FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00DA/HPO/2021/0013-0016**
Premises	**:**	**Rooms 1 & 2, Flat 5 Elm House and Rooms 1 & 2, Flat 6 Elm House Levens Garth Leeds LS15 0AR**
Applicant	**:**	**Levens Garth Holdings Limited**
Representative	**:**	**Mr J Bates, Counsel JMW Solicitors LLP**
Respondent	**:**	**Leeds City Council**
Representative	**:**	**Ms V Vodanovic, Counsel Legal Services, Leeds City Council**
Type of Application	**:**	**Appeals against Prohibition Orders under the Housing Act 2004**
Tribunal Members	**:**	**Judge J Holbrook Regional Surveyor N Walsh Mr A Hossain**
Date and venue of Hearing	**:**	**25 April & 7 November 2022 Manchester**
Date of Decision	**:**	**24 November 2022**

DECISION

DECISION

The Prohibition Orders are confirmed.

REASONS

PROCEDURAL HISTORY

1. This is an appeal (technically four appeals) by Levens Garth Holdings Limited against four prohibition orders made by Leeds City Council on 6 August 2021 ("the Prohibition Orders"). The first of the Prohibition Orders relates to Flat 5, Room 1, Elm House, Levens Garth, Leeds LS15 0AR; the second relates to Flat 5, Room 2, Elm House; the third to Flat 6, Room 1, Elm House; and the fourth to Flat 6, Room 2, Elm House (together, "the Premises").

2. The Prohibition Orders were made under sections 20 and 21 of the Housing Act 2004 and the effect of each Order is to prohibit entirely the occupation of the room in question.

3. The appeals against the Prohibition Orders were made on 20 August 2021, under paragraph 7 of Schedule 2 to the 2004 Act. The Applicant (which is a company registered in Guernsey) was then known as Midgard Holdings Limited.

4. The Tribunal inspected the Premises on 5 April 2022 in the presence of the parties' representatives, and an in-person hearing was held at the Tribunal's hearing centre in Manchester on 25 April. The time which had been allotted for that hearing proved to be insufficient and so the hearing was adjourned part-heard. Regrettably, the logistics of finding a suitable date to re-convene proved challenging, but the hearing was eventually concluded (by video) on 7 November.

5. We heard oral evidence for the Applicant (on 25 April) from Mr Richard Lord (an independent Chartered Environmental Health Practitioner) and from Ms Cassandra Tucker (the Appellant's Director of Asset Management). For the Respondent local housing authority, we heard oral evidence (on 7 November) from Mr Geoffrey Belcher (Principal Housing Officer). We were also provided with hearing bundles containing the statements of additional witnesses and extensive documentary evidence to which reference was made during the hearing.

6. The Applicant was represented at the hearing by Mr Justin Bates, and the Respondent by Ms Vilma Vodanovic, both of counsel, and we are grateful for their assistance.

7. Judgment was reserved.

FACTUAL BACKGROUND AND DESCRIPTION OF THE PREMISES

8. Elm House is one of three similar four-storey residential blocks at the Levens Garth site in Leeds. It is of standard brick and concrete construction, with exterior brick elevations. When first built in the 1960s or 70s, the three blocks contained a total of 18 two-bedroomed maisonettes. In 1987 Leeds City Council gave the then owner permission to convert the maisonettes into 44 one-bedroom self-contained flats and one three-bedroom 'warden's' self-contained flat.

9. The Applicant has since purchased the site and now seeks to further sub-divide the flats into a total of 92 self-contained bedsitting rooms (bedsits), with every two bedsits sharing designated and separate kitchen facilities.

10. The Applicant is a company which buys and redevelops property, focusing on converting properties which were in single or family occupancy to multiple occupancy. According to its Director of Asset Management, Cassandra Tucker, "This allows for more efficient use of property resources by providing property at a price people can afford which has been specifically adapted for that use and so provides a far higher quality of accommodation than would be the case if they simply shared a normal flat or house.".

11. This is the basis of the redevelopment at Elm House, and we understand that the likely target market for the individual bedsit units once completed would be young people on minimum wage, or over 35s in receipt of Universal Credit. The Applicant intends to let the bedsits on assured shorthold tenancies for terms of up to three years. Given the geographical location of the site, it is unlikely that they would be used for student accommodation.

12. We understand that planning permission is not required for the redevelopment. Nevertheless, between September 2020 and July 2021, the Applicant liaised with the Respondent on an informal/advisory basis, during which time the Respondent expressed concerns about the Applicant's plans for further developing the already converted single occupancy flats at the site. Having failed to reach an agreement with the Respondent, and in an effort to demonstrate the size, layout, furnishings and finishes to be provided, the Applicant has undertaken a 'model' conversion of four bedsits. These comprise Flat 5, Rooms 1 & 2, Elm House, and Flat 6, Rooms 1 & 2 (i.e., the Premises).

13. Each of the four bedsits have been converted to a good standard with good quality furnishings, décor and fittings. The shared kitchens in both flats are also finished to a good standard, with a good array of wall and floor storage units, worktops, a built-in washing machine, fridge freezer, sink and drainer.

14. Flat 5, Room 2 has an 'L' shape layout, while the other three bedsits are rectangular in layout. Each room is provided with a table, wardrobe, chair and a space-saving fold-away 'Murphy' bed to maximise the living accommodation.

15. We did not verify the measurements of the Premises. However, the Respondent's evidence (which was not challenged) was that Flat 5, Rooms 1 & 2 have a floor area of 10.48m² and 11.09m² respectively. Each room additionally has an en-suite shower-room/wc with a floor area of 1.7m². The designated shared kitchen/diner in Flat 5 has a floor area of 9.24m². Flat 6, Rooms 1 & 2 have a floor area of 11.08m² and 10.7m² respectively, with en-suite shower-room/wcs measuring 1.9m² and 2.45m². The separate designated shared kitchen in Flat 6 has a floor area of 8.51m², and so is too small to accommodate sit-down dining.

