FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00FA/HIN/2013/0016**
Property	:	**Flat 4 141 Princes Avenue, Hull HU5 3DL**
Applicant 1	:	**Mr David Wood**
Representative	:	**None**
Applicant 2	:	**Ms Sarah Peacock**
Representative	:	**None**
Respondent	:	**Hull City Council**
Representative	:	**Mr Paul Thompson, Solicitor, Mr John Bower, Environmental Heal Officer**
Type of Application	:	**Housing Act 2004, Sch,1 para. 10(1)**
Tribunal Members	:	**Prof. Caroline Hunter** **Mr Ian Loncaster FRICS FRSA**
Date and venue of Hearing	:	**10 January 2014, Mercure Hull Royal Hotel**
Date of Decision	:	**21 January 2014**

DECISION

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carrying out the works in paragraph (I.) or alternatively by carrying out the works in paragraph (II.)"

7. The first set of works was that which had been set out in the 2012 notice, i.e requiring works to be done to the ceiling of Ms Peacock's flat. The second, labelled "alternative works" required the installation of a fire resistant product between the floor joists in Flat 4.

8. By an application dated September 9, 2013 Mr Wood appealed against the notice to the Tribunal. Ms Peacock was named as an interested party in that application. She also submitted to the Tribunal (although it is not clear exactly when and it is more as a response to the original RPT decision) a written submission. While the written submission was sent to the Tribunal and also to the Council, it was not sent to Mr Wood. Given her interest in this matter the Tribunal has exercised its power under Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, r.10(1), adding her as an applicant to this matter.

Matters agreed and in dispute

9. Given that the detailed factual history to this matter is set out in the RPT decision relating to the 2012 notice we do not intend to rehearse it again in this decision. Ms Peacock in her written submission disputed two factual matters set out in the RPT decision. The first relates to the original division of the houses into flats. She points out that the division was originally into five flats and not seven. This is borne out by the deeds which relate to covenants to pay a fifth of the costs of maintenance of the structure. However, nothing turns on this in relation to our decision. Secondly she alleged that any disrepair to her ceiling was due to leaks from Flat 4 above. We shall deal further with this allegation below (see paras 44 and 45).

10. In relation to two matters all the parties were in agreement.
    a. That a Category 2 hazard exists in Flat 4 because of the lack of fire separation between the two flats
    b. 141/143 Princes Avenue is an HMO as defined by Housing Act 2004, s.257.

11. The matters in dispute were:
    a. Who was the "person having control" of the HMO on whom the notice should be served. Mr Wood argued that the notice should not have been served upon him, but on Ms Peacock alone.
    b. Whether the notice should have included the "alternative works" as a reasonable course of action to be taken. Mr Wood argued that it should not have been included.
    c. Who was the appropriate person to pay the costs of the work. Schedule 1, para. 11 of the Housing Act 2004 gives the Tribunal power to make such a decision. This question was not raised by Mr Wood, but rather arose implicitly from the written submission of Ms Peacock, which asserted that she should not have to pay for these works. At the hearing Ms Peacock was asked if she wished the Tribunal to consider her submission as an appeal on this basis. She confirmed that she did. Because her written submission had not previously been served on Mr Wood, nor formulated in this precise way the Tribunal was concerned that Mr Wood should have a proper opportunity to deal with it. At the hearing Mr Wood, having been provided

15. Section 13 makes provision as to the contents of improvement notices as follows:

"(1) An improvement notice under section 11 or 12 must comply with the following provisions of this section.

(2) The notice must specify, in relation to the hazard (or each of the hazards) to which it relates–

(a) whether the notice is served under section 11 or 12,

(b) the nature of the hazard and the residential premises on which it exists,

(c) the deficiency giving rise to the hazard,

(d) the premises in relation to which remedial action is to be taken in respect of the hazard and the nature of that remedial action,

(e) the date when the remedial action is to be started (see subsection (3)), and

(f) the period within which the remedial action is to be completed or the periods within which each part of it is to be completed.

(3) The notice may not require any remedial action to be started earlier than the 28th day after that on which the notice is served.

(4) The notice must contain information about–

(a) the right of appeal against the decision under Part 3 of Schedule 1, and

(b) the period within which an appeal may be made.

(5) In this Part of this Act "specified premises", in relation to an improvement notice, means premises specified in the notice, in accordance with subsection (2)(d), as premises in relation to which remedial action is to be taken in respect of the hazard."

