

**RESIDENTIAL PROPERTY TRIBUNAL
OF THE
MIDLAND RENT ASSESSMENT PANEL**

BIR/44UD/HIN/2006/0003

*DECISION OF THE RESIDENTIAL PROPERTY TRIBUNAL
ON AN APPEAL AGAINST AN IMPROVEMENT NOTICE
UNDER PARAGRAPH 10 OF SCHEDULE 1 TO THE HOUSING ACT 2004*

<u>Applicant:</u>	Mr L McGarraghy
<u>Respondent:</u>	Rugby Borough Council
<u>Subject property:</u>	145 Clifton Road Rugby Warwickshire CV21 3QN
<u>Date of improvement notice:</u>	19 October 2006
<u>Date of appeal to Residential Property Tribunal:</u>	5 November 2006
<u>Hearing date:</u>	6 February 2007
<u>Appearances:</u>	
<i>For the applicant:</i>	Mr L McGarraghy
<i>For the respondent:</i>	Mr J Tallon Ms Verina Wenham
<u>Members of the Tribunal:</u>	Professor N P Gravells MA Mr T F Cooper BSc FRICS FCI Arb Mr D A Lavender BSc Dip Law MCIEH
<u>Date of decision:</u>	14 FEB 2007

Decision of the Tribunal: summary

- 1 This is a decision on an appeal made to the Residential Property Tribunal by Mr L McGarraghy ("the applicant"), freeholder of the property at 145 Clifton Road, Rugby, Warwickshire CV21 3QN ("the subject property"). The appeal, dated 5 November 2006, was made under paragraph 10 of Schedule 1 to the Housing Act 2004 ("the 2004 Act") against an improvement notice ("the improvement notice"), dated 19 October 2006, issued by Rugby Borough Council, the relevant local housing authority ("the respondent").
- 2 The Tribunal determines that the improvement notice is invalid because it fails to comply with the requirements of section 8 of the 2004 Act. The appeal is therefore allowed and, by virtue of the power conferred by paragraph 15(3) of Schedule 1 to the 2004 Act, the Tribunal orders that the improvement notice be quashed.
- 3 For the reasons indicated below, the Tribunal is of the view that it would not be appropriate to comment on the substance of the improvement notice except to the extent that the substance is relevant to the issue of compliance with section 8 and other defects in the notice.

Legal framework

- 4 The Housing Act 2004 introduced a new system for the assessment of housing conditions and for the enforcement of housing standards. The Housing Health and Safety Rating System ("HHSRS") replaces the former system under the Housing Act 1985, which was based on the concept of unfitness. It places the emphasis directly on the risk to health and safety; and it involves the identification of specified housing-related hazards and the assessment of their seriousness by reference to (1) the likelihood over the next twelve months of an occurrence that could result in harm and (2) the range of harms that could result from such an occurrence. Those two factors are combined in a prescribed formula to give a numerical score for each hazard. The range of numerical scores are banded into ten hazard bands, with Band A denoting the most dangerous hazards and Band J the least dangerous. Hazards in Bands A to C (which cover numerical scores of 1000 or more) are classified as "category 1 hazards"; and hazards in Bands D to J (which cover numerical scores of less than 1000) are classified as "category 2 hazards".
- 5 Where the application of the HHSRS identifies a category 1 hazard, the local housing authority has a duty under section 5(1) of the 2004 Act to take appropriate enforcement action in relation to the hazard. Section 5(2) sets out seven courses of action that may constitute appropriate enforcement action (including the serving of an improvement notice, the making of a prohibition order and the serving of a hazard awareness notice). If two or more courses of action are available to the authority, it must take the most appropriate course of action (section 5(4)). If the authority serves an improvement notice in respect of a category 1 hazard, the remedial action required by the notice must, as a minimum, ensure that the hazard ceases to be a category 1 hazard (section 11(5)(a)).
- 6 Where the application of the HHSRS identifies a category 2 hazard, the local housing authority has a power under section 7(1) of the 2004 Act to take enforcement action in relation to the hazard. Section 7(2) sets out five kinds of enforcement action (including the serving of an improvement notice, the making of a prohibition order and the serving of a hazard awareness notice).

- 7 Section 9 of the 2004 Act requires the local housing authority to have regard to any guidance for the time being given by the appropriate national authority about the exercise of their functions in connection with the HHSRS. In February 2006 the Office of the Deputy Prime Minister (then the appropriate national authority in relation to England) published *HHSRS Operating Guidance* and *HHSRS Enforcement Guidance*.
- 8 The person on whom an improvement notice has been served may appeal to a residential property tribunal against the notice; the appeal is by way of rehearing; and the tribunal may by order confirm, quash or vary the notice: see Part 3 of Schedule 1 to the 2004 Act.

