FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/34UF/HEP/2021/0003**
Property	**:**	**9 Cartmel Place** **Northampton** **NN3 2AW**
Applicant	**:**	**Mr Robert Kaniu**
Represented by	**:**	**In person**
Respondents	**:**	**West Northamptonshire Council**
Represented by	**:**	**Mrs Ruksana Munir, solicitor**
Type of Application	**:**	**Appeal against emergency prohibition order**
Tribunal Members	**:**	**Tribunal Judge Stephen Evans** **Mr John Francis**
Date and venue of Hearing	**:**	**27 April 2022** **Wellingborough Magistrates Court**
Date of Decision	**:**	**23 May 2022**

DECISION

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DECISION

The Tribunal determines that:

(1) The appeal shall be dismissed;

(2) The Emergency Prohibition Order is varied in the terms set out in paragraph 103 below.

Introduction

1. The Applicant seeks the quashing of an Emergency Prohibition Order imposed by the Respondent Council on 6 October 2021.

Relevant law

2. The relevant statutory provisions are set out in Appendix 1 to this decision.

Background Facts

3. The Applicant is the freeholder of 9 Cartmel Place, Northampton NN3 2AW ("the Property").

4. On 18 March 2016 the Respondents, having inspected the Property on 16 March 2016, served a schedule of deficiencies in respect of the state of the Property upon the Applicant. These included deficiencies in terms that there were signs of dampness to the bathroom, that there was a partially collapsed kitchen ceiling, and that the kitchen light was affected by dampness.

5. A further inspection followed on 14 April 2016, and on 2 June 2016 the Respondent served on the Applicant an Improvement Notice, which alleged that there were category 1 and 2 hazards within the Property. Such hazards included damp and mould growth in the kitchen and bathroom and rear bedroom, as well as food safety hazards in the kitchen, by reason of the ceiling having collapsed. The Respondent's recommended works included instructing a damp specialist to investigate the dampness, and an examination of the state of the bathroom floor.

6. The Applicant appealed this improvement notice but his appeal was dismissed by the Tribunal for procedural non-compliance: see case reference CAM/38UF/HIN/2016/0010.

7. On 18 March 2021 a complaint was received by the Respondent from the tenant of the Property. She complained that there had been issues of dampness from 2016 onwards in the bathroom affecting the kitchen.

8. The Respondent decided to visit and to undertake a health and housing safety rating system assessment. After several attempts to make contact with the letting agents, which did not bear fruit, the Respondent served a notice of entry on the Applicant, the occupiers and the letting agent pursuant to section 239 the Housing Act 2004, indicating an intention to visit on 7 April 2021.

9. The inspection duly went ahead on 7 April 2021. The officer of the Respondent who inspected was Mr Anthony Emaike, Private Sector Housing Enforcement Officer.

10. On 13 April 2021 the Respondent undertook a heath and housing safety rating system assessment based on the above inspection, which concluded that there were 10 hazards of category 2 classification. A decision was made to serve a Hazard Awareness Notice, which duly followed on 5 May 2021.

11. However, matters took a downwards turn when, on 6 May 2021, the Respondent received a text from the tenant to inform it that the ceiling in the kitchen had collapsed. The Respondent inspected the Property once more, that day.

12. On 20 July 2021 the Respondent served an Improvement Notice on the Applicant, which he later appealed.

13. On 5 October 2021, the situation further deteriorated, according to the Respondent. The tenant sent a WhatsApp message to the Respondent to inform it there had been a further collapse in the kitchen ceiling.

14. The Respondent, through Mr Emaike and another officer called Mr Arthur Chikonde, inspected the Property on 6 October 2021, during the afternoon. The Respondent decided to serve an Emergency Prohibition Order (EPO) on the Applicant, citing structural collapse and falling elements, which constituted a Category 1 hazard according to the Respondent.

15. The details in the Order can be summarised as:

    (1) Bathroom: evidence of an historic leak (from 2016 apparently), joists and floorboards rotting, and evidence that the ends of the joists were losing bearing. The bath looked and felt unstable;

    (2) The ceiling had partially collapsed, with bulging and cracking; the hole in the ceiling was continuing to widen, and there was debris from it on the cooker below.

16. As a result, the Respondent moved the tenant and her young family out of the Property into temporary accommodation where they still reside.

17. On 29 October 2021 this Tribunal received an appeal by the Applicant against the EPO.

18. In November 2021 the Applicant withdrew his appeal against the Improvement Notice which had been earlier served in respect of the same areas in the Property.

19. Directions were given by the Tribunal in these proceedings on 6 January 2022.

20. Directions were extended, with respect to certain steps only, on 10 February 2022.

21. The Applicant's finalised grounds of appeal are contained in a document dated 17 March 2022. These are set out in detail later in this decision.

22. The matter was listed for hearing on 27 April 2022. Approximately 1 week before the hearing, the Applicant had the kitchen ceiling repaired, to the extent that the hole was covered over, and the celling replastered.

Issues

23. The procedural directions identified the issues as follows:

(1) Has the Respondent gone through the necessary steps in respect of the issue of the EPO?

(2) Do category 1 hazards exist?

(3) If so, do hazards involve an imminent risk of serious harm to the health and safety of any relevant occupiers?

(4) Should the council have taken enforcement action?

(5) If so, and if an emergency prohibition order is the appropriate enforcement action, do the contents of the order complied with the requirements of section 44 of the act?

(6) Should the Tribunal confirm, vary or revoke the emergency prohibition order?

The inspection

24. The Tribunal inspected the Property on the morning of the hearing on 27 April 2022. Photographs were taken by the Tribunal, which were shared with the parties before the hearing started later that day.

25. The Applicant attended the inspection, as did the Respondent's officers Mr Chris Stopford, Mr Chikonde, and Mrs Ruksana Munir, solicitor.

