FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AU/HIN/2015/0026**
Property	**:**	**Studio Flat R/O 164 Fairbridge Road, London N19 3HU**
Appellant	**:**	**Primetank Limited**
Representative	**:**	**Mr Moti Friedlander**
Respondent	**:**	**London Borough of Islington**
Representatives	**:**	**Ms Annette Cafferkey Counsel** **Mr Nicholas Whittingham Snr EHO**
Type of Application	**:**	**Section 18 and Schedule 1 Housing Act 2004 – an appeal against an improvement notice**
Tribunal Members	**:**	**Judge John Hewitt** **Mr Michael Cartwright JP FRICS**
Date and venue of hearing	**:**	**25 February 2016** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**24 March 2016**

DECISION

Decisions of the tribunal

1. The tribunal determines that:

   1.1 The improvement notice dated 13 August 2015 shall be quashed as of today, to be replaced by a prohibition order pursuant to section 20 Housing Act 2004 prohibiting the subject property from being used for residential purposes until it is demolished;

   1.2 The above determination is made on the appellant, through Mr Friedlander, having given an undertaking to the tribunal that in the event the improvement notice was to be quashed to be replaced by a prohibition order it would procure that the electrical and water services to the subject property would be capped or disconnected so as to make it less attractive for someone to break into it and reside in it unlawfully; and

   1.3 The appellant shall by **5pm Friday 29 April 2016** pay to the respondent the sum of £1,000.00 by way of penal costs pursuant to rule 13(1)(b).

2. The reasons for our decisions are set out below

NB Later reference in this Decision to a number in square brackets ([ ]) is a reference to the page number of the hearing files provided to us for use at the hearing. The prefix 'A' refers to the files prepared by the applicant and the prefix 'R' refers to the file prepared by the respondent.

Background

3. The appellant was registered at Land Registry as proprietor of the subject property (the unit) on 13 May 2011 [R9]. The appellant is owned and controlled by Mr Matt (sometimes Moti) Friedlander, the sole director. Evidently Mr Friedlander purchased the unit in his own name in or about 2008 and subsequently transferred it to his company.

4. The respondent (the council) is a local housing authority upon which statutory functions are imposed by the Housing Act 2004 (the Act). So far as material to this appeal those functions concern the enforcement of housing standards set out in Part 1 of the Act.

5. The unit lies behind 164 Fairbridge Road, London N19 3HU and on (or close to the top of) a railway embankment. Fairbridge Road comprises a number of terraces of rather substantial homes probably constructed in late Victorian or Edwardian times. Many of them have since been adapted or sub-divided to create self-contained flats, and 164 Fairbridge Road is one that has.

6. The exact history of the unit was not explained to us. Whilst at the rear of 164 Fairbridge Road it does not appear to have formed part of that property. It may, at one time, have been constructed as a rear addition to that property. The local planning authority appears to be of the view that

the unit is or was used for commercial purposes for planning legislation purposes. Mr Friedlander told us that when he first purchased the property in 2008 it had already been adapted to provide a studio apartment which had been used for residential purposes prior to his purchase. Mr Friedlander said that since his purchase it has been used by a succession of his tenants for residential purposes. The tenancy agreement for the most recent letting describes the unit as 'Rear Studio Flat'.

7. The unit is about 18 sq m and is laid out as one room with a small wc/shower room to one end. The entrance door is set in the flank wall. There are two double glazed windows; one set in the flank wall adjacent to the entance door and one set in the rear wall overlooking the railway embankment. Some photographs of the property are at [A1-2] and some further photographs was handed in by the council at the hearing, which we have numbered [R98-106].

8. By a tenancy agreement dated 25 September 2012 the unit was let to a Mr Gerrard Bennett for a term of 12 months commencing on 28 September 2012 at a rent of £980 per four weeks. Evidently at the end of the fixed period the tenant remained in occupation as a periodic tenant. It appears that Mr Bennett may have been a vulnerable person who was in need of housing and that he was introduced to the appellant by the council as a potential tenant of the unit. Throughout Mr Bennett's tenancy the rent has been paid by way of Housing Benefit.

