

EASTERN RENT ASSESSMENT PANEL
RESIDENTIAL PROPERTY TRIBUNAL

Property : Flat 7, Reed Place, Bloomfield Road, Harpenden

Applicant : D Healy (not present)

Respondent : St Albans City and District Council
Represented by : S C Appleyard CIEH,
Senior Environmental Health Officer

Case number : CAM/26UG/HPO/2006/0002

Date of Application: 24 September 2006

Type of Application: Appeal against a Prohibition Order
Schedule 2, para.7, Housing Act 2004 ("the Act")

Date of Hearing : 13th November 2006

Tribunal : David S Brown FRICS MCIArb (Chair)
Joanne Oxlade
Peter A Tunley

**DECISION AND
STATEMENT OF REASONS**

The Decision

1. The Tribunal determines that the prohibition order relating to the Property, dated 12th September 2006, is invalid because it does not comply with the requirements of section 22 and section 8 of the Act.

2. In view of the newness of this legislation, the relative lack of guidance in the form of precedents, together with the urgency expressed in this case and some of the issues raised in evidence, the Tribunal considers that it may be of assistance to the parties to indicate what its decision would have been, had the prohibition order not been invalid. Such an indication is for general guidance and information only; it is not a decision or determination by the Tribunal and would not be binding on the parties in the event of an appeal of the above decision or the making of a new prohibition order. On that basis, in the light of the evidence before it, had the prohibition order been valid, the Tribunal would have confirmed the order.

Participants

3. Mr Healy, (who is the leaseholder of the Property), was not present at the inspection or the hearing and had given no indication to the Tribunal whether or not he was proposing to attend. He had corresponded with the Tribunal office using envelopes which bore an Eire postmark but which had the Property address as his return mailing address, his latest letter having been sent on 7th November. He had also put the Property as his address on the application form. He had responded to mail which had been sent to that address and the Tribunal was satisfied that he had been given Notice of the hearing date in accordance with the Regulations and was not satisfied that there was a good reason for his failure to appear and therefore proceeded with the inspection and hearing.

The Order and the Application

4. The Respondent served a prohibition order on the Applicant in respect of the Property on 12th September 2006.

5. The prohibition order prohibits the occupation of Flat 7 on the grounds that a Category 1 hazard exists, namely structural collapse and falling elements. The order refers to *"evidence of current and active subsidence affecting flats 6, 7 and 8, to such a degree they are in danger of collapse"*.

6. The Schedule to the order refers to a recent structural appraisal and precise level survey commissioned by St Albans District Council, but no details of that survey are included and there is no copy of the hazard assessment attached to the order.

7. The Applicant gave written notice of appeal against the order to the Tribunal on 24th September 2006. The grounds of appeal are that the relevant category 1 hazard can only be remedied by the carrying out of extensive work to the substratum of the property, that the cost of these works would be prohibitive for one person, that, according to the Respondent, flats number 6 and 8 are equally affected by the alleged hazard and should be prevailed upon to join in carrying out these works and bearing part of the costs of same.

8. In addition, the Applicant contends that –

- as he is the owner occupier, the effect of the order would effectively be to render him homeless, which would be in breach of his legal rights to a home;
- the respondent has sufficient legal powers to take action against the other occupiers/owners to force them to co-operate in effecting the repairs necessary to lead to withdrawal of the order and should be called upon to exercise those powers;
- it is open to the Respondent to carry out the necessary works and levy the costs of doing so against the owners affected by the hazard, including this appellant;
- it is not appropriate to board up the properties because there is a shortage of housing locally;
- there is a prospective danger to members of the public and neighbouring tenants from falling masonry and the landlords responsible should be compelled by legal action to join in effecting collective repairs or alternatively the Respondent should execute the necessary repairs and levy the cost against the other landlords and the appellant.

9. Mr Healy states that he has already tried unsuccessfully to arrange for collective repairs and is ready and willing to discharge his proportion of the costs.

The Statutory Framework

10. The Housing Act 2004 introduced a new system, the Housing Health and Safety Rating System (HHSRS), for assessing the condition of residential premises, which can be used in the enforcement of housing standards. The system entails identifying specified hazards and calculating their seriousness as a numerical score by a prescribed method.

11. Those hazards which score 1000 or above are classed as category 1 hazards. If a local housing authority makes a category 1 hazard assessment, it becomes mandatory under section 5(1) for it to take appropriate enforcement action. Hazards with a score below 1000 are category 2 hazards, in respect of which the authority has a discretion to take enforcement action.

