UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2017] UKUT 277 (LC)
Case No: LRX/29/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – dwelling – student accommodation comprising demised bed-sits with shared use of lounges, kitchens and dining space – whether bed-sits "part of a building intended to be occupied as a separate dwelling" – whether tribunal having jurisdiction in relation to service charges – s.38, Landlord and Tenant Act 1985 – appeal allowed

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

BETWEEN:

JLK LIMITED

Appellant

and

EMMANUEL CHIEDU EZEKWE
(and others)

Respondents

Re: Alexander Terrace
Hatton Garden
Liverpool L2

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Martin Rodger QC, Deputy Chamber President

Royal Courts of Justice, London WC2A

22 June 2017

Justin Bates, instructed by EAD Solicitors LLP, for the Appellant
Adrian Carr, instructed by Bury & Walkers LLP, for the Respondents
The following cases are referred to in this decision:

Baker v Turner [1950] AC 401

Cole v Harris [1945] 1 KB 474

Horford v Lambert [1976] Ch. 39

King v Udlaw Ltd [2008] L. & T.R. 28

Llewellyn v Hinson [1948] 2 KB 385

Morgan v. Kenyon (1913) 110 LT 197

Neale v Del Soto [1945] 1 KB 144

Oakfern Properties Ltd v Ruddy [2007] Ch 355

R(N) v Lewisham London Borough Council [2014] UKSC 61

St Andrews Place (Liverpool) RTM Company Ltd v JLK Ltd (unreported, first-tier tribunal, 21 January 2016)

Uratemp Ventures Ltd v Collins [2002] 1 AC 301

Williams v Perry [1924] 1 KB 936

Introduction

1. Alexander Terrace is a large building mainly on four floors which was erected in the nineteenth century as the headquarters of the Liverpool Fire Brigade. In 2012 it was converted to provide 93 units of residential accommodation intended for occupation by students. All but six of the units comprise a bed-sitting room with *en suite* facilities (the remainder have the use of shared showers and toilets). Each of the units is let on a long lease which demises the unit together with the right to use communal kitchens, lounges, showers and toilets situated on the same floor.

2. The issue in this appeal is whether the First-tier Tribunal (Property Chamber) (FTT) has jurisdiction under the Landlord and Tenant Act 1985 to determine the amount of the service charges which the leaseholders of the units are liable to pay. The FTT will only have jurisdiction, and the leaseholders will only be entitled to the protection afforded by sections 18 to 30 of the 1985 Act, if the units are "dwellings" within the meaning of section 38. Amongst other protections the relevant sections of the 1985 Act limit service charges to sums reasonably incurred for works or services of a reasonable standard, require the provision of information and prior consultation with tenants on major works, impose time limits on the recovery of service charges and provide access to independent tribunals to determine disputes.

3. In a decision given on 29 November 2016 the FTT decided that the units were "dwellings" and ruled that it therefore had jurisdiction to determine two applications under section 27A of the 1985 Act brought by 56 leaseholders concerning the service charges payable for the years 2014, 2015 and 2016 to their landlord, JLK Ltd, under the leases of 65 of the units. Recognising that developments of this type are not uncommon in the student accommodation sector, and that the issue is therefore one of wider practical significance, the FTT granted permission to appeal.

4. At the hearing of the appeal both sides were represented by counsel: Justin Bates for the appellant and Adrian Carr for all 56 respondents who are named in the appendix to this decision. I am grateful to them both for their helpful submissions.

The relevant facts

5. Planning permission was not required for the conversion of the former fire station to residential use but listed building consent was, and it was obtained on behalf of the appellant's predecessor in title, Middle England Developments Ltd, in September 2011. The consent described the proposal as the conversion of the existing building to student accommodation.

6. The work was certified as having been completed in accordance with the Building Regulations on 22 May 2012.

7. The FTT inspected the building and described the accommodation as follows:

> "There are 93 units of accommodation ("Units"), or "Pods", as they were referred to by the Respondents' Counsel, each Unit consisting of one single bedroom, a wardrobe and desk. Save for six Units, or Pods, each bedroom has an en suite shower, washbasin and WC.

Some of the en suite bathrooms are adapted for use by a disabled occupant. The six units not having an en suite bathroom have the use of communal bathrooms on the same floor as the relevant accommodation.

