FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AW/HIN/2015/0002**
Property	**:**	**144 Lexham Gardens, London W8 4JE**
Applicant	**:**	**DMG Global Consulting Limited**
Representative	**:**	**Ms C Doran, Counsel**
First Respondent	**:**	**Royal Borough of Kensington & Chelsea**
Representative	**:**	**Mr N Grundy, Counsel**
Second Respondent	**:**	**Major J Vickers**
Representative	**:**	**Mr A Swirsky, Counsel**
Type of Application	**:**	**Appeal against an Improvement Notice under the Housing Act 2004**
Tribunal Members	**:**	**Judge P Korn (Chairman)** **Mr T Sennett FCIEH**
Date and venue of Hearing	**:**	**14th April and 8th June 2015 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**26th June 2015**

DECISION

Decisions of the tribunal

(1) The Improvement Notice is hereby varied as set out in the Appendix to this decision.

(2) In all other respects the Improvement Notice is confirmed.

(3) The Tribunal's decision on costs (including the fee for preparation and service of the Improvement Notice) is reserved pending receipt of the parties' written submissions on costs and on the disputed fee.

The application

1. The Applicant has appealed to the Tribunal, pursuant to paragraph 10(1) of Part 3 of Schedule 1 to the Housing Act 2004 ("the 2004 Act"), against an improvement notice (the "Improvement Notice") issued by the First Respondent under sections 11 and 12 of the 2004 Act and dated 23rd December 2014.

The background

2. The Property is described in the application as a six storey end-of-terrace Victorian house. The Property was until recently occupied by a number of different people with shared use of the common parts, but it is now unoccupied save for a part of the first floor described in the papers as the First Floor Flat. This is occupied by the Second Respondent, who is an 88 year old retired major, and two former Gurkhas, Mr Intarack and Mr Prasit. The evidence indicates that the Second Respondent has the benefit of a Rent Act protected tenancy.

3. In his witness statement the Second Respondent states that he has been a tenant since 1973 and that Mr Intarack has lived in the flat for some 32 years and that Mr Prasit has lived in the flat since 2009. The Second Respondent also states that he has always been allowed to share the flat with these two gentlemen since they first went into occupation.

4. The Applicant purchased the Property in May 2014, and the evidence indicates that it wishes to convert the Property into luxury apartments.

5. The Improvement Notice supersedes an earlier improvement notice served on the Applicant on 26th August 2014. The Applicant had appealed against the earlier improvement notice and the First Respondent had agreed to withdraw it on the basis that the Applicant withdrew its appeal. According to the First Respondent, it agreed to withdraw the earlier improvement notice because further investigations showed the condition of the Property to have deteriorated and therefore

works beyond those originally specified were in its view required to remedy the identified hazards.

6. The Improvement Notice lists a number of alleged hazards and sets out a schedule of works required to remedy those alleged hazards. Notably, in the "General Informatives" section the Improvement Notice includes the statement that the Second Respondent and the other two occupiers "will remain in their home whilst the works are carried out".

7. The Applicant's grounds of appeal against the Improvement Notice are set out in detail in the application but can be summarised as follows:-

- it is not accepted that the floor of the first floor mezzanine kitchen and bathroom is liable to fail with little or no warning;
- it is not necessary to prop up the floor of the kitchen and bathroom;
- it is unnecessary to treat for rot as new joists will be provided;
- the requirement to provide a permanent kitchen in the first floor right mezzanine room in the manner envisaged by the Improvement Notice cannot be satisfied as the room is too small;
- the First Respondent does not have the power to require the Applicant to build a temporary kitchen and bathroom on the second floor mezzanine, and in any event the Applicant should not be required to incur the expense of doing so;
- the First Respondent has included in the Improvement Notice a requirement that the Applicant carry out the necessary works with the occupiers in situ but the Applicant does not accept that it would be able to do so.

8. The Tribunal inspected the Property prior to the start of the hearing and we also had an opportunity to meet, and speak briefly to, the Second Respondent.

The issues

9. In addition to the specific grounds of appeal listed above, certain other issues have been raised. These issues are as follows:-

- whether serving a prohibition order would have been the best course of action;

- whether the entire Property is a house in multiple occupation ("HMO");

- how extensive the Tribunal's powers are on an appeal.

10. At the hearing Ms Doran for the Applicant said that the First Respondent's conclusions as to the condition of the Property were mostly accepted by the Applicant.

11. The parties' respective positions on the grounds of appeal and on the other related issues are summarised below.

The works required

Liability of floor to fail without warning and necessity of propping it up

12. Included in the hearing bundle is a report from Mr K Elliott of The Elliott Partnership Consulting Engineers commissioned by the Applicant. In his report Mr Elliott states that his initial view was that the floor of the kitchen and bathroom areas on the first floor landing was in imminent danger of collapse, but that on re-visiting the Property and carrying out further tests he changed his view on this point. Having concluded that the floor was not in imminent danger of collapse, it followed in his view that propping up was not a necessary first step.

13. The First Respondent's view was that a lack of reinforcement to the slab and the inadequate support from beneath gave reason to believe that the slab could potentially fall with little or no warning. In written submissions on the issue of propping up, Mr Swirsky for the Second Respondent stated that his understanding was that propping up could be achieved quickly and inexpensively.

14. At the hearing Mr Grundy for the First Respondent asked Mr Daponte, the Applicant's managing agent, whether he accepted that the floor could collapse with no warning. He appeared to accept that it could but then added that there would be cracking first. Mr Grundy then put it to him that nobody would actually see this cracking unless a relevant professional happened to be inspecting at the right moment.

15. In cross-examination, Ms Doran for the Applicant put it to Mr Freeman, a surveyor employed by the First Respondent, that the floor was not in immediate danger of collapse and therefore that a temporary prop was unnecessary. In response he said that it was unknown how well-supported the floor was and that the floor would not necessarily give any warnings before starting to fail. In response to a question from Mr Swirsky, Mr Freeman confirmed his estimate of £1,000 for the cost of temporary propping.

Necessity to treat for rot

16. The Applicant's position was that it was unnecessary to treat the relevant timber, brickwork and plaster for rot because new joists would be provided. The First Respondent disagreed, stating that as it was accepted by all parties that the Property suffered from extensive damp and decay it was obviously prudent to treat all relevant areas for rot.

Requirement to provide permanent kitchen in first floor mezzanine room

17. In the Applicant's submission, it was not feasible to provide a kitchen in this area as the room was too small.

18. In the First Respondent's submission, the items specified in the Improvement Notice as needing to be included in the kitchen space could fit within that space. At the hearing, Mr Grundy cross-examined Mr Vinnikov on this point, Mr Vinnikov being a director of VIP Properties (UK) Limited, the contractor retained by the Applicant to carry out repairs to the Property. In response to Mr Grundy's question, he confirmed his view that the kitchen was too small but was unable to say what the measurements of the kitchen were.

