Neutral Citation Number: [2017] EWCA Civ 364

Case No: C3/2015/2084

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL LANDS CHAMBER
DEPUTY PRESIDENT RODGER QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/05/2017

Before:

LORD JUSTICE PATTEN
LORD JUSTICE LEWISON
and
LORD JUSTICE UNDERHILL

Between:

DAVID WOOD	**Respondent**
- and -	
KINGSTON UPON HULL CITY COUNCIL	**Appellant**

Michael Paget (instructed by Kingston-upon-Hull City Council, Solicitors' Office) for the **Appellant**
David Wood (Litigant in Person)

Hearing date: 4 May 2017

Approved Judgment

Lord Justice Lewison:

1. Mr Wood is the freehold owner of a first floor flat (Flat 4) at 141 Princes Avenue in Hull. Ms Peacock is the freehold owner of the ground floor flat immediately below. The vertical boundary between the two flats is at the mid-point of the joists between the ceiling of the ground floor flat and the floor of Flat 4. Hull City Council took the view that there was inadequate fire resistance between the two flats, and served notice under section 12 of the Housing Act 2004 on both Mr Wood and Ms Peacock requiring remedial works to be carried out. The notice stated that the ground floor flat had a section of original lath and plaster ceiling which was in very poor condition with some sections missing. That lack of material separation increased the likelihood of unchecked spread of fire into Flat 4 from the ground floor flat in the event of a fire occurring within the ground floor flat. The notice specified two alternative schemes:

    i) Taking down a section of the original ceiling in the ground floor flat and constructing a new plasterboard ceiling; or

    ii) Installing a suitably certificated fire resistant product between the floor joists of the existing timber floor of Flat 4 in a corresponding area.

2. Mr Wood appealed against the notice first to the FTT and then to the Upper Tribunal (Martin Rodger QC, Deputy President). The Deputy President held:

    i) Since the first of the remedial schemes required work to be carried out wholly within the ground floor flat, it should have been excluded from the notice served on Mr Wood.

    ii) In relation to the second scheme of works, notices were correctly served on both Mr Wood and Ms Peacock.

    iii) There was no legal bar on the inclusion in a notice of alternative schemes of remedial work, although it was undesirable to include alternatives where the alternatives were to be carried out by different owners.

    iv) Mr Wood could not be required to contribute to the first of the alternative schemes. If the second of the alternative schemes were to be carried out, then Mr Wood and Ms Peacock should contribute equally to its cost.

    v) However, the second scheme would be more expensive (£7,000 as opposed to £1,000) and more disruptive than the first scheme. It was irrational for the local authority to have required the carrying out of the second scheme when a cheaper and easier alternative was available.

3. The Deputy President therefore quashed the improvement notice served on Mr Wood, and as against Ms Peacock he varied it by deleting the reference to the second scheme of works. The overall effect of his decision was that Ms Peacock was required to repair the ceiling of her own flat, and at her own expense. The Deputy President's decision is at [2015] UKUT 0165 (LC).

4. The local authority appeals on two grounds:

    i) The irrationality conclusion was beyond the scope of the appeal; and

ii) In any event the irrationality conclusion was wrong.

5. Mr Wood seeks to uphold the decision of the Deputy President but also argues the following points:

i) A notice should not include alternative schemes to remove the same hazard where the alternatives would involve different owners because that would be likely to give rise to disputes between neighbours;

ii) A property owner should contain a hazard within his or her own property and should maintain his or her own property. These considerations mean that responsibility for eliminating the hazard should lie with the owner of the ground floor flat.

6. Ms Peacock has played no part in the appeal.

7. The Deputy President gave a full explanation of the system for assessing housing conditions introduced by the Housing Act 2004. The previous regulation of housing conditions had been by reference to the concept of fitness for human habitation, whose origins lie in the 19th century. The 2004 Act replaced that with a risk based assessment of the effect of any deficiencies in dwellings using objective criteria.

