FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/OOAP/HPO/2017/0011**
Property	**:**	**Basement Flat, 38 Fentiman Road, London SW8 1LF**
Applicant	**:**	**Mr Malcolm Grealy**
Representative	**:**	**Miss Rachel Coyle, Counsel instructed by Samuel Ross Solicitors**
Respondent	**:**	**The London Borough of Lambeth (1)** **Amazon Properties Limited represented (2)**
Representative	**:**	**Mr William Dean of Counsel with Mr J Melnick, Mr M Swain and Miss C Thomas of the Council (1)** **Mr A Maddon of Counsel instructed by Anthony Gold Solicitors accompanied by Mr P Verstage, director of the second Respondent company and Miss Tilly Boyce second respondent's property consultant (2)**
Type of Application	**:**	**An appeal against an emergency prohibition order (sections 43 and 45 of the Housing Act 2004)**
Tribunal Members	**:**	**Tribunal Judge Dutton** **Ms S Coughlin MCIEH**
Date and venue of Hearing	**:**	**10 Alfred Place, London WC1E 7LR on23rd November 2017**
Date of Decision	**:**	**5th February 2018**

DECISION

DECISION

The Tribunal allows the appeal of Mr Grealy for the reasons set out below.

BACKGROUND

1. This was an appeal by Mr Malcolm Grealy the Applicant against an emergency prohibition order (EPO) dated 3rd August 2017 in respect of the property known as Flat 1 (Lower Ground), 38 Fentiman Road, London SW8 1LF (the Premises). The application for appeal, which is dated 25th August 2017, suggests there are alternative courses of action which could be taken, in particular the service of an Improvement Notice under sections 11 and 12 of the Housing Act 2004 (the Act)

2. A background of the matter may be of assistance. It appears that the Applicant Mr Grealy has been in occupation since September of 1972 and is a Rent Act protected tenant. He presently pays £160 every four weeks. The property itself is a one bedroom lower ground floor/basement flat which shares a toilet on the upper ground floor. Within the flat itself is a kitchen as well as a bedroom and living room. A shower cubicle is located in the kitchen. It appears that the second Respondent, Amazon Properties Limited, has owned the property since around 2010. Details of the chronology concerning various exchanges of correspondence and surveys are set out in the skeleton argument prepared by Miss Coyle on behalf of Mr Grealy, in particular paragraphs 6 to 21. It does not appear that any of this chronology is in dispute.

3. Prior to the hearing, we were provided with a bundle of papers which included statements by Mr Grealy dated 7th November 2017, a statement of Miss Carlene Thomas dated 3rd November 2017 and a statement by Mr Martin Swain dated 27th October 2017. The latter two people are employees of the Council and directly involved in this matter. Within the bundle there was also provided a copy of the first Respondent's and second Respondent's submissions. The second Respondent, Amazon Properties Limited had sought and been granted a right to be joined in the proceedings and supports the first Respondent in the issuing of the EPO although does resile to an extent from the need for it to be an emergency prohibition order rather than simply a Prohibition Order.

4. The bundle contained copies of correspondence with the Tribunal and the directions. There were inspection reports prepared by Michele Glazebrook on behalf of the second Respondent dated 18th August 2016 which followed a report by Thames Valley Surveying dated 9th June 2015. The Thames Valley report had been updated with a further report dated 4th October 2017, which included a review of the category 1 hazards and schedules indicating the works required and time scales. In addition to these papers there were a number of exhibits to the witness statements before us as well as correspondence passing between the parties. We had the opportunity of reading these papers in advance of the hearing. We also received a skeleton argument referred to above on behalf of the Applicant with various annexes.

5. As a result of issues arising during the hearing relating to the service of the initial notice under section 239 of the Act we also received further correspondence from

the Council, from Anthony Gold and from Miss Coyle. We will deal with the contents of those submissions in due course.

INSPECTION

6. Prior to the hearing we inspected the Premises in the company of Mr Grealy, Miss Coyle and a representative of instructing solicitors. Mr Melnick, solicitors for the Council was in attendance as was Mr Dean their Counsel. We also met Mr Swain, Mr Verstage and Miss Boyce.

