned by David and Sophie Lukey. With the exception of the second floor flat, which has been vacant for a number of years and was said by the appellants in their submissions to the F-tT to be in a derelict condition, each of the flats in the Building is occupied by sub-tenants of these lessees.

7. On 13 July 2005 a company named 33 Kenilworth Road RTM Company Limited gave notice to the respondent that it intended to acquire the right to manage the Building in accordance with

Chapter 1 of Part 2 of the Commonhold and Leasehold Reform Act 2002. The notice recorded that the members of the company were Mr Rochford, Mr Lukey and Aranoak Limited, which was then the lessee of the first floor flat.

8. The right to manage was duly acquired by the RTM Company on 14 November 2005 and in June 2007 it applied to the appellant for a grant to carry out work of repair to the common parts of the Building. The work included the replacement of the rear external staircase, which had become dilapidated, and was expected to cost more than £100,000. On 18 August 2008 the appellant approved a grant of almost £55,000 towards the total cost of the works, which was made conditional on the work being completed within 12 months.

9. The RTM Company did not carry out the work within the 12 months allowed and as a result the grant was cancelled.

10. As a result of the application for the grant the appellant had become aware of the poor condition of the external staircase, and on 24 August 2009 it served an emergency prohibition order, prohibiting the use of the staircase. In response to that notice some remedial work was carried out by Hyfield Estates Limited which owns the only two occupied flats on the upper floors. The work was sufficient to discharge the prohibition order but, following a further inspection by the appellant, it served an improvement notice under s. 11 of the Housing Act 2004 on 6 December 2012.

11. The improvement notice specified two hazards arising from deficiencies in the Building. The first was the risk of falls on the external staircase because it remained in a state of disrepair. The second was the risk of exposure to fire because the fire detection system, emergency lighting and means of escape using the external staircase were inadequate. The work required by the improvement notice was the renewal of the external staircase in accordance with the Building Regulations 2000 and the provision of various fire safety measures including emergency lighting on the staircase and the installation of an automatic fire detection and warning system, including interlinked heat detectors in each of the flats.

12. The improvement notice was served on both the respondent in its capacity as the owner of the freehold interest in the Building, and on the RTM Company. In its statement of case to the F-tT the appellant suggested that, in retrospect, it considered that service of the notice on the RTM Company was incorrect. It is not clear from the material before the Tribunal whether at any stage the appellant formally revoked the improvement notice served on the RTM Company.

13. In response to the service of the improvement notice the appellant appealed to the Southern Rent Assessment Panel (the predecessor of the F-tT) on 12 December 2012. That appeal seems to have gone into abeyance and on 11 September 2013 a further appeal was lodged by the respondent. In directions given on 4 March 2014 the F-tT stated that it would first determine the issue whether, where an RTM Company has exercised the right to manage, an improvement notice can validly be served on the landlord under paragraph 4(2) of Schedule 1 to the Housing Act 2004. With the agreement of the parties, that issue was determined by the F-tT on the basis of their written

representations. Before considering its decision it is necessary to refer to the relevant provisions of the Housing Act 2004.

The Statutory Framework: the Housing Act 2004

Part 1 of the 2004 Act

14. Part 1 of the Housing Act 2004 introduced a new system of assessing the condition of residential premises, to be used in the enforcement of housing standards. It replaced the concept of fitness for human habitation in s. 604 of the Housing Act 1985 with a new Housing Health and Safety Rating System ("HHSRS"). The new rating system involves a risk based assessment of the effect of any deficiencies in dwellings using objective criteria.

15. Part I of the 2004 Act provides for prescribed hazards to be categorised by calculating their seriousness as a numerical score. The Housing Health and Safety Rating System (England) Regulations 2005, which were made under the powers conferred by the 2004 Act, provide a method of calculating the seriousness of a hazard. More serious hazards are classed as category 1 hazards, whilst lesser hazards are in category 2. The hazards with which this appeal is concerned are in category 1.