26. The Property is a small, terraced house. Inside it was clear that the Applicant was undertaking some refurbishment/ building works. However, given current restrictions, the Tribunal limited itself to the areas in dispute, namely the kitchen and bathroom. In the kitchen it was immediately apparent that there had been a repair to the kitchen ceiling; there is no longer a hole, the kitchen ceiling having been replastered to a smooth finish. The ceiling light had not yet been reinstated, and there was an electrical wire hanging down. The cooker was missing.

27. Upstairs, the bathroom was of a small size, and was devoid of any bath or pipework and sanitary installations. The bath was in an adjoining room. The floorboards were bare and were intact, save for a small section of floorboard, roughly 12 inches in length. Through this hole it could be seen that there was plasterboard attached to the kitchen ceiling. There were no obvious signs of dampness or rot in this limited area visible to the Tribunal. The Tribunal members stood in the area where the bath was previously, and there was no obvious weakness or unevenness in the floorboards. The full extent of any works was unclear from the inspection, however, given the limited access.

The Hearing

28. Given the state of the Property, the Tribunal afforded the parties the opportunity to enter into discussions and negotiations, on site and at the hearing venue.

29. Shortly after noon, the Tribunal was informed that the parties were near to settlement, and the Tribunal gave assistance to the parties by way of explanation of its powers on the issue of costs.

30. Regrettably, by 12.30pm the parties could not reach terms, and the hearing commenced.

31. The Tribunal had the benefit of a bundle from the Applicant amounting to 55 pages, another from the Respondent of 194 pages, plus the photographs taken at the inspection.

32. It was agreed that the hearing would proceed by way of rehearing, pursuant to section 45(5) of the Housing Act 2004, with the Respondent calling its evidence first. At this juncture there were representations made concerning adjournment of the hearing, given that one of the Respondent's witnesses, Ms Ling, had tested positive for coronavirus that day, and was unfortunately unable physically to attend court. The Applicant opposed an adjournment; he wanted the hearing to proceed either with Ms Ling's statement being admitted in evidence, or it being ruled inadmissible.

33. The Tribunal retired to consider its decision, during which time the parties took lunch. In this period, the Tribunal case officer successfully investigated whether a remote video link could be established with Ms Ling so as to enable her evidence to be given "live".

34. The hearing resumed at 1.35pm, when the Tribunal informed the parties that it was possible for Ms Ling to give her evidence remotely by video. The parties were asked to consider proceeding as a hybrid hearing, with Ms Ling only giving her evidence by video link. The parties agreed to this course, and the Respondent proceeded to call Ms Ling and Mr Chikonde in turn, to confirm their witness statements and give any oral clarification. Ms Ling confirmed she was well enough to give evidence. The Applicant had the opportunity to, and did, ask questions of those witnesses. Mr Emaike's written evidence was tendered as hearsay evidence.

35. The Applicant then had the opportunity to adduce his evidence, and the Tribunal took the Applicant through his grounds of appeal one by one in the course of this process. Questions were asked of him by the Respondent.

36. The parties gave their closing representations from 4.10pm to 5pm.

Post hearing

37. On 5 May 2022 the Applicant emailed the Tribunal with further representations, together with a link to a high court decision (considered later below). The Tribunal accepted receipt of those submissions and directed the Respondent to file a response.

38. The Respondent objected to the Applicant making submissions and/or adducing evidence post hearing. The Tribunal then directed that it would benefit from legal representations on the Applicant's submissions, which did not constitute evidence. The time for the Respondent to reply was extended to 16 May 2022.

39. The Respondent informed the Tribunal by email on 16 May 2022 that the only cases it relied on are the first 2 mentioned in paragraphs 63 and 64 of this decision; however, the Respondent could not obtain full copies of those cases online.

The grounds of appeal

40. The Appellant's grounds of appeal are as follows:

(1) The issue and service of the EPO was invalid because:

- the officer serving the EPO had no delegated powers to serve it;
- accordingly the officer should not have signed the statement of reasons which formed part of the EPO;
- the officer did not issue 24 hours' power of entry to enter the premises with the sole purpose of issuing an EPO;
- no emergency remedial works were carried out or organised by the Respondent which would exempt the requirement for a notice of entry.

(2) There is no need for an emergency prohibition order because:

- such an order is draconian and should be used as a last resort and the Respondent ought to have considered other options; the statement of reasons does not give a sufficient justification as to why other available enforcement options were not appropriate;

- the officer did not rely on any professional structural reports to deem there to be an imminent danger of collapse of the ceiling;

- The officer had a predetermined decision without having undertaken an assessment;

- Works have not been outstanding since 2016; the evidence reveals that it had closed its case in 2018; and in any event the tenant has been a problem tenant;

- The cost of repairs is relatively low and therefore the Respondent has vested powers to enforce remedial emergency works and recover costs where there is imminent danger/risk; the Respondent having inspected the premises in May 2021 had 6 months to carry out remedial works and recover its costs.

41. There is no appeal on the basis the Applicant is a not relevant person to be served with an EPO.

Determination

42. We have considered each of the grounds of appeal in turn, and give our reasons as follows:

(a) "The issue and service of the EPO was invalid because the officer serving the EPO had no delegated powers to serve it"

43. The officer concerned was Mr Emaike. Whilst Ms Ling was of the view the EPO had been posted, the evidence of Mr Emaike is that the EPO was served on the Applicant (a) by email, with the tenant and lettings agents copied in; and (b) a copy was attached to the Property.

44. It was accepted by the Respondent that Mr Emaike did not have delegated authority to sign the EPO. An examination of the EPO reveals that Ms Ling was the signatory. She confirmed in evidence that she made the decision on behalf of the Council to serve the notice; and that whilst she signed it, general administrative work is carried out by case officers.

45. The Respondent's position was therefore that Mr Emaike wrote the covering letter and sent the EPO by email, but these actions were administrative acts.