Factual background

- 9 Mr J C Tallon, the Housing and Urban Renewal Team Leader for the respondent local housing authority, investigated the condition of the subject property, following a complaint received from a neighbouring property owner. Although Mr Tallon did not enter on to the subject property, he noted three potential hazards:
 - (i) A number of the double-glazed window units to the front elevation of the property had been replaced with non-transparent inserts. To the extent that the inserts blocked out almost all natural light from the front rooms of the property, Mr Tallon formed the view that there existed a Lighting hazard: see *HHSRS Operating Guidance*: Hazard Profile 13.
 - (ii) The rear boundary wall between the subject property and the adjoining property (147 Clifton Road) showed signs of spalled brickwork and missing mortar and pointing; and Mr Tallon noted that, when he placed his hand on the wall, he was able to cause the wall to deflect some two inches at the point of pressure. Mr Tallon formed the view that there existed a Structural Collapse and Falling Elements hazard: see *HHSRS Operating Guidance*: Hazard Profile 29.
 - (iii) Water from the toilet cistern was leaking from the overflow pipe down the external wall at the rear of the subject property. Mr Tallon formed the view that, by reason of the risk of slipping caused by the resulting pool of water on the ground, there existed a Falling on Level Surfaces hazard: see *HHSRS Operating Guidance*: Hazard Profile 20.
- 10 Mr Tallon subsequently assessed all three hazards as category 1 hazards falling within Band C. On 12 September 2006 the respondent served an improvement notice under section 11 of the 2004 Act. However, since the applicant had rectified the problem with the toilet cistern, that notice was withdrawn; and on 19 October 2006 the respondent served a new improvement notice, which identified the Lighting and Structural Collapse and Falling Elements hazards only. The notice required the applicant:
 - (i) To replace the double-glazed window units to the front elevation.
 - (ii) To take down the rear existing boundary wall and to rebuild on new sound footings and with piers every two metres.
- 11 By an application dated 5 November 2006, the applicant appealed against the improvement notice. In response to the two identified hazards and the specified remedial work, he submitted:

- (i) That it was pointless replacing the glass in the front windows because experience suggested that they would very soon be smashed again by local gangs.
 - (ii) That the wall was not unstable or dangerous and thus was not in need of immediate remedial work.
- 12 The members of the Tribunal inspected the subject property on 6 February 2007 in the presence of the applicant and Mr Tallon.
- 13 A hearing was subsequently held at the office of the Rugby Council for Voluntary Service. It was attended by the applicant; and by Ms Verina Wenham, the respondent's Legal and Committee Services Manager, and Mr Tallon.

Representations of the parties

- 14 So far as relevant to the decision of the Tribunal, the representations of the parties are referred to below.

Determination of the Tribunal

- 15 The Tribunal raised a number of preliminary issues relating to (the validity of) the improvement notice and the underlying HHSRS assessment.

Non-compliance with section 8 of the 2004 Act

- 16 Section 8 of the 2004 Act applies where a local housing authority decides to take one of the kinds of enforcement action mentioned in section 5(2) (or section 7(2)). As indicated above, such action includes the service of an improvement notice.
- 17 Section 8 provides:
- “(2) The authority must prepare a statement of the reasons for their decision to take the relevant action.
 (3) Those reasons must include the 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”
- 18 These clearly mandatory requirements are referred to and explained in the *HHSRS Enforcement Guidance*. Paragraph 4.6 states:
- “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.”
- The right to a fair hearing is, of course, a long-established fundamental right; and it was further reinforced by the enactment of the Human Rights Act 1998.
- 19 Mr Tallon accepted that no such statement as required by section 8 had been prepared or had accompanied the improvement notice served on the applicant and that the notice was therefore invalid.

- 20 In fairness to the applicant, he expressed the view that he did not wish to challenge the improvement notice on "technicalities".
- 21 However, in the view of the Tribunal, the requirements in section 8 cannot be categorized as technicalities. Nor can they be disregarded (or waived by the recipient of the notice) save perhaps in the most exceptional circumstances. An example might be where any delay in taking enforcement action would expose the occupier of property to an unacceptable risk of serious harm. No such circumstances exist in the present case.
- 22 The Tribunal therefore determines that, in the absence of such a statement as is required by section 8, the improvement notice in the present case was invalid and should be quashed.