16. Where a local housing authority consider that a category 1 hazard exists on any residential premises it comes under a duty, imposed by s. 5(1), to take appropriate enforcement action, which may include serving a notice, referred to as an improvement notice, requiring the person on whom it is served to take such remedial action in respect of the hazard concerned as is specified in the notice.

17. Improvement notices relating to category 1 hazards are described in s. 11 of the 2004 Act. The premises in relation to which remedial action may be required to be taken by an improvement notice are identified in s. 11(3). If the residential premises on which the hazard exists are a dwelling or HMO which is not a flat, the notice may require action to be taken in relation to the dwelling or HMO; if those premises are one or more flats, or are the common parts of a building containing one or more flats, the notice may require action to be taken in relation to the building (or any part of the building) or any external common parts.

18. The content of an improvement notice must be in accordance with s.13. Certain information must be specified in relation to the hazards to which the notice relates including, by s. 13(2)(b) and (d), "the nature of the hazard and the residential premises on which it exists" and "the premises in relation to which remedial action is to be taken in respect of the hazard and the nature of that remedial action".

Parts 2 and 3 of the 2004 Act

19. Part 2 of the Housing Act 2004 introduced a new scheme for the licensing of houses in multiple occupation, referred to as HMOs, by local housing authorities. An HMO is a building

or part of a building which satisfies one of the five alternative tests in s. 254(1), Housing Act 2004. HMOs take different forms, and may comprise a house, a self contained flat, a converted building, a building in mixed use, or, in certain circumstances, a block of flats. This appeal concerns a block of flats.

20. A block of flats can only be an HMO where it is a "converted block of flats" to which s. 257 applies. A converted block of flats is a building or part of a building which has been converted into, and consists of, self-contained flats. The object of s. 257 is to bring within the scope of the legislation controlling HMOs certain converted blocks of flats which do not satisfy modern building standards. In the case of a converted block of flats on which building work was completed before 1 June 1992, s. 257 applies if the work undertaken in connection with the conversion did not comply with building standards equivalent to those imposed by the Building Regulations 1991, and less than two-thirds of the self-contained flats are owner occupied (s. 257(2)-(3)). Such a block of flats is referred to as "a section 257 HMO".

21. Although a block of flats may be an HMO, for the purpose of Part 1 of the Act a distinction is drawn between an HMO and what is called a "building containing one or more flats". The expression "building containing one or more flats" is stated in s. 1(5) of the Act not to include an HMO.

22. With immaterial exceptions every HMO to which Part 2 applies is required by s. 61(1) to be licensed. However, Part 2 of the 2004 Act does not apply to all HMOs but only to those of a type which has been prescribed or which are in an area designated by a local housing authority as subject to additional licensing (s. 55(2)). The Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2006 ("the 2006 Order") prescribes certain HMOs, and so renders them subject to mandatory licensing, but the Order does not apply to section 257 HMOs. The fact that section 257 HMOs are not within Part 2 of the 2004 Act, and therefore are not subject to mandatory licensing, does not alter their status as HMOs for the purposes of Part 1 of the Act.

23. By s. 72(1) a person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under Part 2 but which is not so licensed. The expression "person having control" is defined in s. 263, as follows:

> "263(1) In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent."

The term "rack-rent" is defined in s. 263(2) is defined as meaning a rent which is not less than two-thirds of the full net annual value of the premises.

24. In *Pollway Nominees Limited v Croydon London Borough Council* [1987] 1 AC 79, which concerned the meaning of the expression "person having control" in section 39(2) of the Housing Act 1957 the House of Lords held that in the case of a house comprising a number of

residential units let on long leases at ground rents, the expression "person having control" applied collectively to all the long lease holders who between them either received the rack-rent or units-lets at rack-rents or would receive the rack-rent if the units were so sub-let. It followed that the freeholder, who only had a reversionary interest conferring no right of occupation, was not a person having control of the house within the meaning of the subsection. A notice served on the freeholder under section 9(1A) of the Housing Act 1957 requiring it to carry out certain structural repairs was accordingly a nullity.