46. The Tribunal determines this ground of appeal against the Applicant, for the following reasons:

47. First, there is nothing in sections 43, 44 or Part 1 of Schedule 2 to the Housing Act 2004 which requires the person serving an EPO to have delegated powers to serve it. Section 243 of the Act concerns authorisation for enforcement purposes etc. but this section does not apply to an EPO: see s.243(1).

48. Secondly, the Applicant's argument rests solely on asserting that the Respondent acted in breach of the Record of Delegation, as attached to Mr Emaike's witness statement. The Applicant did not put it this way at the hearing, but it seemed he was advancing some sort of argument of what lawyers term *ultra vires*, i.e. that the Council was acting outside of its powers in a public law sense.

49. In his belated written submissions, the Applicant relied on a case called *The Queen on the application of Bridgerow Limited v Cheshire West and Chester Borough Council & Whitefriars Resident Association* [2014] EWHC 1187 (Admin). In that case, a local authority's refusal to renew a sexual entertainment venue licence was set aside where, in breach of its constitution, the decision was taken by a panel of 12 councillors instead of by 3 members drawn from the full committee on a politically proportionate basis. It held that it was important that the manner in which executive functions were carried out was published, transparent and reliable.

50. The Applicant contends that, in the case, it was "well-established that a local authority acts unlawfully if it has adopted and published a scheme of delegation and then does not act in accordance with that scheme".

51. However, the case contains no such quotation, which appears to be taken instead from a later case which cited *Bridgerow* with approval: see para. 7 *of The Queen (on the application of Romeo Dance Academy Limited v Milton Keynes Council* [2022] EWHC 475 (Admin), per Upper Tribunal Judge Cooke sitting as a Deputy High Court Judge.

52. In any event, the foundation of the decision in *Bridgerow* was that, on the facts before the judge, the delegation of the decision in issue had been taken by a group of people who had no power to take it: see para. 37 of the judgment, per Stuart-Smith J (as he then was).

53. In so doing, the judge implicitly accepted, based on the House of Lords case of *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603 that, where a council acts in excess of its powers but in a way which is so

negligible as to be truly minimal, a discretion exists not to quash the decision; however, the case before him was not such a case, because the court could not be satisfied the decision would not have been any different if the correct 3 persons had taken it.

54. The Record of Delegation in the instant proceedings makes clear "that delegation is not authorised for the service of…emergency prohibition orders." However, in the Tribunal's determination, it is sufficient for the EPO to have been signed (as it was here by Ms Ling) by an officer with delegated powers to do so. We consider that the emailing of the EPO and the signing of a covering letter to it are essentially administrative acts, which Mr Emaike was competent to do. In other words, that "service" as used in the Record of Delegation means the signing of the EPO. To hold otherwise would mean that senior officers would have to post or email EPOs to relevant persons, or where necessary, have to travel to affix EPOs to the subject Property.

55. Even if we are wrong on that, we consider that any act in excess of the powers of the Respondent was so negligible as to be truly minimal. The EPO had been lawfully signed by an appropriate officer, and (unlike the *Bridgerow* decision) there is no obvious reason to think the outcome would have been any different had Ms Ling emailed the EPO to the Applicant instead of Mr Emaike.

56. We are not therefore satisfied, the burden being on the Applicant, that the Respondent acted outside of its powers. Alternatively if it did, we do not quash the decision of the Respondent on that basis.

(b) "The issue and service of the EPO was invalid because the officer should not have signed the statement of reasons which formed part of the EPO"

57. The Applicant is right to point out that the Respondent must prepare a statement of reasons for their decision to take the relevant enforcement action: s.8(2) of the Act; and that the statement must accompany an EPO: section 8(4)(b) and (5)(b).

58. However, as with issue (a) above, the Act does not legislate as to who must prepare the statement of reasons. The evidence of Ms Ling was that Mr Emaike had the delegated power to prepare a statement of reasons. We accept that evidence.

59. The Applicant's contention was in effect that, because the statement of reasons must accompany the EPO, it had to be prepared by an officer who had power to serve/sign the EPO.

60. Accordingly, it seems to the Tribunal that this issue stands or falls together with issue (a).

61. We reject the ground of appeal for the same reasons as in issue (a).

(c) "The issue and service of the EPO was invalid because the officer did not issue 24 hours power of entry to enter the premises with the sole purpose of issuing an EPO"

62. It was common ground that no notice under s.239(5) of the Housing Act 2004 was given by the Respondent before going into inspect on 6 October 2021.

63. By section 239(9), such a notice must be written and must state the purpose for which entry is sought.

64. The parties joined issue as to whether any such notice was necessary. The Respondent's case was that the tenant had invited the Applicant in, and that was sufficient, relying on the Tribunal decision at first instance in *Cheltenham Construction Ltd v Gloucester CC*, CHI/23UE/HER/2007/001. It similarly relied on *Jarrett v Nottingham CC*, BIR/00FY/HER/2001/01, but that concerned a lack of notice before ERA.

65. The Applicant relied on contrary authority: see the Tribunal decisions at first instance in *Gupta v Sandwell MBC*, BIR/00CS/HEP/2019/0001, and *Stewart v Trafford*, MAN/00BU/HEP/2013/0001.

66. This Tribunal is not bound by any of the above authorities; at most they are persuasive. Moreover, in none of the above cases, so far as were cited to us, does it appear that consideration was given as to the effect of failing to comply with s.239. Where it was, the Tribunal automatically assumed that breach of the section would invalidate the EPO.

67. Where a statute prescribes a procedure which a person must follow in order to exercise or acquire a right under it, not every failure to comply will invalidate the process; the question is whether Parliament can fairly be taken to have intended total invalidity to follow from non-compliance*: R. v Soneji* [2005] UKHL 49; [2006] 1 A.C. 340.

68. We note that under s.239(6) and (7), notice need not be given if the Respondent seeks to ascertain whether certain offences had been committed. We also note that there is no modification of the requirements in resect of EPOs, unlike the case of ERAs: see s.40 of the Act.