8. The task now is to identify "hazards" which are divided into "category 1 hazards" and "category 2 hazards". A hazard is defined by section 2 (1) as:

> "any risk of harm to the health or safety of an actual or potential occupier of a dwelling or HMO which arises from a deficiency in the dwelling or HMO or in any building or land in the vicinity (whether the deficiency arises as a result of the construction of any building, an absence of maintenance or repair, or otherwise)."

9. It will be observed that this definition deals with two things:

i) The risk of harm to human health or safety of an occupier of a dwelling and

ii) The deficiency which gives rise to that risk.

In many cases the risk and the deficiency will be located in the same dwelling. But there may be cases, of which this is one, where the risk that arises in one dwelling (i.e. the risk of injury from fire to an occupier of Flat 4) is caused by a deficiency in another dwelling (i.e. the inadequacies of the ceiling in the ground floor flat).

10. Where a local authority identifies a category 1 hazard it has a duty to act. Where it identifies a category 2 hazard it has a power to do so. The hazard with which we are concerned is a category 2 hazard.

11. In the case of a category 2 hazard one of the local authority's powers is the service of an improvement notice under section 12. This provides:

> "(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 subsection (3) and section 13.

(3) Subsections (3) and (4) of section 11 apply to an improvement notice under this section as they apply to one under that section.

(4) An improvement notice under this section may relate to more than one category 2 hazard on the same premises or in the same building containing one or more flats.

(5) An improvement notice under this section may be combined in one document with a notice under section 11 where they require remedial action to be taken in relation to the same premises."

12. Section 11 (3) and 11 (4), which apply to improvement notices as a result of section 12 (3), provide:

"(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) ….

Paragraphs (b) and (c) are subject to subsection (4).

(4) The notice may not, by virtue of subsection (3)(b) or (c), require any remedial action to be taken in relation to any part of the building or its external common parts that is not included in any residential premises on which the hazard exists, unless the authority are satisfied—

(a) that the deficiency from which the hazard arises is situated there, and

(b) that it is necessary for the action to be so taken in order to protect the health or safety of any actual or potential occupiers of one or more of the flats."

13. The contents of an improvement notice are prescribed by section 13:

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

(a) …,

(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) … and

(f) …."

14. Section 13 (5) goes on to provide:

> "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."

15. The identity of the person on whom an improvement notice is served is dealt with by Schedule 1. Paragraph 3 of that Schedule provides:

> "(1) This paragraph applies where any 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 a flat.
>
> (2) In the case of dwelling which is a flat, the local housing authority must serve the notice on a person who—
>
> (a) is an owner of the flat, and
>
> (b) in the authority's opinion ought to take the action specified in the notice."

16. Part 3 of Schedule 1 gives a right of appeal against an improvement notice. There is no restriction on the grounds of appeal, although particular grounds are specified in paragraph 11:

> "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) take the action concerned, or

(b) pay the whole or part of the cost of taking that action."

17. Paragraph 15 provides:

"(2) The appeal—

(a) is to be by way of a re-hearing, but

(b) may be determined having regard to matters of which the authority were unaware.

(3) The tribunal may by order confirm, quash or vary the improvement notice."

18. The Deputy President began by considering the provisions of section 12 (and the incorporated parts of section 11). He considered that the case was one that fell within section 11 (3) (b) and that therefore the limitations imposed by section 11 (4) applied. It is now common ground that he was right so to decide. In discussing the effect of those limitations he said at [57]:

> "Subsection (4) restricts the premises in relation to which remedial action may be required. A notice may not require action to be taken in relation to any part of the building that is not included in residential premises on which the hazard exists unless the authority is satisfied that two conditions are met. The first is that the deficiency from which the hazard arises must be situated in that part of the building; the second is that it must be "necessary for the action to be so taken" in order to protect the health or safety of the occupiers of one or more of the flats. Two important matters should be noted when considering the second of these conditions. The first is that the statute prescribes a test of necessity, not convenience; it must be "necessary" for action to be so taken. The second is that it must be necessary for the action to be "*so* taken" i.e. it must be necessary for the remedial action to be taken in a part of the building which is not the residential unit on which the hazard exists. The condition is not simply that it must be necessary for action to be taken somewhere; it must be necessary that it be taken outside the unit where the hazard arises." (Emphasis in original)