25. A modified definition of "person having control" is applicable to section 257 HMOs in relation to licensing under Parts 2 and 3 of the Act, but it has no application for the purpose of the provisions concerning improvement notices in Part 1 of the Act. For the purpose of licensing only, s. 61 of the Act is modified in its application to a section 257 HMO by regulation 3 of the Houses in Multiple Occupation (Certain Blocks of Flats) (Modifications to the Housing Act 2004 and Transitional Provisions for section 257 HMOs) (England) Regulations 2007. The modification introduces s. 61(7)-(8) as follows:

> "(7) In this Part the "person having control" in respect of a section 257 HMO is—
>
> > (a) in relation to an HMO in respect of which no person has been granted a long lease of a flat within the HMO, the person who receives the rack rent for the HMO, whether on his own account or as an agent or trustee of another person;
> >
> > (b) in relation to an HMO in respect of which a person has been granted a long lease of a flat within the HMO, the person who falls within the first paragraph of subsection (8) to apply, taking paragraph (a) of that subsection first, paragraph (b) next, and so on.
>
> (8) A person falls within this subsection if the person—
>
> > (a) has acquired the right to manage the HMO under Part 2 of the Commonhold and Leasehold Reform Act 2002(1);
> >
> > (b) has been appointed by the Leasehold Valuation Tribunal under section 24 of the Landlord and Tenant Act 1987(2);
> >
> > (c) is the person who is the lessee of the whole of the HMO under a lease between him and a head lessor or the freeholder, or is the freeholder of the HMO; or
> >
> > (d) has been appointed to manage the HMO by the freeholder, by a head lessor of the whole of the HMO, or by a person who has acquired the right to manage the HMO under Part 2 of the Commonhold and Leasehold Reform Act 2002."

26. Part 3 of the 2004 Act also provides for licensing of other residential accommodation which is not an HMO.

Service of improvement notices

27. Paragraphs 1 to 5 of Part 1 of Schedule 1 to the 2004 Act deal with the requirements for the service of improvement notices, including identifying the person on whom a notice must be served. Four distinct situations are catered for, each of which identifies the recipient of the notice by reference to the nature of the specified premises in the improvement notice; the expression "specified premises" is defined in s. 13(5) as premises specified in an improvement notice as premises in relation to which remedial action is to be taken in respect of the hazard. The situations are:

> (a) Where the specified premises are licensed under Part 2 or Part 3 of the 2004 Act, paragraph 1 of Schedule 1 requires the local housing authority to serve the notice on the holder of the licence.
>
> (b) Where the specified premises are not so licensed and are not a flat, paragraph 2 applies. In that case, where the specified premises are a dwelling the local housing authority must serve the notice on "the person having control of the dwelling". Where the specified premises are an HMO it must serve the notice either "on the person having control of the HMO" or on the person managing it.
>
> (c) Where the specified premises are a flat which is either a dwelling not licensed under Part 3 of the Act, or an HMO which is not licensed under Parts 2 or 3, paragraph 3 applies. In such a case the local housing authority must serve the notice either on the person managing the flat, or on a person who is both an owner of the flat, and in the authority's opinion ought to take the action specified in the notice.
>
> (d) Where any specified premises are common parts of a building containing one or more flats, or any part of such a building which does not consist of residential premises, paragraph 4 applies. The improvement notice must in such a case be served by the local housing authority on a person who "(a) is an owner of the specified premises concerned, and (b) in the authority's opinion ought to take the action specified in the notice." It is appropriate at this stage to recall the distinction referred to in paragraph 21 above and to remember that by reason of s.1(5) of the 2004 Act, the expression "building containing one or more flats" does not include an HMO.