7. The Premisesare a lower ground floor/basement flat, which has its own entrance at lower ground floor level which unfortunately we were not able to access. Entrance was therefore via the steps to the front of the property to the upper ground floor where we had the opportunity of inspecting the separate WC. This showed damp in the ceiling and there was no wash hand basin.

8. Entrance to the flat itself was via a fairly steep but it appeared relatively secure staircase, although there was no handrail on either side nor a balustrade on the outside edge. On descending to the floor level, we noted that most of it was covered with newspapers and the flat was clearly in a very poor condition. The lighting in the main living room was limited and heating was provided by an electric fire. The basement front door which was not capable of being used because of structural issues opened into a small lobby in which the very dated electrical intake and fuses were located. . The floor by the stairs was springing but the floor in the living room itself was not too decrepit. The ceiling height was relatively good. Leaving the living room and entering the hallway to the left was the bedroom for the flat. The floor in this room was really very poor and was in need, it would seem to us, of immediate attention. The hallway, which suffered from loose flooring, led to the kitchen, up steps, which had a solid floor. In the kitchen there were some dated white goods which belonged to the tenant and a sink with quite severe staining, although hot water was present. In the far corner of the room was a shower cubicle which was in poor condition and at the time of our inspection appeared to be used for storage. There was limited cupboard space, a gas cooker and a fridge and it appeared only one socket with multiple plugs extruding from same. To the rear, accessed by a door from the kitchen was a large overgrown rear garden which was exclusively for the use of Mr Grealy. We noted from an external inspection that the toilet area on the ground floor appeared to have a plastic corrugated roof. Mention was made of a chimney in the kitchen extension which appeared to have been removed although the stack was still in situ above the roof.

9. There is no doubt that the Premises are virtually uninhabitable. No repairs appear to have been carried out for many years, nor does there appear to have been any improvement works carried out either by the tenant or the landlord since the tenant took occupation in the 1970s.

HEARING

10. At the commencement of the hearing, Miss Coyle asked for permission to rely on the witness statement from Mr Grealy which had only just been produced. There was no objection to this from the first or second Respondents.

11. Miss Coyle told us that the main principle of Mr Grealy's case was that there was no imminent risk and that whilst it was accepted that there were Category 1 hazards, he was able to remain in situ whilst these works were undertaken. She raised the spectre of the breach of section 239 concerning the initial inspection, it being suggested that the notice was defective in a number of regards which we will refer to in due course under a separate heading. In her view, the real issue was the risk to Mr Grealy of remaining and indeed whether he could do so if works were undertaken. She said that currently there was no offer on the table about rehousing and that the Council had not offered alternative accommodation. She drew our attention to the emergency prohibition order which is dated 3rd August and signed by Miss Thomas the Environmental Health Team Manager. This lists a number of Category 1 hazards which are as follows:

- Falling on stairs
- Personal hygiene, sanitation and drainage
- Excess cold
- Structural collapse and falling elements
- Falling on level surfaces
- Food safety
- Electrical hazards
- Fire

Under schedule 2 the remedial action says as follows:-

"*The hazards identified in schedule 1 of this notice on such that significant remedial works must be taken to ensure the property can be considered suitable for living and sleeping purposes whether for rental or owner occupation.*

Provide a fire risk assessment to comply with the Regulatory Reform (Fire Safety) Order 2005. The assessment should contain proposals for undertaking the remedial works.

Structural movement has been noted to the brick elevation of the rear kitchen addition. A structural surveyor's engineer's report identifying the source of this movement and the condition of the adjacent unsupported kitchen chimney breast should be submitted to the Property Standards and Enforcement Service within 56 days of the date of this notice. The report should contain proposals for undertaking remedial works.

Until the hazards identified in schedule 1 have been remedied, the premises identified as Flat 1 (Lower Ground), 38 Fentiman Road, London SW8 1LF must not be used for living or sleeping purposes.

When the hazards identified in schedule 1 have been remedied in accordance with the above mentioned report, the Council will revoke the order."

12. Miss Coyle pointed out that no structural report had been obtained notwithstanding the fact that the EPO was made in August and indeed nothing had been undertaken concerning the works.