9. As a result of complaints made by Mr Bennett about the unit it came to the attention of the council's environmental health officers who visited it. In consequence the council prepared an improvement notice dated 6 March 2015 [R44]. That may not have been addressed to the correct party and so a second improvement notice (in identical terms) dated 13 August 2015 was prepared and addressed to the appellant.

    In broad terms the council considered that Category 1 hazards existed as regards:

    Damp and Mould;
    Excess Cold;
    Food Safety; and
    Fire

    The remedial works required are set out in detail in schedule 2 to the improvement notice. The council required those works to be commenced by 13 September 2015 and completed within two months of that date.

10. On 3 September 2015 the tribunal received an application from the appellant by way of an appeal against the improvement notice dated 13 August 2015.

11. Directions were given on 18 September 2015.

12. On 30 October 2015 the tribunal received the council's bundle and on 5 February 2016 the tribunal received the appellant's bundle.

Inspection and hearing

13. Arrangements had been made for the members of the tribunal to inspect the property at 10:00 on 18 February 2016. On arrival representatives of the council were present. The appellant was not present or represented. A telephone call was put through to Mr Friedlander to explain that access was required. As a result of that call Mr Friedlander arranged for his builder to attend, which he did a little while later when he afforded us access. We noted that the property was damp and was evidently not habitable for several reasons but in view of what we say shortly we need not go into the details.

    During the course of the telephone call Mr Friedlander said that he proposed to attend the hearing later that day.

14. The hearing was due to commence at 13:30. Mr Friedlander was not present at that time. The case officer made a call to him and evidently he was on his way but held up in traffic and hoped to arrive shortly. Mr Friedlander duly arrived to present the appeal on behalf of the appellant.

15. The council was represented by Ms Annette Cafferty of counsel who was accompanied by Mr Nicholas Whittingham (a senior environmental health officer employed by the council who had dealt with the matter throughout) and Mr E Salter another employee of the council.

16. When the hearing got underway it became clear that Mr Friedlander did not dispute that the works identified in the improvement notice required to be carried out. He explained that he was seeking planning permission to demolish the unit and construct a new split level unit for residential purposes. If planning consent for a new unit was not possible he proposed to demolish the unit and rebuild it to the same configuration but compliant with modern standards and current building regulations, for which, he said, he would not require planning consent. Thus whatever the outcome of his current quest for a planning consent the unit is to be demolished and rebuilt in any event.

17. In discussing this position with Mr Friedlander it became apparent that he would be content if the improvement notice was quashed and replaced with a prohibition notice which prohibited the unit being used for residential purposes until the unit was demolished.

18. Following a short adjournment to enable the parties to take stock and make some further enquiries Ms Cafferkey said that the council was unwilling to withdraw the improvement notice, it wished to see the unit brought up to standard and fit for residential purposes as soon as possible and it had concerns about policing a prohibition notice to ensure that it was not in fact being used for residential purposes in contravention of the notice.

19. The tribunal then went ahead with the hearing of the appellant's appeal against the improvement notice. Mr Friedlander's case was that the works were required but the notice should be quashed and replaced by a prohibition notice.

Findings of fact

20. Mr Friedlander gave evidence in support of his case and his intentions to demolish and rebuild the unit in some form or another and he was cross-examined by Ms Cafferkey in some detail.

21. In essence the issue turned on the accuracy and plausibility of Mr Friedlander's intentions, about which the council had serious reservations.

22. The background lies in the correspondence which has passed between Mr Friedlander and the council and assertions he has made which are not always true or accurate. For present purposes the correspondence began in July 2014 when at [R27] he listed a number of issues which he said will be rectified. In December 2014 Mr Friedlander claimed that 'thousands of pounds' had been spent on the unit [R33], but the council was still receiving complaints from Mr Bennett about poor housing conditions. Mr Whittingham, a senior EHO with the council, visited the property on 10 December 2014 and in a letter dated 8 January 2015 Mr Whittingham identified a number of deficiencies and made recommendations [R35-43].