28. More than one person may have an interest in any house, flat or HMO, whether as freeholder, long lessee or short term tenant. The provisions in Schedule 1 of the 2004 Act for identifying the proper recipient of an improvement notice make it important to be able to identify the "owner", the "person having control", and the "person managing" the specified premises.

29. Reference has already been made to the meaning of "person having control" as defined by s. 263(1) and to the potential, identified by the House of Lords in *Pollway,* where a building is divided into flats in separate ownership, for that person to comprise the whole group of persons in receipt of the rack rents of those flats.

30. The "owner" in relation to any premises is defined in s. 262(7). The owner of specified premises always includes the owner of the freehold interest in those premises. It also includes "a person holding or entitled to the rents and profits of the premises under a lease of which the unexpired term exceed 3 years". Thus, if the specified premises are subject to a lease with more than 3 years left to run, the "owner" will include both the lessee (the holder of the lease) and the lessor (the person entitled to receive the rent payable under the lease).

31. In relation to an improvement notice served under paragraph 4 of Part I of Schedule 1 to the 2004 Act, where the specified premises are the common parts of a building, the expression "owner" is given an extended meaning. A person is an owner of any common parts of a building if he is an owner of the building or part of the building concerned, or (in the case of external common parts) if he is an owner of the particular premises in which the common parts are comprised. Thus, in relation to common parts, a lessee with a lease for a term of more than 3 years is an owner for the purposes of paragraph 4.

32. The expression "person managing" is defined in s. 263(3). The person managing is an owner or lessee of premises who receives rents or other payments (in the case of an HMO) from persons in occupation of parts of the premises as tenants or licensees (or who would do so but for having entered into an arrangement under which another person receives those payments).

The F-tT's Decision

33. The respondent's case before the F-tT was that by virtue of sections 96 and 97 of the Commonhold and Leasehold Reform Act 2002 Act, on the acquisition of the right to manage on 15 November 2015 all management functions in relation to the Building had passed to the RTM Company and that it, the respondent, had no authority to carry out work to the Building. Reference was made to an earlier decision of a Residential Property Tribunal, *Triplerose Limited v Derby City Council* in which an improvement notice served on a landlord in respect of the common parts of a building which was under the management of an RTM Company had been quashed. The respondent suggested that paragraph 4 of Schedule 1 to the 2004 Act defined the person on whom an improvement notice requiring remedial work to be undertaken to the common parts of the Building could be served, and that as it had no right to carry out works to the Building it could not be required to do so by the appellant.

34. The appellant's case to the F-tT was that it had been entitled to serve the improvement notice on the respondent as an owner of the Building. The RTM Company was not an owner for the purposes of the 2004 Act and accordingly, the appellant submitted, the respondent was the *only* party on whom it was possible for it to serve an improvement notice. It pointed out that the respondent could apply to the Magistrates Court under section 36 of the 2004 Act to obtain an order entitling it to enter the Building and carry out the remedial action required by the improvement notice.

35. Having reminded itself of paragraph 4(2) of Schedule 1 to the 2004 Act, the F-tT said that it was clear that an improvement notice could only be served on an owner of the specified premises whom the local housing authority considered ought to take the relevant action. As a result of the

acquisition of the right to manage, and by virtue of s. 97(2) of the 2002 Act the respondent was not entitled to do anything which the RTM Company was now empowered to do, except in accordance with an agreement made between the landlord and the RTM Company. The F-tT went on:

> "The tribunal therefore considers that [the appellant] could not realistically expect [the respondent] to carry out the works specified in the improvement notice and was well aware that this was the responsibility of the RTM Company. Therefore the improvement notice should not have been served on the [respondent] as it does not comply with paragraph 4(2) of Part 1 of Schedule 1 to the Housing Act 2004."