Whether First Respondent has power to require Applicant to build temporary kitchen and bathroom on the second floor mezzanine

Applicant's position

19. The Applicant's position was that the second floor mezzanine was not within the "residential premises" as defined in section 1(4) of the 2004 Act and that, as the deficiencies did not arise from this area, the First Respondent could not require works to be done to the second floor mezzanine. In making this submission Ms Doran for the Applicant referred the Tribunal to section 11(4)(a) of the 2004 Act.

20. In written submissions the Applicant noted the First Respondent's contention that the entirety of the Property was an HMO and that therefore the whole Property fell within the definition of "residential premises", but the Applicant did not accept this. The Respondent's argument that the whole Property was an HMO contradicted the basis on which the Improvement Notice had been made, namely that the Property was a building containing a flat and that hazards existed at the First Floor Flat. The Applicant also argued that the whole Property could not be an HMO as it did not consist of one or more units of living accommodation and nor was it a self-contained flat.

21. The Applicant further argued that any contention that the Second Respondent merely had a right to use the first floor kitchen and bathroom ran contrary to contentions made in the Second

Respondent's counterclaim in separate ongoing possession proceedings.

22. A further contention was that the construction of a temporary kitchen and bathroom did not fall within the definition of "remedial action" in section 11(8) of the 2004 Act.

23. In addition, the Applicant contended that to build a temporary kitchen and bathroom would cost approximately £75,000 + VAT and that this was an unreasonable cost to expect the Applicant to incur when these facilities would be in use for about 12 weeks and the Applicant could in any event provide quality alternative accommodation at much lower cost.

Respondents' position

24. The Respondents' position was that the whole Property was an HMO under the standard test set out in section 254 of the 2004 Act. Their written submissions on this point are quite involved but those points considered to be the most pertinent will be referred to later on.

25. The First Respondent has also argued in the alternative that even if the Property is not an HMO the temporary works to the half landing between the first and second floors are to part of "residential premises" within which the relevant hazard is situated.

26. The First Respondent considered that it could require the temporary provision of services as part of an improvement notice. In its submission, a notice must specify works which abate the relevant hazard and at the hearing Mr Grundy offered the analogy of a lighting system with unsafe wiring in arguing that a local housing authority would be entitled to require a temporary lighting system to be installed to provide a source of light whilst the permanent lighting system was being rewired.

27. Mr Vinnikov gave evidence on this issue on behalf of the Applicant. His evidence is summarised in the Applicant's hearing bundle which contains a breakdown of the cost he considers would need to be incurred in order to install a temporary bathroom and kitchen on the second floor mezzanine.

28. In cross-examination, Mr Vinnikov confirmed that he did other work for Mr Daponte, the Applicant's managing agent, and Mr Grundy for the First Respondent put it to him that this meant that he was not independent. Mr Vinnikov countered that he had about 20 clients and therefore was not dependent on Mr Daponte.

29. Mr Grundy described Mr Vinnikov's estimate of £75,000 + VAT to construct a temporary kitchen and bathroom as preposterous, and he questioned whether particular items in his breakdown even formed part of constructing a temporary kitchen and bathroom. He also questioned some of Mr Vinnikov's assumptions. Mr Swirsky for the Second Respondent also pressed Mr Vinnikov on the reliability of his figures and on his assumptions as to the standard of work needed to construct a temporary kitchen and bathroom. The Tribunal also asked Mr Vinnikov some questions as to the basis for some of the prices quoted by him in his breakdown.

30. Mr Swirsky also cross-examined Mr Daponte on the costings at the hearing. He noted that Mr Daponte had estimated that it would cost £200,000 to create and renovate each of 6 luxury flats and yet it would cost as much as £75,000 just to create a temporary kitchen and bathroom. Mr Daponte replied that things could not be done in isolation and that the figure of £75,000 included certain related items.

31. In response to a question from the Tribunal Mr Daponte said that he did not normally seek competitive quotes when arranging for a contractor to carry out works and that this was because the emphasis was on quality rather than just on price.

32. Mr Freeman, a surveyor employed by the First Respondent, gave evidence on this issue on behalf of the First Respondent. He regarded Mr Vinnikov's estimate as excessive, and he had calculated the total cost at £5,845. He commented that as the kitchen/bathroom would only be needed for a very short time it did not need to be a "Rolls Royce" job.

Occupiers remaining in situ

33. The Applicant's position was that it was not safe to carry out the works required by the Improvement Notice with the Second Respondent and other occupiers remaining in occupation. The floor could not be replaced whilst at the same time keeping the hallway clear. The Second Respondent had carers visiting him, and the limited access that would result from the carrying out of the works would pose a fire or other emergency risk. It would also be unpleasant for them to live there whilst these works were going on. In his report, Mr Elliott expressed the view that it would be necessary to barrier off the two rooms affected by rot during the carrying out of the works.

34. Mr Daponte, the Applicant's managing agent, was called to give evidence on behalf of the Applicant. His evidence is summarised in the Applicant's hearing bundle, his view (and that of Mr Vinnikov) being that it was not possible to do the works with the occupiers in situ.

35. At the hearing, Mr Daponte said that the Applicant was able to provide good quality alternative accommodation for the Second Respondent and the other two occupiers at a low rent whilst the works were being carried out. In his view it would be safer and cheaper to house the occupiers in temporary alternative accommodation. He did not accept that this offer of alternative accommodation was just a way of getting the Second Respondent out of the Property, and nor did he accept that the Second Respondent had been given veiled threats by or on behalf of the Applicant. Mr Swirsky, in arguing that the evidence showed that the Applicant's primary concern was to get the Second Respondent out of the Property, referred Mr Daponte to an email from Mr Daponte to the Second Respondent which Mr Swirsky described as very aggressive, but Mr Daponte did not accept this.

36. The Applicant's view was that the Second Respondent's concerns were unnecessary as he would have a legal remedy if he was unlawfully prevented from returning to the Property after completion of the works.

37. Mr Swirsky pressed Mr Daponte as to the Applicant's ability to grant a tenancy of the alternative accommodation proposed by Mr Daponte, given that the Applicant did not actually own it, and he asked what the terms would be. Mr Daponte was confident that he could arrange something, as the property belonged to another client of his, but he said that he would need to take legal advice on the terms.

