



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

Case Reference : CHI/00HH/HIV/2018/0001

Property : 45 Palace Avenue, Paignton TQ3 3EN

Applicant : Mr George Edward Swayne

Representative : Mr Rob Wigginton

Respondent : Torbay Council (hereinafter referred to as the Council)

Representative : Mr Brent Acutt, Housing Specialist,
Torbay Council

Type of Application : Appeal in respect of an Improvement Notice

Tribunal Members : Judge Tildesley OBE

Date and venue of Hearing : Determination on the Papers

Date of Decision : 18 February 2019

DECISION

Decision of the Tribunal

- (1) The Tribunal confirms the issue of the improvement notice dated 24 August 2018 for the hazards of falling on stairs (**18 April 2019**), Excess Cold (**18 March 2019**), Damp and Mould (**18 May 2019**), Lighting (**18 May 2019**), Falling between Levels (**18 April 2019**) and Fire (**18 April 2019**) subject to new dates of compliance which are set out in bold and in brackets after the relevant hazard.
- (2) The Tribunal varies the improvement notice for the hazard of overcrowding and space by substituting a Prohibition Order which applies unless the Flat is occupied by one person and the requirements of the improvement notice as amended are met to the satisfaction of the Council. The Prohibition Order will be suspended whilst the current tenant and his son occupies the property.
- (3) The Applicant has not been successful with its Appeal against the underlying order and therefore is liable to pay the charge for enforcement action in the sum of £300.

The Appeal

1. On 11 September 2018 the Applicant appealed against an improvement notice dated 24 August 2018 requiring the Applicant to carry out remedial works on a dwelling known as Flat A, 45 Palace Avenue, Paignton, Devon, TQ3 3EN to remedy category 1 and 2 hazards at the property.
2. The property is a two bedroom flat on the ground floor and lower ground floor of a house converted into four self-contained flats with a small office at the front of the building.
3. Mr Acutt for the Council in his description of the property stated there were a mains wired fire alarm system in place with a control panel in the ground floor hallway, a heat detector to the kitchen area and smoke detection to the living room and hallway in the lower ground floor. The front door of the flat was a fire door fitted with a mortice lock with an intumescent strip which had been fitted upside down. There were no smoke seal and no self closer to the door. The window to the main bedroom had a tilt and turn window which was suitable for means of escape into the rear yard. The second bedroom had no window and relied on escape through the main bedroom to the window. The ceiling to the hallway and the living room have recessed light fittings. There were voids to the living room ceiling where there had been damage to the plasterboard. There were two light tunnels to the living room which extended up to the ground floor.

4. Mr Acutt inspected the flat on 12 April 2018 in the presence of Mr Wigginton following a complaint by the tenant that the landlord had refused to repair the pump in the gas boiler. Mr Acutt identified four Category 1 hazards (Falling on Stairs, Crowding and Space, Excess Cold and Damp and Mould) and four Category 2 hazards (Lighting, Falling between levels, Fire and Crowd and Space) at the property.
5. On 3 May 2018 Mr Acutt advised the Applicant of the results of his inspection and requested a response within 10 days. No response was received. From 14 May 2018 Mr Acutt sent various reminders to the Applicant and Mr Wigginton and dealt with various enquiries from them. By the end of August 2018 Mr Acutt concluded that there did not appear to be any prospect of the landlord gain possession of the property and there had been no response from the landlord to advise on how he would deal with the hazards identified in the property. Mr Acutt decided that the only option open to him was to take enforcement action in the form of an improvement notice which was served on the Applicant and his agent on 24 August 2018.
6. The Applicant lets out the property on an assured shorthold tenancy to a Mr Lee White (the tenant) who lives at the property with his 19 year old son. Mr Acutt produced a copy of the tenancy agreement given to him by the tenant which commenced on 1 April 2018 and terminated on 1 October 2018. Mr Acutt advised that the Applicant had taken possession proceedings against the tenant but those proceedings had been thrown out by the Court because of the invalidity of the section 21 Notice. The Tribunal understands that a section 8 Notice has now been issued and a court hearing is scheduled for 8 January 2019. The rent for the flat is stated to be £525 per calendar month.
7. The Applicant is represented by Mr Rob Wigginton who appears to be the landlord's agent. The Tribunal notes that Mr Wigginton has not provided written authorisation to act on the landlord's behalf. A copy of the HM Land Register for 45 Palace Avenue Paignton under Title Number DN79805 shows a Mr Edward George Swayne as the Registered Proprietor.
8. The Applicant's grounds for appeal as stated by Mr Wigginton in the application:

“There is compelling evidence which is supported by the courts which details the tenant deliberately preventing the maintenance being carried out to gain an improvement notice to stay and prevent eviction. The Council were fully aware of this and yet proceeded not to assist and issue an improvement notice seven days before the hearing. In addition Mr Acutt, the housing specialist for Torbay Council threatened the tenant staying in the property until the High Court bailiff had been in attendance. If the tenant does not stay, the Council will refuse

him assistance re housing. District Judge Priddis suggests the Council have acted inappropriately in this case and an appeal must be made”.

9. The Tribunal issued directions on 2 November 2018 to progress the application. The Tribunal directed the Appeal to be dealt with on the papers unless an objection was made. The Tribunal received no objections from the parties.
10. The Tribunal required the Council to provide the Applicant with copies of the calculations used to calculate the Category 1 and 2 hazards by 12 November 2018. The Applicant was directed to provide the Council with a statement setting out the grounds on which it relied. On 30 November 2018 Mr Acutt contacted Mr Wigginton informing him that the Council had not received the Applicant’s statement in accordance with the directions. On 4 December 2018 the Applicant sent a variety of documents by email to the Council which was followed by a hard copy on 6 December 2018. According to Mr Acutt the documents did not include a statement setting out the Applicant’s grounds for appealing the improvement notice. Instead they were a selection of pages submitted with the original application plus copies of witness statements from other tenants submitted to the Court in connection with the possession proceedings.
11. Mr Acutt contacted the Tribunal because he was not sure what to do following the Applicant’s failure to provide a full statement of case. The Tribunal directed the Council to send to the Applicant a statement of reasons for opposing the Application and any signed witness statements of fact. The Council supplied copies of the hearing bundle to the Tribunal and the Applicant by the required date.

The Legislative Background

12. Part 1 of the Housing 2004 Act introduces a new system of assessing the condition of residential premises, and the way in which this is to be used in enforcing housing standards. It replaces the housing fitness standard as set out in section 604 of the Housing Act 1985 with a new Housing Health and Safety Rating System (HHSRS) which evaluates the potential risk to health and safety from any deficiencies identified in dwellings using objective criteria.
13. Local Authorities apply HHSRS to assess the condition of residential property in their areas. HHSRS enables the identification of specified hazards by calculating their seriousness as a numerical score by a prescribed method. Hazards that score 1000 or above are classed as Category 1 hazards, whilst hazards with a score below 1000 are Category 2 hazards.
14. Section 2(1) of the 2004 Act defines hazard as:

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

15. Section 2(1) defines a Category 1 hazard as:

“category 1 hazard’ means a hazard of a prescribed description which falls within a prescribed band as a result of achieving, under a prescribed method for calculating the seriousness of hazard of that description, a numerical score of or above a prescribed amount”.
16. Section 2(3) provides:

“Regulations under this section may, in particular, prescribe a method for calculating the seriousness of hazards which takes into account both the likelihood of the harm occurring and the severity of the harm if it were to occur”.
17. The regulations referred to in section 2(3) are the Housing Health and Safety Rating System (England) Regulations 2005 which set out the prescribed method for calculating the seriousness of the hazard and give the definition of harm. Regulation 7 prescribes bands of hazards from A to J on the basis of a range of numerical scores. Thus a Band A hazard is one with a numerical score of 5000 or more; and a Band B hazard is one with a numerical score of 2000 to 4999; and a Band C hazard is one with a numerical score of 1000 to 1999. Regulation 8 provides that a hazard falling within band A, B or C is a Category 1 hazard and that a hazard falling within any other band is a Category 2 hazard.
18. The numerical score for a hazard is reached in a number of steps prescribed by regulation 6. First the Authority is required to assess the likelihood, during the period of 12 months beginning with the date of assessment, of a relevant occupier suffering any harm as the result of that hazard. The assessment identifies one of a range of 16 ratios of likelihood. Who is a “relevant occupier” is defined in regulation 6(7) by reference to particular matters contained in Schedule 1. For example the relevant occupier for the excess cold hazard is an occupier aged 65 years or over.
19. The second step requires the Authority to assess which of the four classes of harm a relevant occupier is most likely to suffer. Thirdly the Authority must assess the possibility of each of the three other classes of harm occurring as a result of that hazard, as falling within a range of percentages of possibility. For each range there is also set out a representative scale point of the percentage range (RSPPR). Step four requires the Authority to bring the total of RSPPRs for the four classes up to 100%. Step five is the production of a numerical score for the seriousness of the hazard for each of the four classes of harm. For each of these, the likelihood is multiplied by the RSPPR and then by a further factor, which weights the seriousness of the classes of harm. This factor is 10000

for Class I, 1000 for Class II, 300 for Class III and 10 for Class IV. The final step is to add the four individual numerical scores to produce the numerical score that can be related to the prescribed bands.

20. Under section 5 of the 2004 Act if a Local Authority considers that a Category 1 hazard exists on any residential premises, it must take appropriate enforcement action. Section 5(2) sets out seven types of enforcement action which are appropriate for a Category 1 hazard. If two or more courses of action are available the Local Authority must take the course which it considers to be the most appropriate. Prohibition order, improvement notice and hazard awareness notice are included in the types of enforcement actions that a Local Authority may take following the identification of a category 1 hazard.
21. Section 9 of the 2004 Act requires the Authority to have regard to the HHSRS Operating Guide and the HHSRS Enforcement Guidance¹.
22. Sections 11-19 of the 2004 Act specify the requirements of an improvement notice for Categories 1 and 2 hazards. Section 11(2) defines an improvement notice as a notice requiring the person on whom it is served to take such remedial action in respect of a hazard as specified in the notice. Section 11(8) defines remedial action as action (whether in the form of carrying out works or otherwise) which in the opinion of the Local Authority will remove or reduce the hazard. Section 11(5) states that the remedial action to be taken by the Notice must as a minimum be such as to ensure that the hazard ceases to be a Category 1 hazard but may extend beyond such action. Section 12 deals with an improvement notice for a Category 2 hazard, and contains similar provisions to that in section 11.
23. An appeal may be made to the Tribunal against an improvement notice under paragraph 10, part 3, schedule 1 of the 2004 Act. There are no statutory limits on the grounds of Appeal, although the Act contains provision for specific grounds, which under paragraph 11 includes the ground that one or other persons as an owner or owners of the specified premises ought to take the action concerned.
24. The Appeal is by way of a re-hearing and may be determined by the Tribunal having regard to matters of which the Authority is unaware. The Tribunal may confirm, quash or vary the improvement notice. The function of the Tribunal on an Appeal against an improvement notice is not restricted to a review of the Authority's decision. The Tribunal's jurisdiction involves a

¹ Housing Health and Safety Rating System: Operating Guidance & Enforcement Guidance ODPM February 2006;

rehearing of the matter and making up its own mind about what it would do.