23. In an email to the council dated 11 February 2015 [A14] Mr Friedlander made reference to an architect being employed to submit plans to convert the unit to a one bedroom split level house. He was reluctant to spend vast amounts of money on the unit because if planning permission were obtained: "*we would be knocking the premises down.*" Mr Friedlander went on to observe: *"I have been through your list of requirements and find them to be slightly excessive. Whilst I am happy to carry out the majority of the work, there are several points which I do not accept to be correct."* Mr Friedlander then made a number of observations. At the end of the email he said: *"To summarise, most of your schedule would be ok to carry out besides the dry-lining."*

24. The recommended works were not carried out and so it was the first improvement notice was given in March 2015. This was issued to an associated and evidently dormant company.

25. Mr Friedlander informed the council that notice to terminate Mr Bennett's tenancy on 27 May 2015 had been given. In an email dated 29 June 2015 [A16] Mr Friedlander implied that possession proceedings had been issued in the County Court and said: *"I will send you the eviction documents as soon as we receive them from the Gee Street Court House."*

    He went on to say: *"Just to update you, I have now instructed a planning consultant to take over the application."*

26. In an email dated 7 July 2015 [A17] Mr Friedlander stated that he had yet to receive a response from the County Court and said that he was not able to carry out any works until the tenant has either vacated or been evicted.

27. Following a further visit to the unit and upon it becoming apparent that the first improvement notice had not been given to the landlord and owner of the unit, Mr Whittingham prepared a fresh (but identical) notice and it was served on the appellant on 13 August 2015 [R60-72]. This prompted Mr Friedlander's letter to the council dated 20 August 2015 [R73]. In that letter Mr Friedlander referred to a meeting in March 2015 when Mr Whittingham was informed that: *"… the intention was to redevelop the property into a larger unit and hence the recommended improvement notice would not need enforcing."* Mr Friedlander stated that the current planning application had been refused: *"… but we are in the process of re-applying with a new proposal."*

    The letter went on to say that steps were in hand to terminate Mr Bennett's tenancy and stated that: *"The tenant had 14 days in which to file a defence from 22 July 2015. He has not done so and we have now asked for a possession order…"*.

28. The court proceedings were issued on 22 July 2015 [A19] but were returned by the court under cover of a letter dated 1 September 2015 [A30] because they were not in correct form.

29. The application form to the tribunal dated 1 September 2015 appealing the improvement notice contained a statement of truth signed by Mr Friedlander on behalf of the appellant. In box 17 Mr Friedlander said, amongst other things: *"I am currently in the process of evicting the current tenants* [sic] *in order to carry out any improvements required to the property. The County court have granted possession in mid july 2015 and a request for eviction has been sent to the county court following the tenants failure to leave."* He goes on to say: *"…until we have possession we are unable to carry out any works … in admission the property is not in good condition and we are looking to subsequently apply for planning to rebuild the property from scratch."*

    Finally, he says: *"please can you place a stay on the Notice whilst the remedial action we are taking takes effect."* [sic]

30. On 10 September 2015 an order was made by the court requiring Mr Bennett to give possession on or before 24 September 2015 [A31]. A warrant for possession was sought on 15 October 2015 [A32] and on 26 November 2015 notice of appointment was given stating that the warrant would be enforced on 12 January 2016 [A33]. The appellant recovered possession of the unit on 12 January 2016.

31. On 7 January 2016 the appellant submitted an application for planning. Evidently that was an application to: *"Proposed demolition of the existing single storey residential studio unit and the erection of single storey residential unit plus basement with green roof."* By a notice dated 22

January 2016 [R107] and headed: *Application Still Invalid*" the council planning department stated that the application remained invalid for the several reasons therein set out.

32. In his oral evidence Mr Friedlander said that a prohibition order would be preferable to the improvement notice because it more resonates with the current planning application before the council. He said that the planners had the unit zoned as being for commercial use and had some reservations about the evidence showing residential user since pre-2008. Mr Friedlander appeared confident that the requisite evidence had been or was being collated and would satisfy the planners. He was thus confident that he would achieve an acceptable planning permission shortly. He was also quite certain that if he did not he would demolish the existing unit and rebuild it. Thus, one way or another the unit will be demolished and rebuilt shortly.

33. Mr Friedlander accepted that in his correspondence with the council he intimated that he would have the requisite works carried out but he made the pointed remark that he had not said when that might be.

34. Mr Whittingham gave oral evidence. His evidence as to the requirement for the works was not challenged by Mr Friedlander.

