



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

Case Reference : **CAM/22UG/HIV/2019/0001**
P : PAPERREMOTE

Property : 61 Mile End Road, Colchester CO4 5BU

Applicant : John Martin Peartree

Respondent : Colchester Borough Council

Type of Application : appeal against service of a suspended improvement notice [HA 2004, ss.11, 12, 14, 15 & Sch 1 Pt 3]

Tribunal : Judge G K Sinclair

Date of determination : 6th May 2020

DECISION

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1. This appeal is against the service on the applicant of a notice varying a suspended improvement notice made by the respondent local authority, the variation notice being dated 27th September 2019. The original suspended improvement notice had been made on 6th November 2018. Although the application was not received at the tribunal office until 24th December 2019 the tribunal was satisfied that the appellant had a reasonable excuse and, by a directions order dated 23rd January 2020, allowed the appeal to proceed.

2. Although in the application form the appellant said at section 9 that he would not be content with a paper determination he then went on at section 11 to say “I hope this can be satisfactorily concluded without a hearing”. The case was therefore listed for an inspection and hearing on 4th May 2020 but the Covid-19 pandemic then intervened, inspections and face-to-face hearings were halted, and the tribunal wrote to the parties enquiring how they wished to proceed. Faced with the option of a paper or telephone hearing or adjourning the case for perhaps upwards of six months the parties both agreed that it be dealt with on paper. The tribunal therefore proceeded on that basis.
3. The notice under appeal is in two parts, alleging both Category 1 and 2 hazards. Served under section 11, it alleged a single Category 1 hazard, viz

Falling on Stairs, etc [HHSRS Hazard Class 21]	Band C
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The second part, served under section 12, was varied by removing one allegation, leaving a single Category 2 hazard; viz

Damp & Mould Growth [Class 01]	Band F
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The allegation removed, an alleged Category 2 hazard of Falling between Levels [Class 22], was instead made the subject of a Hazard Awareness Notice under section 29. This was served on the same date.
4. For the reasons which follow the tribunal allows the appeal and directs that the suspended improvement notice be quashed.

Background

5. In about June 2018 Mr & Mrs Burkey, prospective tenants of a semi-detached house with garage at 61 Mile End Road, Colchester, were applying for financial assistance from the local housing authority under its Homefinder scheme. As part of that scheme the local authority instructed Keith Morland, a Private Sector Housing Officer, to conduct an inspection of the premises by reference to the Housing Health and Safety Rating System under the Housing Act 2004. He was given permission to inspect by Paul King of David Martin Group, a letting agent who held the keys and was involved in finding the prospective tenants. Although the applicant states that the agent managing the property was JA Management, which he had set up with his son, it would appear that Mr King had ostensible authority to grant Mr Morland entry to the premises.
6. The local authority officer involved with the Homefinder scheme then received a series of enquiries from Mr King, asking whether Mr Morland’s report was ready yet. Perhaps because they were anxious not to lose the tenancy Mr & Mrs Burkey then decided to borrow the deposit from within their family and not to proceed any further with their Homefinder application. However, rather like the question-master in Mastermind, as Mr Morland had started his report he decided to continue with it.
7. The outcome was that he identified what he considered to be a number of Category 1 and Category 2 hazards and, after some negotiation with the landlord, an improvement notice was served upon him. However, as the tenants did not consider that the matters alleged were hazards for them, and disagreed with the proposed remedial works, the council decided to suspend the effect of the notice