12. Section 5(2) sets out seven types of enforcement action which are “appropriate” for a category 1 hazard. If two or more courses of action are available, the authority must take the course which they consider to be the most appropriate. If the authority serves an Improvement Notice in respect of a category 1 hazard, the remedial action must be such as to ensure that the hazard ceases to be category 1 hazard but may extend beyond that. There are five types of enforcement action available for a category 2 hazard (section 7(2)).

13. Section 22 deals with the contents of a prohibition order. Subsection (2) includes a requirement that the order “*must specify... (e) any remedial action which the authority consider would, if taken in relation to the hazard, result in their revoking the order under section 25*”.

14. A “relevant person” may appeal to a Residential Property Tribunal against a prohibition order (Schedule 2, para.7). The appeal is by way of re-hearing. The Tribunal may confirm, reverse or vary the decision of the housing authority (para. 13(3)).

The Operating and Enforcement Guidance

15. Section 9 of the Act requires the local housing authority to have regard to any guidance for the time being given by the Secretary of State. The same duty is imposed upon the Tribunal by paragraph 12(2) of Schedule 2 if the grounds of appeal consist of or include the ground that one of the courses of action mentioned in para. 8(2) is the best course of action.

16. Operating Guidance was published in February 2006. “Structural collapse and falling elements” is Hazard Profile number 29. This category is stated to cover “*the threat of whole dwelling collapse, or of an element or a part of the fabric being displaced or falling because of inadequate fixing, disrepair, or as a result of adverse weather conditions*”. There is no particular age group identified as being more vulnerable than others.

17. Para. 29.08 refers to a requirement that the foundations and load bearing external walls should be of sufficient strength to support the weight of the building, fittings, furnishings and users. Relevant matters affecting likelihood and harm outcome are identified in para. 29.18 and include evidence of continuing structural movement, structural cracks and/or bulges to external walls and open joints.

18. Enforcement Guidance was also published in February 2006. It requires the housing authority to assess hazards by the Housing Health and Safety Rating System, determine a hazard score, consider whether it has a duty or discretion to act and make a judgement as to *"the most appropriate means of dealing with the hazard, taking account of both potential and actual vulnerable occupants"*.

19. Para. 5.15 explains that a prohibition order is a possible response to a category 1 hazard and that it may prohibit the use of part or all of the premises for some or all purposes or occupation by particular numbers or descriptions of people. Para. 5.21 states that a prohibition order might be appropriate in certain circumstances, including *"where the conditions present a serious threat to health or safety but where remedial action is considered unreasonable or impractical for cost or other reasons"*.

20. When considering serving a prohibition order the authority should also take a number of matters into consideration (para.5.23), including the position of the building in relation to neighbouring buildings, the effect of complete prohibition on the well being of the local community and the appearance of the locality and whether it is appropriate to offer financial advice or assistance.

The Validity of the Order

21. Section 22 of the Act prescribes the contents of prohibition orders and subsection (2) provides that *"the order must specify, in relation to the hazard (or each of the hazards) to which it relates....*

(e) any remedial action which the authority consider would, if taken in relation to the hazard, result in their revoking the order under section 25."

22. The Schedule to the order made by the Respondent has a heading "Remedial Action which the authority consider would, if taken in relation to the hazard, result in it revoking the order under Section 25", under which it states –

"A recent structural appraisal and precise level survey was recently commissioned by St Albans District Council the conclusions and recommendations detailed in the report are as follows:

On the basis of all the information which is currently to hand and on the results of the site survey of this property and the level survey of the property it appears that the foundations to flats 1 to 5 are stable and there is no sign of current active subsidence. The current and active subsidence relates primarily to flats 6,7 and 8 and it does appear that these flats have now subsided to such an extent that they are now dangerous and should not be inhabited again until these flats have either been underpinned or ideally demolished and rebuilt off new foundations."

23. The Tribunal finds that this form of words does not meet the obligation created by s.22(2)(e). The term "specify" indicates a definitive and directional statement with an element of precision, so that the recipient knows what he has to do to address the situation. It need not be a detailed specification in the form that an architect or building contractor would prepare one but it must clearly and unequivocally inform the recipient of the notice what remedial action he needs to carry out if he wishes to have the order revoked. A statement that "the flats should not be inhabited again until

they have been underpinned or ideally demolished and rebuilt off new foundations” is too vague and imprecise to meet the mandatory requirement.

