UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING - housing conditions and housing standards -- Housing Act 2004 -- Housing Health and Safety Rating System (England) Regulations 2005 -- local housing authority deciding to take emergency remedial action in relation to what it assessed to be a category 1 hazard -- appeal by way of rehearing against that decision to the First-tier Tribunal -- matters to be considered by F-tT upon such an appeal

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN:

ELI ZOHAR **Appellant**

- and -

LANCASTER CITY COUNCIL **Respondent**

Re: 46 Westminster Road,
Morecambe
LA4 4JD

Determination on Written Representations
by
His Honour Judge Huskinson

No cases are referred to in this decision

DECISION

Introduction

1. This is an appeal from the decision of the First-tier Tribunal Property Chamber (Residential Property) (hereafter "the F-tT") dated 16 March 2016 whereby the F-tT dismissed the appeal which had been brought by the appellant under section 45 of the Housing Act 2004 against the decision of the respondent, as local housing authority, to take emergency remedial action under section 40.

2. The emergency remedial action which the respondent had taken was to replace the lock on the main entrance door to 46 Westminster Road, Morecambe ("the property").

3. Having dismissed the appellant's appeal the F-tT ordered that the respondent should recover from the appellant the sum of £105.00 being the cost of changing the lock. The F-tT also awarded the respondent £500 costs in relation to the costs of defending the appeal to the F-tT.

4. The parties have agreed that the present appeal to the Upper Tribunal should proceed on the basis of written representations.

5. The circumstances in which the respondent concluded that it was necessary to change the lock at the property were as follows.

6. There were ongoing concerns on the part of the respondent in respect of the property, being a property owned by the appellant and being sub-divided into a number of flats. It appears that the respondent had served an improvement notice upon the appellant in respect of the property. However the details regarding that are not presently relevant. What is relevant is that on 6 October 2015 Mr Charlesworth, a duly authorised officer of the respondent, made an inspection of the property. At this inspection he found that he was able easily to enter the property as the main entrance door was insecure. He observed that the ground floor flat appeared to be unoccupied with one of the two entrance doors to the flat damaged and crudely boarded. He then described the situation as he found it and explained the action which the respondent took in the following way:

> "The occupant of the Second Floor Flat told me that there was a persistent problem with unauthorised access to the building for drug use. He also told me that for a period his flat entrance door had been insecure, belongings had been taken and that he had found used sharps in his flat.
>
> Based on the available evidence we considered that the lack of security to the building presented a serious risk to the health and safety of the occupants and their visitors through the hazard of Entry by Intruders which we judged to be Category 1 under the HHSRS.

We concluded that the most appropriate action was to secure the entrance door to the building by carrying out Emergency Remedial action under Section 41 of the Housing Act 2004.

Our reasons for adopting this course of action were:

- The property was insecure.
- The building is in a high crime area.
- There was evidence of unauthorised access to the ground floor flat.
- Tenant of the upper flat had advised me that there was a recurring problem with nuisance and drug use in the property.
- The lack of security and poor condition of the building was likely to attract further unauthorised access and nuisance.
- The lack of security to the building presented a serious risk to the health and safety of the occupants and their visitors which we judged to be a Category 1 hazard under the HHSRS.
- The landlord has a history of non-compliance as evidenced by the two outstanding Improvement Notices at the building and the condition of the building at the time of inspection.
- The landlord had been aware that the property was insecure and that the Council intended to visit the property that day but did not appear to have taken action to carry out the necessary repairs.
- The works were urgently required to prevent further unauthorised access to the property."

This is taken from the document submitted by the respondent to the F-tT in response to the appellant's appeal.

7. In this document the respondent goes on to make certain observations regarding the appellant, apparently to explain the particular concern the respondent had regarding the property. The respondent explained that service of an improvement notice was not considered appropriate, for the purposes of remedying the defective lock on the communal front door, because the operative period would not start for 28 days and there was a high likelihood of any notice being appealed and this would leave the tenants vulnerable for an unacceptable period. Accordingly Mr Charlesworth made an appointment to meet a locksmith at the property the following morning. This he did and the new lock was installed at a cost of £105.