16. Although the Premises are fully furnished, none of the bedsits have been occupied since they were converted.

HHSRS ASSESSMENT AND MAKING OF PROHIBITION ORDERS

17. Following conversion of the Premises, they were inspected by a suitably qualified officer of the local housing authority, employed in its Private Sector Housing Team. The officer assessed the condition of the Premises using the housing health and safety rating system (HHSRS) which was established under Part 1 of the 2004 Act. We explain the HHSRS in more detail below, but it operates by reference to the existence of "category 1" or "category 2" hazards on residential premises. For these purposes, a hazard is any risk of harm to the health or safety of an actual or potential occupier of the premises which arises from a deficiency in them, and category 1 hazards are more serious than category 2 hazards.

18. The Respondent's decision to make the four Prohibition Orders which are the subject of this appeal was based on the HHSRS assessments made by its inspector. Each of those Prohibition Orders identifies a category 1 hazard of "Crowding and Space". In addition, each Order also identifies at least two category 2 hazards (although the number, and nature, of those category 2 hazards is not the same in every case).

19. The various types of hazard identified by the Prohibition Orders are summarised in the following table:

Hazard	Category	Rooms
Crowding and Space	**1**	All
Falls associated with baths etc	**2**	F5R1, F5R2, F6R1
Falls on level surfaces	**2**	F5R1, F5R2, F6R1
Flames / hot surfaces	**2**	All
Collision and entrapment	**2**	All
Fire	**2**	F5R1
Position & operability of amenities	**2**	F5R1, F5R2, F6R1

Category 1 (Crowding and Space) hazards

20. The Prohibition Order relating to Flat 5, Room 1 provides the following explanation of the deficiencies giving rise to the category 1 hazard of Crowding and Space:

> "This one person bedsitting room is one of two bedsits which have been created in what was formerly a 40m² one bedroom self-contained flat. The original self-contained flat comprised a 17.44m² combined living/kitchen/dining room, a 9.44m² bedroom and a 4.14m² bathroom all of which were for the exclusive use of the sole household. A flat of this size complies with the Nationally Described Space Standard (NDSS) of 37m² for a one bedroom, one person flat.
>
> The combined living room and bedroom in the bedsit being assessed has a gross floor area of just 10.48 m². The Houses and Flats section of the Metric Handbook - Planning and Design Data contains a table of rooms sizes which suggests a living room alone for one person should be a minimum of 11m² and a bedroom should be a minimum of 7.5m². A total space requirement of 18.5m². Leeds City Council's Crowding and Space guidance suggests a bedsitting room for one person, albeit with dining facilities, should be a minimum of 18m².
>
> With just 10.48m² of floor space, the bedsit is small and cramped with insufficient space to adequately separate different household activities, store personal possessions or safely arrange basic items of furniture associated with normal household life. The lack of space has required provision of a single sized sofa bed which, rather than being for

occasional use, must be converted twice a day by the occupant which will constantly serve to remind them just how small their home is. Given the sofa bed is only single sized the occupant will also be unable to offer visitors a comfortable place to sit.

In addition to the bedsitting room being too small, the shower room facility is also far too small at just 1.70m². In comparison the NDSS allows for a 3.0m² shower room and the aforementioned table in the Metric Handbook suggests a shower room should be at least 3.6m². Leeds City Councils guidance also suggests a shower room should be at least 3.6m²."

21. The corresponding explanation provided in the Prohibition Order relating to Flat 5, Room 2 is substantially the same, save that the combined living room and bedroom in the bedsit is said to be "awkwardly shaped" with a gross floor area of 11.09m².

22. As far as Flat 6, Room 1 is concerned, the explanation provided in the relevant Prohibition Order is again similar. However, it notes that (unlike either of the Flat 5 rooms) this bedsit must also serve as a dining room due to a lack of space in the shared kitchen. The combined living room, bedroom and dining room in the bedsit is said to have a gross floor area of 11.08m², compared with the 20.5m² minimum space requirement recommended in the Metric Handbook for a dwelling with a galley kitchen for one person (comprising a living room of at least 13m² and a bedroom of at least 7.5m²). The shower room is said to be 1.90m².

23. The explanation provided in the Prohibition Order relating to Flat 6, Room 2 is similar to that for Flat 6, Room 1, save that the combined living room, bedroom and dining room in the bedsit is said to have a gross floor area of 10.70m². In contrast to the explanations provided in the other three Prohibition Orders, however, this one makes no criticism of the size of the shower-room/wc (which has a floor area of 2.45m²).

24. As far as remedial action in respect of these category 1 hazards is concerned, the Prohibition Orders all say the same thing: each of the two flats should be reconfigured to form one self-contained unit of accommodation for a single household in place of the two bedsits.

Category 2 hazards

25. The various category 2 hazards identified in the Prohibition Orders are also said to arise because of the small size of the four bedsits. So, for example, hazards associated with flames/hot surfaces and with collision and entrapment are identified in all four rooms. These hazards are explained by reference to the positioning of the single bed with insufficient clearance from the electric convector heater (in Flat 5, Room 1), and by the positioning of the heated towel rail on the wall immediately adjacent to the wc in each of the shower-rooms.

26. Apart from in Flat 6, Room 2, there are said to be hazards in each bedsit of falls associated with baths etc.; falls on level surfaces; and a hazard

associated with the position an operability of amenities. The Prohibition Orders state that, because of the small size of the shower-rooms, there is inadequate activity or functional space, which may make them more difficult to use and increase the likelihood of a fall, or of a strain or sprain injury.