24. Section 8 of the Act applies where a local housing authority decides to take one of the kinds of enforcement action mentioned in section 5(2) or 7(2), which includes prohibition orders. It provides that –

- (2) *The authority must prepare a statement of reasons for their decision to take the relevant action.*
- (3) *Those reasons must include reasons why the authority decided to take the relevant action rather than any other kind (or kinds) of enforcement action available to them under the provisions mentioned in section 5(2) or 7(2).*
- (4) *A copy of the statement prepared under subsection (2) must accompany every notice.....*

25. This mandatory requirement is referred to in the HHSRS Enforcement Guidance, at paragraphs 4.6 – 4.8. Paragraph 4.6 states that *“This provision is designed to meet concerns that the absence of a duty on local authorities to give reasons might fail to comply with Article 6 of the European Convention on Human Rights – the right to a fair hearing”*.

26. The Respondent has not prepared such a statement. Mr. Appleyard expressed the opinion that the structural report and the hazard assessment together fulfill that obligation. The Tribunal has no hesitation in finding that they do not. Apart from the fact that copies of those documents did not accompany the notice, they fall well short of amounting to a statement of reasons why the Council decided to make a prohibition order rather than any other kind of enforcement action.

27. The provision of a statement under s.8 is a mandatory requirement and without such a statement the order is not valid.

The Appropriateness of the Order

28. The Tribunal has indicated that it would have confirmed the order, had it been valid. For the purpose of assistance and guidance, it sets out below brief details of its reasons for that conclusion :-

The Inspection

29. The Tribunal inspected the Property and the exterior of the block of flats on the morning of the hearing. The Property is as described in the structural appraisal report by David Carr. The Tribunal did not have access to the interior but this was not necessary as the Applicant has not challenged or disputed the contents of the structural appraisal report and, in any event, it was abundantly clear from external inspection that the section of the building containing flats 6,7 and 8 has suffered severe structural movement and that some areas of masonry have fallen out, in addition to which some tiles have fallen from the edge of the roof, which appears to have occurred relatively recently.

The Evidence

30. The Applicant sent a note to the Tribunal indicating that his statement of case was “statements made to the appeals tribunal and previous correspondence”. The

Tribunal assumes from his written statements that his principle ground of appeal is that a prohibition order was not the most appropriate action for the Respondent to take.

31. The Respondent provided a copy of the structural appraisal report and further information in a letter dated 23rd October 2006 giving a brief history of the events leading up to the making of the order. This included the fact that in August 2005 the tenants of flat 7 complained of a gas leak and defective electrical installation, as a result of which the Council served Abatement Notices under the provisions of the Environmental Protection Act and the tenants were re-housed. The flat was re-let but flats 7 and 8 were vacated in February 2006 on the advice of the Respondent and these and flat 6 were boarded up. In September 2006 the Applicant was carrying out works to the interior of flat 7 which suggested that it was being prepared for occupation.

32. The structural appraisal and precise level survey report was prepared by D. I. Carr BSc. C.Eng. MICE, of David Carr Consulting Engineers Ltd, on instructions from the City and District of St. Albans Council. It sets out in detail the evidence of structural movement in the building containing the Property and makes the following conclusions and recommendations:-

1. *It is concluded that there is no active subsidence to flats 1 to 5 inclusive.*
2. *It is concluded that there is current and active subsidence to the foundations of flats 6,7 and 8 with the maximum movement occurring to the left-hand flank wall of flats 7 and 8.*
3. *It is concluded that flats 6,7 and 8 are currently in a dangerous condition and should not be occupied until remedial measures have been taken to deal with the current active subsidence.*
4. *It is therefore recommended that serious consideration is given to demolishing and rebuilding flats 6,7 and 8 off new foundations which should be founded on stable material and this will probably necessitate introducing piled foundations to these parts of the property but detailed site investigations need to be completed prior to any repairs being implemented.*

33. At the hearing, Mr. Appleyard addressed the grounds of appeal. He confirmed that prohibition notices had been served on the owners of all three flats. He said that flats 6 and 8 were in the same ownership and have subsequently been sold to a new owner.

34. He disputed the Applicant's claim that the prohibition order made him homeless. He said that Mr. Healy had never lived at the flat.

35. With regard to the choice of enforcement action, Mr. Appleyard said that he had dealt with this matter and that his principle concern had been to eradicate the immediate danger to occupants of the flats. He considered that the gas leak in 2005 and the defective electrics might be attributable to the structural movement and that they might be repeated or deteriorate with further movement of the structure.