19. He concluded at [58]:

> "The principle which underlies these provisions seems to me to be clear. It is that wherever possible remedial action should be taken in the residential premises on which the hazard exists. Only if a hazard arises as a result of a deficiency situated outside the residential premises on which the hazard exists may remedial action be required to be taken somewhere other than those premises; and even then such action may be required only if action outside the premises on which the hazard exists is the

> only way of protecting the health or safety of the occupiers of those premises. If there is more than one way of remedying a hazard, the preferred method, if it is available, is therefore always to require action within the premises on which the hazard exists. But if the hazard is caused by a deficiency in other premises and the only way of removing the hazard is by work to those other premises, an improvement notice may require work to the premises on which the deficiency exists in order to protect the occupiers of the premises on which the hazard arises."

20. Both Mr Paget on behalf of the Council, and Mr Wood appearing in person, criticised this part of the Deputy President's reasoning. Mr Paget was concerned to support the Council's decision to serve an improvement notice on Ms Peacock, while Mr Wood was concerned to resist the service of a notice on him.

21. It is common ground that the deficiency which gives rise to the hazard is in the ground floor flat. Thus section 11 (4) (a) is satisfied. The question is whether section 11 (4) (b) is also satisfied. At the heart of this issue is what is meant by "necessary" in section 11 (4) (b). In a very different context Lord Griffiths remarked in *In Re An Inquiry Under The Company Securities (Insider Dealing) Act 1985* [1988] AC 660, 704:

> ""Necessary" is a word in common usage in everyday speech with which everyone is familiar. Like all words, it will take colour from its context; for example, most people would regard it as "necessary" to do everything possible to prevent a catastrophe but would not regard it as "necessary" to do everything possible to prevent some minor inconvenience. Furthermore, whether a particular measure is necessary, ... involves the exercise of a judgment upon the established facts. ... I doubt if it is possible to go further than to say that "necessary" has a meaning that lies somewhere between "indispensable" on the one hand, and "useful" or "expedient" on the other, and to leave it to the judge to decide towards which end of the scale of meaning he will place it on the facts of any particular case. The nearest paraphrase I can suggest is "really needed.""

22. Thus at one extreme the word may mean that there is no possible alternative. That seems to me to be an unlikely meaning to attribute to the word in this context, because with enough technical ingenuity and money there will almost always be a possible alternative. For example, the fire resistance between the two flats could have been improved by requiring Mr Wood to lay a new floor structure incorporating fire retardant material on top of the existing floor in Flat 4. However, this is the meaning that the Deputy President appears to have adopted, because he distinguished between a case in which the "only" way to remedy the hazard and a case where there was "more than one way". There is also considerable force in Mr Wood's point that in order to eliminate a hazard it will often be necessary to eliminate the cause of the hazard (i.e. the deficiency). To give another example, discussed in the course of argument, if the problem is caused by a boiler emitting noxious gases into a particular

dwelling it might well be possible to seal or ventilate the dwelling, even though the obvious remedy would be to modify the boiler. In my judgment the concept of "necessity" in the context of a scheme for improving housing conditions in the interests of health and safety includes considerations of cost and disruption; and, in addition, includes the need to eradicate the cause of the problem rather than merely its symptoms. In looking at the question of possibility in the abstract without regard to cost, disruption and responsibility for the deficiency, I consider that the Deputy President adopted too strict a test.

23. One further aspect of the word "necessary" in section 11 (4) (b) is that, as Mr Paget submitted, it limits the scope of the work that may be carried out to the minimum scheme required to eliminate the hazard.