Each cluster of five Units, or Pods, has the use of a communal kitchen, consisting of a sink and drainer, an electric hob and electric oven, all built into the kitchen units. Thus, on the ground floor twenty units are served by four kitchen areas, each identically having the above facilities. Each unit also has the use of a communal living area, usually adjacent to the kitchen area. All living areas have smoke alarms, emergency lighting and extractor fans. There are no locks on any of the internal doors other than those to the individual units.

Hot water and heating to the Property is supplied from a communal boiler in a plant room in the basement. Although there is gas supplied to the building for heating purposes, no gas is supplied to any Unit and the individual units are not separately metered for electricity or water.

Two lifts serve the three floors to the Property. The original staircase has been retained. The tribunal were informed that there had been a communal laundry room in the basement in which there were coin operated washing machines. There was also a gymnasium. The equipment for both these facilities had been removed at the time of inspection. There was also a manager's office. The communal corridors and staircases have cctv."

8. After its conversion Alexander Terrace was occupied by students, but at the time of the FTT's inspection it was entirely vacant. The original developer had gone into administration and the appellant had acquired the building from the administrator on 5 February 2014. Although it is not referred to by the FTT, I was informed that on 17 April 2014 a prohibition order under section 20, Housing Act 2004 was made by the local housing authority. The reason for this extreme step was that the communal boiler in the building had ceased to function and there was no longer any supply of hot or cold water. From that date the use of the building was prohibited and it became an offence for any person to use or permit the building to be used in contravention of the order. For a time after the students moved out squatters moved in.

The leases

9. Before practical completion of the building had been certified almost all of the units of accommodation had been let by the original developer on leases for terms of 250 years. I was shown the lease of Unit F21 on the first floor of the building which was granted to Mr Ezekwe, the first respondent, on 5 October 2011.

10. The lease is at a peppercorn rent and was granted in return for a premium. The only property demised by the lease is the unit itself (referred to as "the Property") but the letting is with the benefit of rights specified in Part I of the Second Schedule. Those rights are expressed to be exercisable in common with all other persons having a similar right and include the right to use "the Facilities" on the same floor of the building or, at the discretion of the landlord, those elsewhere in the building. The "Facilities" are defined as "the kitchen, bathroom, shower and other areas provided for communal use by the owners of the Units in the Building". An additional

overlapping right is granted to use any facilities or things provided for common use, including the gymnasium in the basement.

11. The lease includes a covenant on the part of the tenant to pay an annual maintenance charge, being a proportion of the sums spent from time to time by the landlord in the maintenance and administration of the building. It also includes a covenant requiring that:

> "no part of the Property shall be used for any purpose other than as or incidental to a private dwelling in the occupation of one household only."

The statutory provisions

12. Section 18 to 30 of the 1985 Act are concerned with service charges, which are defined in section 18(1) as "an amount payable by a tenant of a dwelling" for services of various kinds.

13. As originally enacted, section 18(1) referred to an amount payable by a tenant of "a flat", rather than "a dwelling". The definition of "flat" in section 30 included a requirement that the premises should be "occupied wholly or mainly as a private dwelling". The word "dwelling" was substituted (and the definition of "flat" removed) by section 41 of the Landlord and Tenant Act 1987 which also introduced a number of other important changes to the 1985 Act. The result was to extend the protection of the statutory scheme to tenants of houses and other units of accommodation which were not flats.

14. Section 38 of the Act contains minor definitions, including the following definition of "dwelling":

> "dwelling" means a building or part of a building occupied or intended to be occupied as a separate dwelling, together with any yard, garden, outhouses and appurtenances belonging to it or usually enjoyed with it.

15. As a definition of "dwelling" section 38 perhaps leaves something to be desired, as it includes the word it seeks to define. The purpose of the definition is not to explain what a "dwelling" is, but rather to identify those dwellings which are intended to be referred to when the word is used in the 1985 Act, and to bring ancillary premises within the scope of the legislation. "Dwelling" is an ordinary word in the English language whose meaning was considered by the House of Lords in *Uratemp Ventures Ltd v Collins* [2002] 1 AC 301 and more recently by the Supreme Court in *R(N) v Lewisham London Borough Council* [2014] UKSC 61. It is a word of wide import capable of having shades of meaning but it generally connotes "a place where a person lives, regarding and treating it as home" (*Uratemp*, per Lord Irvine of Lairg LC at [3]).