36. The structural report had been commissioned in April 2006, after which he had consulted with the Council's legal department. He considered that a prohibition order was the most appropriate action because it removed occupants of the flats from the immediate risk and he was hopeful that the resulting loss of rental income would encourage the owners of the flats to get together and effect repairs.

37. Asked about the option of a Demolition Order, he said that it would be very time consuming and expensive.

38. As for an Improvement Order, he said it was debatable whether or not the structure could be repaired. He was not certain that demolition and rebuilding could be remedial action specified in an Improvement Notice and queried whether such a notice could then be enforced if the Property was unoccupied. He thought that an appeal against such a notice might be successful in those circumstances.

39. The Tribunal asked if he had considered the point that an Improvement Notice would specify a period for the remedial action to be taken, at the end of which, in the absence of action, the Council would be able to carry out the work and then recover the cost. This would eradicate the present problem that the Property is not being repaired, it is a danger to occupants of neighbouring properties and anybody who ventures onto the garden and it could deteriorate before the flat owners manage to agree and embark upon a course of action. Mr Appleyard said that he had been mindful of the expense of carrying out such work. The structural engineer had given him a ball park figure of £100,000 per flat. The Council would have to bear that expense in the first instance; it was a financial situation but he confessed to not being sure whether or not the authority's financial circumstances were a relevant consideration.

40. What if no remedial work was carried out? Mr. Appleyard said that he had been in correspondence with the Council's Building Control department who could take action under other legislation in respect of dangerous buildings, but he had not yet had a response from them.

41. The Tribunal drew Mr. Appleyard's attention to paragraph 5.2.3 of the Enforcement Guidance and asked if he had taken into account the position of the premises in relation to neighbouring buildings and the effect of prohibition on the wellbeing of the local community and appearance of the locality. He accepted that a prohibition order was not a complete solution but repeated that his primary concern had been the welfare of occupants of the flats.

42. On the question of financial advice or assistance (also mentioned in para. 5.2.3) he said that if he could have spoken to Mr. Healy he might have discussed such issues but Mr. Healy would not talk to him.

The Tribunal's Conclusions

43. As Mr. Appleyard stated, a prohibition order is not a complete solution in this case. This seems to the Tribunal to be a case where the optimum solution would be for the authority to take two kinds of enforcement action simultaneously, such as a prohibition order to remove the occupants from the immediate risk and an Improvement Notice to ensure that remedial action is taken as soon as reasonably possible. Unfortunately section 5(4) limits the authority to taking one course of action, the one "*which they consider to be the most appropriate of those available to them*".

44. An Improvement Notice on its own could have resulted in the Property being re-occupied and remaining occupied, with the occupiers at risk, for some time while remedial work was being organised. The Tribunal considers that an Improvement Notice could require demolition and rebuilding as remedial works and does not accept that an appeal against such a notice would be likely to succeed because the dwelling was empty.

45. The hazard is too serious for a hazard awareness notice.

46. A Demolition Order would be an option. However, removing part only of the building has potentially serious consequences for the remainder of the block and some detailed investigations would have to be carried out before any demolition work was undertaken, during which time any occupants of the Property would be at risk.

47. A clearance area is not relevant in this case.

48. The Tribunal rejects the Applicant's contention about homelessness. There is no evidence that he has resided at the property or intended to. In any event, if by "legal rights to a home" he is referring to Article 8 of the European Convention on Human Rights, that is a qualified right, interference with which is prescribed by clear and accessible UK law (this Housing Act), the aims of the prohibition order include protection of health and the interference is no more than is necessary to secure that aim.

49. The Tribunal does not consider that the financial status of the local housing authority is a legitimate consideration in deciding which enforcement action is appropriate or the most appropriate under section 5.

50. In the opinion of the Tribunal, it was not unreasonable for the Respondent to anticipate that depriving the flat owners of their rental income would spur them into action to carry out remedial works in order to get the order revoked. Section 5(5) provides that if the initial course of action does not prove satisfactory, the authority can take another course of action and so if the owners do not take relevant action on remedial work, the Respondent could choose another enforcement action.

51. Having considered all of the factors, the Tribunal considers that it was reasonable (and arguably essential) for the Respondent's immediate concern to be for the health and safety of occupants of the Property and that securing vacancy of the Property was a proper primary objective. On that basis, it concludes that the prohibition order was justified and was the most appropriate enforcement action for the Respondent to take.

Signed:



20th November 2006

D S Brown FRICS MCI Arb (Chair)