13. Mr Maddon on behalf of the second Respondents replied to this and addressed firstly the negotiations which had apparently taken place concerning rehousing of Mr Grealy. He told us that these had broken down but that there had been more detailed negotiations before the local authority's involvement. Despite substantial attempts being made, there was no progress and he was not in a position to reveal the terms of those attempts as they were privileged and he had no instructions to breach that privilege. He told us, however, that his clients were satisfied that they had acted appropriately. They did accept, however, that if Mr Grealy vacated he would lose his security of tenure under the Rent Act but that if he did not vacate they would serve notice to quit and it would then be for the Council to rehouse.

14. He said that the client was not intending to proceed further with any works without permission and that Mr Grealy's position was essentially emotional which he considered was to be largely irrelevant in deciding this case. His submission was that it was the first Respondent, the Council, that had the responsibility to deal with the problems associated with the premises and the second Respondent was largely in support. No works had been done because of the Appeal. The core issue was whether or not these works should be dealt with under a prohibition order or an improvement notice. It is the second Respondent's case that they did not think the works could be carried out without Mr Grealy vacating and that the Premises were unsafe. He said that although the prohibition order was in effect a possession order by the back door the issue was whether or not the works could be carried with Mr Grealy in situ and that as presently found the Premises were not fit to be lived in. He relied on the surveyor's report to show the condition and our inspection.

15. He was asked by us whether it was agreed that we had the discretion to substitute any order we wished in place of an emergency prohibition order and it was agreed by all three Counsel that we did have that discretion.

16. Mr Dean making a final opening said that he agreed with most of that which had been said by Mr Maddon. He raised the question of the notice to inspect under section 239 of the Act which had not been within the grounds of appeal and had appeared in the skeleton argument for the first time. He indicated he was not in a position to deal with this and we agreed that time would be given for submissions to be made after the conclusion of the hearing.

17. After the luncheon adjournment we heard from Mr Grealy. His statement was taken as read and there were no supplementary questions largely it seemed because the statement gave more of a history as to his occupancy than any particular comment on the condition of the Property or whether he was in a position to remain living there if works were to be undertaken. His statement did nonetheless seek to argue that an improvement or hazard awareness notice could have been issued by the local authority. In a letter from Anthony Gold to the Council dated 10th March 2017, the conclusion indicates that the second Respondents consider a prohibition order is the most appropriate way forward enabling the tenant to be rehoused by the local authority and for the works then to be carried out to make it safe for future occupiers and inhabitants of both the flat and the rest of the building.

18. At this point Mr Dean sought assurance that Mr Grealy was not in his evidence seeking to challenge the provisions of section 239 of the Act. The bundles contained an unsigned and incomplete copy of the s.239 notice. It was agreed that the first Respondents would file a signed copy of the notice of inspection with proof of service and the authority for such notice to be issued. This would be dealt with within seven days and subject to any submissions by other parties.

19. We then heard from Mr Swainwho had provided a witness statement. We were referred to a number of pages within the bundle. The first was the notice exercising power under section 239 which was to be found at page 133 of the bundle. This was unsigned and formed part of the further evidence to be produced in due course. We were then referred to the inspection report undertaken by Mr Swain and Miss Thomas which is dated 15th June 2017 and a further letter from Mr Swain to Mr Grealy of 21st July 2017 informing Mr Grealy that having conducted a risk assessment using the HHSRS provisions the Council was satisfied that there were hazards involving "imminent risk of serious harm to the health and safety of any occupier." It was decided then that an emergency prohibition order would be required and that as we know was dated 3rd August 2017.

20. He was asked questions as to the inspection that he undertook. These included questions relating to the inspection of the floor where it was confirmed that carpets and newspapers were lifted in some cases. Certainly springing flooring was noted although not throughout the Premises and certainly not in the kitchen. It was a concern said Mr Swain that familiarity could lead to complacency which could in turn lead to a fall. He thought that the extent of the works was such that it would not be possible for Mr Grealy to live in the Premises whilst the works were being undertaken. He accepted there was access through the garden to the kitchen but he wasn't sure how that was achieved. He did accept that some people can live in extreme conditions but he did not consider the works could be undertaken with Mr Grealy still in situ. It was pointed out to him and accepted by him that whilst he had provided scores for 7 of the 8 hazards the scoring procedure was not detailed and no score had been provided for the fire hazard. There were calculations conducted by Miss Glazebrook when she inspected in 2016 and these were annexed to her report. These also did not contain any assessment of fire hazard.