8. There was then some difficulty in the respondent making available the keys to the new lock to the tenant of the second floor unit (and to any other persons who might be occupying the property). It appears that the appellant contended that the changing of the lock actually created a further problem because it locked people out of the building and the new lock was effectively immediately broken through for the purpose of persons who were entitled to have access to the building actually getting into the building. However nothing for present purposes turns upon that.

9. The respondent left at the property a notice explaining that emergency remedial action had been taken. On 12 October 2015 the respondent served a notice under section 41, the operative paragraphs of which stated as follows:

> "1. Lancaster City Council ("the Council") is satisfied that a Category 1 hazard relating to **Entry by Intruders** exists on the premises which involves an imminent risk of serious harm to the health and safety of the occupiers of the premises.
>
> 2. The Council is further satisfied that no Management Order is in force in relation to the premises under Chapter 1 or 2 of Part 4 of the Housing Act 2004.
>
> 3. This notice is served as the deficiencies specified in **SCHEDULE 1** give rise to the hazards at the premises as specified in **SCHEDULE 1**.
>
> 4. The local authority has taken such remedial action in respect of the hazard concerned as the authority considered it immediately necessary in order to remove the imminent risk of serious harm.
>
> 5. The remedial action which the Council has taken is specified in **SCHEDULE 2**.
>
> 6. The remedial action is taken under section 40 of the Housing Act 2004 and has begun on 7th October 2015.
>
> 7. The Council considers this Emergency Remedial Action as the most appropriate course of action under Section 5(2) of the Housing Act 2004 for the reasons stated in the attached statement of reasons."

The notice contained a statement of reasons for the taking of the emergency remedial action which included the following text:

> "Reasons why the Local Authority has decided to take emergency remedial action
>
> Lancaster City Council is satisfied that a serious hazard exists on the premises which has been calculated to be a category 1 hazard, that poses an imminent risk of serious harm to the health and safety of the occupiers.
>
> The property is in a high crime area.
>
> The property is already subject to two outstanding improvement notices which have not been complied with.
>
> The landlord was invited to attend the inspection, but did not attend.
>
> The boarding up of the ground floor flat entrance indicates that the property may have been the subject of unauthorised access and consequent damage due to the insecure front door.
>
> Tenant reports problems with people entering the property, taking drugs and discarding needles.
>
> The authority considers that carrying out the works specified in schedule 2 of the notice are necessary to remove the imminent risk of serious harm or reduce it to an acceptable level. The works required are proportionate to the risks presented and are practical in the circumstances. They will allow the continuing occupation of the property.

Reasons why the Local Authority decided to take this action rather than any other available under Section 5 of the Housing Act 2004.

Although there is considered to be an imminent risk to the health and safety of the occupants, the remedial works in schedule 2 will eliminate the hazard/reduce the risk from the hazard to an acceptable level meaning the residents can remain in the property. An emergency prohibition order is not, therefore, considered to be appropriate in this case.

The imminent risk to occupiers and visitors posed by the hazard requires immediate action which is not available through service of an improvement notice or hazard awareness notice.

Making a demolition order or declaring a clearance order are not appropriate in this case as the hazard can be eliminated or the risk reduced to an acceptable level by carrying out the remedial works."

10. Schedule 2 to this notice stated that the action taken by the council was:

"Action taken by the Council for the hazard under section 11:

- Overhaul the main building entrance door, lock and frame and leave capable of being easily opened, closed and securely locked shut whilst openable from the inside without the use of a key.
- It if is necessary to change the lock a minimum of three keys must be provided to Private Sector Housing."

The nature of the hazards and deficiencies giving rise to the hazard were stated in schedule 1 to the notice to be as follows:

"Section 11: Category 1 Hazard

- Main building entrance door insecure leaving the common hallways easily accessible.
- Damage to ground floor flat entrance indicates that unauthorised access has occurred.
- Tenant reports problems with people entering property, taking drugs and discarding needles.
- Property is in a high crime area.
- Evidence and reports of unauthorised access indicates that further incidents are likely to occur.
- Fear of further incidents is likely to be affecting the tenants."