The issues

16. As it was presented by Mr Bates, the appellant's case gives rise to three distinct issues:

(1) Whether, for a unit of accommodation to be a "dwelling" for the purpose of the 1985 Act, it is necessary that it should be used as, or be intended to be used as someone's home.

(2) If so, whether the units at Alexander Terrace satisfy that requirement.

(3) Whether, in any event, each of the units at Alexander Terrace is occupied or intended to be occupied as a "separate" dwelling, or whether the availability of communal facilities to which each tenant has access under the terms of their lease, means that the necessary element of separateness is missing.

17. In the parties' written submissions they did not distinguish between the period at the beginning of 2014 when the units were occupied by students and the period after 17 April 2014 when the prohibition order was made and it became unlawful for the units to be used as residential accommodation. In his oral argument Mr Bates suggested that the fact the units could not be occupied for most of the period in issue strengthened his case that they were not dwellings.

Issues 1 and 2: For the purpose of the 1985 Act must a "dwelling" be someone's home?

18. Mr Bates submitted that to be a "dwelling" within the meaning of section 38 of the 1985 Act a unit of accommodation must be a "home". A small unit intended for occupation by a student, which lacks cooking facilities (and, in the case of six units, also lacks private washing facilities), and where the occupier is expected to make use of communal facilities and to be subject to regulations, could not be described as a home.

19. The foundation of this argument was the decision of the House of Lords in *Uratemp,* and in particular the following observations of Lord Millett at [30]:

> "The words "dwell" and "dwelling" are not terms of art with a specialised legal meaning. They are ordinary English words, even if they are perhaps no longer in common use. They mean the same as "inhabit" and "habitation" or more precisely "abide" and "abode", and refer to the place where one lives and makes one's home. They suggest a greater degree of settled occupation than "reside" and "residence", connoting the place where the occupier habitually sleeps and usually eats, but the idea that he must also cook his meals there is found only in the law reports."

20. Other speeches in *Uratemp* also made the association between the word dwelling and the concept of a home on which Mr Bates relied. At [3] Lord Irvine said that "in this context" the word "connotes a place where one lives, regarding and treating it as home". Lord Bingham at [10] described the object of the statute as being "to give a measure of security to those who make their homes in rented accommodation at the lower end of the housing market". Lord Steyn at [15] also stressed the importance of the statutory context, before at [17] concluding that "a bed-sitting room which a tenant occupies as his home may be a dwelling even if he brings in all his meals or goes out for all his meals".

21. The issue in *Uratemp* was whether a single room in a hotel, in which Mr Collins had lived for many years, was "a dwelling-house" within the meaning of section 1, Housing Act 1988, or whether it was prevented from being one by the fact that no cooking facilities were provided for his use either in the room or elsewhere in the hotel. Mr Collins brought in takeaway food or used his own simple electrical appliances to prepare rudimentary meals which he ate in his room. He had no other accommodation and there was no doubt that he occupied the single room in issue as his home. The House of Lords held that there was no requirement for cooking facilities to be available to a tenant for the premises let to him to qualify as a dwelling-house and that Mr Collins would be an assured tenant if the rights granted to him were those of a tenant rather than a licensee.

22. The statutory context in which the references in *Uratemp* to a dwelling or dwelling-house being a home is immediately apparent from section 1(1) of the 1988 Act, which prescribes the conditions which must be satisfied before a tenancy will be an assured tenancy. For the tenancy of a dwelling-house "let as a separate dwelling" to be an assured tenancy, the tenant must be an individual and must occupy the dwelling-house "as his only or principal home".

23. Mr Bates also referred to the more recent decision of the Supreme Court in *R(N) v Lewisham* in which the leading judgment was given by Lord Hodge (with whom Lords Clarke, Wilson, Carnwath and Toulson agreed, Lord Neuberger and Baroness Hale dissenting). The question in that case was whether the Protection from Eviction Act 1977 applied to accommodation occupied by homeless families accommodated temporarily by a local housing authority while it considered the extent of its housing duty under Part VII, Housing Act 1996. To attract protection the relevant accommodation had to be "occupied as a dwelling". Lord Hodge acknowledged at [26] that, although much may depend on the context in which the word is used, as a general rule "dwelling" suggests a greater degree of settled occupation than "residence"; at [28] he added that "the establishment of a home" was a component of the activity of "dwelling".