Consideration

25. Although there was no request from the parties for an oral hearing, the Tribunal as a matter of course after receipt of the hearing bundle carries out a review on whether the case is still suitable for a paper determination. The Tribunal concluded that there was no dispute on the findings of Mr Acutt's inspection and the scoring of those hazards under the HHSRS. The Tribunal proceeded to determine the application on the papers

26. The Tribunal intends to deal with the dispute in two stages. The Tribunal starts with the examination of the assessment process undertaken by Mr Acutt, followed by a consideration of the enforcement actions which would depend upon the Tribunal's findings on the assessment

27. In evaluating the evidence the Tribunal acknowledges the limitations of the HHSRS scheme which were articulated by the then President of the Upper Tribunal (Lands) in *Bolton Metropolitan Council v Amratlal Patel* [2010] UKUT 334 (LC):

“Before I consider Mr Clark's submissions I should say something about the method of hazard assessment provided for by the Act and Regulations and its application by the technical officer in this case. It seems to me important that RPTs when determining cases under Part 1 of the Act should bear in mind the nature of such assessments as these and their limitations. The complicated set of provisions is designed to produce a numerical score for each hazard that is under consideration so that it can be seen to fall within a particular band and in either Category 1 or Category 2. The great danger of a numerical score produced in this way it that it creates the impression of methodological accuracy, whereas the truth may be that it is the product of no more than a series of value judgments based on little understood statistics of questionable validity”.

28. The Council relied on the witness statement of Mr Acutt dated 20 December 2018 who gave the following evidence of hazards found at the property:

“Fall on stairs: The staircase from the ground floor to the lower ground floor has no guarding or handrail in place. The staircase was timber construction and the floor to the living room adjacent to the staircase was a laminate surface. There was winder at the top of and the bottom of the staircase. Mr Acutt considered the lack of handrail increased, the presence of a winder at the top and bottom of the stairs and the poor illumination increased the likelihood of a fall on the stairs, whilst the lack of guarding increased the seriousness of harm. Mr Acutt having regard to these facts calculated a hazard score of 2,346, a Category 1 hazard.

Crowding and Space (Actual): Two bedroom flat occupied by a 47 year old man and his 19 year old son. The flat consisted of a kitchen, shower room, living room, a double bedroom and a second bedroom of approximately four square metres. Mr Acutt considered there was a mismatch between the dwelling and household. Mr Acutt stated that the bedroom used by the son was too small to be considered a sleeping space which in his view increased the likelihood of harm. Mr Acutt having regard to these facts calculated a hazard score of 1,994, a Category 1 hazard.

Excess cold: The boiler was not operating as it should resulting in the occupant not being able to use the heating system. Mr Acutt decided that a dysfunctional boiler increased the likelihood of harm which produced a hazard score of 1,819 for excess cold, a Category 1 hazard.

Damp and Mould: There was evidence of dampness to the internal wall of the main bedroom and to the lower part of the party wall in the second room. There was no window to the second room. The living room has no windows and no means of natural ventilation. The kitchen windows were fixed pane with no mechanical air ventilation. Mr Acutt decided that the facts of dampness affecting the property and the lack of natural and artificial ventilation in the property increased the likelihood of harm and the spread of it. Mr Acutt calculated a hazard score of 1,371, a Category 1 hazard.

Lighting: The flat was over the ground floor and basement in a converted mid terrace house. The living areas were in the basement. Only the main bedroom had a window, a single one with a view of the stairs which lead up to the rear yard. The window in the kitchen was high level and provided no outlook. Mr Acutt considered the lack of natural lighting and outlook increased the likelihood of harm, Mr Acutt calculated a hazard score of 982, a Category 2 hazard.

Falling between stairs: The timber guarding to the top of the stairs in the kitchen was loose due to not being fixed to the wall. The stairs below were timber with no covering. There was no guarding to the open side of the staircase. Mr Acutt decided that the insecure guarding increased the likelihood of harm, whilst a fall on the hard timber surface increased the spread of harm. Mr Acutt calculated a hazard score of 297, a Category 2 hazard.