27. Finally, the Prohibition Order relating to Flat 5, Room 1 identifies a category 2 hazard of fire. This relates to the positioning of the single bed in proximity to the electric convector heater.

28. The stated remedial action required for each of the category 2 hazards is the same as for the category 1 hazards of Crowding and Space: the Prohibition Orders say that each of the two flats should be reconfigured to form one self-contained unit of accommodation for a single household in place of the two bedsits.

GROUNDS OF APPEAL AND ISSUES FOR DETERMINATION

29. The Applicant asks the Tribunal to quash all four Prohibition Orders. It argues that the local housing authority should not have carried out any HHSRS assessment (or, alternatively, taken any enforcement action) until the Premises were actually occupied and the "real world" risk of a hazard eventuating could be assessed.

30. Alternatively, the Applicant disputes the Respondent's hazard assessments: it asserts that none of the four bedsits gives rise to a category 1 hazard of Crowding and Space, and that there are no category 2 hazards which (either alone or in combination) justify serving a Prohibition Order. The Applicant contends that, to the extent any hazards do exist within the Premises, the best course of action for the local housing authority to take in respect of those hazards is the making of a hazard awareness notice.

31. Although the parties disagree about the assessment of the various category 2 hazards, as well as the category 1 Crowding and Space hazard, they do agree that this case is principally about the correct approach to Crowding and Space. The Respondent accepts that it would not have made the Prohibition Orders in response to the identified category 2 hazards alone: in reality, those Orders are a response to the category 1 hazard of Crowding and Space. However, even if no other hazards had been identified, the Respondent would still have served Prohibition Orders because of the seriousness of its assessment of the Crowding and Space hazard. The principal focus of the argument, and of the Tribunal's consideration, is therefore on that specific hazard: is there a hazard of Crowding and Space? How serious is it? And what is the best course of action for the local housing authority to take?

LAW

Operation of the HHSRS

32. Part 1 of the Housing Act 2004 deals with housing conditions, and Chapter 1 contains a system (the HHSRS) for assessing housing conditions and enforcing housing standards. The Act provides for the HHSRS to be used by local housing authorities to assess the condition of residential premises in their area. Using the system, specified hazards can be identified, calculating their seriousness as a numerical score by a method prescribed by the Housing Health and Safety Rating System (England) Regulations 2005.

33. The 2005 Regulations prescribe the descriptions of category 1 and category 2 hazards, as well as prescribing the method for scoring their seriousness. Regulation 2 defines "harm" as harm within any of Classes 1 to IV as set out in Schedule 2. The Schedule provides that Class 1 harm is "such extreme harm as is reasonably foreseeable as a result of the hazard in question, including -", and then are set out "(a) death from any cause" and, from (b) to (g), lung cancer, malignant tumours, permanent paralysis below the neck, regular severe pneumonia, permanent loss of consciousness and 80% burn injuries. Class II harm is "severe harm" (including, for example, cardio-respiratory disease and serious burns). Class III harm is "serious harm" (including, for example, chronic severe stress). Class IV is "moderate harm" (including, for example, regular serious coughs and colds).

34. Regulation 3(1) provides that a hazard is of a prescribed description for the purposes of the 2004 Act where the risk of harm is associated with any of the matters or circumstances listed in Schedule 1. The list includes: "11. Crowding and Space"; "19. Falls associated with baths etc."; "20. Falling on level surfaces etc."; "24. Fire"; "26. Collision and entrapment"; and "28. Position and operability of amenities etc".

35. Regulation 7 prescribes bands of hazards from A to J on the basis of a range of numerical scores. Thus a Band A hazard is one with a numerical score of 5000 or more; a Band B hazard is one with a numerical score of 2000 to 4999; and a Band C hazard is one with a numerical score of 1000 to 1999. Regulation 8 provides that a hazard falling within band A, B or C is a category 1 hazard and that a hazard falling within any other band is a category 2 hazard.

36. The numerical score for a hazard is reached in a number of steps prescribed by regulation 6. First the inspector is required to assess the likelihood, during the period of 12 months beginning with the date of assessment, of a relevant occupier suffering any harm as the result of that hazard as falling within one of a range of 16 ratios of likelihood that are set out. For each range there is also set out a representative scale point of range (L, as it is called in a formula that later falls to be applied). Thus, for instance, in the range of ratios of likelihood between 1 in 4200 and 1 in 2400 the representative scale point of range is stated to be 3200.

37. Who is a "relevant occupier" is defined in regulation 6(7) by reference to particular matters contained in Schedule 1. For paragraph 11 (Crowding and Space) the relevant occupier is the actual occupier. For most of the other hazards mentioned above, the relevant occupier is an occupier aged 60 years or over. The exception is Collision and entrapment, for which it is generally an occupier under the age of five years.

38. The second step requires the inspector to assess which of the four classes of harm a relevant occupier is most likely to suffer. Thirdly they must assess the possibility of each of the three other classes of harm occurring as a result of that hazard, as falling within a range of percentages of possibility. For each range there is also set out a representative scale point of the percentage range (RSPPR). Thus, for instance, for the range 0.15% to 0.3% the RSPPR is 0.2%.

39. Step four requires the inspector to bring the total of RSPPRs for the four classes up to 100%. To do this they add the percentages of the three RSPPRs they have reached at step three, take the total away from 100% and attribute what is left to the class of harm that they assessed to be most likely to occur.

40. Step five is the production of a numerical score for the seriousness of the hazard for each of the four classes of harm. For each of these, L (see paragraph 36 above) is multiplied by the RSPPR and then by a further factor, which weights the seriousness of the classes of harm. This factor is 10000 for Class I, 1000 for Class II, 300 for Class III and 10 for Class IV. The final step is to add the four individual numerical scores to produce the numerical score that can be related to the prescribed bands.

