



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

**Case Reference** : **MAN/00CH/HIN/2019/0003**

**Property** : **1-8 Dykes Way, Gateshead, NE10 8QL**

**Applicant** : **Proxima GR Properties Ltd**  
**Representative** : **Mr. M. McIntosh –  
Estates & Management Ltd**

**Respondent** : **Gateshead Council**

**Interested Parties** : **Leaseholders – see Annexe A**

**Type of Application** : **Housing Act 2004 – Schedule 1  
Paragraph 10 (1)**

**Tribunal Members** : **Mrs A Rawlence MRICS  
Mr W Reynolds MRICS**

**Date of Determination** : **23 May 2019**

**Date of Decision** : **29 May 2019**

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**DECISION**

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**Order: The Appeal against the improvement notice served on the Applicant in relation to 1-8 Dykes Way, Gateshead is upheld.**

**Application.**

1. The Applicant appealed Schedule 1, Paragraph 10 of the Housing Act 2004 (“the Act”) against an improvement notice relating to 1-8 Dykes Way, Gateshead NE10 8QL (“the Property”). The notice was served by Gateshead Council, the local housing authority (“the Authority/Respondent”). It is dated 20 December 2018 and is made under sections 11 of the Act, requiring certain works to be carried out to the Property to remedy hazards referred to in the Notice. The Appeal lodged on behalf of the Appellant is dated 10 January 2019, which is within the 21 day appeal period provided for under Paragraph 14(1) of the Act.
2. The provisions of Paragraph 10 of Schedule 1 provide for the person on whom an improvement notice is served to have the right to appeal to a Residential Property Tribunal.
3. Paragraph 11 of Schedule 1 states:
  - (1) An appeal made 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) take the action concerned or
    - (b) pay the whole of part of the cost of taking that action.
4. Directions as to the future conduct of the appeal was given by Tribunal Judge J Holbrook dated 15 March 2019. Both parties agreed to a paper determination and the matter was listed for consideration by the Tribunal.
5. As the appeal concerns the identity of the correct recipient of the notice and not the contents of the Improvement Notice, the property was not inspected.
6. However, the Tribunal notes that the notice related to inadequate lighting within the common areas.

**The Law**

7. The law relating to the service and content of Improvement Notices as they relate to a situation where there is a category 1 hazard is set out in Sections 11-13 Housing Act 2004 and appears below:
8. Section 11 Improvement notices relating to category 1 hazards: duty of authority to serve notice
  - (1) If—
    - (a) *the local housing authority are satisfied that a category 1 hazard exists on any residential premises, and*

- (b) *no management order is in force in relation to the premises under Chapter 1 or 2 of Part 4,*

*Serving an improvement notice under this section in respect of the hazard is a course of action available to the authority in relation to the hazard for the purposes of section 5 (category 1 hazards: general duty to take enforcement action)*

- (2) *An improvement notice under this section is a 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 in accordance with subsections (3) to (5) and section 13.*
- (3) *The notice may require remedial action to be taken in relation to the following premises-*
  - (a) *...*
  - (b) *if those premises are one or more flats, it may require such action to be taken in relation to the building containing the flat or flats (or any part of the building) or any external common parts.*
  - (c) *if those premises are the common parts of a building containing one or more flats, it may require such action to be taken in relation to the building (or any part of the building) or any external common parts.*

9. Section 4 of Schedule 1 of the Act states:

***Service of improvement notices: common parts***

- 4 (1) *This paragraph applies where any specified premises in the case of an improvement notice are*
  - (a) *common parts of a building containing one or more flats; or*
  - (b) *any part of such a building which does not consist of residential premises.*
- (2) *The local housing authority must serve the notice 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.*
- (3) *For the purposes of this paragraph 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) of the particular premises in which the common parts are comprised.*

## **Submissions**

10. Both parties made submissions which were copied to the Tribunal and to the other party.
11. The Applicant contended that the notice should have been served upon the long leaseholders who, collectively, were demised the entirety of the property.
12. The Respondent did not dispute that the long leaseholders of the 8 flats also fell under the definition of owner at Section 262 (7) b of the Act. However, The Respondent relied upon Section 4(2) (b) of Schedule 1 of the Act and considered that the freeholder of the property ought to take the action specified in the notice.
13. Both parties referred to various Clauses of the Lease (see below).
14. The Respondent also referred to extracts from the Upper Tribunal decision in *Hastings Borough Council v Braear Developments Limited* [2015] UKUT 145 (LC). The Respondent acknowledged however (Paragraph 16 of their case) that in the Braear case, the argument was based on a different set of facts and asserts that the crucial difference between this appeal and the Braear case was that there is no RTM company.
15. The Respondent suggested that if an RTM company was in place, it may be that a notice would have been served on the individual leaseholders and that in the absence of such a company there was a simple contractual arrangement between the freeholders and leaseholders at paragraph 2 of the Fifth Schedule which allowed the Appellant to comply with the improvement notice. It further suggested that the most practical method of ensuring compliance with the notice was for the Appellant to be responsible for the remedial works with the Appellant recovering the cost of those works from the leaseholders.