21. Mr Swain accepted that insofar as cold was concerned, there was some mould in the kitchen but that there was damp, which can of itself create other problems. The EPO did not in fact include damp as a Category 1 hazard. This was because it was difficult to identify the extent of any dampness and it was possible that if the heating was improved it could eliminate the mould and dampness. He was asked questions by Miss Coyle concerning the heating arrangements which he felt were inadequate and he considered that he would have expected perhaps gas central heating, which would in turn have removed any damp which could have also been dealt with by way of plastering and the inclusion of a damp proof. He did accept that some people may be happy to remain in situ whilst the works were being undertaken but he did not consider that it would be appropriate, although he accepted that certain works could be carried out with Mr Grealy still living in the Premises. On the question of the kitchen, he thought that the sink was rusty and

that was a hazard, the more so as this was the only place for Mr Grealy to wash himself. The shower cubicle in the kitchen could create a slip hazard and also interfere with cooking and if it was to stay in the kitchen some changes would be required. On the question of the electrics, this he said could be resolved by rewiring the flat which could be done whilst Mr Grealy was living there but that some supplementary system would need to be in place to provide electrics whilst this work was being undertaken. There would, he said, need to be good co-ordination between contractors but he was sure that some contractors would be prepared to undertake the works with Mr Grealy in situ but for a price. Asked whether he had considered other options, he said an improvement notice had been considered as had indeed all enforcement options but the seriousness of the situation in his view did not warrant this being dealt with by way of an improvement notice. This he said he dealt with in some detail at paragraph 18 of his statement. He was asked whether Emergency Remedial Action (ERA) had been considered but that and the making of an improvement notice were not considered appropriate. He considered that such action would place an unreasonable financial burden on the first respondent.

22. He was taken to his statement at paragraph 18 referred to above. He considered that there was an imminent risk to the occupier. Asked why there appeared to be no clear indication of the extent of the works, he referred to the report undertaken by Thames Valley Surveying on 4th October 2017 which appeared in the bundle carried out by Mr Leyton which purports to be an independent expert's report, although relied an inspection carried in 2015. We noted what was said which appeared to support the Council's position on Mr Grealy vacating. At page 150 onwards, there was a review of the Category 1 hazards. Again we noted all that was said.

23. Mr Maddon asked questions concerning the works and whether or not works could be undertaken with Mr Grealy in occupation. He went through in some detail the extent of the work to be undertaken, although none of this appeared in the second schedule to the EPO.

24. On questions from the Tribunal, he answered that he considered the hazards present were sufficiently serious to mean that an improvement notice could not be proceeded with. Asked about emergency remedial action he indicated that the issue with this may be costings. Whilst he accepted that some steps could have been undertaken with emergency remedial action, this was possibly the worst Premises that he had seen in Lambeth.

25. He was of the view that such was the seriousness and the extent of the works that an emergency prohibition order was the only way forward. He did accept that Lambeth had provided temporary accommodation but this did not appear to have been pursued.

26. He was asked about the chronology. The original visit had taken place on 15th June 2017 which at that time gave him cause to think that this was a serious situation. However, he only worked part time and was unable to say when an emergency prohibition order was finally decided upon but accepted it was not issued until 3rd August several weeks after the initial inspection. He did point out that on some weeks he only worked two days. He conceded that this was the first

EPO he had served and otherwise he had normally dealt with matters by way of an improvement notice. He was taken through some of the issues and conceded that the chimney works could have been dealt with by way of an emergency remedial action, as could have the electrics if not by way of an improvement notice. As to the fire hazard, it was put to him whether this could have been dealt with by way of a hazard awareness notice but he was not able to assist although considered that on its own the fire safety issues could be dealt with by way of an improvement notice.