24. Mr Bates was able to make a connection between the 1985 Act and these decisions of high authority on different legislation by referring to the decision of the Lands Tribunal (George Bartlett QC, President) in *King v Udlaw Ltd* [2008] L. & T.R. 28. Three bungalows on a holiday park and caravan site in Cornwall were let on long leases which prohibited their use "for any purpose other than as a holiday bungalow"; the planning permission regulating the use of the park also stipulated that it was not to be used for permanent residential accommodation. The bungalows were each designed with all the amenities required for residential accommodation and the question arose whether they constituted "dwellings" within the meaning of section 38 of the 1985 Act, so as to allow the tenants to challenge their service charges before a tribunal.

25. Having referred to *Uratemp* and to other authorities in the planning field, the Tribunal identified a basic distinction between those statutory contexts in which "dwelling" implies use as a home, and those where it does not. Whether the word was used with that additional implication or not was to be ascertained by examining the statutory context and the policy behind the relevant provisions. The Tribunal did not derive any material assistance from an examination of the rather complicated changes made to the 1985 Act by the Landlord and Tenant Act 1987 (which included the substitution in section 18 of "dwelling" for "flat"). The answer, it was said, was to be found in more general considerations, explained by the Tribunal at paragraph 27:

> "It is clear from *Uratemp* that "dwelling", where it appears in legislation conferring protection on tenants, will convey its ordinary meaning of the occupier's home unless there is something that suggests it should not be so limited. I can see nothing that would suggest that in relation to sections 18 to 30 the protection conferred should be extended to premises that are not a person's home."

26. The Tribunal also referred to the then very recent decision of the Court of Appeal in *Oakfern Properties Ltd v Ruddy* [2007] Ch. 355, in which it had decided that the lessee of a block of flats who had sublet individual flats in the block was nevertheless the tenant of "part of a building occupied or intended to be occupied as a separate dwelling". This was contrary to the conclusion of the Court of Appeal in *Horford v Lambert* [1976] Ch. 39 that the tenancy of two houses each containing a number of units of accommodation was not "a tenancy under which a dwelling-house (which may be a house or part of a house) is let as a separate dwelling" so as to afford the tenant the benefit of the rent restriction provisions of the Rent Act 1968. In *Horford* Scarman LJ had described the policy of the Rent Acts as being "to protect the tenant in his home". In *Oakfern* Jonathan Parker LJ took a different view of the statutory purpose of the 1985 Act:

> "The policy underlying the service charge provisions in the 1985 Act and earlier Acts is, however, a different policy in that its emphasis is not so much on protecting the tenant in his home as on providing him with a way of challenging unreasonable charges sought to be levied by his landlord."

The Tribunal in *King v Udlaw* did not read this passage as saying that it was no part at all of the policy of the 1985 Act to limit protection to premises occupied by a person as his home (paragraph 32).

27. I find the reasoning in *King v Udlaw* difficult, and I do not accept that the protection of sections 18 to 30 of the 1985 Act extends only to those occupying residential accommodation as their home. Section 38 does not refer to a home or contain any express requirement of residence at all; it is sufficient that the building or part of a building be "intended to be occupied as a separate dwelling". It was only by designating the "ordinary meaning" of "dwelling" as being the occupier's home that the Lands Tribunal arrived at its conclusion that it bore that meaning in the 1985 Act because there was nothing to suggest that a different meaning was intended. That approach was said to be clear from *Uratemp*, but most of the speeches in *Uratemp* drew support for that gloss from the specific statutory context (the Rent Acts and the Housing Act 1988) which, as *Oakfern* demonstrates, was not the same as the purpose and context of the 1985 Act.

28. The use of the word "dwelling" seems never to have been treated as sufficient in itself to import a requirement of residence or occupation as a condition of statutory protection. Under the Rent Acts the use of the word "dwelling" signified premises which were capable of being regarded as someone's home, but the word itself was not understood to mean that a unit of accommodation which was not occupied as someone's home could not be a dwelling. A contractual tenancy could be a protected tenancy within the meaning of section 1, Rent Act 1977, whether or not the tenant was in actual occupation. Residence became a requirement of the continuation of statutory protection only after the termination of the protected tenancy, but that was made explicit by section 2(1) which provided that a statutory tenancy would endure only for so long as the tenant occupied the dwelling-house as his residence. The same approach can be

seen in the Housing Act 1988: the requirement of occupation as the tenant's home is additional to the requirement that the subject of the letting must be a dwelling house let as a separate dwelling.