38. Mr Swirsky put it to Mr Daponte that the Respondents could not trust any assurances given by or on behalf of the Applicant as it had not even carried out the most basic works of repair needed and had therefore for a long time been in breach of its obligations under section 11 of the Landlord and Tenant Act 1985. The Applicant had done everything possible to avoid carrying out any works and had not even secured the toilet pan or repaired the Second Respondent's tap. In response to Mr Swirsky's question as to why the Applicant had not even carried out the necessary work to the bay, Mr Daponte said that the Applicant needed access to the Second Respondent's premises to carry out this repair.

39. In closing submissions Mr Grundy for the First Respondent noted that the Second Respondent was old and frail and submitted that he did not have an easy remedy at his disposal to ensure that he could get back into the Property after completion of the works. Also, the Applicant was based in the British Virgin Islands which would make it harder still to take legal action against the Applicant.

40. As part of Mr Vinnikov's evidence, he said that in his view the works would involve the electricity and water needing to be disconnected for about 2 to 3 weeks, and the tight spaces on the half-floor landing meant that materials would need to be stored in common areas which might pose a trip hazard. In his view there would also be a danger of items falling on top of the occupiers, on the assumption that they could not be

relied upon to wear hard hats, and there might be real difficulties in obtaining insurance. Mr Swirsky asked Mr Vinnikov about the specific legislation relevant to these issues but Mr Vinnikov did not have this information.

41. Mr Freeman, for the First Respondent, did not accept that the whole of the electricity and water would need to be disconnected, and nor did he accept that it would be necessary to barrier off the two rooms referred to in Mr Elliott's report.

42. Mr Swirsky referred the Tribunal to a report prepared for the First Respondent by Mr David Jones of Design Group Nine, a firm of surveying and architectural consultants. In that report Mr Jones states that subject to the provision of a temporary shower room and kitchenette and adequate protection being provided there is no reason that the remedial works cannot be carried out with the occupiers in situ.

43. Ms Doran for the Applicant put it to Mr Freeman in cross-examination that the requirement for the Second Respondent and other occupiers to remain in situ during the carrying out of the works placed the burden on the Applicant to find contractors who would be willing to do the work with the occupiers in situ, and she suggested that no reputable contractor would be willing to do the works under such circumstances. In response Mr Freeman said that the First Respondent had taken the independent advice from Mr Jones of Design Group Nine referred to above. He also commented that he was aware of contractors who could carry out this sort of work in these circumstances.

44. At the hearing Ms Doran also cross-examined Mr Ewing, Environmental Health Officer for the First Respondent, on his alleged concerns as to the Applicant's motives in relation to the Second Respondent. There followed some discussion regarding the provision of keys, the status of Mr Intarack's and Mr Prasit's occupation, the original improvement notice and the First Respondent's own motives in requiring the works to be done with the occupiers in situ. Ms Doran also noted the First Respondent's failure to send a warning letter before serving a formal notice requiring the Applicant to remove rubble from the Property, although Mr Freeman countered that the Applicant was well aware of the need to remove the rubble by the time that the formal notice was served.

45. Mr Ewing accepted, when the point was put to him by Ms Doran, that the alternative accommodation being offered by the Applicant was better than the Property in its current condition. Ms Doran also put it to him that the Second Respondent's best interests were not served by his remaining in the Property, but Mr Ewing replied that the Second Respondent understood the issues and wanted to stay. Ms Doran also pressed him on the question of whether the works really could be done

with the occupiers remaining in situ, and Mr Ewing replied that the landing could be kept safe and that all risks could be managed. He also considered it reasonable for the First Respondent to take into account what he regarded as a well-founded concern on the part of the Second Respondent that if he was required to vacate he might not be able to get back in to the Property after completion of the works.

Alternative option of serving a prohibition order

46. In addition to its various challenges to the Improvement Notice, the Applicant submits that in these particular circumstances serving a prohibition order would have been more appropriate than serving an improvement notice. A prohibition order would not render the occupiers homeless as the First Respondent would have a duty to re-house them, and in any event the Applicant had offered to pay for alternative accommodation and this would be more comfortable than their current accommodation.

47. In written submissions Mr Swirsky for the Second Respondent noted that the Applicant has already begun possession proceedings against the occupiers and suggested that the Applicant's real objective was to secure the recovery of possession of the Property so that it could be redeveloped. In closing submissions Ms Doran said that the possession claim actually pre-dated the Improvement Notice.

Tribunal's powers on an appeal against an improvement notice

48. At the hearing Ms Doran noted that under paragraph 15(2) of Part 3 of Schedule 1 to the 2004 Act an appeal under paragraph 10 *"(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"*. In her submission, the word "re-hearing" was the key word and needed to be distinguished from the word "review".

49. Ms Doran referred the Tribunal to a commentary on Rule 52.11.1 of the Civil Procedure Rules. Whilst she appreciated that the Civil Procedure Rules were not directly relevant to proceedings in the First-tier Tribunal, the relevance of the commentary was that it contained some examination of the distinction between a review and a re-hearing. Ms Doran also referred the Tribunal to the Court of Appeal decision in *E I Dupont de Nemours & Co v S T Dupont (2006) 1 WLR 2793*.

50. The First Respondent's position, on the other hand, was that a distinction needed to be drawn between the Tribunal's general role in an appeal under paragraph 10 of Part 3 of Schedule 1 to the 2004 Act and its role where – pursuant to paragraph 12(1) – the ground of appeal was that a course of action other than serving an improvement notice was the best course of action. In the case of the specific ground referred

to in paragraph 12(1), paragraph 17 expressly specified the basis on which a tribunal should consider this ground and the First Respondent accepted that a tribunal had the power to make a fresh decision on this ground. In the case of any other appeal under paragraph 10, in the First Respondent's submission the appeal was akin to a judicial review and the Tribunal only had power to quash or vary the Improvement Notice if satisfied that the First Respondent's decision was irrational, i.e. that no reasonable local housing authority would have reached the same conclusion.

51. The First Respondent accepted that paragraph 15(2)(a) states that the appeal is to be by way of a re-hearing, but in Mr Grundy's submission the problem was that a "re-hearing" assumed that the decision being appealed against had been made at a "hearing". If the First Respondent's decision was itself a "hearing" then it followed that in conducting a "re-hearing" the Tribunal should have all the same powers and duties as did the First Respondent when making its decision. As in his view this was so unlikely as to be discounted, it followed that at the "re-hearing" the Tribunal could not have all the powers contended for by the Applicant.