Enforcement action

41. If a local housing authority makes a category 1 hazard assessment (i.e., it identifies a hazard that scores 1000 or above, so that it falls within Band A, B or C), it is obliged under section 5(1) of the 2004 Act to take appropriate enforcement action – the courses of action which might be "appropriate" in this regard (which include making a prohibition order or serving a hazard awareness notice) being identified in section 5(2). If two or more courses of action are available the authority must take the course which it considers to be the most appropriate.

42. If a local housing authority makes a category 2 hazard assessment, it has a discretion whether or not to take enforcement action. If the authority decides to act in respect of such a hazard, the options available to it again include making a prohibition order or serving a hazard awareness notice.

43. A prohibition order may prohibit the use of a dwelling, an HMO, or a building (or part of a building) containing flats, and it may impose such prohibitions on the use of the premises as the local housing authority considers appropriate in view of the hazard or hazards in respect of which the order is made.

Appeals

44. The making of prohibition orders is dealt with in sections 20 – 22 of the 2004 Act and a right of appeal is conferred by paragraph 7(1) of Schedule 2. This is a general right of appeal, but a specific ground on which an appeal may be made is that the best course of action in relation to the hazard in respect of which the order was made is serving a hazard awareness notice.

45. An appeal against a prohibition order is to be by way of a rehearing, but may be determined having regard to matters of which the local housing authority was unaware. The Tribunal may by order confirm, quash or vary the prohibition order.

46. Where the grounds of appeal consist of or include the specific ground mentioned in paragraph 44 above, when deciding whether, for example, serving a hazard awareness notice 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 of the 2004 Act. Such guidance has been given in the Housing Health and Rating System Operating Guidance ("the Operating Guidance") and in the Housing Health and Safety Rating System Enforcement Guidance ("the Enforcement Guidance"), both issued by the Office of the Deputy Prime Minister in February 2006. We make further reference to these publications below.

DISCUSSION

The Tribunal's approach

47. As stated above, the appeal is by way of a rehearing. The Tribunal's task is not simply a matter of reviewing whether the Respondent's decision to make the Prohibition Orders was reasonable. As Mr Bates rightly submitted, the Tribunal is not (for example) limited to checking the Respondent's HHSRS calculations for mathematical accuracy. Rather, the Tribunal must decide for itself – in respect of each of the four bedsits – whether there is a hazard (or hazards) of the sort the Respondent alleges and whether making a Prohibition Order was the appropriate action to take. The views of the local housing authority are, of course, relevant and merit respect, but the Tribunal must make its own decision based on all the available evidence and applying its own knowledge of local housing conditions.

48. Mr Bates also submitted (by reference to the decision of the Upper Tribunal (Lands Chamber) in *Bristol City Council v Aldford Two LLP* [2011] UKUT 130 (LC)) that the Tribunal should not simply attempt to carry out its own HHSRS assessment of the Premises, but that it should deploy its own expertise to take "a broader, nuanced approach to risk", and thereby make "a common sense assessment". In Mr Bates'

submission, the Tribunal need not follow the Operating Guidance or the Enforcement Guidance slavishly.

49. These submissions are not necessarily incorrect, but they do need to be treated with a degree of caution in our view. The Tribunal does not have particular expertise in carrying out HHSRS assessments and, in determining appeals concerning such assessments made by local housing authorities, it should bear in mind the following cautionary observations made by the Upper Tribunal in paragraph 52 of the *Aldford Two* case:

> "By reducing to numerical terms essentially subjective judgements of risk the system may give a misleading impression of scientific precision to the assessment results. The objective standards provided to guide the subjective judgements – national averages of the incidence of harm and of distribution between the four classes – have a statistical basis that is self-evidently fragile."

50. However, the Upper Tribunal was not thereby suggesting that tribunals may disregard the principles underpinning the HHSRS. It went on to say this (in paragraph 55 of *Aldford Two*):

> "… when confronted by cases in which enforcement action by councils is in issue, [tribunals] should not shy away from making their own assessment of the hazard and should not treat the figures given for national averages as compelling. Any such assessment must take account of those figures, but it must be reached in the light of the evidence given in relation to the facts of the particular case. Reasons must of course be given for it. The tribunal will bring its knowledge and experience to bear in evaluating the evidence and reaching its conclusion, and it will, importantly, bring common sense to bear in the judgement that it makes."

51. The Upper Tribunal went on to explain (at paragraph 56) that, in making a common sense judgment in relation to appeals, tribunals must still consider the seriousness of any hazard by reference to the HHSRS. Criticising the approach of the First-tier Tribunal on the facts of *Aldford Two*, the Upper Tribunal said:

> "But what [the FTT] ought to have done was to determine whether or not the evidence showed that there was a category 1 hazard, examining the council's assessment and the reasons for it and reaching a conclusion in the light of this and all other relevant material and giving reasons for its conclusion."

52. In the present case, therefore, the Tribunal must determine, in particular, whether there is a category 1 hazard of Crowding and Space in relation to all or any of the four bedsits in question. That requires us to examine the parties' competing HHSRS assessments, with a particular focus on the evidence about the appropriate range of likelihood of an occupier suffering any harm as the result of the hazard. Having determined whether or not there is any such category 1 hazard, the

Tribunal must go on to decide what is the best course of action to take, and it should do this having regard to its experience and using common sense.

Timing of HHSRS assessments and enforcement action

53. Before examining the parties' competing HHSRS assessments in any detail, we need to deal with the Applicant's assertion that the local housing authority "jumped the gun" by assessing the Premises (or, alternatively, by taking enforcement action) before they have been occupied "in the real world". Mr Bates submitted that this proposition emerges from the Enforcement Guidance, which stresses that the actual use of the premises concerned is critical, both to the assessment of risk and to the decision as to what (if any) enforcement action to take, and also from the Operating Guidance which is to similar effect. He argued that the approach taken by the Respondent has denied both it and the Tribunal the opportunity to see how the Premises are actually used and to then make an informed assessment as to risk and remedy.