## **The Lease**

16. The Tribunal were provided with a copy lease in respect of Studio Solo Flat 6 on the first floor and proceeded on the basis that all of the leases for the property are in similar form save as to the actual premises demised.
17. The Applicant contended that the lessees were responsible for maintaining lighting to the common areas. In particular, the Applicant identified that (at paragraph 5 of the fifth schedule to the leases), the lessees covenant '*to maintain in efficient working order a sufficient electric light of not less than sixty watts in the passage outside the Studio Solo Flat included in the demised premises in a position designated by the lessor for the benefit of persons using the block and keep the same at all times on electricity supply*'.

18. The Respondent referred to paragraph 2 of the Fifth Schedule to the leases which provides as follows:

*'To permit the Lessor or its agent to enter the demised premises upon prior reasonable notice being given (except in case of emergency) to view the state of repair and condition thereof and to leave on the demised premises notices in writing to the Lessee of all defects and wants of reparation then and there found which the Lessee is liable to make good under the covenants herein contained and if the Lessee shall not proceed diligently within three months of any such notice to execute and complete such outstanding works to permit the Lessor to execute such repairs the cost of so doing to be payable by the Lessee on demand and if not so paid to be recoverable as if the same were rent in arrear'.*

19. The Applicant suggested that there was no state of dis-repair when contrasting the lighting provided in the common areas with that which was provided when the building was constructed and that the Applicant effectively considered that paragraph 2 of the Fifth Schedule limits the Lessor's rights to a right to execute repairs.

20. The Respondent further contended (at paragraph 13 of their case) that the lease does not give the individual leaseholders any rights to enter the other demised premises in the block to effect the works and that there is no contractual mechanism for the leaseholders to require each other to comply with the notice or the repair covenant.

21. The Applicant disagreed with the Respondents contention at Paragraph 13 of their case and referred to paragraph 4 of the First Schedule to the leases which provides the lessees with:

*'Such rights of access to and entry upon the other common parts in the block and the other Studio Solo Flats as are necessary for the proper performance of the Lessees obligations hereunder'.*

22. The Applicant also referred to Clause 4 of the leases which provides that:  
*'The Lessee hereby covenants with the Lessor and with the lessees of the other Studio Solo Flats comprised in the block that the Lessee will observe and perform the obligations on the part of the Lessee set out in the Fifth Schedule hereto'.*

### **Tribunal's Deliberations**

23. The Tribunal have considered the terms of the leases carefully. The Tribunal consider that, prima facie, the Lessees are obliged to maintain sufficient lighting to the passages outside the Studio Solo Flats. The Tribunal further considers that the Respondents assertion at paragraph 13 of their case that the lease does not give the individual leaseholders any rights to enter the other demised premises in the block to effect the works and that there is no contractual mechanism for the leaseholders to require each other to comply with the notice or the repair covenant is not correct.

24. The Tribunal take the view that on construction of the lease, the owners who 'ought to take the action specified in the notice' are the lessees of the flats.
25. The Tribunal has also had regard to the comments made by Martyn Rodger, Deputy President of the Upper Tribunal in respect of the Braear case in which (at paragraph 59 of the transcript), he notes:  
*'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.'*
26. The Tribunal has therefore also considered whether the Respondents case that the most practical method of ensuring compliance with the notice is for the Appellant to be responsible for the remedial works with the Appellant recovering the cost of those works from the leaseholders under the provisions of paragraph 2 of the Fifth Schedule to the leases.
27. The Tribunal notes however that to avail itself of this provision, the Applicant would have to first inspect and serve notice on the lessees of the wants of repair or defects and, having done so, would have to allow the lessees a period of 3 months to undertake the necessary work before it was able to undertake the works itself. The Tribunal finds this timescale to be inconsistent with the requirements of the Notice served on the Applicant on 20<sup>th</sup> December 2018 which required the remedial action to be started by 28<sup>th</sup> January 2019 and completed by no later than 25<sup>th</sup> February 2019.

## **Decision**

28. The Tribunal therefore concludes that the owners who 'ought to take the action specified in the notice' are the lessees and that the Applicants rights under paragraph 2 of the Fifth Schedule to the leases do not confer any degree of practicality for compliance with the notice. The appeal is allowed.
29. If either party is dissatisfied with this decision, they may apply for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be made to the First-tier Tribunal within 28 days of this decision (Rule 52 (2)) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.
30. The Upper Tribunal (Lands Chamber) may be contacted at: 5<sup>th</sup> Floor, Rolls Building, 7 Rolls Buildings, Fetter Lane, London EC4A 1NL (tel: 020 7612 9710); or by email: [lands@hmcts.gsi.gov.uk](mailto:lands@hmcts.gsi.gov.uk) .

Anthea J Rawlence  
Tribunal Member  
23 May 2019

## **Annexe A**

### **LEASEHOLDERS**

<b>Leaseholder</b>	<b>Property</b>
Mrs D McCall	1 Dykes Way
Ms L Fenwick	2 Dykes Way
Mrs D Davies	3 Dykes Way
Mrs D McCall	4 Dykes Way
Mr P Crow	5 Dykes Way
Mrs D McCall	6 Dykes Way
Ms K Zorgani	7 Dykes Way
Mr A J Bambrough and Mr R E Davidson	8 Dykes Way