24. On the basis that the residential premises on which the hazard arose was Flat 4, the Deputy President went on to consider whether it was "necessary" to carry out work outside Flat 4. He noted that the FTT had not made specific findings of fact on that question. He said that the evidence on that issue was "rather limited, but the following conclusions seem to me to be justified on such evidence as there is". He concluded that the first alternative scheme (replace the ceiling in the ground floor flat) would take place outside flat 4. That conclusion is not challenged. He concluded that the second alternative (insert fire retardant material between the joists) would take place at least in part outside Flat 4 because the material would protrude beyond the mid-point of the depth of the floor joists. Mr Paget, on behalf of the local authority, criticises the latter conclusion as involving the making of unjustified factual assumptions. It is true that, as the Deputy President said, there was precious little evidence on the subject. The Deputy President was acting under section 12 of the Tribunals, Courts and Enforcement Act 2007 in re-making the FTT's decision and in so doing was entitled to make findings of fact. However, I need not decide whether the Deputy President's finding of fact was open to him since in my judgment the question he was considering only arose if his interpretation of the word "necessary" was correct.

25. In my judgment, however, the Deputy President's overall conclusion that it was lawful for the Council to serve an improvement notice on Ms Peacock requiring her to carry out works to the ground floor flat was correct, although my reasoning has followed a different path.

26. The Deputy President went on to hold that, by contrast, it was not lawful for the Council to serve notice requiring Mr Wood to carry out works to the ground floor flat because paragraph 3(2) of Schedule 1 required that an improvement notice be served on a person who is an owner of the flat, and who in the authority's opinion ought to take the action specified in the notice. It followed that in relation to the work required to be carried out wholly within the ground floor flat, the only permissible recipient of the notice was Ms Peacock. Mr Wood was not an owner of the ground floor flat, and a notice requiring work entirely within the ground floor flat could not be served on him. For that reason, to the extent that the improvement notice required Mr Wood to replace the ceiling of the ground floor flat, it was unlawful. The Council accepts that he was correct so to hold.

27. The Deputy President went on to consider the second alternative scheme (namely the insertion of fire retardant material between the joists). As to that he said at [68]:

> "A notice served on each of the owners requiring that each carry out part of the work within their own flat would be unsatisfactory, since this is a single scheme of work. A pragmatic solution would be to regard Ms Peacock and Mr Wood jointly as the appropriate addressees of such a notice. Each of them is a necessary addressee of an improvement notice requiring work within their own flat. To the extent that the fire resistant material is to be [laid] in an area forming part of the Ground Floor Flat, a notice must be served on Ms Peacock; the work also requires action in Flat 4, to lift floor boards and gain access to the space between the joists, so Mr Wood is also a necessary recipient. There is only one scheme of work and rather than serving separate notices on each owner requiring each to carry out the part within their own premises it would seem preferable for a single notice to be addressed to them both."

28. That led to the question whether it was possible for an improvement notice to specify alternative means of remedying the hazard. The Deputy President concluded that in principle it was, since there was nothing in the Act to preclude it. Mr Wood submitted that this conclusion was wrong. As he pointed out section 13 requires the improvement notice to "specify" the premises in relation to which remedial action is to be taken in respect of the hazard and the nature of that remedial action. The argument is that to give the recipient of an improvement notice a choice of remedial schemes does not "specify" the nature of the work. In a case where the works in question are to be carried out in a single dwelling by a single owner I consider that this is too narrow a view. If a single owner receives a notice requiring one of two alternatives, it is up to him to decide which one to adopt. If he adopts either one he will have complied with the notice. In all likelihood he will choose the cheaper and least disruptive option, but that is a matter for him. It is also the case that in some instances a number of persons collectively may be regarded as the owner or person having control of the specified premises. This was decided by the House of Lords in *Pollway Nominees v Croydon LBC* [1987] AC 79. It was not suggested that this decision was inapplicable to the current legislative scheme.

29. However, as the Deputy President correctly said at [87]:

> "… it is highly undesirable to require two persons to remedy a hazard by taking either remedial action A or remedial action B, unless they are joint owners of the same interest in the premises on which the action is to be taken. A notice should not require a recipient to carry out work on premises in which they have no interest."