29. The decision in *King v Udlaw* was considered but not followed by the High Court in *Phillips v Francis* [2010] L. & T.R. 28, another case concerning chalets on a holiday park let on long leases which included covenants limiting their use to holiday purposes. The chalets were held by HHJ Griggs to be "dwellings" within the meaning of section 38 of the 1985 Act. The meaning to be attached to the word was said to be context specific and the Judge could see no reason why the protection against abuse associated with the levying of service charges should have been intended to be afforded only to tenants who occupy premises as their home rather than owning them as a holiday home. The correctness of this conclusion has been assumed in the High Court and the Court of Appeal in the subsequent litigation between the same parties ([2012] EWHC 3650 (Ch) and [2014] EWCA Civ 1395).

30. *King v Udlaw* was based on dicta in *Uratemp*, but it is important to note that the statutory language under consideration by the House of Lords was different. The language of section 38 ("a building or part of a building occupied or intended to be occupied as a separate dwelling") is not the same as that of section 1 of both the Rent Act 1977 and the Housing Act 1988. In the 1977 Act the relevant expression is "a tenancy under which a dwelling-house (which may be a house or part of a house) is let as a separate dwelling", while in the 1988 Act the words in parentheses are omitted. In those statutes the synonyms "dwelling" and "dwelling-house" are used to describe both the subject matter and the purpose of the tenancy. That element of duplication is missing in section 38, which defines a dwelling as "a building or part of a building occupied or intended to be occupied as a separate dwelling".

31. The distinct question considered in *Uratemp*, namely whether the subject of the letting was a dwelling-house, therefore does not arise under section 38. As Lord Bingham pointed out in *Uratemp* at [9] the House of Lords was not concerned with the requirement in section 1(1) of the 1988 Act that the premises be "let as a separate dwelling" because Mr Collins occupied a single bedsit and was not required or entitled to share facilities with anyone. For the purpose of section 38 the equivalent question regarding the subject of the letting is simply whether the premises are a building or part of a building. To answer that question requires a consideration of the physical characteristics of the premises, not whether they are someone's home.

32. Whether a building or part of a building is "occupied or intended to be occupied as a separate dwelling" requires a consideration of the objective purpose for which it is occupied or intended to be occupied. That purpose will often be apparent from the design of the unit itself but, as in this case where occupation for any purpose other than as or incidental to a private dwelling is prohibited, the terms of the letting may also be significant. Under the Rent Acts the general rule was that where the terms of a tenancy provided for or contemplated the use of the premises for some particular purpose, that purpose was the essential factor, not the nature of the premises or the actual use made of them (see *Williams v Perry* [1924] 1 KB 936 and *Megarry on The Rent Acts*, 11th ed (1988), vol 1, pp 88-94). If part of a building is physically capable of being occupied as a separate dwelling there seems to me to be nothing in the language, context or purpose of sections 18 to 30 of the 1985 Act to require additionally that it must be occupied as someone's home. I respectfully disagree with the statement to that effect in *King v Udlaw*.

33. I therefore do not accept Mr Bates submission that for a unit of accommodation to be a "dwelling" for the purpose of section 38 it must satisfy the additional requirement of being someone's home.

34. Mr Bates did not go so far as to suggest that the fact that a unit was not occupied for the time being as someone's home meant that it could not be a dwelling, but he submitted that a number of factors meant that these units were not in fact occupied or intended to be occupied as dwellings. I do not agree with that submission either.

35. The fact that six of the units have no washing facilities of their own and depend on communal facilities would not have been sufficient to disqualify them as dwellings for the purpose of the Rent Acts or the Housing Act 1988. Nor would the absence of cooking facilities in any of the units (as *Uratemp* demonstrates). I do not consider that section 38 is intended to have a narrower application. The inclusion in the leases of a power for the landlord to make regulations in the interest of good estate management is a standard feature of residential lettings, and the fact that the manager has imposed stricter limitations on the student residents than might normally be encountered is not material. The fact that the units were let with the intention that the occupiers should share a number of facilities, including kitchens and lounges, is very relevant to the question whether each unit was occupied "as a separate dwelling" but does not exclude them from the scope of section 18 to 30 at any earlier stage on the grounds that they cannot be someone's home.