27. After Mr Swain finished giving evidence we heard from Miss Carlene Thomas. She confirmed that the inspection report at page 141a of the bundle had been prepared by Mr Swain and that she had merely been there to accompany him and was not the author.

28. Under cross examination from Miss Coyle, she confirmed that she had had sight of the reports from Miss Glazebrook and from Mr Leyton but those had not affected their views. She confirmed that at the time of the hearing no structural report had been provided as set out in schedule 2 to the EPO and that the report by Mr Leyton was not a structural one. She denied that the letter from Anthony Gold of 10th March 2017 had impacted on her decision. She did not accept that she had attended with a pre-conception but did attend thinking that some form of notice would be required. Her position was that she needed to be satisfied as to the steps that had to be taken and was not therefore unduly influenced by the Gold letter. She accepted that she had not examined all areas of flooring but that some parts were unsafe. She thought it was possible that somebody could fall through the floor but could not give any probability. Some areas of the Premises were unsafe but she accepted that not the entire Premises and accepted that access could be obtained through the front door under the stairs, subject to works being undertaken in the living room first or by the door in the kitchen.

29. She told us in answer to questions from Miss Coyle that consideration had been given as to whether the works could be carried out with Mr Grealy remaining in the flat but had not considered in particular the access points. She was referred to page 155 of the bundle which dealt with the Category 1 hazard of falling on level floors where it was indicated that new flooring could be installed within two to three weeks, which was a timescale that she agreed. However she pointed out that the October 2017 report indicated that those works would not be possible whilst Mr Grealy was in occupation a fact that Mr Swain had agreed with earlier in his evidence. Miss Thomas's view was that after an assessment of the hazards it was considered that an EPO was the most appropriate way forward although she accepted that an improvement notice might be acceptable for some items. Asked what hazards she considered had to be present for an EPO to be made, she considered that the falling on stairs constituted an imminent risk as was the excess cold, structural collapse and the electrics. Her view was that the hazards and deficiencies together warranted an EPO and that no real consideration had been given to separating the works and the hazards.

30. She confirmed that they had considered an improvement notice and other enforcement methods, but had discounted them. The decision to impose an EPO had rested with Mr Swain as he was the case officer who had carried out the scoring and had presented the position to Miss Thomas for her to sign off. She

was asked whether in her view it was possible for co-ordinated tradesmen to carry out works whilst Mr Grealy remained in occupation. She thought that that could not be the case even with plastic sheeting being erected. Asked whether the Council's financial situation impacted on the ability to carry out matters, she said no that the notice was based on the hazards and did not think it was possible, practical or safe for him to remain there in situ.

31. Asked by the Tribunal as to the reasons for her visit she replied that this was because it would be necessary for her attendance if a prohibition order or an EPO or HMO licences were required. She confirmed that at the time of her inspection she had in mind that some form of order would be required. Asked about the Council's rehousing duties, she said that what normally would happen is that they would contact the accommodation officer with details which is what had been done on this case and they had written to the tenant to advise. It was accepted by the Council that there was a rehousing obligation.

SUBMISSIONS

32. Following the evidence we then had submissions from Counsel for all the parties. Mr Dean went first. He told us that the issues were, is it necessary for a prohibition order and whether it was possible to carry out the work with Mr Grealy in residence? Secondly, whether it should be an EPO or just a prohibition order subject to the risk of harm. As there was no issue with regard to the Category 1 hazards, he did not need to address us on that matter. The local authority, however, must take appropriate action and the most appropriate action in this case would either be an improvement notice or a prohibition order. He said it was accepted that in some cases some of the hazards could be dealt with on a stand-alone basis with Mr Grealy remaining. It was his submission, however, that we should take the hazards in total. It was the extent of the works that were required to cure the defects and it would not be practical for Mr Grealy to remain. The floor needed replacing and the report by Mr Leyton in 2017 went through the various issues and set out in his view the circumstances surrounding the works and the need for Mr Grealy to vacate. Reviewing section 5 of the Act the EPO was in his submission the appropriate action. Exploration could take place with regard Mr Grealy remaining but in Mr Dean's submission it was not practical and would also extend the period of works. We were referred to various extracts from the reports before us, which in his submission highlighted the magnitude of the works which would not be undertaken with Mr Grealy in occupation.

