



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

Case Reference : **MAN/OOBY/HPO/2019/0004**

Property : **Blocks C & E, 30 Fox Street, Liverpool L3 3BQ**

Appellant : **Dr Michael Steiner**

Respondent : **Liverpool City Council**

Type of Application : **Housing Act 2004 Schedule 2 Paragraph 7**

Tribunal Members : **Laurence Bennett (Tribunal Judge)
Niall Walsh (Deputy Regional Valuer)**

Date of Hearing : **16 and 17 July 2019**

Date of Decision : **30 July 2019**

DECISION

Appeal

1. Dr Michael Steiner appeals under Schedule 2 Paragraph 7 of the Housing Act 2004 (the Act) against a Prohibition Order dated 17 April 2019 made by Liverpool City Council (Liverpool) in respect of Blocks C & E, 30 Fox Street, Liverpool L3 3BQ (the Property).

Attendance

2. Dr Steiner attended the hearing. His witnesses were Mr David Bennett, Architect engaged in the original development and currently involved in continuing work at the Property and Mr David Blackman, a Letting Agent and spokesperson for Fox Street Village Association also involved in the co-ordination of work at the Property.
3. Liverpool was represented by Mr Matt Hutchins QC, a Barrister. Its witnesses were Mr Nick McCormack, Station Manager Merseyside Fire & Rescue Authority, Mr Mervyn Forrer, a Fire Engineer with Design Fire Consultants Ltd and Mr Dan Donovan, Environmental Health Enforcement Officer with Liverpool.

Preliminary

4. Dr Steiner's appeal is dated 14 May 2019.
5. A telephone case management conference was held on 11 June 2019. At the conference Dr Steiner indicated that he represented members of Fox Street Village Investors Association, an unincorporated association. In the absence of application or confirmation by individual members, the Tribunal proceeded on the basis that Dr Steiner was a sole Appellant.
6. In accordance with directions the parties provided written submissions, witness statements and documentary evidence including photographs.
7. At the hearing, the Tribunal accepted late evidence comprising a Schedule of Work in the form of a spreadsheet and summary and copies of communications issuing from the parties.
8. Page references in this decision relate to the paginated hearing bundle.

Inspection

9. Prior to the hearing on 16 July 2019, the Tribunal visited the Property. They observed it comprised 5 multi-storey blocks maximum 7 storeys of brick construction clad with ACM and maroon panelled box features.
10. Work was in progress at the site concentrated on Block B. We were able to see aspects of completed internal work to Block C including risers, fire doors and ancillary fire equipment. We noted the presence of waking watch employees.
11. The Tribunal saw and ACM cladding panel in process of reinstallation to Block B of similar type to Blocks C & E. The Tribunal also noted a cutting table where contractors were cutting materials to size.
12. From their inspection, the Tribunal was able to identify the location of photographs within the evidence.

Hearing

13. A hearing was listed for 3 days commencing 16 July 2019 at Liverpool Civil Justice Centre. It was not necessary to sit on 18 July 2019.

Background

14. Dr Steiner's oral evidence included background details of the development also apparent from the parties' documents. Flats were first occupied in 2015 mainly following purchase of long leases by investors, many overseas, letting on Short Term Tenancies to students. Some units are owner occupied. Following the service of Prohibition Orders, as far as Dr Steiner is aware, no new lettings have taken place. He said that around 12 families remain in residence. Student tenants at the time of the Prohibition Orders are no longer tenants, having completed the academic term.

Prohibition Orders

15. Liverpool made a Prohibition Order in respect of Blocks C & E under Section 20 of the Act on 17 April 2019 (p.70). The Order identifies category 1 hazards arising from deficiencies set out in the Schedule to the Order relating to hazard 24:fire, for which the HHSRS assessment score was 1,117. The Order included: "The likelihood of the occurrence has been adjusted to take account of the poor construction quality, the ease with which the building can be accessed, signs of regular smoking around the immediate perimeter of the building and the lack of confidence in the ability of the building owner to provide and manage an ongoing waking watch programme." (p.72). It was also noted that the building did not have a current Building Regulations Completion Certificate.
16. The Statement of Reasons for the making of the Prohibition Order refers to the category 1 hazards and mentions low confidence about how fire safety is managed and occupants would be likely to respond. There is comment upon the persons undertaking waking watch at the time of the inspection.
17. Reasons for the course of action include: "It is considered that the service of an Improvement Notice is not the most appropriate action to deal with the significant category 1 hazards identified in the premises because due to the poor structural conditions of the building allowing occupants to remain while works are done will increase the risk of harm."
18. It was stated: "Although serious, the hazard encountered does not pose an imminent risk to the health and safety to occupiers and visitors to the property so the taking of **Emergency Remedial Action** or making **Emergency Prohibition Order** is not appropriate in this case." (p.76).