Other defects in the improvement notice

- 23 Section 13(2)(a) of the 2004 Act provides that an improvement notice served under section 11 (category 1 hazards) or section 12 (category 2 hazards) must specify in relation to each hazard "whether the notice is served under section 11 or 12". The improvement notice in the present case stated that it was served "under section[s] [11] and [12]", although it identified category 1 hazards only.
- 24 Section 15 of the 2004 Act provides that an improvement notice becomes operative at the end of the period of twenty-one days beginning with the day on which it is served. Although the (initial) operative date is postponed where an appeal is made against the notice, the notice in the present case incorrectly specified the date of service as the (initial) operative date.
- 25 Although it might be argued that these two further defects in the improvement notice are not sufficient, either individually or collectively, to render the notice invalid (and, in the light of its decision on the consequences of non-compliance with section 8 of the 2004 Act, it is not necessary for the Tribunal to determine that issue), the Tribunal would stress that, at the very least, it is highly desirable that local housing authorities ensure that notices served by them comply fully with the relevant requirements.

The HHSRS assessment

- 26 The defects in the improvement notice identified above are further compounded by the Tribunal's findings on the respondent's HHSRS assessment.

The Lighting hazard

- 27 Mr Tallon's rating assessment in respect of the Lighting hazard resulted in a numerical score of 1488, which put the hazard into Band C, the lowest band of category 1 hazards. However, Mr Tallon's calculation reveals a significant error. Although the notes to the assessment suggest that Mr Tallon intended to apply the national average figures for the range of harms resulting from the hazard (and he confirmed that intention at the hearing), his calculation used the figure of 1 rather than 0.1 in respect of Class 1 harm (the most serious). Applying the national average figures for the range of harms (but assuming the correctness of Mr Tallon's likelihood assessment of 1 in 10 (as compared with the national average figure for Lighting hazards of 1 in 50,825)), the numerical score for the Lighting hazard falls into Band D, which reduces the hazard to a category 2 hazard.

- 28 Mr Tallon accepted that his calculation was erroneous and he accepted that the Lighting hazard was a category 2 hazard in Band D.


The Structural Collapse and Falling Elements hazard

- 29 Mr Tallon's rating assessment in respect of the Structural Collapse and Falling Elements hazard resulted in a numerical score of 1322, which put the hazard into Band C. That score is based on figures for the likelihood of an occurrence resulting in harm and the range of harms that are rather different from the national average figures. More specifically, Mr Tallon assessed the likelihood of an occurrence resulting in harm in the next twelve months as 1 in 10 (as compared with the national average figure in respect of similar properties of 1 in 10,825); and he increased the figures for the more serious classes of harm.
- 30 Although Mr Tallon adhered to his figures in response to questions, the Tribunal was not persuaded that his very significant adjustment to the national average figure for the likelihood of an occurrence resulting in harm in the next twelve months could be supported. In the view of the Tribunal, Mr Tallon had overstated the likelihood of such an occurrence. However, even if the next representative scale point for the likelihood factor (1 in 18) is substituted (while retaining Mr Tallon's adjusted figures for the range of harms), the numerical score for the Structural Collapse and Falling Elements hazard falls into Band D, which reduces the hazard to a category 2 hazard.

Conclusion on the HHSRS assessment and its significance

- 31 Mr Tallon accepts and the Tribunal determines that the Lighting Hazard is properly classified as a category 2 hazard. The Tribunal further determines that the Structural Collapse and Falling Elements hazard is also a category 2 hazard. In the view of the Tribunal, therefore, the present case concerns two category 2 hazards.
- 32 That conclusion is significant for the Tribunal's views on the validity of the improvement notice and for the appropriateness of further comment on the substance of the notice.
- 33 It seems to the Tribunal that, in the case of category 2 hazards, which by definition are less serious, the local housing authority is likely in practice to consider a wider range of possible enforcement action, including serving a suspended improvement notice or a hazard awareness notice or taking no action at all. Indeed, Mr Tallon confirmed that the respondent would not always take enforcement action in respect of category 2 hazards. In the view of the Tribunal, it is therefore even more important that, where the authority does take enforcement action, it should comply with the requirements of section 8 of the 2004 Act and, in particular, give reasons why the authority has decided to take the action in question rather than any other kind of enforcement action available to them.
- 34 For analogous reasons, the Tribunal takes the view that the improvement notice should accurately state whether it is served under section 11 or section 12 or both.
- 35 Since a local housing authority has a power (but no duty) to take enforcement action in respect of category 2 hazards, and in the exercise of its discretion may elect to exercise that power by taking any one or more of a wide range of enforcement actions, including taking no action at all, in the view of the Tribunal

it would be inappropriate to comment further on the substance of the improvement notice in the present case, which in any event was served on the basis of an assessment of the hazards as category 1 hazards.

Signed 

Date **14 FEB 2007**

Professor Nigel P Gravells
Chairman