36. On that basis the F-tT allowed the respondent's appeal against the improvement notice.

The appeal

37. In his skeleton argument submitted on behalf of the appellant Mr Flanagan pointed out that the appellant is under a statutory duty, imposed by s. 5 of the 2004 Act, to take appropriate enforcement action where it becomes aware that a category 1 hazard exists. The view taken by the appellant had been that because remedial action was required to common parts, paragraph 4 of Schedule 1 to the 2004 Act applied and it was required to identify the owner of the specified premises whom it considered ought to take the action specified in the notice. Where there is more than one owner of the specified premises a local housing authority was entitled to select the most appropriate person on whom it considered the notice ought to be served. The fact that an RTM Company had the management of the Building did not prevent the appellant from serving a notice on the owner whom it considered ought to carry out the works specified in the Notice. The RTM Company was not an owner and therefore it could not be the recipient of a notice served under paragraph 4.

38. In defence of the appellant's conclusion that the respondent, as freeholder, ought to carry out the work, Mr Flanagan submitted that there were a number of means by which the respondent could comply with the notice notwithstanding the prohibition in s. 97(2) of the 2002 Act which prevented it from doing anything which the RTM Company was empowered to do by s. 96 of that Act: it could reach agreement with the RTM Company for it to be permitted carry out the work. It could apply to a magistrates' court under s. 36 of the 2004 Act for an order enabling it to enter the premises and take the remedial action required by the improvement notice; it could apply to the County Court under s. 197 of the 2002 Act for an order requiring the RTM Company to comply with its management obligations. The respondent could thereby procure the carrying out of the work by the RTM Company. Mr Flanagan also pointed out that by virtue of s. 97 of the 2002 Act the landlord's obligations under the leases of flats in the Building were owed by the RTM Company to the freeholder, so if the respondent carried out the work at its own expense it would have a claim against the RTM Company for its failure to comply with the landlord's repairing covenant. Finally, Mr Flanagan pointed out that in proceedings against a person for the offence under section 30 of the 2004 Act of failing to comply with an improvement notice, it is a defence that he had a reasonable excuse for the failure to comply with the notice. The respondent would not be at risk of conviction if after taking the steps Mr Flanagan suggested were open to it, it was unable to complete the work required by the notice.

39. In a helpful supplemental note provided very shortly before the hearing, and in a further written submission taking account of points canvassed during the hearing, Mr Flanagan acknowledged that paragraph 4 of Schedule 1 was not, on reflection, applicable to the improvement notices served in this case. It is apparent from paragraph 4(1)(a) that paragraph 4 only applies where an improvement notice specifies premises which are "common parts of a building containing one or more flats." Mr Flanagan drew attention to the definition of that expression in section 1(5) of the 2004 Act which provides that "building containing one or more flats" does not include an HMO. The Building is an HMO and accordingly, although the improvement notice required work to the common parts of the Building, the identity of the proper recipient of the notice could not be found by applying paragraph 4(2).

40. Mr Flanagan suggested instead that the appropriate recipient of the improvement notice should be identified by applying paragraph 2 of Schedule 1. Paragraph 2 applies where the specified premises are either a dwelling which is not licensed under Part 3, or an HMO which is not licensed under Parts 2 or 3 of the Act, and which (in either case) is not a flat. Whether an HMO is licensed or not is a question of fact and does not depend on whether the HMO is required to be licensed.

41. I agree with Mr Flanagan's alternative submission on the paragraph of Schedule 1 applicable in this case. The premises in relation to which the remedial action was required to be taken were the Building. The Building is an HMO which is not licensed and which is not a flat; accordingly paragraph 2 is apt to identify the person on whom an improvement notice must be served. By paragraph 2(2)(b) the local housing authority must serve the notice either on the person having control of the HMO or on the person managing it.