36. For these reasons I dismiss the appellant's first and second grounds of appeal.

Issue 3: Are the units occupied or intended to be occupied as separate dwellings?

37. The 93 bed-sitting rooms at Alexander Terrace are clearly parts of a building and the contrary was not suggested. They are therefore capable of being dwellings for the purpose of sections 18 to 30 of the 1985 Act, and will be if they are "occupied or intended to be occupied as a separate dwelling". It was common ground that the question whether a disputed sum was a service charge ("an amount payable by the tenant of a dwelling") was an issue of jurisdiction; if the sums were not service charges the FTT could not make any determination concerning them under section 27A of the 1985 Act. It was therefore also agreed that the condition that the units must be dwellings within the meaning of section 38 had to be satisfied in respect of the period of time to which the determination related (which in this case is the calendar years from 2014 to 2016) rather than, for example, at the date on which the lease was granted.

38. Mr Bates submitted that the units at Alexander Terrace were not occupied or intended to be occupied as "separate" dwellings and he relied on a decision of the FTT concerning very similar property, a former church converted for use as student accommodation, with separate bed-sitting rooms and shared kitchens, lounges and recreation space (*St Andrews Place (Liverpool) RTM Company Ltd v JLK Ltd*). The individual bed-sitting rooms were held not to be "dwellings" within the meaning of section 112(1), Commonhold and Leasehold Reform Act 2002, (which, so far as relevant, is in the same terms as section 38 of the 1985 Act) because they were not intended to be occupied as "separate" dwellings, but rather as only part of each student's dwelling the remainder of which comprised the communal living space which was not demised.

39. As Lord Millett explained in *Uratemp*, the statutory origins of the phrase "occupied as a separate dwelling" go back further than the first Rent Act (the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915). At paragraph 39 of his speech he referred to the fact that "much judicial labour was expended" during the 20th century on the requirement that the premises must be let as a "separate" dwelling "that is to say not shared with others". Prior to the Rent Act 1949 the result of that judicial labour was the evolution of a rule that if the tenant shared living accommodation, such as a kitchen or living room, either with his landlord or with another tenant, the premises let to him were not let as a "separate" dwelling and so were outside the protection of the Acts.

40. The origin of this doctrine was *Neale v Del Soto* [1945] 1 KB 144, a decision of the Court of Appeal. The tenant took a tenancy of two rooms in a house together with the use, in common with the landlord, of other rooms including the kitchen, bathroom and w.c.. This was held not to be a letting of the two rooms as a separate dwelling, but a sharing of the house; the extent of the sharing which was required before the rule would be engaged was said to be a matter of degree.

41. In *Cole v Harris* [1945] 1 KB 474 the premises let to the tenant consisted of a bedroom, living room and kitchen on the first floor of a house together with the use of a bathroom and w.c. in common with the landlord and the tenant of the second floor. The majority in the Court of Appeal held that the tenancy was within the Acts and that only the sharing of "living rooms" would have the effect that a letting would not be of a "separate" dwelling; the use of shared facilities such as a bathroom or w.c. (which, though essential, were not regarded as "living rooms") would not. Morton LJ explained the rule as follows, at p 485:

> "I think that the true test, where the tenant has the exclusive use of some rooms and shares certain accommodation with others, is as follows: there is a letting of part of a house as a separate dwelling, within the meaning of the relevant Acts if, and only if, the accommodation which is shared with others does not comprise any of the rooms which may fairly be described as 'living rooms' or 'dwelling rooms.' To my mind a kitchen is fairly described as a 'living room,' and thus nobody who shares a kitchen can be said to be tenant of a part of a house let as a separate dwelling."

42. The rule obtained the approval of the House of Lords in *Baker v Turner* [1950] A.C. 401, where at page 414 Lord Porter summarised it in the following two propositions:

> "(1.) A portion of a house which is let by a landlord to a tenant, even if in itself separate, ceases to be a separate dwelling or to be protected by the Acts if the terms of the letting contain a provision that the tenant shall have the right of using a living room belonging to the landlord: *Neale v Del Soto* [1945] KB 144 (2) To take away the protection of the Acts, the room over which rights are given must be a living room: a bathroom, lavatory or cupboard will not avail, but for this purpose a kitchen is a living room: see *Cole v Harris* [1945] KB 474."