The Law

19. Part I of the Act sets out a regime for the assessment of housing conditions and a range of powers for local authorities to enforce housing standards. Housing conditions are assessed by the application of HHSRS.
20. Where a hazard or several hazards in a property are rated as HHSRS category 1 hazards, the options for enforcement include, by section 5 of the Act, the power to serve an improvement notice under section 11 or the making of a prohibition order under Section 20.

21. By Section 8 of the Act, the authority must prepare a statement of the reasons for its decision to take the relevant action.
22. A Prohibition Order is an order which prevents specified residential premises being used for all or any purposes. By Section 22 the contents of prohibition orders are prescribed. By Section 22(2)(e) the order must specify, in relation to the hazard (or each of the hazards) any remedial action which the authority consider would, if taken in relation to the hazard, result in its revoking the order under section 25. Section 25 requires an authority to revoke an order if it is satisfied that the hazard in respect of which the order was made, does not then exist.
23. An Improvement Notice is a notice requiring the person on whom it is served to take remedial action in respect of the hazard, for example by carrying out the works.
24. Appeals in respect of prohibition orders are dealt with in Part 3 of Schedule 2 to the Act. Paragraph 7 of that schedule gives a relevant person a general right of appeal against service of a prohibition order. Paragraph 8 provides:

“8(1) An appeal may be made by a person under paragraph 7 on the ground that one of the courses of action mentioned in sub-paragraph (2) is the best course of action in relation to the hazard in respect of which the order was made.

(2) The courses of action are:

1. (a) serving an improvement notice under section 11 or 12 of this Act;
2. (b) serving a hazard awareness notice under section 28 or 29 of this Act;
3. (c) making a demolition order under section 265 of the Housing Act 1985.”

Evidence and submissions

Appellant's case

25. Dr Steiner does not dispute the deficiencies noted in the Prohibition Order. Whilst he considers the communications and process between his association and Liverpool have not been satisfactory and that there was differential treatment in respect of Block B in the time allowed for work, his grounds of appeal are that as sufficient work has now been carried out, the Prohibition Order is no longer appropriate and that requirements should be specified in an Improvement Notice with an appropriate period for completion. He restated in his concluding remarks confirming that at the beginning of April 2019 prohibition was appropriate but there has since been progress. The evidence shows that a Building Regulation Certificate was provided and there is a fire watch present.
26. Dr Steiner submitted a fire risk assessment dated 28 May 2019 prepared by Mr Tony Renton of GI Fire Engineers, a programme and schedule of work and documents relating to the commencement of the work including HSE Notice of Construction. He included a Statement of Finance. The Association also engaged Mr Jason Hill, Fire Engineer to give a preliminary report. Both Engineers focussed on slightly different aspects but with some overlap.
27. Mr Blackman explained his involvement as a Letting Agent engaged by many investors at the development. He said that he was in contact and spoke on behalf of the Association and the Freeholders now in administration who did not take part in the proceedings. He explained that money available from rent received and held by him had been allocated

by investors to the repair programme and that additional contributions could be raised relatively quickly. He pointed to the economic fact that unless investors made contributions to complete the work, their assets would be worthless.

28. Mr Blackman has been active on site and is in contact with the company selected to carry out the cladding work, Messrs P J B Joinery. He said that problems had arisen because of delay in receiving a Pavement Licence to allow cherrypickers to be used for the road facing facades. HSE has required concentration on one block, currently Block B before moving to the next block.
29. Mr Bennett gave information about the circumstances that have led to the requirements. He acknowledged that the original design, oversight and certification was defective. Currently he is on site around twice a week. He agreed that cavity barriers and internal voids require intrusive inspection. He indicated that his involvement was ad hoc and there were no contractual arrangements or terms of engagement.
30. Mr Bennett explained the spreadsheet presented as late evidence. Matters indicated as complete largely reflect the passage of time and not inspected work with time estimates for remaining work based on the contractor's comment. He did not give an overall completion date nor was he able to comment on the financial position.

Respondent's case

31. Mr McCormack explained his role in advising the appropriate authority, Liverpool in relation to fire risk. He has visited the development and was not satisfied that work was being carried out in a methodical manner. He received differing answers from people on site including Mr James Sandys who appeared to be the Site Manager. Mr McCormack questioned aspects of the work he saw carried out, not least querying whether the maroon box cladding feature had been removed for inspection. He did not receive a Schedule of Work and does not have confidence that the work recommended in the Fire Engineer's report is being completed fully or satisfactorily.
32. Mr Forrer detailed his background and specialist expertise in respect of exterior cladding. He explained the rationale underlying the requirements both in respect of compartmentalisation and fire resistant materials. He raised a particular concern regarding the cavity that may exist behind the strand board and the wall which does not appear to have been inspected as work seems concentrated on the space between the external cladding and the strand board.
33. Mr Forrer gave information about the fire resistance of certain materials. He felt it unlikely that the building meets requirements, particularly in relation to Parts B3 and B4 of the relevant Building Regulations. He deems the Property a risk to occupants and passers by and said that intrusive inspection is required to assess what must be done.
34. Mr Donovan gave evidence about his involvement and the history of his consideration and actions. He mentioned the difficulty in tracing all interested parties and his calculation and rating of the risk. In response to questions he said Liverpool does not lightly wish to prohibit occupation of the building but there is an unacceptable risk. He emphasised that he would be happy when requirements had been addressed and the Order could be revoked.
35. Mr Donovan explained that in the interim, in the interests of the welfare of those occupying the Property, Liverpool has organised, funded and maintained a waking watch

but this could not continue beyond the point when the Prohibition Order becomes effective.