16. The starting point for our decision is therefore to consider the "residential premises" where the deficiency arises: see s.12(1). In this case the parties are agreed that 141/143 Princes Avenue is an HMO which is not a flat (although it contains flats): they are the residential premises on which the hazard exists pursuant to s.11(3)(a). Subsection 11(4) limits the circumstances where remedial action can be required to premises other than where the hazard exists and is not applicable in this case.

17. Given this starting point the relevant provision as to whom should be served with the notice is set out in Schedule 1, para. 2 to the 2004 Act (emphasis added):

"2(1) This paragraph applies where the *specified premises* in the case of an improvement notice are—

(a) a dwelling which is not licensed under Part 3 of this Act, or

(b) an HMO which is not licensed under Part 2 or 3 of this Act,

and which (in either case) is not a flat.

(2) The local housing authority must serve the notice—

(a) (in the case of a dwelling) on the person having control of the dwelling;

(b) (in the case of an HMO) either on the person having control of the HMO or on the person managing it."

22. The question therefore becomes who is the person having control under the second limb. The council submitted that it is Mr Wood and Ms Peacock together. Mr Wood submitted that it is Ms Peacock alone. The council's argument took as its starting point the line of cases that establish that where the relevant premises are in divided ownership there can be more than one person having control.

23. The leading case is the House of Lords decision in *Pollway Nominees Ltd v Croydon LBC* [1987] 1 AC 79. This was decided under one of the predecessors to the Housing Act 2004, the Housing Act 1957. The premises in question were a block of 42 flats, of which 10 were let on a single long lease to an associate company of the appellants, and then sublet on short leases. The remaining 32 flats were let on long leases with small ground rents. Croydon determined that the property was in disrepair and served a notice under s.9(1A) of the 1957 Act. When the notice was not complied with they carried out the repairs in default and sought to recover the costs from the appellants as the "person having control of the house". The definition of "person having control" was contained in s.39(2):

> "For the purposes of this Part of this Act, the person who receives the rack rent of a house, whether on his own account or an agent or trustee for any other person, or who would so receive it if the house were let at a rack rent, shall be deemed to the person having control of the house. In this subsection the expression 'rack rent' means rent which is not less than two-thirds of the full net annual value of the house".

24. While their Lordships expressed some disquiet as to whether a block of 42 flats could be properly called a "house" this was not argued before them. Rather the key question was how the second limb should be applied, given that there was no one person actually in receipt of the rack rent. Lord Bridge concluded that where a freeholder "has granted separate leases of all the separate units capable of occupation comprised within the building at rents which in the aggregate are less than the rack rent of the building and thus retains only a reversionary interest which confers no right of occupation which he can either enjoy for himself or let to anyone else" he could not be the "person having control" under the second limb (p.95B).

25. While this dealt with appeal, Lord Goff went on to consider whether this meant that there was in fact no one having control. He concluded that this was inconsistent with the intention of the legislature because "it must have been the intention of the Act that there shall always be a person having control of any relevant house, so that the statutory machinery must operate in relation to that house" (p.97F). Thus with the aid of the Interpretation Act the phrase "person who receives the rack rent" could be read in the plural "as applicable to a number of persons, having interests in different parts of the house which together comprise the totality of the house, join together to grant a lease of the whole house at a single rack rent. Such a result may, in the circumstances of the present case, be exceedingly improbable; it may also create a considerable inconvenience for the local authority; but it is, as I read it, capable of falling within the statutory definition" (p.98A).

hazards, including works to the common parts and also works to the dividing walls between the flats to provide 30 minutes fire resistance.

31. The Tribunal in Leintwardine Manor concluded that the notice was not valid as the notice should have identified the individual premises in which the hazard exists (see para. 56). An important part of their reasoning was that the notice had been served on flat owners who have no interest or control in the premises where works were being required and yet could potentially be criminally liable under s.30 of the 2004 Act for failure to comply with an improvement notice. Mr Wood argued that the same was true in this case as he was potentially being made criminally liable for not carrying out works, where he had no power to carry them out in Ms Peacock's flat.

32. In response to this argument the council pointed to the defence in s.30(4) which provides:

> "In proceedings against a person for an offence under subsection (1) it is a defence that he had a reasonable excuse for failing to comply with the notice".