30. He added at [89]:

> "Even if it is permissible to serve a notice requiring A and B to carry out alternative courses of action, I do not think it would be desirable for an authority to do so and, as a matter of discretion at least, it ought to be avoided. In particular I consider that it is essential that an improvement notice should

> not require alternative forms of remedial action to be taken where one of the alternatives is to carry out work in premises of which one of the recipients of the notice is the sole owner, and the other alternative is to carry out work either in the premises of the other owner or in both of the premises. As a matter of practicality the better course in any case is likely to be to serve a notice specifying a single course of remedial action to be carried out by a single owner acting alone. If it is not possible to do so, because a single course of remedial action is required to be carried out in premises belonging to different owners, the proposal of alternative courses of action risks making the necessary cooperation more difficult to achieve and, for that reason, should be avoided."

31. I agree. There is one further point to be made. If, as in this case, the housing authority concludes that it is necessary to require remedial works to be carried out in a place where the deficiency (rather than the risk) exists, it is difficult to see how, consistently with its conclusion about necessity, it can simultaneously require works to be carried out elsewhere. Whatever meaning is given to the word "necessary", if the facts dictate that work is carried out in the place where the deficiency (rather than the risk) exists it appears inconsistent to require different works to be carried out elsewhere.

32. The Deputy President returned to this theme at [92] in which he said that the question for him was:

> "whether the alternative course of action should have been included, requiring Ms Peacock and Mr Wood to cooperate in installing fire resistant material between the floor joists. Despite such a course of action being undesirable, for the reasons I have given, it would be necessary to go further before it would be possible to describe it as unlawful."

33. As to that he concluded at [110]:

> "In my judgment it would be irrational to require more expensive and more disruptive work where a cheaper and easier alternative is available. It would be irrational to require action which would cost both parties to incur expenditure of £3,500, where alternative action would achieve the same result at a cost to one of £1,000 and at no cost to the other."

34. Mr Paget complains that the Deputy President was not entitled to consider whether the specification of alternative schemes of remedial works were irrational, because that was not within the scope of the appeal. In addition he argued that the Deputy President was wrong to say that the inclusion of the second alternative scheme was irrational. It is not entirely clear what test the Deputy President applied but his reference to the lawfulness of the notice at [92] coupled with his use of the word "irrational" at [110] suggests that he may well have been applying a public law test.

35. It is necessary at this stage to say something about the scope of an appeal. Although one of the powers given to the tribunal under paragraph 15 is a power to quash a

notice, I do not consider that the word "quash" is intended to import a public law test. First, if a public law test were appropriate the proper remedy would be by way of judicial review, in which case the choice of the specialist chamber of the FTT as the appellate tribunal would itself be hard to explain. Second, the appeal is by way of "re-hearing" which is not apt to describe a process akin to judicial review. Third, an appeal to the tribunal is (or at least includes) an appeal on the merits of the works required by the notice. On such an appeal the tribunal has the power to vary the notice. That power is in itself inconsistent with the application of a public law test. If a notice is invalid because of irrationality there is no valid notice capable of being varied. The housing authority would have to start again. In my judgment it is not necessary for the tribunal to be satisfied that the inclusion of a particular scheme of works was irrational (and therefore unlawful) before it can exercise the power to vary. The grounds of appeal against an improvement notice are unlimited; and a dissatisfied recipient of such a notice is entitled to appeal on the ground, say, that there exists a cheaper and equally effective alternative to the works required by the improvement notice. Although the Deputy President used the language of irrationality, it was not a necessary precondition to his exercise of the statutory power to vary the notice.

36. If the tribunal is satisfied that the best way forward is to adopt a scheme of remedial works other than that required by the notice (whether for reasons of cost, efficacy, disruption or any other reason) it may, in my judgment, vary the notice to give effect to its decision. Likewise if it is satisfied that a remedial scheme required in one notice is a better option than one required in another notice, it is entitled to quash the latter and confirm the former. That does not mean that either notice was unlawful: it merely means that having heard the evidence a tribunal is satisfied that there is a better way forward.

37. Accordingly, although the Deputy President's reasoning process may have been flawed, his overall conclusion was correct. I would dismiss the appeal.

Lord Justice Underhill:

38. I agree.

Lord Justice Patten:

39. I also agree.