until after their occupation of the premises had ceased.¹

8. After further discussions in an attempt to avoid an appeal, proposals made by the landlord about certain aspects of or alternatives to the proposed works, and a request for a second opinion from another officer, Colchester agreed to review and vary the terms of the suspended improvement notice.
9. The council was and remains insistent that there is a single Category 1 hazard, viz Falling on Stairs, but this is a collective assessment of three separate things :
 - a. No guarding to one side of the internal flight of stairs, with a maximum fall distance of 2.2 metres and a minimum of 1.2 metres
 - b. Open guarding on both sides of a flight of four external steps from the rear of the garage down to the patio level
 - c. A steep semi-circular flight of six steps from patio down to the rear garden with no handrails to assist ascent and descent.
10. The notice requires that the lack of guarding be remedied by the installation of boarding or vertical spindles with a gap between them of no more than 100mm, and the installation of a handrail to one side of the patio retaining wall and a second, freestanding railing close to it and to be used in conjunction with it on the semi-circular steps. The tenants do not want guarding to the internal stairs, as this not only makes it difficult to manoeuvre furniture and bulky objects but might also create a sense of claustrophobia. So far as the steps down to the lawn are concerned the appellant is content to provide one handrail against the wall, but no more. The tenants do not want either, but certainly not a freestanding rail which they regard as unattractive as well as unnecessary.
11. Although the council was originally concerned about falling between levels, and wanted a low picket fence at the edge of the patio to be replaced by a barrier at least 1100mm high, that has since been dropped and is now the subject-matter of a Category 2 hazard awareness notice.
12. The sole Category 2 hazard named in the varied notice subject to appeal is the hotly disputed issue of damp and mould growth. The appellant is insistent that there is no mould, that some of the damp might be caused by a leaking pipe, and that an old house will seasonally display signs of damp. Nevertheless, he has taken the advice of a chartered surveyor, investigated the leak, hacked back and replaced plaster to an internal wall, inserted a chemical DPC to the front and rear walls, installed additional air bricks and a french drain to keep the latter clear from obstruction. Some or all of this work may have taken place after the council's re-inspection in July 2019.

Material statutory provisions and guidance

13. An improvement notice is one of the remedies available to a local authority under Part 1 of the Housing Act 2004, which concerns housing conditions. By Part 1 the old concepts of fitness for habitation are replaced by a new Housing Health &

¹ As the tenants were occupying under a fixed term assured shorthold tenancy they were initially alarmed that they would have to leave after its expiry, so works could be undertaken, but they were reassured by the council that the suspension would continue so long as they remained in occupation – which could be medium to long term

Safety Rating System. This is a system founded on the analysis of 29 specified hazards, 51 types of potential harm (grouped in 4 classes ranging from extreme to moderate, by severity of outcome), the likelihood of an occurrence that could result in harm to a member of a vulnerable group within the next 12 months, and the spread of possible outcomes resulting from it, expressed as a percentage for each of the classes of harm – to which representative scale points are assigned. Essentially mathematical, the result of these calculations for each identified hazard produces a numerical score placing the hazard within one of a number of bands, ranging from A to C (collectively Category 1) and D to J (collectively Category 2).²

14. By section 3 a local housing authority must keep the housing conditions in their area under review with a view to identifying any action that may need to be taken. Section 4 states that if the authority consider, as a result of any matters of which they have become aware in carrying out their duty under section 3, or for any other reason, that it would be appropriate for any residential premises in their district to be inspected with a view to determining whether any category 1 or 2 hazard exists on those premises, the authority must arrange for such an inspection to be carried out.
15. Section 5(1) provides that if a local housing authority consider that a category 1 hazard exists on any residential premises, they **must** take the appropriate enforcement action in relation to the hazard. Section 7(1), by contrast, provides that if a local housing authority consider that a category 2 hazard exists on any residential premises, they **may** take the appropriate enforcement action in relation to the hazard.
16. Section 9 provides that :
 - (1) The appropriate national authority may give guidance to local housing authorities about exercising –
 - (a) their functions under this Chapter in relation to the inspection of premises and the assessment of hazards,
 - (b) their functions under Chapter 2 of this Part in relation to improvement notices, prohibition orders or hazard awareness notices,[etc.]
 - (2) A local housing authority must have regard to any guidance for the time being given under this section.
17. To assist Environmental Health Officers in carrying out their duties under this Part of the Act, and in making their HHSRS hazard assessments, the ODPM (now the MHCLG) has published two documents providing Operating Guidance and Enforcement Guidance.³
18. Sections 11 and 12 then respectively make provision for the taking of appropriate enforcement action (which includes service of improvement notices) in the case of Category 1 and Category 2 hazards. The material parts of section 8 provide that :
 - (1) This section applies where a local housing authority decide to take one of the

² Housing Health and Safety Rating System (England) Regulations 2005 [SI 2005/3208]

³ 05 HMD 03485/A and 05 HMD 03485/B respectively

kinds of enforcement action mentioned in section 5(2) or 7(2) (“the relevant action”).