The statutory provisions

11. The power of a local housing authority to take emergency remedial action arises under section 40 of the Housing Act 2004 which provides in subsection (1) and (2) as follows:

"**Emergency remedial action**

(1) If –

(a) the local housing authority are satisfied that a category 1 hazard exists on any residential premises; and

(b) they are further satisfied that the hazard involves an imminent risk of serious harm to the health and safety of any of the occupiers of those or any other residential premises; and

(c) no management order is in force under Chapter 1 or 2 of Part 4 in relation to the premises mentioned in paragraph (a).

the taking by the authority of emergency remedial action under this section in respect of the hazard is a course of action available to the authority in relation to the hazard for the purposes of section 5 (category 1 hazards: general duty to take enforcement action).

(2) Emergency remedial action" means such remedial action in respect of the hazard concerned as the authority consider immediately necessary in order to remove the imminent risk of serious harm within subsection (1)(b)."

12. Accordingly for the power to take emergency remedial action to arise it is necessary that all of the following conditions are satisfied:

(1) The local housing authority are satisfied that a category 1 hazard exists on the relevant residential premises.

(2) The local housing authority are further satisfied that the hazard involves an imminent risk of serious harm to the health or safety of any of the occupiers of those or any other residential premises.

(3) No management order is in force.

(4) The emergency remedial action is such remedial action in the respect of the hazard concerned as the authority "consider immediately necessary" in order to remove "the imminent risk of serious harm.

13. The condition mentioned in paragraph 12(1) above requires consideration of whether a category 1 hazard exists on the relevant residential premises. Section 2 of the Act provides:

"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 hazards of that description a numerical score of or above a prescribed amount."

Section 2 defines the word "hazard" as meaning:

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

Regulations have been made prescribing the relevant matters for the purposes of these definitions. These are to be found in the Housing Health and Safety Rating System (England) Regulations 2005.

14. These 2005 regulations make detailed provisions prescribing descriptions of hazard and prescribing a formula pursuant to which the seriousness of a hazard is to be assessed, which in turn is dependent upon the prescription of certain classes of harm which may flow from a hazard. Paragraph 8 of the regulations provides that a category 1 hazard is a hazard which, in effect, has a numerical score range of 1,000 or more.

15. Section 41 makes provision for the service of a notice (as required by section 40(7)) in respect of emergency remedial action. Section 42 deals with the recovery of expenses incurred by a local housing authority in taking emergency remedial action. Section 45 deals with appeals relating to emergency measures. Section 45(1) and (5) and (6) are in the following terms:

> "**Appeals relating to emergency measures**
>
> (1) A person on whom a notice under section 41 has been served in connection with the taking of emergency remedial action under section 40 may appeal to the appropriate tribunal against the decision of the local housing authority to take that action.
>
> (5) An appeal under subsection (1) or (2) –
>
> (a) is to be by way of a re-hearing, but
>
> (b) may be determined having regard to matters of which the authority were unaware.
>
> (6) The tribunal may –
>
> (a) in the case of an appeal under subsection (1), confirm, reverse or vary the decision of the authority.
>
> (b) in the case of an appeal under subsection (2), ….."

It is important to note that an appeal is to be by way of a re-hearing. This means that upon the appeal the F-tT must consider whether upon the evidence, when analysed in accordance with the statutory provisions, it was appropriate to take the emergency remedial action which has been taken.

The F-tT's Decision

16. The F-tT decided that the appellant's appeal should be dismissed and that the appellant was liable to pay £105 costs of the remedial action to the respondent and to pay £500 in respect of the costs of the proceedings before the F-tT.