52. The First Respondent went on to argue that paragraphs 16 and 17 gave the Tribunal specific powers in specific circumstances, but that otherwise the power was simply to confirm, quash or vary the improvement notice. In the First Respondent's submission, these words – particularly the word "quash" – were indicative of an administrative law jurisdiction and were identical to those used in section 204(3) of the Housing Act 1996. That section provided a right of appeal on a point of law against the decision of a local housing authority on any of the points set out in section 202(1) of that Act, and in *Begum v Tower Hamlets London Borough Council (1999) 32 HLR 445* that right of appeal was held to be akin to judicial review. Counsel for the First Tribunal also referred the Tribunal to the case of *Crawley BC v B (2000) 32 HLR 636*.

The Tribunal's analysis

53. We note the oral evidence and written submissions from the parties and have considered the various copy documents provided.

Preliminary points

54. Having considered the evidence, we are satisfied that the First Respondent went through all of the necessary procedures correctly. It served the correct notices, sought representations from the relevant people and undertook joint inspections with the Applicant's managing agent and surveyor.

55. The evidence also indicates that the First Respondent went through a proper and competent process to establish whether there were any hazards at the Property and, if so, how to rate those hazards and what follow-up action needed to be taken. In so doing, the evidence indicates that the First Respondent carried out a risk calculation in a proper manner, applying the relevant guidance.

56. As a general point, the Applicant has sought to draw inferences from what it regards as certain contradictions in the Respondents' evidence. It has argued that one of the First Respondent's submissions runs contrary to the precise description of the Property in the Improvement Notice and that one of the Second Respondent's submissions runs contrary to an argument advanced by it in its counterclaim in the ongoing possession proceedings. In response to these comments on behalf of the Applicant neither of the Respondents has sought to withdraw the relevant submission, and as the decision is one for this Tribunal to make there seems no reason why we should decline to accept either of these submissions in the event that we do in fact agree with it. The position might of course be different if another court or tribunal had already made a determination on the point in question, but no evidence has been brought that this is the case.

Tribunal's powers

57. Paragraph 15(2) of Part 3 of Schedule 1 to the 2004 Act states that *"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"*. Paragraph 15(3) states that *"The tribunal may by order confirm, quash or vary the improvement notice"* Paragraph 17 contains specific additional requirements where the grounds of appeal include the ground that a course of action other than the service of an improvement notice is the best course of action.

58. Ms Doran submits that the word "re-hearing" should be given its plain meaning and distinguished from the word "review". In the commentary on Rule 52.11.1 of the Civil Procedure Rules supplied by Ms Doran, it is noted that Rule 52.11.1 expressly makes a distinction between a review and a re-hearing. The commentary also refers to the Court of Appeal decision in *E I Dupont de Nemours & Co v S T Dupont* cited by Ms Doran. In that case May LJ expressed the view that the scope of a rehearing under Rule 52.11.1(b) will normally approximate to that of a rehearing in the fullest sense of the word, and that on such a rehearing the court will hear the case again and will reach a fresh decision unconstrained by the decision of the lower court, although it will give to the decision of the lower court the weight that it deserves. However, elsewhere in his judgment May LJ states that questions such as whether on an appeal the appeal court will start all over again as if the lower court had never made a decision are not answered simply by labelling the appeal process as a review or a rehearing. He also cites

particular categories of appeal in respect of which the rehearings were in his view well understood not to extend to rehearings in the fullest sense of the word.

59. Mr Grundy for the First Respondent submits that the use of the word "re-hearing" in paragraph 15(2)(a) is problematic because there has been no initial hearing in relation to which this could be treated as a "re-hearing". If the decision by the First Respondent was itself the "hearing" then it followed that the Tribunal's role would be to step completely into the First Respondent's shoes and to take on all of its powers and duties, which cannot have been intended by Parliament. In addition, he argues that words such as "quash" are the language of judicial review, and that an appeal against a local authority's exercise of its discretion is akin to a judicial review and therefore its decision can only be reviewed if no reasonable authority could have made the same decision. In support of his position he has cited the cases of *Begum v Tower Hamlets London Borough Council* and *Crawley BC v B*. Both cases related to a local authority's duties towards homeless people. In *Begum* it was held that an appeal under section 204 of the Housing Act 1996 gave to the county court a power akin to that of judicial review exercisable in the High Court, and this was followed in *Crawley BC*.

60. We accept that the word "re-hearing" presents a linguistic difficulty, in that it seems to assume that there was first a hearing in relation to which the appeal is now a re-hearing. However, for the draftsman merely to have described the appeal as a "hearing" would have been a statement of the obvious and would have shed no light on the type of hearing it was intended to be. Therefore, whilst we note the linguistic difficulty, in our view the purpose of the use of the word re-hearing is to distinguish the process from a review.

61. The reference to re-hearing is in paragraph 15(2)(a), and then paragraph 15(2)(b) goes on to state that the appeal may be determined having regard to matters of which the authority were unaware. In our view sub-paragraph (b) is a clarification as to the sort of re-hearing that this is intended to be, namely the sort of re-hearing at which the tribunal may have regard to matters of which the authority were unaware. In our view, this qualification alone renders it very unlikely that this appeal process was intended to be one of judicial review, as the basis of challenge cannot merely be that the authority has acted irrationally if the tribunal can determine the appeal having regard to matters of which the authority were unaware.

62. As regards the use of the word "quash", whilst it is true that this is used in a judicial review context there is no evidence before us that it can only be used in that context.

63. The analysis in the commentary on Rule 52.11.1 of the Civil Procedure Rules and the decision in *E I Dupont de Nemours & Co v S T Dupont*

are of some assistance. Whilst May LJ states that the scope of a re-hearing under Rule 52.11.1(b) will normally approximate to that of a re-hearing in the fullest sense of the word, he does not say that the word re-hearing always means exactly the same thing. However, he does not argue that a re-hearing can be akin to a judicial review process in which the relevant decision can only be challenged on the ground that no reasonable person could have made that decision. On the contrary, in May LJ's judgment even a mere review (as distinct from judicial review) will engage the merits of the appeal, and the court or tribunal will have to judge how much respect to accord to the original decision depending on a number of factors.

64. As regards the cases of *Begum* and *Crawley BC*, as Mr Grundy acknowledges these cases both relate to section 204 of the Housing Act 1996. Section 204(1) allows an applicant who has requested a review under section 202 to appeal to the county court on a point of law. Section 202 sets out various decisions in respect of which an applicant has a right to request a review.