54. We do not accept the argument that the approach taken by the local housing authority in this case is unlawful. Nor do we accept the proposition that either the Operating Guidance or the Enforcement Guidance indicates that premises should not be assessed in relation to the hazard of Crowding and Space unless they are occupied. Ms Vodanovic submitted (rightly, in our view) that 'Crowding' and 'Space' are two different concepts, albeit expressed under one particular hazard for the purposes of the HHSRS: whilst it is only possible to assess whether a property is over-occupied by reference to its actual occupancy, the concept of Space (whether a property has adequate space for living, sleeping and normal family/household life) can be assessed by making assumptions about its typical occupation. Here, both parties have assumed that the typical occupation of each bedsit is going to be by a single adult.

55. The Respondent does not argue that the Premises are over-occupied. Rather, it says that the space provided in each of the bedsits is so small as to pose a serious risk to the health and safety of the assumed single adult occupier. We accept that the degree of risk can properly be assessed before the Premises are occupied: indeed, it is clearly prudent to do so. Whilst the views of any actual occupiers could be taken into account, if they are relevant, when deciding upon appropriate enforcement action, there is no requirement that the Premises must be occupied in order to be assessed in the first place, or that the views of occupiers must be taken into account.

56. The provisions of the Operating Guidance and the Enforcement Guidance support the Respondent's position, rather than the Applicant's. In particular, paragraphs 11.21 and 11.22 of Annex D to the Operating Guidance state (specifically in relation to the hazard of Crowding and Space):

> "11.21 As with all hazards, the initial assessment should be of the dwelling disregarding the current occupants. This should take into account the size and layout of rooms based on the occupancy level that typically might be expected to use the dwelling.
>
> 11.22 Unlike other hazards, *a second stage is involved for Crowding*. This involves determining whether the dwelling is over-occupied by the current household, taking account of their ages and relationships." [*Emphasis added*]

Assessing the hazard of Crowding and Space

57. The Prohibition Orders themselves do not reveal the individual HHSRS scores or calculations on which the Respondent's hazard assessments were based. That information was disclosed during the course of these proceedings, however, and the Applicant has also commissioned its own HHSRS assessments from an independent Chartered Environmental Health Practitioner, Richard Lord. The outcomes of the competing assessments are, it has to be said, radically different. They are summarised in the following table:

Crowding and Space Hazard Assessments				
	LHA		**Applicant**	
Premises	**Score**	**Band**	**Score**	**Band**
F5R1	3749	B	21	H
F5R2	2142	B	21	H
F6R1	11996	A	21	H
F6R2	6665	A	21	H

58. The explanation for these starkly contrasting outcomes is to be found in the differing views taken by the parties' respective assessors to the likelihood, during the subsequent period of 12 months, of an occupier suffering harm as the result of the hazard. According to the Operating Guidance, the national average likelihood of such harm in respect of all dwelling types is 1 in 8000. Mr Lord, in carrying out his assessments on behalf of the Applicant, saw no justification for departing from that figure. For the purposes of the HHSRS, he therefore adopted the most optimistic available range of ratios of likelihood in respect of all four bedsits (i.e., "less likely than 1 in 4200", for which the HHSRS representative scale point is 5600).

59. Geoffrey Belcher (who carried out HHSRS assessments on behalf of the Respondent) took the following (very different) view of the likelihood of harm resulting from the hazard of Crowding and Space:

Premises	Range of ratios of likelihood	Representative scale point
F5R1	1 in 42 to 1 in 24	32
F5R2	1 in 75 to 1 in 42	56
F6R1	1 in 13 to 1 in 7.5	10
F6R2	1 in 24 to 1 in 13	18

60. As far as the spread of harm between Classes I – IV are concerned, both Mr Belcher and Mr Lord took the view that there was no reason to depart from the average harm outcomes indicated in the Operating Guidance (so, for example, it was accepted that there is a 14% chance that any harm resulting from the hazard would be Class I harm).

61. To reduce the differences between the assessments made by Mr Belcher and by Mr Lord to a statement of the obvious: Mr Belcher concluded that there are serious category 1 Crowding and Space hazards (falling within Bands A or B) in all four bedsits, whereas Mr Lord concluded that there were only very minor category 2 hazards. The differences between their assessments turn entirely on the judgments they made about the likelihood of harm.

62. One thing that Mr Belcher and Mr Lord did agree about was that an assessment of the likelihood of harm occurring as the result of this hazard of 1 in 100 or more would be sufficient to result in a category 1 hazard falling within Band C at least.

<u>The justification given for Mr Belcher's assessments</u>

63. This can be summarised, generally, as follows:

63.1 The bedsits have to serve as a bedroom and sole living area of the occupier and visitors to their home, and the small en-suite shower room/wc is the only facility for the occupier and their visitors to use. The space available is too small for sleeping and private daily living functions to be adequately separated.

63.2 A variety of published guidance suggests that the bedsits are too small to safely accommodate sleeping and private daily living functions. This guidance includes:

63.2.1 The Nationally Described Space Standard (NDSS), which requires a one-bedroom flat (with a shower) for one person to be a minimum of 37m². It states that a single bedroom must be at least 7.5m².

63.2.2 The Houses and Flats section of the Metric Handbook - Planning and Design Data, which specifies a living room for one person should be at least 11m² and, as in the NDSS,

a single bedroom should be at least 7.5m², a total space requirement of 18.50m².

63.2.3 The Respondent's own Crowding and Space guidance, which suggests a bedsitting room for one person, albeit which is also used for dining, should be at least 18m². A bedsit used as a bedroom and living area for the occupant and their visitors (but not as a dining area) should be at least 16.50m².