33. He then turned to the purported defects in the documentation. He accepted that in explaining why a prohibition order had been made it was necessary to show what had been considered. It is a reason, he said, to say that an improvement notice was not reasonable. Asked whether there are any legal authorities that indicate that an improvement notice could not be dealt with in conjunction with a requirement for Mr Grealy to vacate and it would seem that there were not. The prohibition order of course stops anyone staying or going into the Premises to reside there.

34. Insofar as schedule 2 to the EPO was concerned, there could be a variation to include the details provided by Mr Swain in evidence. We could accept Mr

Leyton's updated statement to vary the terms of the EPO and in effect turn that into the second schedule. It was Mr Dean's submission that the EPO is necessary in that there was an imminent risk of harm particularly concerning the state of the flooring which could result in serious injury and the fact that it had not happened was irrelevant. It had been scored as a 1:1 chance and therefore the threshold for an EPO had been made. The flooring, however, was just an example. Returning again to the tests set out at section 5, it was in his submission impossible for the works to be carried out with the tenant in occupation and that it is an EPO and not a prohibition order.

35. Mr Maddon for the second Respondent adopted the local authority's submissions. He submitted that the issue was whether the problems could be addressed by way of either an improvement notice or whether an EPO was the correct way forward. He thought that the improvement notice was not appropriate given the amount of work required and the need, in the Respondents' view for Mr Grealy to vacate. He submitted that Miss Thomas acted correctly based on the facts before us and that the scale of the works was too great to allow Mr Grealy to remain in the Premises. Those works were set out in Miss Glazebrook's report and by Mr Leyton. These experts indicated that it would be necessary for Mr Grealy to vacate and the local authority came to the same conclusion. His submission was that the view on this was subjective. The question is could anyone remain in the Premises given the extent of the works. The difficulties with the flooring, the damp, the cold, the electrics all needed to be considered. Although there was access through the rear garden, apparently this was only an alleyway with no vehicular access. In the undergoing of works Mr Grealy would be left with a lack of a bathroom and a kitchen, no water, a difficult electricity supply, impossible he said to live through those works. It should also be borne in mind that Mr Grealy is now 72. He could not see how a contractor could be responsible for Mr Grealy and it would not be appropriate to leave him in a building site for some six months. The Premises was at the end of its life. A detailed schedule of works is required as agreed by both Respondents and we should not allow the appeal just because we felt sorry for Mr Grealy.

36. Finally, we heard from Miss Coyle who indicated in her view that this was possession through the back door. We were referred to her skeleton argument. We were, she said, entitled to make our own decision. She expressed surprise that it was only now that the local authority had shown concern as it had taken nearly fifty years for the Premises to become in this condition and nothing had been done before. Mr Grealy has no mental illnesses, he has no carers and he can and wished to remain living in the Premises. She suggested that the use of dust sheets, temporary electrics, and planned works that he could live in different rooms as the works were undertaken. She submitted that the length of the works was exaggerated and that 14 weeks seemed to be appropriate. This was, she reminded us, a rehearing and we need to consider the needs and preferences of the occupier. We were referred to the enforcement guide. Her submission was that the schedule 2 to the notice was inadequate. She considered that contractors would be willing to take on the work, that it was not impractical or impossible to do so with Mr Grealy in occupation and nor was there any evidence that costs would increase if he was. Her submission was that there was no imminent hazard. The Premises was not in its totality suffering from damp or from rotting

floors. Nothing had collapsed and he had not fallen through. Most was carpeted. The works could be done on a room by room basis.

37. Her view was that the statement of reasons failed to meet the requirements of section 8(3) of the Act. Nothing had been put today which supported matters contained in the statement of reasons. The formalities had not been followed and the failings were significant enough for the EPO to be quashed. In her view an improvement notice with emergency remedial action or just an improvement notice would enable the works to be undertaken to resolve the problems with the Premises. It is her submission that it is the second Respondent who has really started the ball rolling and the length of time taken to serve the prohibition order was unexplained. Her view was that Miss Thomas and Mr Swain had attended with preconceived ideas. She was not sure that the EPO was not as a result of letters by Anthony Gold and it would be unfair and improper to uphold the EPO where in her submission the Council had been influenced by the second Respondent. She reminded us that there no HHSRS scoring sheets provided. In her view the risk was not imminent, the kitchen had not collapsed, nothing had changed since Mr Leyton's report in 2015, the flooring was only deficient in parts and the risk was low.