Mr Wood suggested that it was not appropriate to have to rely on a defence.

33. The Tribunal did not find this matter straight forward. When we consider the *Pollway* and *White* decisions, neither considered the point about criminal liability (in *Pollway* because the question only related to payments for works that had been undertaken by the council and in *White* because the question was only about the position of the statutory tenant). Nor have any of the cases had to consider the position where the property in question was a house in multiple occupation, particularly one under the extended definition in s.257.

34. Nonetheless we have concluded that the approach of the council is the correct one for the following reasons:
    (a) The starting point is that the premises on which the hazard exists is an HMO which is *not* a flat.
    (b) Once premises have been identified as an HMO under s.11(3)(a), it is not possible to consider them otherwise as e.g. separate self-contained flats.
    (c) Section 11(4) is not applicable and the notice correctly specified that the remedial action should be taken in respect of the HMO. In accordance with s.13(5) the HMO is accordingly the "specified premises" for the purposes of the Act.
    (d) Accordingly the appropriate paragraph of Schedule 1 of the 2004 Act defining who should be served is paragraph 2 as the specified premises is an HMO.
    (e) The Act must be read as intending the specified premises to remain consistent throughout. Thus once the specified premises have been identified these are the same premises to which s.263(1) refers. Accordingly the council asked itself the correct question, i.e. who is the person having control of 141/143 Princes Avenue.
    (f) There is no basis for departing from the decision in *Pollway* that where premises are in multiple ownership the person who receives or would receive the rack-rent are made up of a composite of those persons. In this case the council correctly identified them as Mr Wood and Ms Peacock as the composite persons.

39. Ultimately in our view the matter rests on who is to pay for the works. In principle we see no reasons why the council should not give alternative forms of remedial action, particularly when dealing with "composite" persons having control who will have to agree to access to carry out the works. Accordingly we uphold the alternative works set out in the notice.

The appeal as to who should pay for the works

40. The inadequate separation between the two flats covers a relatively small area of Flat 4 which is immediately above the suspended ceiling in the bathroom and lobby of Ms Peacock's flat. We were provided with photographs of that area taken by the council during a revisit on August 13 2013. They show that the original Victorian ceiling is in a state of some disrepair. They also show that the area between the suspended ceiling and the original ceiling is used by Ms Peacock for storage purposes.

41. Ms Peacock told us that the suspended ceiling had been in place when she bought the flat. It is not therefore surprising that the original ceiling has not been maintained. Ms Peacock also complained that the state of the ceiling had deteriorated due to leaks from the bathroom above. Mr Wood disputed this and suggested that any damp was more likely to be caused by problems with the external drainage. We are not in a position to determine these causes nor do they seem relevant to the decision that we have to make.

42. The decision which we are being asked to make is as to who should pay for the costs of the works to remedy the hazard. Paragraph 10 of Schedule 1 to the 2004 Act provides that the person on whom an improvement notice is served may appeal against the notice. By para. 11(1)(b):

> (1) An appeal may be made by a person under paragraph 10 on the ground that one or more other persons, as an owner or owners of the specified premises, ought to –
>
> (a) ....
>
> (b) Pay the whole or part of the cost of taking that action.

43. We were not taken to, nor are we aware of, any decisions which indicate how a Tribunal should approach an appeal made on this basis. Ms Peacock essentially argued that she will not benefit from these works – they would remedy a hazard in a different flat. Indeed she argued she was only here because Mr Wood had bought up the other flats in the property and rented them out – creating a house in multiple occupation.

44. Mr Wood argued rather that the deficiency arose because of defects in the ceiling, created by Ms Peacock's failure to maintain it. The proper and reasonable way to remedy them was to remedy the ceiling and the costs should lie where they fell. This was the simplest way of dealing with the matter and also corresponded with how matters had been dealt with in the past, when he had undertaken and paid for works which benefited Ms Peacock. Further under the conveyance she was the person liable to maintain the ceiling. (We note that under the conveyance the ownership is split at the mid-point of the joists between the flats.)

50. The Tribunal notes that it has upheld the council's notice. We cannot conclude that the council has acted in anyway unreasonably in defending or conducting these proceedings. We refuse Mr Wood's application for costs. Nor given our conclusions do we consider it appropriate to make an order that the council pays any of Mr Wood's fees.