Fire: There was a mains wired fire alarm system with a control panel in the ground floor hallway. There was a heat detector to the kitchen and a smoke detector to the living room and hallway. The front door had no smoke seal and no self closer. Mr Acutt believed that a building with four flats each with a kitchen would carry an increased likelihood of fire. Mr Acutt considered that the spread of harm would increase by virtue of the person in the smaller room needing to rely on the door to the main bedroom being operable to access the window. Mr Acutt calculated a hazard score of 115, a Category 2 hazard.

Crowding and Space (notional): Mr Acutt calculated a hazard score of 35, a Category 2 hazard”.

29. The Applicant's evidence comprised letters from a Mr Russel Hodge, Gas Safe Engineer, and a Mr Graham Napier, a General Builder dated 4 and 24 July 2018 respectively who stated that they had been denied access to the Flat by the tenant to inspect the boiler and carry out certain works. In addition the Applicant produced witness statements from other tenants in the building, Miss Heidi Cox, Mr Craig Williams, Mr Anthony Lang and Miss Natalie Shaw who all complained about what they considered to be anti-social behaviour by the tenant and his son.
30. The hearing bundle prepared by the Council contained copies of documents supplied by Mr Wigginton in relation to the property which included the Electrical Inspection Report, Energy Performance Certificate, Fire Alarm Certificate and a Gas Safety Certificate. The latter was dated 19 August 2017 and signed by R Hodge.
31. The hearing bundle also included a letter from a Mr Simon Jones of the Health and Safety Executive dated 23 August 2018 addressed to Mr Wigginton imposing a fee for contravening Health and Safety Law. The contravention committed by Mr Wigginton was arranging a person (a Mr Russell Hodge) who was not a member of Gas Safety Register to undertake work on a gas fitting at a tenanted property.
32. The Tribunal observes that the Applicant has adduced no evidence which challenged Mr Acutt's statement on the deficiencies he found at the Flat, and his calculations of the hazard scores.
33. The Tribunal accepts Mr Acutt's evidence on the deficiencies. The Tribunal has examined Mr Acutt's reasoning for arriving at the scores for the various hazards identified at the property. The Tribunal is satisfied that Mr Acutt's scores are sound and justified on the evidence given in his witness statement.
34. The Tribunal, therefore, finds that the property suffers from four Category 1 hazards and four Category 2 hazards with the lighting hazard being at the top end of Category 2.
35. The legislation is structured in such a manner that if a Category 1 hazard is present on a property appropriate enforcement action must be taken to reduce the hazard. Where there are category two hazards there is discretion to take action to reduce the hazard.
36. The Tribunal has found that this property has four Category 1 hazard and four Category 2 hazards. In view of the large number of hazards which affect the property, the Tribunal is satisfied that it is appropriate to take enforcement action.
37. The question, therefore, is whether the improvement notice was the most appropriate enforcement action to take in respect of the hazards at the property.