38. There was then a flurry of response concerning any allegations of the conduct of Mr Swain and Miss Thomas but that, as we indicated at the time, not a matter that we propose to concern ourselves with.

THE LAW

39. The provisions of section 5 of the Act require the local authority to take action if a Category 1 hazard exists and to take the appropriate enforcement action, which is set out at sub-section 2. At sub-section (3) it says that if only one course of action within sub-section (2) is available then the local authority must take that course but if by virtue of sub-section (4) more than one course of action is available then they must take the most appropriate available to them.

40. Under section 8 they must provide reasons for the decision to take enforcement action which should include at sub-section (3)why the authority decides to take the relevant action rather than any other kind. Section 20 of the Act deals with prohibition orders relating to Category 1 hazards and under chapter 3 paragraph 43 provisions relating to the emergency prohibition orders and appeals therefrom are set out. At section 44 the contents of the emergency prohibition order include at sub-section (2) a requirement that the order must specify:

(a) the nature of the hazard concerned and the residential premises on which it exists
(b) deficiency giving rise to the hazard
(c) the premises in relation to which prohibitions are imposed by the order
(d) any remedial action which the authority considered would if taken in relation to the hazard result in their revoking the order under section 25.

41. Another element to this case is the question of the notice seeking the right to enter the premises for the purposes of considering a survey or examining the Premises. This is to be found at section 239 which at sub-section (5) requires

that before entering any premises an exercise of the power conferred by sub-section (3) the authorised person or proper officer must have given at least 24 hours' notice of his intention to do so (a) to the owner of the premises if known and (b) to the occupier if any.

42. At sub-section (3) reference is made to an authorised person or proper officer. One then needs to look at section 243 of the Act which sets out officers within the local authority who are empowered to give such authority. Section 243 requires that a person exercising the powers set out in sub-section (1) which includes powers of entry under section 239 must be authorised by the appropriate officer of the local housing authority. Sub-section (3) defines the appropriate officer as a person who is a deputy chief officer within the meaning of section 2 of the Local Government and Housing Act 1989 and whose duties consist of or include duties relating to the exercise of the relevant functions or is an officer to whom such person reports or is accountable.

FINDINGS

43. The first matter we propose to deal with is the question of the legality of the notice served under section 239 of the Act seeking the right to visit Mr Grealy's Premises. We have noted carefully the documents which have been submitted to us, in particular the letter from Lambeth of 24th December 2017 together with Mr Swain's further witness statement dated 30th November 2017. We have also taken note of the contents of the letter from Anthony Gold Solicitors for the second Respondents of 18th January 2018 and the substantial submissions made by Miss Coyle on behalf of the Applicant under cover of a letter of 16th January 2018.

44. We find that there is no deficiency in the notice, insofar as the totality of same, served on Mr Grealy. We accept Mr Swain's evidence that a full copy was provided at the appropriate time, with a signature. Furthermore, we do not see that the notice becomes inoperative because Mr Swain attends with another. Indeed, section 239 sub-section (8)(a) appears to make provision for that.

45. The real mischief in connection with this notice is the question of delegation. The Council says that under its system of delegation Miss Candida Thompson was the appropriate officer to be able to authorise officers to issue a notice under section 239 and that Mr Swain was so authorised. The Housing Act 2004 however made specific provision for the authorisation of specific actions by the appropriate officer of the local authority which is defined at s 243 (3). The service of a s.239 notice is one of the specified provisions which must be authorised in this way. It, appears to be conceded that Ms Thompson is not a deputy chief officer of the authority as provided for at section 243 (3)(a). In the circumstances, therefore, we must find that the notices served under section 239 are ineffective and that accordingly anything that flows from those notices, which of course is the EPO, falls.