63.2.4 The National Housing Federation - Housing Standards Handbook and Approved Document M of the Building Regulations, which both contain furniture schedules for dwellings. The individual bedsits are not large enough to safely accommodate the furniture items and activity spaces recommended by this guidance. So, for example, there is insufficient room for two armchairs or a two-seat sofa; a double bed; a free-standing TV; or a coffee table. Neither of the bedsits in Flat 6 can accommodate a dining table or chairs, even though there is no separate dining space in the shared kitchen. Realistically, only bedroom furniture can be safely accommodated (with the fold-down 'Murphy' (single) bed highlighting the inadequacy of the space available).

63.3 The en-suite shower-room/wcs are also extremely small, claustrophobic and inadequate in terms of the amount of activity space they provide.

63.4 The bedsits should not be assessed by reference to guidance about the size of "study bedrooms", because they are not intended for occupation by students, but as the occupier's sole/permanent home.

63.5 A lack of space and overcrowded conditions have been linked to a number of health outcomes, including psychological distress and mental disorders. Being confined to a single cramped bedsitting room for the majority of your time whilst at home in which there is insufficient space to separate different household activities, safely arrange/utilise basic items of furniture, store personal belongings or entertain visitors in safety and comfort would be extremely distressful for an occupier and consequently severely affect mental health. The resultant anxiety and distress would mean the likelihood of a psychological harmful occurrence over a 12-month period caused by living in such a small room where a comfortable home could never be established is much higher than average.

63.6 The assessments were aided by reference to worked examples relating to comparable properties.

64. As far as the different likelihood of harm assessments ascribed to the individual bedsits are concerned, Mr Belcher explained in his oral evidence that he judged the risk of harm for both Flat 6 bedsits to be greater than for either bedsit in Flat 5, because of the fact that the Flat 6 bedsits must also serve as dining areas as a consequence of the lack of space in the shared kitchen. Mr Belcher considered Flat 6, Room 1 to pose a greater risk than Flat 6, Room 2, because it has a smaller shower room. He considered that there was also a difference in the risk posed by the two bedsits in Flat 5, because of their differing shape and arrangement of space.

The justification given for Mr Lord's assessments

65. This can be summarised as follows:

65.1 The individual bedsits are well-furnished, including a space-saving single fold-out bed providing additional shelving when the bed is down and an easy chair when the bed is up. There is a distinct separation between sleeping and daytime activities.

65.2 Each bedsit gives the impression of a well thought out use of space to maximise comfort during the day and at night. It has a distinct study area and relaxing area with the chair at an appropriate focal length for the TV screen. An open plan arrangement is appropriate for a single person.

65.3 Additional living space for the sake of it is unlikely to offer the occupier a great deal of extra comfort as the space has been well designed. Additional space would have to be heated and may impact on the affordability of heating costs.

65.4 The exclusive en-suite shower-room/wcs provide space that can be used to store toiletries. The shower has a sliding door that takes up less floor space. This is a well thought out use of the space.

65.5 The adjacent kitchen is well laid out for two households to share.

65.6 The Operating Guidance states that open plan arrangements may be suitable for single households, and thus acknowledges that the separation of individual household activities is not always necessary. A single household living in a bedsit may have all the space they need by choice.

65.7 Available worked examples relating to broadly similar small rooms in an HMO with a shared kitchen and living room suggest that there is only a category 2 hazard of Crowding and Space, falling within Band D or E.

65.8 The Respondent's reliance upon the NDSS, the Metric Handbook, furniture schedules, and its own guidance on Crowding and Space is inappropriate.

The Tribunal's conclusions in relation to Crowding and Space hazard

66. All of these four bedsits are undoubtedly very small indeed. We noted during our inspection that, although finished and furnished to a good standard, each of the bedsits provides minimal space for moving around, for everyday activities such as dressing and eating meals, or for storing possessions. Nor do the bedsits appear to offer adequate space or facilities for the occupier to entertain visitors, whether overnight or otherwise: there is only room for one armchair, for example, and then only when the single bed is in its folded-away position. Indeed, the need for the bed to be folded away on a daily basis to gain even a small amount of activity space struck us as awkward and undesirable.

67. The question, though, is whether the lack of space within the Premises for living, sleeping and normal family/household life is such as to pose a risk of harm (i.e., an occurrence resulting in outcomes which would or should require some medical attention – a visit to a doctor or a hospital) to the health or safety of a potential occupier? "Health", for these purposes, means an individual's state of physical, mental and social well-being. It is not limited to the presence or absence of disease, infirmity or physical injury, but includes psychological injuries and distress (see paragraph 2.16 of the Operating Guidance).

68. The Respondent's hearing bundle included a paper titled *Internal space standards for single person accommodation in the private rental sector*. This is a report prepared for the Respondent by Julia Park, an architect and recognised national expert in housing space standards. It explains current space standards, why having sufficient living space is important (including for individuals who live alone), and outlines the dangers of having insufficient living space. Ms Park observes that:

> "[Living space] is also vital to our health. While a lack of space is rarely life-threatening in itself, it is widely accepted that it will be life-limiting; likely to curtail or prohibit activities that are considered 'normal'. It is therefore more likely to harm our general sense of wellbeing and mental health, rather than our physical health. Nonetheless, insufficient internal space can cause physical harm too."

69. Ms Park's report is not evidence of a hazard of Crowding and Space hazard within the Premises. However, we accept the general premise of the report, which is that where living space falls significantly below recognised standards, serious health outcomes may result.