42. The person having control of an HMO (including, for the purpose of Part 1 of the Act, a section 257 HMO) is to be identified in accordance with s. 263(1). The Building is not let as a whole, but it is nonetheless necessary to identify the person who receives the rack-rent of the premises, or who would so receive it if the premises were let at a rack rent. Mr Flanagan submitted that that person having control of the Building collectively comprised the five lessees and the respondent as freeholder. The lessees individually were entitled to receive the rack-rents of the flats; the common parts were not demised, but if they were the person entitled to receive the rack-rents of the common parts would be the respondent as freeholder. He relied on a decision of the Court of Appeal, *R v Lambeth LBC, ex p. Clayhope Ltd* [1988] 1 QB 563, 573G-574G, in support of the proposition that, following *Pollway*, an improvement notice could be served collectively on a group of lessees and the freeholder of the block of flats.

43. I do not accept Mr Flanagan's submission in this regard. *Clayhope*, which like *Pollway*, concerned repair notices under the Housing Act 1957, is not authority for the proposition that where all of the flats in a block of flats are let on long leases at ground rents, the common parts of the building may nonetheless be regarded as having a rack-rental value such that the owner of the freehold is to be treated as part of the composite "person in control" of the building for the purpose of serving a notice on that person. The facts in *Clayhope* were markedly different from the facts of this case. It concerned a block of 20 flats (including shared common parts) of which only 14 were let on long leases at ground rents; the remaining 6 flats were let on protected tenancies. The freeholder was therefore in receipt of the rack-rents of the 6 flats, and the long lessees would have been in

receipt of the rents of the 14 other flats if they had been let at rack rents. Repair notices had been served on the basis that the building was a house. At p. 568H Glidewell LJ said that the person having control of the house as far as the leasehold flats were concerned was the leaseholder, and as far the other flats were concerned was the freeholder. No consideration was given to a notional letting of the common parts. It was in that context that Glidewell LJ said at p.574E that the proper course for the local authority wishing to secure repairs to structure of the building "would have been to serve the 14 leaseholders plus the freeholder as together being the person having control of the whole house."

44. Four of the five flats in the Building are let on assured tenancies by the lessees. Although there is no specific evidence on the point there seems no reason to doubt that the tenancies are at market rents and that, in aggregate, the rents received for the units which are let exceeds two thirds of the annual value of the units as a whole. A fifth flat is not let, but if it were, the recipient of the rack-rent would be the lessee. Looking at the Building as a whole, the person in control in the sense of the person(s) in receipt of the rack rents are the lessees. It seems to me wrong in principle to ascribe a notional rack-rent to the common parts of the Building, when there is no realistic possibility of such a rent being received. That is consistent with the approach taken in *Clayhope* and in *Pollway* (where at 95A-C Lord Bridge referred to the freeholder having "granted separate leases of all the units capable of occupation" and retaining only a reversionary interest "which confers no right of occupation which he can either enjoy for himself or let to anyone else)."

45. It seems to me to be clear that the persons in control of the Building are the lessees of the five flats. Collectively they are in receipt of the rack-rent of the Building and therefore satisfy the description in section 263(1).

46. It follows that the appropriate recipient of an improvement notice in accordance served in relation to the Building as a whole in accordance with paragraph 2 would be the lessees collectively. To the extent that work was required within individual flats each lessee would be the appropriate recipient of a notice requiring that work. Neither the respondent, as freeholder, nor the RTM Company could be served with an improvement notice in relation to any part of the Building. In the case of the respondent, it is not the person in control of the HMO because it is not in receipt of the rack-rents of the premises and therefore does not satisfy the description in section 263(1). The RTM Company is in the same position. Nor is either of them a person managing the Building in the sense indicated by s. 263(3). The respondent receives a ground rent from the lessees, but no rent from persons who are in occupation as tenants or licensees of parts of the premises. The RTM Company receives no rent.

47. There does not seem to me to be anything surprising in that conclusion. The regime established by Part 1 of the 2004 Act is intended to protect the occupiers of residential property, and targets the person receiving the rent paid by the occupier, or the most appropriate owner of the property, as the recipient of improvement notices. In this case those persons are the lessees.