69. Nevertheless, the Tribunal determines that a failure to serve a s.239 notice of entry in this case does not invalidate the totality of a Council's actions. Looking at the scheme of Part 1 of the Housing Act 2004 as a whole, and in particular section 5 thereof, we determine that it cannot have been Parliament's intention that a local authority, armed with the knowledge that a Category 1 hazard exists which imposes a duty upon it to act, would be acting outside of its powers if it later serves an Emergency Prohibition Order without having served a s.239 notice in order to gain that knowledge. Indeed, a physical inspection is not necessarily required before any enforcement action is taken. Furthermore, the service of such a notice is not expressed by Parliament to be a condition precedent to the service of an EPO.

70. It seems to us that there are various mischiefs to which section 239 of the Act is directed. The first and most obvious is the situation where the local authority forces entry, which s.239(11) impliedly authorises. The local authority may be protected against a claim in trespass if it serves due notice. The second mischief is entry outside of reasonable hours; the section only gives such protection if such notice takes place. The third mischief is the situation of either the occupier or the owner having no notice of the local authority's intent, and being unable to be present on inspection, if they so wish; particularly given the powers to take samples of the premises which the section affords the authority. None of the above scenarios were present in the instant case, save for the Applicant's lack of knowledge of intended entry. But this Tribunal is not willing to make the quantum leap from lack of service of notice of entry on the Applicant to invalidation of the enforcement processes which followed consequentially.

71. Whilst we make no finding on this, it may be that an owner or occupier who is not validly served a notice of entry under s.239 of the Act would have at best a civil remedy in trespass against an authority whom they did not invite into the subject premises. We reiterate that in this case, the tenant did invite the Respondent in.

72. We therefore dismiss this ground of appeal.

(d) "The issue and service of the EPO was invalid because no emergency remedial works were carried out or organised by the

Respondent which would exempt the requirement for a notice of entry.”

73. That such works were not executed or organised is accepted by the Respondent, but in our determination this ground does not take the Applicant any further, given our finding under issue (c).

74. We therefore reject this ground of appeal.

(e) There is no need for an emergency prohibition order because such an order is draconian and should be used as a last resort and the Respondent ought to have considered other options; the statement of reasons does not give a sufficient justification why other available enforcement options were not appropriate

75. The Tribunal notes that the front page of the EPO states:

    “For the reasons set out in the statement of reasons accompanying any copy of the order, [the Respondent] has made an emergency prohibition order in respect of the premises specified… on the date below as this is considered to be the most appropriate course of action of those listed in Section 5(2) of the Act.”

76. The statement of reasons signed by Mr Emaike states:

    “Emergency Prohibition Order

    The reasons why the authority have decided to take the relevant action rather than any other kind of or kinds of enforcement action under the provisions of Section 5(2) of the Act are as follows:-

    Factors considered

    - consultation with occupants

    …

    The most appropriate course of action

    With regard to enforcement option listed above the preferred course of action is emergency prohibition order.”

77. The Tribunal notes that section 8(2) of the Act provides that "the authority must prepare a statement of the reasons for their decision to take the relevant action", and section 8(3) adds "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…"

78. In the instant case, the Respondent did consider other options: see the statement of Ms Ling at paragraphs 4-5. In short, she and Mr Emaike had a meeting to discuss the case, and she considered, in the light of the Enforcement Guidance that:

    - A hazard awareness notice and an improvement notice had already been served and the defects has not been resolved.

    - Due to the nature and cost implication of the works regarding renewing joist and floor into the first floor bathroom, which was being occupied by the tenant, it was determined that emergency remedial action was not a suitable option.

    - Given the value and the need for rented accommodation within the borough and the relatively low cost of repairs in comparison to the value of the property, it would not be appropriate to issue a demolition order or clearance area.

79. The Tribunal does not find any error of reasoning in the above considerations, having regard to the national Enforcement Guidance.

80. Accordingly, the only issue is whether the absence of such detailed reasoning in the Statement of Reasons renders the EPO invalid.

81. The parties cited no legal authority on the point to assist the Tribunal.

82. The Tribunal applies by analogy the case law on financial penalties, where the regime (see Schedule 13A to the Housing Act 2004) requires a preliminary notice of intent to impose a penalty and a final notice of intent to give reasons for imposing the penalty. In *Waltham Forest BC v Younis* [2020] H.L.R. 17, the Upper Tribunal said:

    "[73] The purpose of a notice of intent is to inform the recipient of the reasons why the authority is contemplating the imposition of a financial penalty. The notice also performs the important function of limiting the scope of the subsequent procedure. But the notice of intent does not represent the last word on any issue. Not only does the recipient of the

notice have the opportunity to respond to it, but the authority also has the obligation to think again before making a final decision. Once that decision has been conveyed in a final notice, the recipient has the right to appeal to the FTT, where they may rely on matters which were not known to the authority.

[74] Those characteristics of the statutory scheme suggest that the reasons given in a notice of intent should be clear enough to enable the recipient to respond, but they also suggest that if those reasons are unclear or ambiguous, Parliament would not have intended that the notice of intent should invariably be treated as a nullity. The seriousness of the offences for which civil penalties can be imposed, the relative shortness of the time available to a local authority to take action, and the availability of a right of appeal on the merits before an independent tribunal, are all features of the statutory scheme which militate against the adoption of an excessively technical approach to procedural compliance.

[75] In this case, there is no credible suggestion that Mr Younis has been prejudiced by the features of the notice of intent…"

75. This Tribunal accepts the Applicant's case that the Respondent's statement of reasons here was wanting for particularity. It did not give a sufficient explanation as to why an EPO rather than other action was to be taken. However, we consider that any such deficiency or lack of procedural compliance is not to be treated as a nullity within the statutory scheme. In particular, the seriousness of the circumstances of an EPO, the shortness of the time available to the local authority to take action, and the rights of the recipient to an appeal on the merits, to include bringing forward matters which were not known to the authority, are all features which are equally present in the instant case as they were in *Younis*. Moreover, there is no suggestion by the Applicant in the instant case of any prejudice.