65. We do not accept that the decisions in *Begum* or *Crawley BC* assist the First Respondent in our case. Section 204 of the Housing Act 1996 relates to a situation in which a local housing authority has made a decision and then – on being requested to do so by the applicant – has reviewed its decision. In such a case, any appeal to the county court is expressly confined to points of law. There is no suggestion that the county court is empowered to conduct a re-hearing, and in addition its role is limited by the reference to points of law. Indeed, the *Begum* case would seem to be authority not for a limited interpretation of the county court's powers under section 204 but rather as authority for the proposition that the reference to points of law in section 204(1) also permits a challenge on the basis that the authority has acted irrationally. By contrast, paragraph 15(2) of Part 3 of Schedule 1 to the 2004 Act specifically describes the appeal as a "re-hearing" and also states that the appeal may be determined having regard to matters of which the authority were unaware, which is inconsistent with mere judicial review.

66. Therefore, in our view, the appeal envisaged by paragraph 15(2) goes well beyond judicial review and is a re-hearing in the sense that the Tribunal can and should decide what is reasonable based on the evidence before it, including evidence not available to the local housing authority when it made the original decision. As regards the argument that the Tribunal cannot take on this role without also taking on all of the local housing authority's duties, we do not accept this. The Tribunal in fulfilling its statutory role does not become the local authority; its role is simply to make a determination as to the reasonableness of the local housing authority's own decision in response to a challenge pursuant to paragraph 10.

The works required

67. Having seen and heard evidence from all three parties and having inspected the Property, we are satisfied that it was reasonable for the First Respondent to require the Applicant to prop up the relevant floor. There is evidence of water leakage and of timber decay, and in our view there is a significant risk that any early warning signs of the floor being about to fail would not be picked up by anyone, unless someone with the requisite knowledge happened to be inspecting at the relevant time. Given the extent and nature of the risk and the relatively modest cost involved it was clearly reasonable for the First Respondent to specify these works.

68. As regards the necessity to treat for rot, again we are satisfied that it was reasonable for the First Respondent to require this. As argued by the First Respondent, the Property suffers from extensive damp and decay, and it is obviously prudent to require the Applicant to treat all relevant areas for rot.

69. Is the first floor mezzanine room big enough for the permanent kitchen? In our view, whilst it is not particularly spacious, it is big enough for this purpose. The Second Respondent already has a microwave and a refrigerator in his room and therefore the kitchen would only need to be used for basic food preparation. Realistically, all occupiers would need their own small refrigerators.

Whether First Respondent had power to require Applicant to build temporary kitchen and bathroom

70. The first point to address is whether the whole of the Property is an HMO. Under the standard test in section 254 of the 2004 Act, a building meets the standard test if –

(a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;

(b) the living accommodation is occupied by persons who do not form a single household (as defined in section 258);

(c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it;

(d) their occupation of the living accommodation constitutes the only use of that accommodation;

(e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and

(f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities.

71. The evidence indicates that there are one or more units of living accommodation, that the Second Respondent and the other occupiers do not form a single household (as defined in section 258), that the accommodation is occupied by them as their only or main residence, that their occupation of the living accommodation currently constitutes the only use of that accommodation, that rents are payable in respect of the Second Respondent's occupation and that the Second Respondent shares one or more basic amenities with the other occupiers.

72. Does the Second Respondent's living accommodation consist of a self-contained flat? In our view it does not. The physical area demised to him under his tenancy agreement does not contain all the basic amenities needed by him. Instead, he uses the toilet and basin and shower on the half landing between the ground and first floors, and there is no evidence of any objection having been made to this. Equally, there is no practical way to prevent the other occupiers of the Property or any other potential occupiers of the Property from using these facilities, and nor is there any reason to suppose – whether based on the wording of his tenancy agreement or otherwise – that the Second Respondent was intended to have exclusive use of these facilities.

73. Therefore in our view all elements of the test in section 254 are satisfied and the whole Property is an HMO. It follows that the whole of the Property constitutes the same "residential premises" for the purposes of section 1(4) of the 2004 Act.

74. Section 11(4) of the 2004 limits the local housing authority's ability to specify remedial works to an area not included in any residential premises on which the hazard exists. In our case, this does not prevent the First Respondent from specifying works to the second floor mezzanine as this area is part of the same residential premises as those areas where hazards exist.

75. There is then the separate issue as to the meaning of the phrase "remedial action" in the context of the local housing authority's power under section 11(2) to require the addressee of the improvement notice to take remedial action. Section 11(8) defines "remedial action" in relation to a hazard as action which in the opinion of the local authority will remove or reduce the hazard.

76. The Applicant has argued that installing a temporary kitchen and bathroom will not remove or reduce the hazard in question. Whilst we accept that it will not by itself remove the hazard it is arguable that it will reduce it in the sense that the occupiers will have the use of a safer kitchen and bathroom area and therefore will be less exposed to risk.

77. However, in any event we consider that it is not appropriate to take such a narrow view of the meaning of "remedial action" as that suggested by the Applicant. A well thought-through improvement notice will in our view contain a joined-up series of measures which between them constitute a reasonable method of removing or reducing the hazards specified in that notice. Some of those measures may be preparatory measures and some may be indirect ones. The example given by the First Respondent – that of installing a temporary lighting system prior to rewiring the permanent lighting system – is apposite. Subject to the question of cost and the issue of whether the occupiers should remain in situ, in principle we consider that it was within the First Respondent's power to require the installation of a temporary kitchen and bathroom to enable the occupiers to have access to these basic facilities whilst the works are being carried out.

78. As regards the anticipated cost of installing a temporary kitchen and bathroom, we note the written and oral evidence of the parties and the information elicited through cross-examination of witnesses. We did not find the evidence of Mr Vinnikov or Mr Daponte very convincing on this issue and we prefer the evidence of Mr Freeman. Mr Vinnikov in particular struggled to justify his figures, and as an expert tribunal we find the First Respondent's costings much more plausible. On that basis, and subject to the important question as to whether the occupiers should remain in situ, we consider the requirement for the Applicant to install a temporary kitchen and bathroom to be a reasonable one.

Occupiers remaining in situ and alternative of serving a prohibition order

79. Both in written submissions and at the hearing the Respondents have expressed much concern as to the Applicant's true motives in wanting the occupiers to move out whilst the works are being done. The Applicant had already commenced possession proceedings against the Second Respondent, and both Respondents considered this to be a situation in which the Applicant simply wanted the Second Respondent to be removed from the Property so that it could redevelop the Property into luxury flats. The Respondents' fear was that once the Second Respondent vacated he would not be able to get back in.

80. The Applicant for its part has insisted that the Respondents have no proof that the Second Respondent would not be allowed back in and that in any event he would have a legal remedy if prevented from returning to the Property. The Applicant has also stated that it would

not be safe for the occupiers to remain in situ whilst the specified works were taking place.