48. Where a building is an HMO subject to licensing it would normally be expected that an improvement notice would be served on the person holding the licence. Paragraph 2 applies only to HMOs which are not licensed.

49. As it happens, the Building is required to be licensed. As previously explained, a section 257 HMO (such as the Building) is not subject to licensing by reason of s. 55(2)(a) because the 2006 Order by which certain categories of HMO are prescribed specifically excludes section 257 HMOs. A section 257 HMO is only subject to licensing if it is in an area for the time being designated under s. 56 of the Act as subject to additional licensing (s. 55(2)(b)). Mr Flanagan explained that an area of St Leonards, which included the Building, had been designated by the appellant under s. 56 as subject to additional licensing. Thus, although the Building is a section 257 HMO, it is nonetheless required to be licensed under Part 2 of the 2004 Act.

50. In this case a licence ought to have been applied for by the RTM Company as the person in control for the purpose of Part 2 of the Act. The modified provisions of s. 61 apply because the Building is a section 257 HMO (see paragraph 25 above). Because long leases (i.e. leases exceeding 21 years) have been granted of flats within the Building s. 61(7)(a) does not apply. It follows, therefore, that s. 61(7)(b) applies and that the "person having control" in respect of the section 257 HMO is the person who falls within the first paragraph of subsection (8) to apply. The first paragraph of s. 61(8) identifies the person having control as such person as has acquired the right to manage the HMO under Part 2 of the Commonhold Leasehold Reform Act 2002, or in other words, an RTM company. In this case the person having control is therefore RTM Company, and it is the Company, and not the individual lessees, which is obliged to apply for a licence.

51. If the RTM Company had done what was required of it, and had obtained a licence under Part 2 of the Act, there would have been no doubt that it would have been the appropriate person on whom an improvement notice ought to be served under paragraph 1 of Schedule 1. As it is I am satisfied that the lessees (who are all members of the Company) are the appropriate recipient of the notice requiring work to the external staircase and fire detection systems under paragraph 2.

52. For these reasons (which differ from those of the F-tT) I am satisfied that the F-tT came to the correct conclusion and that the appellant was not entitled to serve the improvement notice on the respondent as freeholder. Nor, as the appellant has long acknowledged, was the RTM Company an appropriate recipient of the notice.

53. That is sufficient to dispose of the appeal but I have been asked by the appellant to provide some further comments on how it may approach the service of a notice requiring improvements to the common parts of a building which is under the management of an RTM Company. Full submissions were made on this issue, which is said to be of recurring concern to housing authorities such as the appellant, so I add these further comments which are not part of the reasoning of my decision.

The position of an RTM Company

54. The right to manage may be exercisable in relation to any self contained building or part of a building containing two or more flats, including a converted block of flats which was not a section 257 HMO because it had been converted in a manner which had complied with the appropriate building standards, or because more than two thirds of the flats were owner-occupied.

55. A building of the type described would not be an HMO, and so its common parts would not be precluded from falling within paragraph 4 of Schedule 1 to the Act by reason of the exclusionary definition of "building containing one or more flats" in section 1(5).

56. An improvement notice in respect of the common parts of a building containing one or more flats which is not an HMO is required by paragraph 4(2) to be served on a person who is an owner of the specified premises concerned (i.e. the common parts), and who in the authority's opinion ought to take the actions specified in the notice. It is not necessary that the notice should be served on all owners.

57. The expression "owner" in relation to premises means the freeholder (referred to in s. 262(7)(a) as "a person (other than a mortgagee not in possession) who is for the time being entitled to dispose of the fee simple of the premises whether in possession or in reversion") and also includes both the lessor and the lessee under a lease which the unexpired term exceeds three years. By paragraph 4(3) the "owner" of common parts also includes any owner of the building or part of the building or (in the case of external common parts) of the particular premises in which the common parts are comprised.