76. This ground of appeal is therefore dismissed.

(f) the officer did not rely on any professional structural reports to deem there to be an imminent danger of collapse of the ceiling

77. There is no requirement under the Act or in any guidance for professional structural reports to be obtained by the Council before serving an EPO on structural grounds.

78. Although Mr Emaike was not present at the hearing to be cross-examined, we considered that his professional qualifications, namely B.Eng. Civil

Engineering, MSc Maritime Civil Engineering and NEBOSH Certificate in Health and Safety, were sufficient for him to be capable of concluding that the joists were not bearing adequately, and that wet rot was present.

79. It is notable that the Applicant did not cross-examine Mr Chikonde on either the issue of the bearing of the joists or the presence of wet rot, even though Mr Chikonde was present at the material inspection, and notwithstanding that he specifically mentioned the wet rot during his cross-examination by the Applicant. Mr Chikonde further informed us that the leak was continuous through the kitchen ceiling during the inspection. Ms Ling informed us that her discussions with Mr Emaike before service of the order involved consideration of the photos, which definitely appeared to show wet rot, and that the officers were concerned the floor was springy.

80. We therefore reject this ground of appeal.

(g) The officer had a predetermined decision without having undertaken an assessment

81. The Tribunal determines this ground against the Applicant. The evidence was that Mr Emaike considered that entry was required with a view to Emergency Remedial Action, but as the evidence also shows, the decision to serve the EPO was that of Ms Ling, after detailed discussion with Mr Emaike, following his inspection.

82. We are not satisfied therefore that the Respondent had somehow fettered its discretion whether or not to serve an EPO.

(h) Works have not been outstanding since 2016; the evidence reveals that it had closed its case in 2018; and in any event the tenant has been a problem tenant

83. In the Tribunal's determination, the evidence is not conclusive as to whether works were executed between 2016 and 2018, or whether the Respondent was satisfied the same had been undertaken. The Applicant adduced no evidence of works up to 2018, and for that year he adduced one invoice only, which included the words "investigate and make good all areas affected by water leak from bathroom" and "redecorate kitchen ceiling", as well as other associated works.

84. With respect to the Applicant, this may well evidence that payment for works was demanded, but it does not evidence that works were in fact executed, or undertaken to any reasonable standard.

85. Further, whilst an email from the Respondent indicates the Council did close its case in 2018, the reasons for doing so are unclear. It is an inference, but not an irresistible inference, that the above invoice, ostensibly supplied to the Respondent, led to the closing of the case.

86. In any event, the history from 2016 to 2018 was not a crucial factor in the Respondent's decision to serve the EPO, as we see it. It was only one (possibly 2) of 8 separate bullet-point reasons cited by Ms Ling in para. 5 of her statement. There were other arguably more pressing factors than the history of the case: the structural instability in the present (i.e. 2021), the occupancy by a tenant and 3 children, the fact that an Improvement Notice had already been served in 2021 but not complied with, and the decision that ERA and demolition/clearance orders were not viable options.

87. Lastly, whilst the Applicant sought to introduce evidence at the hearing that the tenant was responsible for the leakage emanating in the bathroom, the Tribunal pointed out that his appeal had not been brought in the written grounds on this basis, and no application was made to amend.

88. In any event, there was no independent evidence of failure by the tenant to use the Property in a tenant-like manner.

89. The Tribunal therefore dismisses this ground, for all the above reasons.

(i) The cost of repairs is relatively low and therefore the Respondent has vested powers to enforce remedial emergency works and recover costs where there is imminent danger/risk; the Respondent having inspected the premises in May 2021 had 6 months to carry out remedial works and recover its costs.

90. Ms Ling was cross-examined at the hearing on this very point.

91. She confirmed financial reasons (one of the 8 bullet point reasons in para. 5 of her statement) as being the fundamental reason why the Respondent had not exercised its discretion to undertake ERA. She also pointed out that the Respondent might well have had to chase payment from the Applicant for such works, which would mean that more public money being spent in order to undertake works which the Applicant should have completed himself.

92. We find no deficiency in this reasoning, and reject this last ground of appeal.

93. We add that the Applicant himself agreed that the costs of works was low, because he had only spent £300 himself on the repairs undertaken. This low figure, we deduce, results from the fact that the works did not include addressing the bearing of the joists or eradicating wet rot. This is because (the Applicant told us) a contractor (whom the Applicant could not name but who was not a structural engineer) had told his project manager (a relative of the Applicant) that there were no such issues.

Conclusions

94. We answer the issues listed in the procedural directions as follows.

Has the Respondent gone through the necessary steps in respect of the issue of the EPO?

95. Yes.

Do category 1 hazards exist?

96. There was no challenge to, or reason to be concerned about, the Council's assessment. Moreover, the limited nature of the Applicant's recent works, and the careful nature of the Respondent's evidence, which we prefer in contrast to the Applicant's multiple hearsay evidence, we consider that Category 1 hazards are likely to continue to exist.

If so, do hazards involve an imminent risk of serious harm to the health and safety of any relevant occupiers?

97. Yes. We note that the Applicant stated that he intends to relet the Property as soon as the Tribunal or Respondent are satisfied it is in a habitable state.

Should the council have taken enforcement action?

98. Yes. And that an EPO was the most suitable action.

If so, and if an emergency prohibition order is the appropriate enforcement action, do the contents of the order complied with the requirements of section 44 of the Act?

99. Yes.

Should the Tribunal confirm, vary or revoke the emergency prohibition order?

100. We reject the appeal in so far as it seeks the quashing of the Order.

101. We were invited by the Respondent to vary Schedule 2 of the Order.

102. We consider we have power to do so. The order should contain works necessary to address the remaining deficiency of structural collapse (the falling element having been addressed by the kitchen ceiling works).

103. The Tribunal therefore varies Schedule 2 as requested, so as to read:

"The Applicant shall arrange the inspection of the floor structure (to include the joists) within the bathroom, by a suitably qualified structural engineer.