38. Section 5(2) of the 2004 Act identifies seven types of enforcement action. In the Tribunal's view, five of the seven types of action were not appropriate to the circumstances of this Appeal. There was no imminent danger to the health and safety of the occupant which ruled out the options of emergency remedial action and an emergency prohibition order. The current condition of the property and the demand for available units of accommodation within Torbay did not justify the radical options of demolition or clearance.
39. The choice, therefore, is between a hazard awareness notice, an improvement notice with the variant of suspending the improvement notice, and a prohibition order.
40. The hazard awareness notice advises the owner of the property of the existence of a hazard and of the deficiency causing it. The notice requires no action to remedy the deficiency on the part of the owner, and there is no formal procedure to ensure that the person has followed the advice. The Enforcement Guidance suggests that a hazard awareness notice is a reasonable response to a less serious hazard, where the Authority wishes to draw attention to the desirability of remedial action. A hazard awareness notice may also be appropriate where an owner or landlord has agreed to take remedial action.
41. The Tribunal does not consider in this case that a hazard awareness notice is appropriate in respect of the hazards covered by the improvement notice. First the scale and the number of hazards militate against the issue of a hazard awareness notice. Second, the Tribunal considers that an order with sanctions is necessary. The Applicant maintained that it was the tenant's fault that the works have not been carried out. The Tribunal, however, is satisfied that Mr Acutt gave the Applicant several opportunities to put forward proposals to remedy the deficiencies which the Applicant and his agent failed to take up before the improvement notice was issued. The Tribunal agrees with Mr Acutt's assessment of the situation that there was no reasonable prospect of the landlord gaining possession of the Flat as in August 2018 and the Applicant had given no response on how he intended to resolve the hazards at the property despite being first notified of them by letter dated 3 May 2018. The Tribunal also takes into account that the Applicant was proposing to use a contractor to examine the boiler who was not a gas safe registered plumber.
42. The Tribunal is satisfied that an improvement notice is the only realistic option to remedy the deficiencies in the property except the hazard of overcrowding and space. The Applicant suggested that the improvement notice should be suspended because of the tenant's failure to allow access to the property. The Tribunal, however, finds that the Applicant and his agent have not co-operated with the Council and had not as in August 2018 taken the

appropriate steps to gain access to the property. In those circumstances the Tribunal decides that the option of suspending the improvement notice was not appropriate.

43. The Tribunal is not convinced that an improvement notice is the most appropriate action to deal with the Category 1 hazard of crowding and space (actual). The Tribunal notes that the action required by Mr Acutt to satisfy the improvement notice is to ensure the flat is not occupied by more persons than what is permitted. Mr Acutt reported that the minimum room sizes for one person were 6.5 square metres and 10.21 square metres for two persons. The Tribunal observes that the landlord cannot meet this requirement whilst the present tenant and his son are in occupation of the property. The Tribunal is satisfied on the evidence that the present facilities at the Flat were only sufficient to accommodate one person subject to compliance with the requirements of the improvement notice in respect of the other hazards.
44. The Tribunal notes that “The Enforcement Guidance” indicates that a prohibition order may be appropriate to specify the maximum number of persons and to control the number of persons who occupy a dwelling so as to ensure that the facilities offered by the dwelling can meet the requirements of the persons living there. Further “The Enforcement Guidance” suggests that a suspended order could deal with future occupation of a property.
45. Thus the Tribunal decides that a prohibition order is the most appropriate course of action for the overcrowding and space hazard. The Tribunal also holds that the Prohibition Order should be suspended to protect the occupation of the current tenants. The order will come into effect when the present tenants leave the property and will be subject to the works being satisfactorily completed under the improvement notice.
46. The Tribunal decides that a prohibition order shall apply to the Flat unless it is occupied by one person and the requirements of the improvement notice have been met to the satisfaction of the Council. The order shall be suspended whilst the present tenant and his son remain in occupation of the property.
47. The Tribunal has considered the remedial works proposed by the Council in the improvement notice in respect of the other six hazards. The Tribunal is satisfied that works proposed were reasonable and practicable. The Tribunal, however, gives new dates for compliance with the requirements because of the time taken to hear the Application.

Decision

48. The Tribunal confirms the issue of the improvement notice dated 24 August 2018 for the hazards of falling on stairs (**18 April 2019**), Excess Cold (**18 March 2019**), Damp and Mould (**18 May 2019**), Lighting (**18 May 2019**), Falling between Levels (**18 April 2019**) and Fire (**18 April 2019**) subject to new dates of compliance which are set out in bold and in brackets after the relevant hazard.
49. The Tribunal varies the improvement notice for the hazard of overcrowding and space by substituting a Prohibition Order which applies unless the Flat is occupied by one person and the requirements of the improvement notice as amended are met to the satisfaction of the Council. The Prohibition Order will be suspended whilst the current tenant and his son occupies the property.
50. The Applicant has not been successful with its Appeal against the underlying order and therefore is liable to pay the charge for enforcement action in the sum of £300.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.