58. Applying these provisions to a self contained building which is not a section 257 HMO, but which is under the management of an RTM company, I suggest that the following persons might properly be the recipients of an improvement notice given under paragraph 4. First, the freeholder, who satisfies the description of "owner" in s. 262(7)(a), as being entitled to dispose of the fee simple of the premises in reversion. Secondly, some or all of the lessees of individual flats with leases for unexpired terms exceeding 3 years, each of whom is "an owner of … part of the Building" in accordance with s. 262(7)(b). Every such lessee is also within the extended definition of owner in paragraph 4(3) in relation to common parts. The RTM company itself is not an owner and cannot be the recipient of an improvement notice.

59. There may therefore be circumstances in which it would be open to a local housing authority to serve an improvement notice in relation to the common parts of a building either on the freeholder or on some or all of the lessees of flats in the building. It will be a matter for consideration in each case which of these owners "ought to take the actions specified in the notice". In reaching a conclusion on that question a local housing authority will wish to have regard to the practicality of compliance with the notice. Where an RTM company has the management of the building the freeholder will have no power to undertake works and no entitlement to recoup the costs of works from lessees. The cumbersome mechanisms suggested in paragraph 38 above by which the freeholder who receives such a notice may comply with it are all indirect and time-consuming means of procuring improvements. In circumstances where the freeholder is precluded from undertaking work except by one of those methods, because an RTM company manages the building, the better course would

seem to be to direct any improvement notice at those lessees who are members of the company and who are therefore collectively in a position to exercise control over its decisions. In the ordinary case the RTM company will be in a position both to carry out the necessary works and to recoup the expense of doing so from those who, by the terms of their leases, have agreed to bear that expense.

60. For the reasons previously given I dismiss the appeal. Although the F-tT did not do so explicitly, the appropriate course of action in those circumstances is to quash the improvement notice.

Martin Rodger QC,

Deputy President

21 April 2015

Addendum on costs

61. Unusually for an appeal from a decision of the First-tier Tribunal, the Tribunal now has to consider an application for costs of the appeal made by the respondent. Submissions in reply to that application have been received from the appellant.

62. The Tribunal's power to award costs is governed by rule 10 of the Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010 (as amended). The general rule is that costs may only be awarded in circumstances falling within sub-paragraphs (3) to (6) of rule 10.

63. In appeals from the First-tier Tribunal the only relevant power to award costs against a party is under rule 10(3)(b) which allows an award of costs if the Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting proceedings.

64. The basis of the application is the submission that the appellant effectively conceded the appeal when it accepted that the improvement notice should have been served under paragraph 2 of Schedule 1, Housing Act 2004, rather than on the respondent under paragraph 4. For the appellant to make that concession in a supplemental skeleton argument served immediately before the commencement of the hearing was, the respondent suggested, unreasonable.

65. I do not agree that an order for costs is appropriate in this case.

66. It is true that the appellant had second thoughts about the basis of the improvement notice, but it certainly did not abandon the appeal, for which it had been granted permission to appeal by the First-tier Tribunal. The granting of permission to appeal showed that the tribunal considered the grounds of appeal were properly arguable. The alternative basis on which the appeal was presented was also properly arguable, although I did not accept it. No time was wasted at the hearing of the appeal trying to justify the approach previously taken. I bear in mind that the legislation is not straightforward and, so far, there is relatively little guidance from courts or tribunals to assist local housing authorities in navigating their way through its complex permutations. I bear in mind also that, although the conclusion which I reached produced the same result as had the First-tier Tribunal's decision, I reached that conclusion for different reasons.

67. It is not unreasonable to be wrong. Where a party concludes, on further reflection, that a point it had intended to argue is not correct it is reasonable behaviour, and not unreasonable, for it to say so. That reasonable conduct is not made unreasonable by the fact that the second thoughts which prompted it came during final preparation for the hearing of an appeal.

68. I therefore refuse the respondent's application.

Martin Rodger QC
Deputy President

19 June 2015