The Applicant shall obtain a written report from the above engineer and serve a copy on the Respondent within 7 days of receipt.

The Applicant shall thereafter execute all necessary works to the floor structure so as to remove a risk of harm to any current or future occupier of the property."

Judge: ____________________________

S J Evans

Date:
23/5/22

ANNEX – RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written Application for permission must be made to the First-Tier at the Regional Office which has been dealing with the case.
2. The Application for permission to appeal must arrive at the Regional Office within 28 days after the Tribunal sends written reasons for the decision to the person making the Application.
3. If the Application is not made within the 28-day time limit, such Application must include a request to an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the Application for permission to appeal to proceed despite not being within the time limit.
4. The Application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the Property and the case number), state the grounds of appeal and state the result the party making the Application is seeking.

Appendix 1

Housing Act 2004

Section 4

Inspections by local housing authorities to see whether category 1 or 2 hazards exist

(1)If a local housing authority consider—

(a)as a result of any matters of which they have become aware in carrying out their duty under section 3, or

(b)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.

(2)If an official complaint about the condition of any residential premises in the district of a local housing authority is made to the proper officer of the authority, and the circumstances complained of indicate—

(a)that any category 1 or category 2 hazard may exist on those premises, or

(b)that an area in the district should be dealt with as a clearance area,

the proper officer must inspect the premises or area.

(3)In this section "an official complaint" means a complaint in writing made by—

(a)a justice of the peace having jurisdiction in any part of the district, or

(b)the parish or community council for a parish or community within the district.

(4)An inspection of any premises under subsection (1) or (2)—

(a)is to be carried out in accordance with regulations made by the appropriate national authority; and

(b)is to extend to so much of the premises as the local housing authority or proper officer (as the case may be) consider appropriate in the circumstances having regard to any applicable provisions of the regulations.

(5)Regulations under subsection (4) may in particular make provision about—

(a)the manner in which, and the extent to which, premises are to be inspected under subsection (1) or (2), and

(b)the manner in which the assessment of hazards is to be carried out.

(6)Where an inspection under subsection (2) has been carried out and the proper officer of a local housing authority is of the opinion—

(a)that a category 1 or 2 hazard exists on any residential premises in the authority's district, or

(b)that an area in their district should be dealt with as a clearance area,

the officer must, without delay, make a report in writing to the authority which sets out his opinion together with the facts of the case.

(7)The authority must consider any report made to them under subsection (6) as soon as possible.

Section 5

Category 1 hazards: general duty to take enforcement action

(1)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.

(2)In subsection (1) "the appropriate enforcement action" means whichever of the following courses of action is indicated by subsection (3) or (4)—

(a)serving an improvement notice under section 11;

(b)making a prohibition order under section 20;

(c)serving a hazard awareness notice under section 28;

(d)taking emergency remedial action under section 40;

(e)making an emergency prohibition order under section 43;

(f)making a demolition order under subsection (1) or (2) of section 265 of the Housing Act 1985 (c. 68);

(g)declaring the area in which the premises concerned are situated to be a clearance area by virtue of section 289(2) of that Act.

(3)If only one course of action within subsection (2) is available to the authority in relation to the hazard, they must take that course of action.

(4)If two or more courses of action within subsection (2) are available to the authority in relation to the hazard, they must take the course of action which they consider to be the most appropriate of those available to them.

(5)The taking by the authority of a course of action within subsection (2) does not prevent subsection (1) from requiring them to take in relation to the same hazard—

(a)either the same course of action again or another such course of action, if they consider that the action taken by them so far has not proved satisfactory, or

(b)another such course of action, where the first course of action is that mentioned in subsection (2)(g) and their eventual decision under section 289(2F) of the Housing Act 1985 means that the premises concerned are not to be included in a clearance area.

(6)To determine whether a course of action mentioned in any of paragraphs (a) to (g) of subsection (2) is "available" to the authority in relation to the hazard, see the provision mentioned in that paragraph.

(7)Section 6 applies for the purposes of this section.

Section 6

Category 1 hazards: how duty under section 5 operates in certain cases

(1)This section explains the effect of provisions contained in subsection (2) of section 5.

(2)In the case of paragraph (b) or (f) of that subsection, the reference to making an order such as is mentioned in that paragraph is to be read as a reference to making instead a determination under section 300(1) or (2) of the Housing Act 1985 (c. 68) (power to purchase for temporary housing use) in a case where the authority consider the latter course of action to be the better alternative in the circumstances.

(3)In the case of paragraph (d) of that subsection, the authority may regard the taking of emergency remedial action under section 40 followed by the service of an improvement notice under section 11 as a single course of action.

(4)In the case of paragraph (e) of that subsection, the authority may regard the making of an emergency prohibition order under section 43 followed by the service of a prohibition order under section 20 as a single course of action.

(5)In the case of paragraph (g) of that subsection—

(a)any duty to take the course of action mentioned in that paragraph is subject to the operation of subsections (2B) to (4) and (5B) of section 289 of the Housing Act 1985 (procedural and other restrictions relating to slum clearance declarations); and

(b)that paragraph does not apply in a case where the authority have already declared the area in which the premises concerned are situated to be a clearance area in accordance with section 289, but the premises have been excluded by virtue of section 289(2F)(b).

Section 8

Reasons for decision to take enforcement action

(1)This section applies where a local housing authority decide to take one of the 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.

(5)In subsection (4)—

(a)the reference to Part 1 of Schedule 1 to this Act includes a reference to that Part as applied by section 28(7) or 29(7) (hazard awareness notices) or to section 40(7) (emergency remedial action); and

(b)the reference to Part 1 of Schedule 2 to this Act includes a reference to that Part as applied by section 43(4) (emergency prohibition orders).

(6)If the relevant action consists of declaring an area to be a clearance area, the statement prepared under subsection (2) must be published—

(a)as soon as possible after the relevant resolution is passed under section 289 of the Housing Act 1985, and

(b)in such manner as the authority consider appropriate.