81. We share the Respondents' concerns about the ability of the Second Respondent to return to the Property after the hazards have been dealt with. The evidence indicates a lack of willingness on the part of the Applicant to do anything to make the Second Respondent's occupation of the Property tolerable. It took no action even to repair a leak to the toilet connection or to repair a tap, and we do not consider the stated reasons for its inaction to reflect much credit on the Applicant. The Applicant is a company based in the British Virgin Islands and there is reason for the Respondents to be concerned that it could be harder to enforce a judgment against a company based in the British Virgin Islands than a company or individual based in England. The Second Respondent is 88 years old and in poor health, and although he currently has the benefit of legal representation he may well not have the ability or appetite to pursue the Applicant through the court system if he needs to do so.

82. In addition, the Second Respondent appears to be adamant that he wishes to remain in situ during the carrying out of the works, and he is represented by Counsel who has assured us that he understands and accepts the risks involved. We were told at the hearing that the occupiers had in fact remained in situ – despite all the dust, noise and vibration – while the roof was replaced and the top floor was extended shortly before the Applicant's purchase of the Property.

83. However, on the issue of the safety and practicality of the occupiers remaining in situ, the Second Respondent's willingness to accept the risks involved is not the only consideration. Conflicting views have been expressed on this point, but having considered the evidence and inspected the Property we have serious concerns about the feasibility of carrying out these works with the occupiers in situ. As already noted, the Second Respondent is 88 years old and in poor health and has limited mobility. He also has carers who visit him and who therefore need safe access to this room. Whilst arguably it is for the Second Respondent himself to decide whether he can cope with the vibration and noise, there are other issues. It is unlikely to be feasible to keep the first floor landing clear at all times and it is possible that it will not even be safe to walk on the first floor landing at times. This in turn will make emergency escape problematic. It seems likely to us that a reputable insurer could well share these concerns and might not be willing to provide cover on this basis. We also agree with the Applicant that it could well be difficult to find a reputable contractor who would be prepared to carry out the works whilst taking these sorts of risks with the safety of the occupiers. In addition, to the extent that it is necessary for the Second Respondent to wear a hard hat or other safety equipment, it is not in our view realistic to expect that he will in fact do so at all relevant times.

84. The First Respondent has in part relied on the opinion of Mr Jones of Design Group Nine in forming the view that it would be safe to leave the occupiers in situ. However, Mr Jones was not called as a witness and therefore neither Ms Doran nor the Tribunal was afforded an opportunity to cross-examine him. His opinion, in a letter dated 26th March 2015, is expressed quite briefly and therefore – whilst of course he is entitled to express his professional opinion – it is unclear precisely what that opinion is based on. It is also unclear whether he was aware when giving his opinion that one of the occupiers is 88 years old and in poor health with limited mobility and that he has carers who visit him. Furthermore, there is no indication in the letter that he considered himself to be giving his opinion in the context of tribunal proceedings and that therefore he owed a duty towards the tribunal.

85. In conclusion, we are reluctantly of the view that it is not sufficiently safe to carry out the works whilst the occupiers are in situ and that in any event it may not be possible for the Applicant to obtain adequate insurance cover from a reputable insurer and/or that it could be difficult for the Applicant to find a reputable contractor willing to carry out the works under these circumstances. Whilst the Respondents have valid concerns as to whether the Second Respondent would have difficulties in enforcing his right to return to the Property once the works have been completed, in our view the safety considerations override these concerns on the facts of this case.

86. Would a prohibition order be more appropriate for this reason or for other reasons? The Housing Health and Safety Rating System Enforcement Guidance states that when considering a prohibition order the local authority should (inter alia) have regard to the risk of exclusion of vulnerable people from the accommodation. The evidence indicates that this factor was a significant part of the First Respondent's calculations in opting for an improvement notice rather than a prohibition order, and in our judgment the First Respondent acted reasonably in this regard. The Second Respondent is clearly a vulnerable person and, for the reasons already stated, the First Respondent had a legitimate concern about the risk of his exclusion from the accommodation. If a prohibition order had been served then the Applicant could have chosen to delay the works for as long as it suited them and it would have been hard for the Second Respondent to get back in to the Property if – as appears to be the case – the Applicant does not want him there.

87. In the difficult and unusual circumstances of this case, in our judgment the most appropriate courses of action are (a) to serve an improvement notice rather than a prohibition order, (b) for the current occupiers not to be allowed to remain in situ during the course of the works, (c) for the Applicant to provide alternative accommodation for the current occupiers during the course of the works (as it has already offered to do) and (d) for the Applicant to give appropriate assurances regarding the provision of that alternative accommodation and regarding the

current occupiers' return to the Property as soon as the hazards have been suitably dealt with.

88. We note the concerns expressed by the Respondents as to possible difficulties in enforcing obligations or undertakings on the part of the Applicant. However, we do not consider that it is reasonable or practicable to impose on their legal representatives an obligation to give undertakings on the Applicant's behalf that it will act in a specific manner. Therefore, in our judgment the most that we can do in the circumstances is to require the Applicant itself to give such undertakings, assurances or other comfort as the First Respondent reasonably requires, both in relation to the provision of alternative accommodation and in relation to the current occupiers' return to the Property as soon as the hazards have been suitably dealt with.

89. Two consequential advantages of the above approach are (a) that the Applicant will not be put to the expense of constructing temporary facilities for the current occupiers within the Property whilst the works are ongoing and (b) that it should take considerably less time to complete the works if the occupiers are not in situ.

90. The exact variations to the Improvement Notice are set out in the Appendix to this decision.

Cost applications

91. As stated at the end of the hearing, the Tribunal's decision on costs (including the fee for preparation and service of the Improvement Notice) is reserved pending receipt of the parties' written submissions on costs and the relevant fee. All parties may make written submissions on costs and on the First Respondent's fee for preparation and service of the Improvement Notice, any such submissions to be received by the Tribunal no later than 5pm on 10th July 2015.

Name: Judge P. Korn **Date:** 26th June 2015

Appendix

Variations to Schedule 2 to Improvement Notice

1. Delete the underlined words in paragraph 1.

2. Delete paragraphs 2 to 9 inclusive.

3. Delete the words in capital letters at the end of paragraph 10.

4. Replace existing paragraph A of the "General Informatives" section with the following:

   *"**The welfare of the occupiers***

   (i) Immediately prior to the commencement of the required works to provide the current occupiers – Major Vickers, Mr Intarack and Mr Prasit – with alternative accommodation for the duration of the required works, which accommodation shall be of such quality, in such location and provided on such terms as the Council reasonably considers to be satisfactory.