46. If we are wrong in that regard, we will nonetheless consider the EPO and whether this is the appropriate course of action to be taken by the local authority. We remind ourselves of the chronology. The inspection of the Premises occupied by Mr Grealy took place on 15th June 2017. Whilst we accept that Mr Swain may work part time it surprises us that it is not until 3rd August 2017 that the EPO is

issued. The basis of the issuing of the EPO is because Mr Grealy in imminent risk of serious harm to health or safety. That being the case, we do not understand why it took nearly two months for the EPO to be served. As to the EPO itself, we find that schedule 2 has not been complied with. Section 44 of the Act sets out clearly what must be contained within an EPO. The difficulty in this case is that under section 44(2)(d) remedial action needs to be set out which would if taken in relation to the hazard enable the order to be revoked. The problem here is that under schedule 2 there is no real indication as to the works to be done other than further investigations. There is a request for a fire risk assessment to be undertaken, the local authority having included fire risk as a hazard without scoring it or presumably carrying out a proper risk assessment and there is a requirement for a structural survey in connection with the chimney breast. Again the local authority had risk assessed this as a serious hazard without having conducted a structural survey. These reports were to be undertaken within 56 days of the date of the notice. No such survey has been undertaken, it is said because of the appeal. It is interesting to note in the report from Mr Leyton that he tends to agree with the Applicant on the question of the structural danger. However, to seek to rely upon Mr Leyton's report as somehow making good the lack in the schedule 2 provisions seems to us to be unacceptable. Although we went through the landlord's proposed works at the hearing, the Applicant did not have the opportunity to properly consider these proposals nor were they the actual proposals of the housing authority. This is not the end of the deficiencies in the EPO. The statement of reasons we find is deficient. Little or no explanation is given as to why emergency remedial action or an improvement notice could not be utilised. It is clearly wrong to say that remedial action cannot be taken since it it is possible to remove all the hazards by remedial works.

47. The local authority accepted they had a rehousing obligation but seemed to have done little other than to send some communication to the appropriate department which appears not to have gone any further they say because of possible disagreement with the tenant.

48. The decision not to serve an improvement notice appears to be based on the supposition that the works cannot be done with the tenant in occupation and that therefore an Improvement Notice cannot be served. This is not consistent with Mr Dean's submission where he appeared to concede that there was no provision excluding the issue of an Improvement Notice and a requirement that the tenant should vacate to facilitate the works. With respect to the local authority, they do not seem to have considered paragraph 5.21 of the Enforcement Guide which clearly says:- *"The landlord may not be able to rehouse the tenant though the authority may consider offering temporary or permanent alternative accommodation to the tenant to assist in progressing remedial works."* We know that the landlord did have alternative accommodation available at least at some point in these dealings and we were told by Mr Swain that Lambeth can make available temporary accommodation. It is also sometimes possible for a tenant to arrange their own temporary accommodation provided that the appropriate legal safeguards are in place. These options do not seem to have been investigated. . Instead there appears to have been an acceptance that an EPO is the only way forward and the fact that this may result in Mr Grealy losing his home that has been his for some 40 years appears not to have played any great part in the local authority's decision making process.

49. In the circumstances, we consider that as things presently stand the EPO is not the correct way forward. We, therefore revoke the EPO with immediate effect and remit the matter back to the local authority for a proper consideration of all forms of action including an improvement notice or a prohibition order combined with some form of emergency remedial action. We do however accept the First Respondents position that these works are too extensive in nature to be undertaken while the tenant remains in occupation. Proper weight should be given to safeguarding the tenant's position and consideration as to whether temporary accommodation could be made available to allow the works to be done and for the tenant to return to his home of 40 years on completion of the works. We would expect to see any further statement of reasons to fully reflect a proper and full consideration of the options available to the first Respondent and that this is dealt with as a matter of some urgency.

Judge: Andrew Dutton

A A Dutton

Date: 5th February 2018

ANNEX – RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-Tier at the Regional Office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional Office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
3. If the application is not made within the 28-day time limit, such application must include a request to an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (ie give the date, the Premises and the case number), state the grounds of appeal and state the result the party making the application is seeking.