Section 20

Prohibition orders relating to category 1 hazards: duty of authority to make order

(1)If—

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

(b)no management order is in force in relation to the premises under Chapter 1 or 2 of Part 4,

making a prohibition order 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)A prohibition order under this section is an order imposing such prohibition or prohibitions on the use of any premises as is or are specified in the order in accordance with subsections (3) and (4) and section 22.

(3)The order may prohibit use of the following premises—

(a)if the residential premises on which the hazard exists are a dwelling or HMO which is not a flat, it may prohibit use of the dwelling or HMO;

(b)if those premises are one or more flats, it may prohibit use of the building containing the flat or flats (or any part of the building) or any external common parts;

(c)if those premises are the common parts of a building containing one or more flats, it may prohibit use of the building (or any part of the building) or any external common parts.

Paragraphs (b) and (c) are subject to subsection (4).

(4)The notice may not, by virtue of subsection (3)(b) or (c), prohibit use of any part of the building or its external common parts that is not included in any residential premises on which the hazard exists, unless the authority are satisfied—

(a)that the deficiency from which the hazard arises is situated there, and

(b)that it is necessary for such use to be prohibited in order to protect the health or safety of any actual or potential occupiers of one or more of the flats.

(5)A prohibition order under this section may relate to more than one category 1 hazard on the same premises or in the same building containing one or more flats.

(6)The operation of a prohibition order under this section may be suspended in accordance with section 23.

<u>Section 43</u>

Emergency prohibition orders

(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 or 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),

making an emergency prohibition order 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)An emergency prohibition order under this section is an order imposing, with immediate effect, such prohibition or prohibitions on the use of any premises as are specified in the order in accordance with subsection (3) and section 44.

(3)As regards the imposition of any such prohibition or prohibitions, the following provisions apply to an emergency prohibition order as they apply to a prohibition order under section 20—

(a)subsections (3) to (5) of that section, and

(b)subsections (3) to (5) and (7) to (9) of section 22.

(4)Part 1 of Schedule 2 (service of copies of prohibition orders) applies in relation to an emergency prohibition order as it applies to a prohibition order, but any requirement to serve copies within a specified period of seven days is to be read as a reference to serve them on the day on which the emergency

prohibition order is made (or, if that is not possible, as soon after that day as is possible).

(5)The following provisions also apply to an emergency prohibition order as they apply to a prohibition order (or to a prohibition order which has become operative, as the case may be)—

(a)section 25 (revocation and variation);

(b)sections 32 to 36 (enforcement);

(c)sections 37 to 39 (supplementary provisions); and

(d)Part 2 of Schedule 2 (notices relating to revocation or variation);

(e)Part 3 of that Schedule (appeals) so far as it relates to any decision to vary, or to refuse to revoke or vary, a prohibition order; and

(f)sections 584A and 584B of the Housing Act 1985 (c. 68) (payment, and repayment, of compensation).

(6)For the purposes of the operation of any provision relating to prohibition orders as it applies in connection with emergency prohibition orders by virtue of this section or section 45, any reference in that provision to the specified premises is to be read as a reference to the premises specified, in accordance with section 44(2)(c), as the premises in relation to which prohibitions are imposed by the order.

Section 44

Contents of emergency prohibition orders

(1)An emergency prohibition order under section 43 must comply with the following requirements of this section.

(2)The order must specify, in relation to the hazard (or each of the hazards) to which it relates—

(a)the nature of the hazard concerned and the residential premises on which it exists,

(b)the deficiency giving rise to the hazard,

(c)the premises in relation to which prohibitions are imposed by the order (see subsections (3) and (4) of section 22 as applied by section 43(3)), and

(d)any remedial action which the authority consider would, if taken in relation to the hazard, result in their revoking the order under section 25 (as applied by section 43(5)).

(3)The order must contain information about—

(a)the right to appeal under section 45 against the order, and

(b)the period within which an appeal may be made,

and specify the date on which the order is made.

Section 45

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.

(2)A relevant person may appeal to the appropriate tribunal against an emergency prohibition order.

(3)An appeal under subsection (1) or (2) must be made within the period of 28 days beginning with—

(a)the date specified in the notice under section 41 as the date when the emergency remedial action was (or was to be) started, or

(b)the date specified in the emergency prohibition order as the date on which the order was made,

as the case may be.

(4) The appropriate tribunal may allow an appeal to be made to it after the end of that period if it is satisfied that there is a good reason for the failure to appeal before the end of that period (and for any delay since then in applying for permission to appeal out of time).

(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), confirm or vary the emergency prohibition order or make an order revoking it as from a date specified in that order.

(7)Paragraph 16 of Schedule 2 applies for the purpose of identifying who is a relevant person for the purposes of subsection (2) in relation to an emergency prohibition order as it applies for the purpose of identifying who is a relevant person for the purposes of Part 3 of that Schedule in relation to a prohibition order.

Section 239

Powers of entry

(1)Subsection (3) applies where the local housing authority consider that a survey or examination of any premises is necessary and any of the following conditions is met —

(a)the authority consider that the survey or examination is necessary in order to carry out an inspection under section 4(1) or otherwise to determine whether any functions under any of Parts 1 to 4 or this Part should be exercised in relation to the premises;

(b)the premises are (within the meaning of Part 1) specified premises in relation to an improvement notice or prohibition order;

(c)a management order is in force under Chapter 1 or 2 of Part 4 in respect of the premises.

(2)Subsection (3) also applies where the proper officer of the local housing authority considers that a survey or examination of any premises is necessary in order to carry out an inspection under section 4(2).

(3)Where this subsection applies—

(a)a person authorised by the local housing authority (in a case within subsection (1)), or

(b)the proper officer (in a case within subsection (2)),

may enter the premises in question at any reasonable time for the purpose of carrying out a survey or examination of the premises.