70. The Applicant appears not to accept that the Premises fail to satisfy any relevant space standard, however. Mr Lord's view was

that the NDSS is not appropriate for bedsit accommodation with shared basic facilities such as kitchens. He also said that the Metric Handbook (which is used by architects and developers for planning and design data covering basic design for all major housing types) does not specifically refer to conversions of buildings into studio rooms, and that furniture schedules (of the type referred to by the Respondent) are not necessarily the most appropriate guidance to establish a Crowding and Space risk in a flat converted into bedsits.

71. Contrary to the Applicant's position, we consider all of the above to be of relevance in informing the assessment of risk in this case. As Ms Park explains in her report, the NDSS has been in operation since 2015, having been drawn up by the government with advice from industry experts. It is a national, cross-tenure, space standard, administered through the planning system. Whilst it is not mandatory, the NDSS is the current, minimum space standard against which homes of all types and tenures (including new-build and conversions, and flats, bedsits and HMOs) may be objectively assessed. It is clearly a relevant modern benchmark to consider when assessing the hazard of Crowding and Space. The Metric Handbook is also relevant in our view – it is specifically identified in Annex D to the Operating Guidance as a source of information and guidance on Crowding and Space. Nor do we see any objection to the use of furniture schedules as an aid to assessing whether a room is large enough to safely accommodate the furniture items which might reasonably be deemed necessary.

72. We accept (for the reasons explained by Mr Belcher) that the Premises do not meet these standards. It is important to stress that this finding, of itself, does not necessarily lead us to conclude that there is a category 1 hazard of Crowding and Space. However, it is a strong indication that the likelihood of an occupier suffering any harm as a result of a Crowding and Space hazard must be considerably greater than the national average for all dwelling types. For this reason, we do conclude that Mr Lord's likelihood assessments are incorrect.

73. It is, of course, difficult to determine how much greater than the national average the risks posed by the Premises actually are. Ultimately, this is a largely subjective assessment. Nevertheless, evidence is available in the form of 'worked examples' which may usefully inform that assessment. Worked examples are, in effect, peer-reviewed model answers for the various HHSRS hazards and are provided with the intention of encouraging consistency of hazard rating. Indeed, the Operating Guidance acknowledges that worked examples are a useful source of information which may assist in judging the likelihood of harm.

74. The parties themselves referred us to four worked examples which, they said, provide assistance in assessing whether there is

a Crowding and Space hazard in relation to the Premises. Mr Lord referred to two worked examples: the first produced by DASH Services (concerning a small bedroom in a two-storey, three-bedroom house, operated as an HMO occupied by three tenants who share amenities including a living room, kitchen and bathroom); and the second produced by Bristol City Council (concerning a bed/study room in a two-storey property comprising five such dwellings, all occupied by single adults who share use of a kitchen/living room and a bathroom). Having considered each of these worked examples carefully, we do not agree that they concern properties which are sufficiently comparable to the Premises for the examples to be of assistance: in particular, both worked examples relate to small bedrooms (not bedsits) in properties which have adequate shared dining kitchens and living rooms.

75. Mr Belcher referred us to a different pair of worked examples. The first of these was also produced by Bristol City Council (in 2007) and concerns a bedsit with an internal floor area of 9m² in a pre-1920 converted house. The bedsit is occupied by a single adult and is intended to be used as a kitchen, living room and bedroom. The plan of the bedsit includes space for a single bed, a wardrobe, a "work surface" and cooker. The likelihood of any harm resulting from a Crowding and Space hazard is assessed at 1 in 100, without adjusting the average spread of harms, resulting in a category 1 (Band C) hazard.

76. The second worked example referred to by Mr Belcher was produced by RH Environmental Ltd (RHE) in 2020. It concerns a ground-floor bedsit having a floor area of 10m² occupied by a single adult in a converted pre-1920 house comprising four bedsits which share two bathrooms and a kitchen. The likelihood of any harm resulting from a Crowding and Space hazard is assessed at 1 in 10, again without adjusting the average spread of harms, resulting in a category 1 (Band A) hazard.

77. We accept that the bedsits which are the subject of both worked examples are broadly similar to the Premises (although neither benefits from an en-suite shower-room/wc and, in the Bristol example, the bedsit also has to serve as a kitchen). However, there is an obvious and marked difference between the likelihood assessments made in these two worked examples. On the face of it, one might expect the likelihood of harm in the Bristol example to be greater than it is in the RHE example – because the bedsit in question has to be used as a kitchen and because it is smaller – but this is obviously not reflected in the assessments. Mr Belcher therefore suggested that the Bristol worked example under-estimates the likelihood of a harmful occurrence and should be treated with caution, primarily because it is now 15 years old. He presumed that the worked example had been benchmarked against Bristol City Council's local space standard of 13m² for a

combined living room, bedroom, kitchen and dining space for one person, which is now regarded as very low and outdated. More modern guidance is now available (the NDSS, for example), as is a body of research (referenced in Julia Park's report) about the harmful effects of poor-quality housing, including insufficient space.

78. Mr Belcher therefore considered that the RHE worked example provided a more useful, and more reliable, source of reference to assist in assessing the Premises. In support of this position, the Respondent provided additional evidence as to the provenance of the worked example, and we note from this that RHE provides environmental health and housing, consulting and training services to local authorities, central government and other organisations both private and public sector. It is currently leading on a review and update of the HHSRS and this includes an updated comprehensive set of worked examples. In 2019 RHE collaborated with the Respondent to develop five new worked examples (including the present one) based on case studies originally developed by the Respondent. The case studies were independently assessed using the HHSRS by a number of housing experts and a single moderated version of each one was then produced. The process was co-ordinated, on behalf of RHE, by a recognised leading expert in the field.