- (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**, copy of a notice, or copy of an order which is served in accordance with-
 - (a) Part 1 of Schedule 1 to this Act (service of improvement notices etc),
 - (b) Part 1 of Schedule 2 to this Act (service of copies of prohibition orders etc), or
 - (c) section 268 of the Housing Act 1985 (service of copies of demolition orders),in or in connection with the taking of the relevant action.

[emphasis added]

19. Section 14 states that an improvement notice may provide for the operation of the notice to be suspended until a time, or the occurrence of an event, specified in the notice. The time so specified may, in particular, be the time when a person of a particular description begins, or ceases, to occupy any premises.

20. Section 17 goes on to provide, however, that :

- (1) The local housing authority may at any time review an improvement notice whose operation is suspended.
- (2) The local housing authority **must review an improvement notice** whose operation is suspended **not later than one year after the date of service of the notice and at subsequent intervals of not more than one year.**
- (3) Copies of the authority’s decision on a review under this section must be served –
 - (a) on the person on whom the improvement notice was served, and
 - (b) on every other person on whom a copy of the notice was required to be served.

[emphasis added]

21. Appeals are dealt with by section 15 and Part 3 of Schedule 1 to the Act, are by means of a rehearing (i.e the evidence is looked at afresh, including matters not known to the council at the time the notice was made) and the tribunal on appeal may by order confirm, quash or vary the improvement notice.

The evidence

22. Pursuant to the directions issued by the tribunal each party prepared their own bundle of documents. The respondent’s evidence comprises witness statements by Keith Morland and his superior officer, Anna Watson, although for some reason the latter is treated as an exhibit to Mr Morland’s statement instead of freestanding evidence. Mr Morland also exhibits a significant number of documents, the original suspended improvement notice and that under appeal, emails and other correspondence, and a letter/statement from Mrs Burkey, the tenant, objecting to some of the desired works of “improvement”.

23. Most importantly, as the tribunal has been unable to conduct an inspection, the

respondent's bundle includes at pages [Resp 31, 34 & 35] colour photographs of the alleged hazards. At [Resp 31] one can see the internal staircase. As shown on the plan at [App 26], it ascends from within the ground floor rear room, adjacent to the entrance to the kitchen. After several steps it turns 90° to the right and continues up by the side wall next to the garage. On the wall side is a wooden handrail fixed to the wall. On the room side there is a short newel post at the turn in the stairs, but otherwise there is no guarding, leaving a triangular void up to just below ceiling height. While the maximum height to this exposed side may therefore be 2.2 metres, as claimed, it is unlikely that anyone could slip on the stairs and fall over the edge until several steps further down, but what guarding there is at first floor level (if any) is not known.

24. At [Resp 35] can be seen the set of four steps down from the garage to patio level. On either side is a brick upstand comprising a line of bricks set vertically at each step, so perhaps 200mm high, and a set of freestanding metal rails with an upright by the top and bottom steps. The complaint is that there are no vertical posts or spindles at 100mm intervals.
25. At [Resp 34] are the semi-circular steps descending from the patio. Behind the low white picket fence along the edge of the patio can be seen, to the left and rear, the short set of steps and handrails leading from the garage. The concrete patio is supported by a rendered brick retaining wall, with the steps rising to meet it between two small brick pillars, each about eight bricks high plus a capstone, or about 700mm tall. The picket fence on either side is affixed to these pillars and, although suggested in the council's evidence that the fence is only about 200mm high, that cannot be so. It is level with the base of each capstone, and beneath is a small brick upstand. The council is correct, however, in saying that it does not come anywhere close to the desired barrier height of 1100mm; high enough to lean on but without toppling over.
26. At the left of the photograph can be seen a brick wall, being part of a redundant barbeque at lawn level. The semi-circular steps are each two bricks high, plus the thickness of a concrete slab and the mortar in which they are bedded; perhaps 170mm. The overall impression from the photograph is of a moderately steep set of steps. The proposed safety improvement accepted by the appellant is to remove the barbeque and fix a hand rail to the pillar and retaining wall on that side of the steps. What he objects to (as do his tenants) is the need to erect a second, freestanding rail on the steps so that a person ascending or descending can reach a rail with each hand. This, they say, is unnecessary and would ruin the look of the steps.
27. In his bundle the appellant, Mr Peartree, produces his witness statement, a summary of the "now" situation, a plan [App 26] showing the ground floor layout and the areas of wall to which damp proofing measures were applied, various technical articles on Protim moisture sensing meters, on damp in old buildings, an email from his chartered surveyor, and many very helpful photographs. These include photographs of the damp course installation and repairs to the water leak, and examples taken from public spaces (probably local authority controlled) of handrails regarded as acceptable. None have vertical posts or balusters. They include a set of handrails on the steps outside Colchester Leisure Centre [App42] and those between beach and promenade at Frinton (Tendring DC) [App 43].