   (ii) To allow the current occupiers – Major Vickers, Mr Intarack and Mr Prasit – back into occupation of the parts of the Property previously occupied by them forthwith after completion of the works required by this Improvement Notice.

   (iii) If there is a delay in completing the required works, to allow the current occupiers back into occupation prior to completion of the required works to the extent that this is reasonably required by the Council having regard to the safety of the said occupiers.

   The Council shall be entitled to require the Applicant to give such undertakings, assurances and/or other comfort that it will comply with the above requirements as the Council reasonably sees fit."

5. Amend paragraph D of the "General Informatives" section to read as follows:

   *"**Provide assistance to occupiers***

   As one of the occupiers in particular is elderly and has difficulties with mobility, to provide adequate assistance with the move to temporary accommodation and the move back into the Property."

6. Delete paragraphs O and P of the "General Informatives" section.

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AW/HIN/2015/0002**
Property	**:**	**144 Lexham Gardens, London W8 4JE**
Applicant	**:**	**DMG Global Consulting Limited**
First Respondent	**:**	**Royal Borough of Kensington & Chelsea**
Second Respondent	**:**	**Major J Vickers**
Type of Application	**:**	**Supplemental cost application following an appeal against an improvement notice under the Housing Act 2004**
Tribunal Members	**:**	**Judge P Korn** **Mr T Sennett FCIEH**
Date of Previous Decision	**:**	**26th June 2015**
Date of Supplemental Decision	**:**	**21st August 2015**

SUPPLEMENTAL DECISION

Decisions of the Tribunal

(1) The Tribunal declines to make any order pursuant to rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

(2) The Tribunal declines to make an order pursuant to section 49 of the Housing Act 2004 reducing, quashing or requiring the repayment of the First Respondent's charge in respect of the administrative and/or other expenses incurred by it in serving the improvement notice on the Applicant.

The background

1. This application is supplemental to an application (the "**Previous Application**") by the Applicant under the Housing Act 2004 against an improvement notice issued by the First Respondent.

2. A hearing took place in relation to the Previous Application on 14th April and 8th June 2015 and a decision (the "**Previous Decision**") in respect of the Previous Application was issued on 26th June 2015.

3. At that hearing the Tribunal reserved its decision on costs (including in relation to the fee for preparation and service of the improvement notice) pending receipt of the parties' written submissions on those issues.

4. Both parties have made a cost application pursuant to rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("**Rule 13(1)(b)**"), and the Applicant has also challenged the First Respondent's fee for the preparation and service of the improvement notice. Both parties have made written submissions.

Applicant's written submissions

5. The Applicant has made two applications in relation to costs and fees. The first is an application pursuant to section 49 of the Housing Act 2004 challenging the level of the First Respondent's charges in respect of expenses incurred by it in serving the improvement notice on the Applicant. The second is an application pursuant to Rule 13(1)(b) for an order that the First Respondent pay its legal costs.

Fee for the preparation and service of the improvement notice

6. In relation to the First Respondent's charges, the Applicant notes that under section 49(7) of the Housing Act 2004 *"where a tribunal allows an appeal against the underlying notice … it may make such order as*

it considers appropriate reducing, quashing, or requiring the repayment of, any charge under this section made in respect of the notice …". The Applicant submits that the Tribunal has allowed the appeal against the improvement notice as it has concluded that the works cannot be carried out safely with the occupiers in situ and that, therefore, the Tribunal has the power to make an order under that sub-section. The Applicant further comments that it ought not to have to bear the cost of the notice "which has been substantially varied".

7. Further or in the alternative, the Applicant notes that section 49(1) of the Housing Act 2004 entitles a local housing authority to make *"such reasonable charge as they consider appropriate as a means of recovering certain administrative and other expenses incurred by them in … serving an improvement notice …"*. Picking up on the reference to a "reasonable" charge, the Applicant submits that the charge levied in this case was unreasonably high. In so doing it quotes the charges of certain other local housing authorities sourced via the internet.

8. The Applicant also notes that the First Respondent's charges have been calculated by reference to an hourly rate and states that section 49(1) does not refer to hourly rates. It also takes issue with aspects of the First Respondent's breakdown of its costs, for example the time taken for the HHSRS report.

Rule 13 costs

9. The application under Rule 13 is for an order that the First Respondent pays the Applicant's legal costs. The Applicant refers in general terms to paragraph 13 of the FTT rules and quotes the whole of paragraph 13 but we assume that the application is specifically under paragraph 13(1)(b)(ii) which provides that *"the Tribunal may make an order for costs … if a person has acted unreasonably in bringing, defending or conducting proceedings in a residential property case"*.

10. In the Applicant's submission, the First Respondent refused to agree to mediation and this was unreasonable conduct such that the Tribunal should order the First Respondent to pay the Applicant's legal costs. In this regard, the Applicant has referred the Tribunal to a letter from the Applicant's solicitors to the First Respondent stating that the Applicant wanted to explore mediation, a follow-up letter a week later and then a response from the First Respondent seeking specific details as to the issues considered by the Applicant to be worth mediating on. The Applicant stated that it wished to mediate on the question of whether the improvement notice could be withdrawn or amended so that the works would only have to be done if the occupiers vacated temporarily. In response the First Respondent stated (on 2nd March 2015) that the works needed to be done with the occupiers in situ as it was highly unlikely that that they would agree to move into temporary

accommodation. The Applicant states that it has incurred legal costs of £27,902, of which £26,522 were incurred after 2nd March 2015.

First Respondent's written submissions

11. The First Respondent has just made one cost application, namely an application pursuant to Rule 13(1)(b) for an order that the Applicant pay its legal costs. It also opposes the Applicant's two applications.

Comments on challenge to fee for preparation/service of improvement notice

12. The First Respondent submits that its officers' hourly rates are reasonable and that it is entitled to recover the cost of the relevant officers' time. It also comments on the Applicant's challenges to specific items. For example, it states that the time claimed for administration and support was 75 minutes, and it impliedly contends that this was a reasonable amount of time to spend. It concludes that in view of the complexity of the case and the difficulties of dealing with the Applicant the amount of £1,390.25 is a reasonable one.

Rule 13 costs

13. The First Respondent submits that the Applicant should pay a proportion of its costs under Rule 13(1)(b) on the basis that the Applicant has acted unreasonably in the course of the proceedings. It also contends that it did not act unreasonably in declining the invitation to mediate.

14. The First Respondent states that the Applicant's motivation for the appeal was to avoid doing any of the work set out in the improvement notice and that this was also part of its strategy to evict the Second Respondent. It further comments that the Applicant acted unreasonably in adducing the evidence of wholly unreliable witnesses at the hearing.