36. Mr Donovan gave his reasons why emergency action was not necessary as set out within the Notice.

Submissions

37. Dr Steiner submitted the progress to date is such that a Prohibition Order is no longer appropriate. He summarised that the Association has obtained 2 Fire Engineer's reports, there is a waking watch present and work in respect of intrusive inspection, compartmentalisation and rectification of internal issues required by the Notice has been completed or is in hand. He mentioned a slow start because of the circumstances of the Freeholder but now Leaseholders have mobilised.

38. Dr Steiner submitted that Liverpool has relied on old inspections. He addressed the current financial situation and is confident that Leaseholders will fund the necessary work and even if not, the contractor will extend payment time to allow the units to be occupied generating rental income. He suggested it appropriate that the Prohibition Order be downgraded to an Improvement Notice "If compromises can be made." Dr Steiner submitted that work has now reached the stage where guesswork need not be relied upon and further surprises are unlikely as sufficient inspections have been carried out to ascertain the likely position.

39. Mr Hutchins submitted the evidence indicates that the development is still dangerous and hazards have not been reduced. This was accepted in evidence by Mr Bennett and the spreadsheet produced by him shows the majority of work has not been completed, not least intrusive surveys. Key hazards remain to be addressed.

40. Mr Hutchins referred to Mr Donovan's reasons for deciding against emergency action and that it is logically coherent to take the view that there is not an imminent risk but the actual risk is too serious to allow occupation of the premises. He observed it is not possible for the Tribunal to impose an obligation on Liverpool to continue the waking watch nor could the Appellants proceed on the basis.

41. Mr Hutchins submitted that Mr Blackman's evidence shows insufficient funds are available, management of remedial work is shambolic, not least as observed by Mr Donovan and corners are being cut without oversight by a reputable professional team on the usual basis. The evidence does not give grounds for confidence that work will be completed by the end of August 2019 and the key issue, whether risk has been reduced by work to date is negative. There is no expert evidence on the efficacy of work to date.

Tribunal's conclusions with reasons

Our conclusions are:

42. We have borne in mind that the appeal is by way of rehearing. We can take into account developments at the time of the hearing.

43. There is no issue that Dr Steiner is a relevant person able to bring the appeal as he is an owner occupier of the whole or part of the specified premises. He has however stated that his appeal is brought on behalf of members of an Association. As Association members have not separately entered or confirmed their appeal, they are not joined in any capacity.

44. We understand difficulties caused by the situation, a considerable number of units occupied by students and other individuals required to be vacated. The timing of events has caused significant disruption, not least to those undertaking examinations or end of course requirements at the time. We understand why Liverpool considered it appropriate to supply a waking watch to allow occupation over that period but have not identified a mandatory duty for them to do so.
45. Dr Steiner did not seek to argue that the hazards identified within the Notice did not exist. The Appellant's own engineers have identified many serious issues. At the time of the hearing work has commenced, the pivotal issue is whether it has advanced to the stage where the risk has been materially reduced.
46. The work appears in course. In compliance HSE requirements, it has not at this stage focussed on Blocks C & E, although from our inspection we note some internal requirements have been carried out. From the evidence we determine that internal work cannot be considered complete until there have been intrusive inspections of voids and rectification of defects found. We note examples from the photographs exhibited. This is yet to be arranged. Similarly, in relation to external work, removal of the cladding inspection and compartmentalisation has not been completed in either the facades within the courtyard area or those facing the road including the maroon box areas.
47. Noting Mr McCormack and Mr Forrer's evidence about the nature of the risk we conclude that the hazard scores calculated by Mr Donovan are not at this stage reduced to any significant extent. We find that there continues to be a serious and substantial risk to occupiers at the Property as rated.
48. The Prohibition Order was not subject to a fire watch but we note that Liverpool took a pragmatic view that until it became effective it would remain. We do not consider this can affect the hazard rating as there is no obligation for it to continue. We neither find nor was it suggested by either party that this could be a specified requirement of an alternative action.
49. Having considered the nature and severity of the hazard, we conclude that an Improvement Notice would not be an appropriate alternative and the Prohibition Order should stand.
50. It was submitted that the Tribunal should take into account doubts that the Appellant and Association is able to continue to manage and complete the required work. We have not found this relevant to the action that should be taken, although it is plainly the case, if properly funded and organised, conditions allowing the Prohibition Order to be reviewed will be accelerated.

Order

51. Dr Steiner's appeal is dismissed.

52. The Tribunal confirms the Prohibition Order dated 17 April 2019.

L J Bennett
Tribunal Judge
July 2019