Each set has a central rail running parallel to the top rail. The Colchester ones also have a lower rail probably less than 100mm above ground level. At [App 44] are photographs of the steps outside the National Gallery, in Trafalgar Square. In fairness, these steps are shallower, and divided into groups of four separated by a wide landing space. There is one large rail near one side to assist the infirm, but not two close to each other.

Discussion and findings

28. The tribunal has considered all the evidence placed before it, and in particular the various photographs including those of the damp proofing works and the public railings on potentially busy sets of steps.
29. Had it not been for the tenants applying for Homefinder assistance from the council then Mr Morland would have had no legitimate reason to seek entry to the premises under section 4 of the Act. When they abandoned their application he had, however, carried out his inspection and decided to proceed with his report. Lumping issues with three sets of steps or stairs together, a finding has been made that there is a hazard (Falling on Stairs) which is so serious that Mr Morland and Ms Watson place it in Category 1, which imposes a duty on the council to do something about it. It is noteworthy, though, that :
 - a. The council gives no proper explanation for increasing the average level of likelihood of risk that is found in the guidance from 1 in 218 to 1 in 32; and
 - b. Section 28 provides that a hazard awareness notice is a legitimate course of action to be taken in respect of a Category 1 hazard.
30. The tribunal cannot be satisfied with the level of assessed likelihood, which has a dramatic effect on the final scoring. This is particularly so with the two sets of external steps. Those from the garage have a handrail each side, at a sensible height, and the brick upstands at each side prevent a foot from slipping sideways off a wet step. Further, there are only four steps.
31. As for the semi-circular steps, the tribunal cannot understand why the council insists upon two sets of railings instead of the one by the retaining wall suggested by the appellant. The tribunal is familiar with busy public spaces where flights of steps have either one set of handrails or multiple ones set so far apart that one cannot reach both at the same time, which is what is sought here. One need look no further than busy railway station steps at Waterloo, Wembley Park, etc to see that handrails are quite wide distances apart and only one can be used at a time.
32. As for the internal stairs, there is a triangular gap and a risk that someone might slip on the carpeted treads, but there is also a handrail easily reached on the other side. Infilling this gap with spindles, as suggested, would restrict the ability to get furniture and large, awkward items such as a mattress up and down stairs and be claustrophobic in effect. If something is required then an easily demountable glass or perspex screen screwed to the outside edges of the timber surround might be preferable, but that is a matter for the landlord and perhaps the tenants. There are no young children here to be concerned about.
33. As for the sole Category 2 hazard now relied upon, the tribunal is satisfied that the appellant has taken proper advice on the potential sources of the damp

problem and has acted upon it. This may have occurred, or been completed, after the council's second inspection in July 2019 but it is a factor that the tribunal is entitled to take into account.

34. The tribunal also bears in mind the following matters :
 - a. The appellant is an experienced landlord and been involved in property management and also in property management organisations
 - b. He prefers medium to long-term tenants, and the current tenants are well-regarded and anxious to stay for the foreseeable future, as the premises are convenient for the hospital – where Mrs Burkey appears to work
 - c. The council has taken the tenants' interests into account by suspending the operation of the improvement notice until after they move out
 - d. Section 17 states that the local housing authority **must** review an improvement notice whose operation is suspended not later than one year after the date of service of the notice and at subsequent intervals of not more than one year
 - e. Both landlord and tenants seek finality; not to have this resurrected every year.
35. The tribunal is satisfied that the works proposed by the appellant to the semi-circular steps are adequate, and should have been accepted. He acted promptly on the previous issues of the low first floor windows and the cat flap, and has sought to engage constructively with the council at every turn.
36. The making of an improvement notice, even a suspended one, was not necessary and the same is therefore quashed.

Dated 6th May 2020

Graham Sinclair
First-tier Tribunal Judge