48. Lord Reid, at page 437, explained why, if a tenant has to share a living room which is not let to him, it is impossible to find anything which is let to him as a separate dwelling:

> "It cannot be the let rooms plus the right to use the other room, because that other room is not let to him at all – he is only a licensee there. And it cannot be the let rooms alone, because his having to share another room shows that the let rooms are only a part of his dwelling place."

49. By the time the rule was approved by the House of Lords in *Baker v Turner* its effect had been modified by Parliament. *Neale v Del Soto* and *Cole v Harris* had both involved a sharing of the landlord's home with the tenant, but the rule had been expressed in terms which meant that a sharing of living accommodation with another tenant would also exclude the Acts (as happened in *Llewellyn v Hinson* [1948] 2 K.B. 385). The breadth of the rule was ameliorated by the Landlord and Tenant (Rent Control) Act 1949 which provided (by section 8) that only the sharing of accommodation with the landlord would preclude the application of the Rent Acts. As Lord Millett explained in *Uratemp* (at paragraph 48), the distinction between sharing with a landlord and sharing with another tenant is the key to the legislative policy which lay behind the requirement that the dwelling be "separate". The right of a tenant to share his living accommodation was such an invasion of the landlord's privacy that Parliament could not be taken to have intended that the tenant should have security of tenure.

50. The legislative policy identified by Lord Millett continues to be reflected in section 22, Rent Act 1977 and section 3, Housing Act 1988, each of which provides that where accommodation is shared with another tenant to a degree which would otherwise prevent the tenant's own separate accommodation from being a "separate" dwelling, the separate accommodation is nonetheless to be *deemed* to be entitled to the protection of the Act.

51. The Landlord and Tenant Act 1985 contains no such deeming provision. The requirement of section 38 that, to be a "dwelling" to which sections 18 to 30 of the 1985 Act apply, the house or part of a house must be intended to be occupied as a "separate" dwelling, is not modified in the 1985 Act so as to enable the sharing of living accommodation with another person to be disregarded.

52. I do not consider that it is possible to interpret section 38 of the 1985 Act without regard to meaning which has been given to the expression "as a separate dwelling" for the purpose of the Rent Acts and the Housing Act 1988.

53. It is therefore necessary to consider the effect of the shared living accommodation at Alexander Terrace. The tenant of each of the units has the right to share a kitchen, lounge, shower and w.c. with every other tenant on the same floor. Can it then be said that the tenant is the tenant of a part of the building which is occupied or intended to be occupied as a separate dwelling? I do not think it can, for the reasons given by Lord Reid in *Baker v Turner*. The bed-sitting room plus the right to use the communal space will not satisfy the requirement because the tenant is not tenant of the whole of that accommodation, but only of part of it; the bed-sitting room itself will not do, because that is not occupied as the tenant's dwelling, but only as part of it. That was the conclusion reached by the FTT in the *St Andrews Place* case, and in my judgment it was correct.

54. On behalf of the respondents Mr Carr submitted that the tenants of the units at Alexander Terrace did not have the right to occupy the shared space, but only the right to use it. I believe that is a distinction without a difference since in each case the right is a right in common with everyone else who is entitled to use or occupy the shared space.

55. For these reasons I agree with the appellant's submission that the units were not dwellings because they were not occupied or intended to be occupied as separate dwellings.

Disposal

56. I therefore allow the appeal on ground three and I find that the FTT does not have jurisdiction to consider the respondents' applications under section 27A, Landlord and Tenant Act 1985, which must accordingly be dismissed.

57. I would add a final comment on the effect of the closure order. I doubt that this alone would prevent a unit from being a "dwelling" within the meaning of section 38. This aspect of the appeal was not addressed by either of the parties in any detail but in *Morgan v. Kenyon* (1913) 110 L.T. 197, where dwelling-houses were the subject of a closing-order, it was the view of Atkin J that:

> "these premises were undoubtedly dwellinghouses at one time, and I do not think that a building ceases to be a dwellinghouse, provided it has in fact been such, because people cease to dwell in it, or because it gets into so bad a state of repair that people cannot live in it or the law will not allow them to live in it."

It is not necessary in this appeal to decide whether the same approach is required under the 1985 Act.

Martin Rodger QC
Deputy Chamber President

6 July 2017