(4)If—

(a)an interim or final management order is in force under Chapter 1 of Part 4 in respect of any premises consisting of part of a house ("the relevant premises"), and

(b)another part of the house is excluded from the order by virtue of section 102(8) or 113(7),

the power of entry conferred by subsection (3) is exercisable in relation to any premises comprised in that other part so far as is necessary for the purpose of carrying out a survey or examination of the relevant premises.

(5)Before entering any premises in exercise of the power conferred by subsection (3), the authorised person or proper officer must have given at least 24 hours' notice of his intention to do so—

(a)to the owner of the premises (if known), and

(b)to the occupier (if any).

(6)Subsection (7) applies where the local housing authority consider that any premises need to be entered for the purpose of ascertaining whether an offence has been committed under section 72, 95 or 234(3).

(7)A person authorised by the local housing authority may enter the premises for that purpose—

(a)at any reasonable time, but

(b)without giving any prior notice as mentioned in subsection (5).

(8)A person exercising the power of entry conferred by subsection (3) or (7) may do such of the following as he thinks necessary for the purpose for which the power is being exercised—

(a)take other persons with him;

(b)take equipment or materials with him;

(c)take measurements or photographs or make recordings;

(d)leave recording equipment on the premises for later collection;

(e)take samples of any articles or substances found on the premises.

(9)An authorisation for the purposes of this section—

(a)must be in writing; and

(b)must state the particular purpose or purposes for which the entry is authorised.

(10)A person authorised for the purposes of this section must, if required to do so, produce his authorisation for inspection by the owner or any occupier of the premises or anyone acting on his behalf.

(11)If the premises are unoccupied or the occupier is temporarily absent, a person exercising the power of entry conferred by subsection (3) or (7) must leave the premises as effectively secured against trespassers as he found them.

(12)In this section "occupier", in relation to premises, means a person who occupies the premises, whether for residential or other purposes.

Section 243

Authorisations for enforcement purposes etc.

(1)This section applies to any authorisation given for the purposes of any of the following provisions—

(a)section 131 (management orders: power of entry to carry out work),

(b)section 235 (power to require documents to be produced),

(c)section 239 (powers of entry),

(d)paragraph 3(4) of Schedule 3 (improvement notices: power to enter to carry out work), and

(e)paragraph 25 of Schedule 7 (EDMOs: power of entry to carry out work).

(2)Any such authorisation must be given by the appropriate officer of the local housing authority.

(3)For the purposes of this section a person is an "appropriate officer" of a local housing authority, in relation to an authorisation given by the authority, if either—

(a)he is a deputy chief officer of the authority (within the meaning of section 2 of the Local Government and Housing Act 1989 (c. 42)), and

(b)the duties of his post consist of or include duties relating to the exercise of the functions of the authority in connection with which the authorisation is given,

or he is an officer of the authority to whom such a deputy chief officer reports directly, or is directly accountable, as respects duties so relating.

Schedule 2, Part 1

Service on owners and occupiers of dwelling or HMO which is not a flat

1(1)This paragraph applies to a prohibition order where the specified premises are a dwelling or HMO which is not a flat.

(2)The authority must serve copies of the order on every person who, to their knowledge, is—

(a)an owner or occupier of the whole or part of the specified premises;

(b)authorised to permit persons to occupy the whole or part of those premises; or

(c)a mortgagee of the whole or part of those premises.

(3)The copies required to be served under sub-paragraph (2) must be served within the period of seven days beginning with the day on which the order is made.

(4)A copy of the order is to be regarded as having been served on every occupier in accordance with sub-paragraphs (2)(a) and (3) if a copy of the order is fixed to some conspicuous part of the specified premises within the period of seven days mentioned in sub-paragraph (3).

Schedule 2, Part 3

Appeal against prohibition order

7(1)A relevant person may appeal to the appropriate tribunal against a prohibition order.

(2)Paragraph 8 sets out a specific ground on which an appeal may be made under this paragraph, but it does not affect the generality of sub-paragraph (1).

8(1) An appeal may be made by a person under paragraph 7 on the ground that one of the courses of action mentioned in sub-paragraph (2) is the best course of action in relation to the hazard in respect of which the order was made.

(2)The courses of action are—

(a)serving an improvement notice under section 11 or 12 of this Act;

(b)serving a hazard awareness notice under section 28 or 29 of this Act;

(c)making a demolition order under section 265 of the Housing Act 1985 (c. 68).

...

Time limit for appeal

10(1)Any appeal under paragraph 7 must be made within the period of 28 days beginning with the date specified in the prohibition order as the date on which the order was made.

(2)Any appeal under paragraph 9 must be made within the period of 28 days beginning with the date specified in the notice under paragraph 3 or 5 as the date on which the decision concerned was made.

(3) The appropriate tribunal may allow an appeal to be made to it after the end of the period mentioned in sub-paragraph (1) or (2) if it is satisfied that there is a good reason for the failure to appeal before the end of that period (and for any delay since then in applying for permission to appeal out of time).

11 This paragraph applies to an appeal to the appropriate tribunal under paragraph 7.

(2)The appeal—

(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.

(3)The tribunal may by order confirm, quash or vary the prohibition order.

(4)Paragraph 12 makes special provision in connection with the ground of appeal set out in paragraph 8.

12(1)This paragraph applies where the grounds of appeal consist of or include that set out in paragraph 8.

(2)When deciding whether one of the courses of action mentioned in paragraph 8(2) is the best course of action in relation to a particular hazard, the tribunal must have regard to any guidance given to the local housing authority under section 9.

(3)Sub-paragraph (4) applies where—

(a)an appeal under paragraph 7 is allowed against a prohibition order made in respect of a particular hazard; and

(b)the reason, or one of the reasons, for allowing the appeal is that one of the courses of action mentioned in paragraph 8(2) is the best course of action in relation to that hazard.

(4)The tribunal must, if requested to do so by the appellant or the local housing authority, include in its decision a finding to that effect and identifying the course of action concerned.