35. Mr Whittingham said that if the improvement notice was confirmed and if it was not complied with the probability is that the council would take enforcement proceedings. He also said that it was unlikely that the council would carry out the required works itself and seek to recover the costs incurred from the appellant.

Discussion and reasons for decision

36. Ms Cafferkey submitted that the objective of the council was that unit should be brought back into habitable residential use as soon as possible. The council took the view the most expedient way to achieve that objective was to pursue and enforce the improvement notice.

37. The council was reluctant to accept the assurances of Mr Friedlander because of the history of failed promises and misinformation provided by him on several occasions both as to the status of the court proceedings and the status of the application for planning permission.

38. Mr Friedlander took exception to the submission that he had lied to deceive the council and the tribunal but he said he was more comfortable with the expression that he had 'played fast and loose' in saying what was convenient at the time when he had not always had the time to check the file for details.

39. Mr Friedlander was not an impressive witness who was open and frank with answers to the questions put to him. At times he tried to be clever. We gained the impression that he was a busy property developer, manager and investor who had several projects afoot that were sometimes more important to him than the future of the subject unit. That said we did not

find him dishonest and we accept his evidence that he will demolish the unit and rebuild it. His preference is to do so pursuant to the planning application he is currently pursuing and which he is confident he will achieve. If he does not achieve planning he will demolish and rebuild it in its current format but with modern materials and compliant with current building regulations. We accept that such an outcome of what in effect will be a new-build is preferable to works or adjustments to the existing build and the overall effect will provide an enhanced residential unit.

40. The council had concerns about policing the property in the event that the improvement notice was quashed and replaced by a prohibition notice. We explored these concerns with Mr Friedlander who said that he would undertake to the tribunal to procure that the water and electrical services to the unit would be capped making it less attractive for someone to break into and reside in the unit unlawfully.

41. Part 3 of Schedule 1 to the Act makes provisions for appeals relating to improvement notices.

Section 15(5) of the Act provides if an appeal against the notice is made under Part 3 of Schedule 1 the operative time for complying with it is deferred.

Paragraph 10 of Schedule 1 provides that a person on whom an improvement notice is served may appeal to the tribunal against the notice.

Paragraph 12 provides that an appeal may be made by a person under paragraph 10 on the ground that one of courses of action mentioned in sub-paragraph (2) is the best course of action in relation to the hazard. By that sub-section those courses are:

(a) making a prohibition order under section 20 or 21 of the Act;
(b) serving a hazard awareness notice under section 28 or 29 of the Act; or
(c) making a demolition order under section 265 of the Housing Act 1985.

Paragraph 15 provides that on appeal under paragraph 10 the appeal is by way of a re-hearing and that the tribunal may by order confirm, quash or vary the improvement notice.

Paragraph 17 provides that where an appeal is allowed on the basis that one of the courses of action mentioned in paragraph 12(2) is the best course of action in relation to that hazard, the tribunal must, if requested by the appellant or the local housing authority, include in its decision a finding to that effect and identifying the course of action concerned.

42. It seems to us that quite clearly the unit is in need of works to be carried out to render it safely habitable. We have accepted the evidence of Mr Friedlander that the unit will be demolished and rebuilt. It will thus be brought back into safe residential use. It is perhaps an irony that the delay in that demolition and rebuilding lies with the council as local planning

authority and its need to be satisfied about the residential use of the unit since 2008 and its consideration of the application for planning.

43. If the improvement notice is confirmed it seems to us quite clear that the appellant will not carry out the works set out in schedule 2 of the notice and on the balance of probabilities the unit will be demolished pending clarification over planning and then rebuilt. If that does not occur the appellant will be as risk of enforcement action in the magistrates' court, which is disproportionate in the event that there may be some unavoidable delay in the demolition being carried out. Thus we find that in the short term there is no realistic prospect of the council achieving its objective of the unit being restored to residential use within the two months' period for completion of works mentioned in the notice.

44. We find that the best course of action in relation to the hazards is the making of a prohibition order under the Act prohibiting the unit from being used for residential purposes until it is demolished. We do so on the basis that it is proportionate, avoids the risks of criminal sanctions and will, in all probability bring about a better quality residential unit.