79. We accept that the Bristol worked example probably under-estimates the likelihood of harm resulting from the Crowding and Space hazard in the property concerned. We also accept that the RHE worked example is the most relevant objective and authoritative benchmark available for current purposes. However, we note that the relevant features of the property assessed for the purposes of the RHE example differ in some respects from those of the Premises: the RHE subject property does not have an en-suite shower-room/wc. Nor does it benefit from a separate shared dining area (unlike Flat 5, Rooms 1 & 2).

80. Taking these differences into account, we conclude that the likelihood of harm resulting from a Crowding and Space hazard in any of the four bedsits is probably less than 1 in 10, but probably falls within no lower range of likelihood than 1 in 42 to 1 in 75 (for which the RSP is 56). For the bedsits in Flat 6 (which do not have a separate shared dining area), a higher range of likelihood is probably justified: 1 in 24 to 1 in 42 (for which the RSP is 32).

81. Accepting (as we do) the parties' view that there is no justification for altering the spread of harms from the national average, it follows from these conclusions that we find the HHSRS Crowding and Space hazard score for each of the bedsits in Flat 5 to be 2142, and for each of the bedsits in Flat 6 we find it to be 3748. In all four cases, therefore, we find there to be a category 1 hazard falling within Band B.

Assessing the other hazards

82. The parties also disagreed about the scoring of the other (category 2) hazards identified in the Prohibition Orders – see paragraphs 25-27 above. The local housing authority's assessment was that there are significant (Band D) hazards of 'Falling on level surfaces etc.' in three of the four bedsits, and of 'Flames, hot surfaces etc.' in Flat 5, Room 1. It assessed the other hazards it identified as less serious (falling within Bands E or F, or even Band G for the hazard of 'Position and operability of amenities etc.').

83. The Applicant's assessor, Mr Lord, took the view that none of the identified category 2 hazards pose a significant risk of harm: he assessed the risk of Falling on level surfaces as a Band G hazard, and each of the other hazards as falling within Bands H, I or J.

84. The Respondent's assessments about the risk of falls are based on concerns about the small size of the en-suite shower-room/wc in the three bedsits in question: those rooms do not have sufficient space to allow for the carrying out of "appropriate tasks and manoeuvres" without increasing the chances of a slip. Mr Lord accepted that the shower-rooms are "tight for space", but he did not agree that this could contribute towards the likelihood of a fall.

85. The Respondent's assessment about the risk from flames and hot surfaces in Flat 5, Room 1 are based on concerns about the distance between the electric convector heater and the bed. Since the initial inspection and assessment, the bed has been moved away from the heater. Nevertheless, there is a residual concern that an occupier might move it back again, into its previous "optimum position" against the heater.

86. We are satisfied that the small size and layout of the Premises is such as to increase the likelihood of harm (compared with the national averages for all dwelling types) resulting from the identified category 2 hazards. However, given our above findings about the existence of category 1 Crowding and Space hazards, and given what we say below about appropriate enforcement action, we consider it unnecessary to go into more detail about the scoring of the category 2 hazards. To put it bluntly, even if the Respondent has overestimated the likelihood of harm associated with the Band D hazards, for example, this makes no difference to our assessment about whether making the Prohibition Orders was the best course of action to take.

Appropriate enforcement action

87. The Applicant argues that, even if the hazards in the Premises are as numerous and as serious as the local housing authority says

they are, the Respondent should not have responded by making the Prohibition Orders. The reason, according to the Applicant, is that the best course of action (whether under section 5 or section 7 of the 2004 Act) in relation to the hazard(s) concerned is serving a hazard awareness notice under section 28 or 29 of the 2004 Act.

88. Mr Bates submitted that, even if there is a hazard (or hazards) justifying enforcement action, serving a hazard awareness notice would be sufficient to reduce the risk to an acceptable level. We disagree.

89. A hazard awareness notice is a notice advising the person on whom it is served of the existence of one or more category 1 or category 2 hazards on the residential premises concerned which arise as a result of a deficiency or deficiencies on the premises. The notice must obviously identify the hazards and deficiencies concerned and give details of any remedial action which the local housing authority consider it would be practicable and appropriate to take. However, the recipient of the notice is not obliged to take the recommended remedial action (and for that reason there is no right of appeal against a hazard awareness notice).

90. Paragraph 5.38 of the Enforcement Guidance recognises that a hazard awareness notice may be a reasonable response to a category 2 hazard where the local housing authority wishes to draw attention to the desirability of remedial action. So, for example, if the only hazard which had been identified in this case had been the Band D 'Flames and hot surfaces' hazard relating to the positioning of the bed in Flat 5, Room 1, a hazard awareness notice would have been appropriate, because it could have warned an occupier not to position the bed too close to the electric heater.

91. It is much more difficult to see how a hazard awareness notice could sensibly provide similar practical advice where the hazard arises because the premises are just too small for their intended purpose: the suggestion that a hazard awareness notice might advise the occupier to consider going out regularly, or to eat their meals with their neighbour, seems absurd, frankly. Although paragraph 5.39 of the Enforcement Guidance acknowledges that a hazard awareness notice might still be a possible response to a category 1 hazard, it suggests that this is likely to be in circumstances where works of improvement, or prohibition of the use of the whole or part of the premises, are not practicable or reasonable. That is not the case in relation to the Premises. On the other hand, paragraph 5.21 of the Enforcement Guidance states that one of the situations in which it is appropriate to make a prohibition order is where the conditions present a serious threat to health or safety but where remedial action is considered

unreasonable or impractical for cost or other reasons. That is precisely the situation here.

92. Given the seriousness of the category 1 Crowding and Space hazards which we find to exist on the Premises, we conclude that prohibiting residential use in their current form is clearly the best course of enforcement action for the local housing authority to take.

OUTCOME

93. For the above reasons, we confirm each of the Prohibition Orders and we dismiss the appeal.

Signed: J W Holbrook
Judge of the First-tier Tribunal
Date: 24 November 2022