15. As regards the First Respondent's rejection of mediation, in the context of the history of the case and the need for the First Respondent to consider the position of the Second Respondent it was not unreasonable to refuse the offer of mediation as any mediation would have further prolonged the resolution of the case. In any event, the question of whether the occupiers should remain in situ was not the only issue as the Applicant's position was also that it did not have to carry out any of the works. The First Respondent further considered in the circumstances that the bona fides of the Applicant in any mediation were open to question.

16. The First Respondent submits that the Tribunal should order the Applicant to pay 75% of its costs if it finds that the Applicant has used

the appeal to attempt to avoid its obligations as the Second Respondent's landlord or 20% of its costs if it finds that the oral evidence relied upon by the Applicant was unreasonable.

The Tribunal's analysis

Fee for the preparation and service of the improvement notice

17. As noted by the Applicant, under section 49(7) of the Housing Act 2004 *"where a tribunal allows an appeal against the underlying notice … it may make such order as it considers appropriate reducing, quashing, or requiring the repayment of, any charge under this section made in respect of the notice …".*

18. The first question is whether we did in fact allow the appeal. We did not quash the improvement notice nor (as we were invited by the Applicant to do) convert it into a prohibition order. We also upheld the requirement to carry out all of the works specified in the notice save for those which were no longer necessary as a consequence of our decision that the works should not be carried out with the occupiers in situ. However, as we upheld the Applicant's objection to the works being carried out with the occupiers in situ and varied the notice accordingly it follows that we allowed the appeal in part. Therefore, in our view section 49(7) is engaged.

19. Leaving aside the separate challenge to the reasonableness of the charges under section 49(1), the question under section 49(7) in our view is whether the charges should be reduced simply by virtue of the fact that an appeal has been allowed. So, just by way of example, if our decision had been to quash the improvement notice in its entirety in circumstances where the local housing authority was clearly at fault then there could be grounds for reducing or even quashing the charges. However, in this case the improvement notice has in the main been upheld and we are satisfied that the First Respondent has acted properly. Whilst we have not upheld the decision to require that the occupiers be allowed to remain in situ, we accept the legitimacy of the First Respondent's concerns about the position of the occupiers. Although ultimately we did not accept their conclusion on this point we do not consider it to have been irrational or a reason to reduce the charges under section 49(7).

20. As regards section 49(1), the Applicant's position seems to be that this sub-section allows for a separate challenge to the reasonableness of the charges. We accept this. Although section 49(1) does not expressly state that an application can be made to the Tribunal, the fact that only a "reasonable" charge can be made indicates that reasonableness is a legitimate basis for a challenge.

21. As to the reasonableness or otherwise of the charge, the comparators provided by the Applicant, viewed in isolation, do give the superficial impression that the First Respondent's charges were above the market norm. However, the Tribunal has no way of knowing, on the basis of the evidence provided, how representative those comparators are or whether the charges quoted would apply to the circumstances of this case, given its complexity and unusual nature.

22. The Applicant submits that section 49(1) does not provide for charges to be based on hourly rates. However, neither does it state that hourly rates are an illegitimate basis for calculating the charges; the charges simply have to be reasonable. As regards the challenges to specific items, we accept the First Respondent's explanations and do not consider that any of the challenges has sufficient merit to demonstrate that the charges are unreasonable.

23. As to whether the charges are in fact unreasonable, in our view, taking into account our expert knowledge of charges generally levied by local housing authorities in these circumstances, the charges are quite high but still within the parameters of that which is reasonable. We accept, in the circumstances of this case, that the second notice would have required further time input and additional surveys plus visits to formulate and prepare the terms of the notice, and we consider the hourly rates themselves to be reasonable.

24. Therefore, in conclusion we decline to make an order under section 49 reducing, quashing or requiring the repayment of the First Respondent's charge in connection with the service of the improvement notice.

Rule 13 cost applications

25. Both the Applicant and the First Respondent have applied for an order under Rule 13(1)(b) that the other reimburse its costs incurred in connection with these proceedings. Such an order can only be made if the other party "has acted unreasonably in bringing, defending or conducting proceedings".

26. In the case of *Ridehalgh v Horsfield (1994) 3 All ER 848* Sir Thomas Bingham MR described the acid test of unreasonable conduct in the context of a cost application as being whether the conduct admits of a reasonable explanation. This formulation was adopted by the Upper Tribunal (Lands Chamber) in the case of *Halliard Property Company Ltd v Belmont Hall and Elm Court RTM Company Ltd LRX 130 2007*. Costs are therefore not to be routinely awarded pursuant to a provision such as Rule 13(1)(b) merely because there is some evidence of imperfect conduct at some stage of the proceedings.

27. The Applicant submits that the First Respondent's refusal to agree to mediation was unreasonable conduct. We disagree. The context of the situation was that the Applicant had failed to carry out any of the necessary works over a long period of time and the First Respondent had a legitimate concern as to the occupiers' ability to return to the Property if they were to vacate before the works were finally commenced. It was, in our view, reasonable for the First Respondent to have concluded that mediation was very unlikely to be successful and would merely further delay the carrying out of works which it had a statutory duty to ensure were carried out. Therefore we do not consider that the First Respondent should be required to pay all or part of the Applicant's legal costs under Rule 13(1)(b).

28. As regards the First Respondent's own cost application, we do have some concerns about the Applicant's approach to its dealings with the First Respondent, as is apparent from the Previous Decision. However, specifically in relation to the Applicant's conduct in "bringing, defending or conducting [the] proceedings" themselves, there are significant points to be made in the Applicant's favour. First of all, on the major issue as to whether the occupiers should remain in situ we have found in the Applicant's favour. Secondly, even though there is a possible question as to its true motivation, it did write to the First Respondent more than once to explore the possibility of mediation. Thirdly, whilst ultimately we did not agree with the Applicant's legal or technical arguments regarding the obligation to carry out certain of the works specified in the improvement notice, the Applicant did succeed in advancing some plausible arguments in this regard.

29. The First Respondent submits or implies that the issue is whether the Applicant has used the appeal to attempt to avoid its obligations as the Second Respondent's landlord and/or whether the oral evidence relied upon by the Applicant was unreasonable. Whilst we accept that these are possible factors, in our view the question of unreasonableness of conduct needs to be considered in a broader manner. Taking the Applicant's conduct of the proceedings as a whole, we are not persuaded that its conduct has been such that it does not admit of a reasonable explanation. Therefore we do not consider that the relevant test has been met, and accordingly the Applicant should not be required to pay all or part of the First Respondent's legal costs under Rule 13(1)(b).

Name: Judge P. Korn **Date:** 21st August 2015