17. The reasoning of the F-tT was as follows. After rehearsing the nature of the application and the evidence which had been placed before it and the relevant statutory provisions, the F-tT gave its conclusions and reasons in paragraphs 16-18 which were in the following terms. (Paragraphs 19 and 20 dealt with the consequential orders regarding the recovery of expenses and costs):

> "16. The Tribunal notes that under section 45(4)(b) of the Act the Tribunal is entitled to take into account in coming to its decision not only matters known to the authority at the time that the decision to take the emergency remedial action but also such information as might subsequently become known. The Tribunal has taken this into account in reaching its decision.
>
> 17. The Tribunal's analysis of the evidence is that:
>
> - The decision taken by Mr Charlesworth to inspect 46 Westminster Road on 6 October is an entirely proper one given the situation in relation to progress with works required.
> - Whilst the letter from him indicating that there was no need to inspect the ground-floor flat could have been more precise the Tribunal is of the view that it quite clearly expresses a continued intention to inspect the second floor flat. It does not indicate an intention to continue with the inspection, rather than cancel, or postpone it.
> - Although Mr Zohar now advises the Tribunal that he had another appointment to attend on 6th October this is not mentioned in any correspondence with Mr Charlesworth, nor in his statement to the Tribunal dated 27 February 2016. Mr Charlesworth's view as to cooperation from Mr Zohar when he attends must be seen in that light.
> - The Tribunal does not agree with the Appellant's view that the letter indicates that there will no longer be any inspection.
> - On attending the property Mr Charlesworth finds the door lock broken and the door can be pushed open at a light touch. The Tribunal is satisfied that such would be the concern of any individual as to safety and security that they would seek to attract the attention of the occupier by any reasonable means, including entering the common parts of the building.
> - Mr Charlesworth advises that he then receives further information from the occupier as to previous forcible entries, causing him further concern.
> - Mr Zohar suggests now that some of these incidents might be attributable to the actions of the tenant himself, No such suggestion is made to Mr Charlesworth at the time.
> - The Tribunal now knows that this door lock has been broken and, entry presumably obtained on about 10 previous occasions. The Tribunal has no doubt that had this been known to Mr Charlesworth, and verifying what he was being told, his concerns would have been heightened.
> - Notwithstanding that Mr Zohar may have repaired the door/lock on these earlier occasions the photographs now available to the Tribunal suggest that this may not have been sufficient, given the somewhat rudimentary appearance of the door in question.

- Although Mr Charlesworth organises the work for the following morning and leaves a notice complying with section 41 there are problems in finding the tenant to give him the new key and before he receives it there is a further forced entry, conceivably by the tenant himself. This is through no fault of Mr Charlesworth and the Tribunal does not consider those problems would have been foreseeable given his discussions with the tenant.
- The Tribunal accepts that Mr Charlesworth acted reasonably to deal with a situation that faced him upon his attendance at the property and that could have had serious implications for the tenant. The steps he took were proportionate and appropriate. The information provided for the hearing shows the extent of reported criminal activity in the locality.
- Mr Zohar suggests that simply to advise the landlord of the situation would have been appropriate. The Tribunal does not agree given the absence of the landlord, or a representative, at the pre-arranged inspection when the matter came to light.

(18) **For those reasons set out above the appeal in respect of emergency remedial action to 46 Westminster Road, Morecambe is dismissed."**

18. Accordingly the nature of the F-tT's reasoning was to make reference to Mr Charlesworth's concerns and to reach the conclusion that Mr Charlesworth acted reasonably to deal with a situation that faced him upon his attendance at the property and that could have had serious implications for the tenant. The F-tT considered the steps he took were proportionate and appropriate.

19. Permission to appeal to the Upper Tribunal was granted on 12 August 2016 by the Deputy President who made the following observations:

> "1. The threshold for taking emergency action is a high one as the local authority (or the tribunal on a re-hearing) must be satisfied that such action was immediately necessary in order to remove the imminent risk of serious harm which it has identified. Neither the evidence of the local authority's enforcement officer nor the decision of the First-tier Tribunal addresses the nature or seriousness of the harm to the occupier, the imminence of the risk, or the necessity of the remedial action taken.
>
> 2. It is arguable (a) that the circumstances identified in the decision were incapable of satisfying the high threshold imposed by section 40(2), Housing Act 2004; (b) that the First-tier Tribunal erred in law by not addressing the question whether the threshold condition was met; and (c) if the First-tier Tribunal was satisfied that the threshold condition was met; that it did not adequately explain its reasons for coming to that conclusion.
>
> 3. The other proposed grounds of appeal do not provide any arguable basis on which the Tribunal could conclude that the decision of the First-tier Tribunal was in error."