45. In making this finding we have accepted the undertaking offered by Mr Friedlander that he will procure the electrical and water supply services will be capped or disconnected to deter unlawful residential use of the unit pending its demolition. We would also encourage him to provide enhanced security to deter persons from breaking in to the unit.

46. For avoidance of doubt, and as requested by Ms Cafferkey on behalf of the council, we record a finding that on the information available to the council at the time the improvement notice was given it was justifiable to give that notice but in the light of the evidence before us as at today's date the best course now is for the improvement notice to be quashed to be replaced by the making of a prohibition notice.

Costs

47. There are two separate issues to consider.

48. The first is section 49 of the Act. That section enables a local housing authority to recover certain costs or expenses incurred in connection with serving an improvement notice.

49. Section 49(5) of the Act provides that where a tribunal allows an appeal against a notice it may make such order as it considers appropriate reducing, quashing, or requiring the repayment of, any charge under section 49 made in respect of the subject notice. No application was made to us under this section.

50. For the reasons set out above and given that Mr Friedlander has accepted (or substantially accepted) from the outset that the works identified in the improvement notice required to be carried out we make it clear that we find that the appellant should pay to the council such costs and expenses as

it may lawfully be entitled to in respect of the improvement notice dated 13 August 2015 by virtue of section 49 of the Act, notwithstanding that we have quashed that notice as of today's date.

51. Rule 13(1)(b) provides that the tribunal may make an order for costs only if a person has acted unreasonably in bringing, defending or conducting proceedings in a residential property case. Rule 1 defines a 'residential property case' as being a case in respect of which the tribunal has jurisdiction by virtue of the Housing Act 2004.

52. Ms Cafferkey made an application for a penal costs order pursuant to rule 13(1)(b). In support Ms Cafferkey submitted that the appellant had acted unreasonably in not complying with directions, had not provided any documents in support of the appeal until 4 February 2016, had not made plain that in his application form (or documents) that he accepted the works mentioned in the improvement notice were required and that he sought the improvement notice should be quashed on the footing that it be replaced by a prohibition notice, had not entered into a dialogue with the council, had refused to meet with council officials to see if settlement was possible, had been untruthful about the possession proceedings and had been less than frank or clear about the proposed demolition of the unit.

53. Ms Cafferkey submitted that due the above failings, or some of them, the council had incurred more costs than it would otherwise have done. By way of an example Ms Cafferkey said a conference was held to discuss and consider the evidence to be put before the tribunal and this would have been avoided if the appellant had been open and frank in its application form and the documents it served on 4 February 2016.

54. We were told that the council's costs of preparation for the hearing were put at £910 being 14 hours at a charge-out rate of £65 per hour. Counsel's fee for a conference and the hearing was £1,500.

55. Mr Friedlander opposed the application. He asserted he was not dishonest or untruthful. He also said that he did not propose to make any applications for costs.

56. We consider that a rule costs order under rule 13(1)(b) should only be made in exceptional circumstances and where the unreasonable conduct complained of has caused the opposite party to incur more costs than it would have done otherwise.

57. The overriding objective set out in rule 3 makes it clear that parties must help the tribunal to further the overriding objective and must cooperate with the tribunal generally. This includes an obligation on the parties to cooperate with one another and to make clear to the opposite party the gist of the case it proposes to pursue.

58. We find that the appeal was made in order to give the appellant more time to get its house in order and to pursue its application for planning. It did not really dispute the need for the works to be carried out and it failed to

communicate the gist of its case to the council. The appellant also failed to respond to an invitation from the council to meet to discuss the differences between them. We find that had Mr Friedlander done so and had he been more open and frank there would have been a real possibility of an outcome being arrived at that would have avoided the council incurring the amount of costs that it has done.

59. We find that the unsatisfactory manner in which the proceedings were brought and conducted by the appellant has caused the council to incur more costs than it would have done otherwise.

60. Accordingly we find that rule 13(1)(b) is engaged. We can but take a broad view on what lower amount of costs the council might have incurred if the appellant had not acted in the way in which it did. We find there will still have been a need for an officer to have spent some time preparing for the hearing and we find it probable that the council will still have briefed counsel for the hearing but the conference to consider evidence would not have been required. In taking a broad view on these matters we make a costs order in favour of the council in the sum of £1,000.00.

Judge John Hewitt
24 March 2016