The Appellant's Submissions

20. The submissions made on behalf of the appellant are mostly directed towards disagreeing with the F-tT upon what the true facts were and towards pursuing points originally sought to be raised by the appellant's grounds of appeal but in respect of which no permission to appeal has been granted. However the appellant's submissions include the contention that the F-tT did not address the question of whether the threshold condition was met for taking emergency remedial measures and that the F-tT did not explain its reasons for coming to its conclusions. The appellant's submission also contend that there was no evidence that a category 1 hazard existed.

The Respondent's Submissions

21. The respondent in submission to the Upper Tribunal repeated its submissions as made to the F-tT and included the bundle which it had placed before the F-tT. The respondent made reference to the Housing Health and Safety Rating System – Enforcement Guidance and to the Housing Health and Safety Rating System -- Operating Guidance. The respondent made reference to the findings of the F-tT in paragraph 17. In conclusion the respondent submitted:

> "18. The Respondent was right to do what they did on 6th October 2015 as Mark Charlesworth determined that the threshold for taking emergency remedial action had been met.
>
> 19. The property had been left unsecure which, together with the risk of unauthorised entry to the flat which was occupied by a vulnerable tenant in a high crime area, gave an imminent risk of serious harm as identified by the Respondent.
>
> 20. There is no definition of "serious harm" and it is a matter of judgment for the local authority.
>
> 21. The First-tier Tribunal identified the relevant law in their decision and applied it to the facts before them.
>
> 22. Accordingly, the Respondent respectfully invites the Upper Tribunal to dismiss this appeal."

Discussion

22. Section 45(5) of the Housing Act 2004 provides that an appeal under section 45(1), namely an appeal such as that in the present case where the appeal is brought against the decision of a local housing authority to take emergency remedial action, is to be an appeal by way of re-hearing.

23. Upon an appeal by way of rehearing it is for the F-tT to reach its own conclusion upon all of the relevant ingredients that are necessary to be considered if emergency remedial action under section 40 is to be taken.

24. Upon such an appeal the parties to the appeal (and in particular the local housing authority) can be expected to place before the F-tT full evidence and argument directed to enabling the F-tT to reach its own conclusions upon all relevant points including in particular the following points. The F-tT should then analyse the evidence and reach its own conclusions, with reasons, upon all the following points, namely:

(1) Whether a hazard existed at the relevant premises;

(2) Whether this hazard was a "category 1 hazard". This will involve examining whether the hazard was of a prescribed description and whether it fell within a prescribed band as a result of achieving, under the prescribed method for calculating the seriousness of hazards of that description, a numerical score of or above a prescribed amount -- see paragraph 6. It will be necessary to examine whether the numerical score fell within bands A or B or C of table 3 in paragraph 7 – because only such hazards constitute a category 1 hazard.

(3) If the F-tT is satisfied that a category 1 hazard existed on the premises, it will next be necessary for the F-tT to consider whether it is satisfied that the hazard involved "an imminent risk of serious harm to the health or safety of any of the occupiers of those or any other residential premises."

(4) The F-tT will next have to check that no management order was in force within section 40(1)(c).

(5) The F-tT will need to consider whether the emergency remedial action which has in fact been taken by the local housing authority was action which fell within section 40(2) namely whether it was such remedial action in respect of the hazard concerned as the F-tT considers was immediately necessary in order to remove the imminent risk of serious harm.

(6) If the F-tT concludes that the taking of this emergency remedial action was a course of action available to the local housing authority, the F-tT must then conclude whether the taking of this emergency remedial action involved the taking of "the appropriate enforcement action" within section 5.

25. In my judgment it was necessary, upon the present appeal by way of rehearing to the F-tT, for the F-tT to address its mind to these points and to come to reasoned conclusions upon each of them. It was not sufficient for the F-tT to rehearse the evidence regarding Mr Charlesworth's concerns and then to conclude that Mr Charlesworth "acted reasonably" in dealing with the situation that faced him upon his attendance at the property and that the situation "could have had serious implications for the tenant". Nor is it sufficient for the F-tT to conclude that the steps which Mr Charlesworth took "were proportionate and appropriate".

26. It is right to point out that the written material placed before the F-tT did not give clear assistance to the F-tT in dealing with all of these points. As to whether the oral evidence presented to the F-tT gave such assistance is unknown to me – but from the findings of the F-tT and from the written material before it I consider it likely that this oral evidence did not do so.

27. The present appeal is proceeding pursuant to a grant of permission to appeal which enables the appellant to raise a point of law. Accordingly the appeal proceeds pursuant to section 11 of the

Tribunals, Courts and Enforcement Act 2007 rather than pursuant to section 231C of the Housing Act 2004, see section 231C(2). However in any event, and whether the appeal is under section 231C or under section 11 of the 2007 Act, section 12(2) – (4) of the 2007 Act apply, see section 231C(5). Where the Upper Tribunal in deciding such an appeal finds that the making of the decision concerned involved the making of an error on a point of law section 12(2) provides:

> "(2) The Upper Tribunal –
>
> (a) may (but need not) set aside the decision of the First-tier Tribunal, and
>
> (b) if it does, must either –
>
> (i) remit the case to the First-tier Tribunal with directions for its re-consideration or
>
> (ii) re-make the decision"

In acting under subsection 2(b)(ii) the Upper Tribunal may make any decision that the F-tT could make if the F-tT were remaking the decision and also may make such findings of fact as it considers appropriate.

28. In my judgment the F-tT's decision must be set aside. The F-tT erred in law by failing to deal with the appeal by way of a rehearing and failing to consider and to reach its own reasoned conclusions upon the various matters requiring consideration as set out above (see paragraph 24 above).

29. In the circumstances of the present case I do not consider it appropriate for the Upper Tribunal to remake the decision rather than to remit the case to the F-tT. This is regrettable bearing in mind the comparatively small amount of money involved. However the F-tT received oral evidence at a hearing that was quite lengthy (see paragraph 10 of its decision). I do not have the benefit of such evidence. I am unsure as to whether I have all the written material that was before the F-tT -- reference is made in paragraph 17 of the F-tT's decision to a statement from the appellant dated 27 February 2016 which I cannot find (there is only before me a letter dated the 26 February 2016). Also there is not before me material upon which I could properly decide whether the hazard which existed at the property constituted a category 1 hazard. The limited material presented by the respondent upon this point appears to be contained in exhibit mc6 at numbered pages 51 and 52 of the bundle. There is no explanation as to what was the nature of the harm reasonably foreseeable and as to why any such harm was said (in part) to fall within Class II or Class III. As I understand it the second floor flat continued to have its own lock on the door to that flat. No detailed calculations have been provided by the respondent for the purpose of expressing the seriousness of such hazard as existed by a numerical score in accordance with paragraph 6 of the regulations.

30. If the F-tT decides that a category 1 hazard did exist at the property it will be necessary for the F-tT then to consider and decide all the other relevant matters referred to in paragraph 24 above including whether the hazard (namely the insecure front door) involved an imminent risk of serious harm to the health or safety of any of the occupiers of the property or any other residential premises. Upon this point the F-tT may consider it relevant to take into consideration whether the front door

had been insecure on numerous previous occasions and whether there is evidence showing that in consequence any occupier sustained any serious harm.

Conclusion

31. In the result therefore I allow the appellant's appeal. I set aside the decision of the F-tT. I remit the case to the F-tT with directions that the F-tT is to reconsider the case and to reach its own reasoned conclusions upon all of the matters set forth in paragraph 24 above and upon any other matters that in consequence arise. I direct under section 12 (3)(a) of the Tribunals, Courts and Enforcement Act 2007 that members of the F-tT who are chosen to reconsider the case are not to be the same as those who made the decision that has been set aside. I direct that the F-tT holds an oral hearing for the purposes of re-determining the case unless both parties agree in writing that they are content for the matter to be decided upon written representations and the F-tT also considers that it will be able to reach a reasoned decision upon all the points before it without the need for an oral hearing.

Dated: 11 November 2016

His Honour Judge Huskinson