FIRST - TIER TRIBUNAL

PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	**BIR/00CS/HEP/2023/0001**
Property	:	**15A Carters Green, West Bromwich, B70 9QP**
Applicant	:	**Mr Nazim Hussain**
Respondent	:	**Sandwell Metropolitan Borough Council**
Type of Application	:	**Appeal against Emergency Prohibition Order - Housing Act 2004, section 45(2)**
Tribunal Members	:	**Tribunal Judge Craig Kelly** **Mr Chumley-Roberts MCIEH, J.P.**
Date of Decision	:	**5 February 2024**

DECISION

Background

1. The Applicant is the owner of the property at 15a Carters Green, West Bromwich, B70 9QP ("the Property"). On 9 February 2023, an Emergency Prohibition Order of the same date was served in relation to Property ("the EPO"). Throughout this application, the Applicant has been assisted and represented by, his son, Mohies Hussain; I refer to the Applicant as meaning both of them for the sake of convenience save where necessary to make the distinction.

2. The Applicant appeals against the EPO under section 45 of the Act to this tribunal by an application notice received on 3 March 2023. Directions were

given on 4 May 2023, by Deputy Regional Judge Gravells. The matter was listed for a final hearing on 5 December 2023.

3. The tribunal panel carried out an inspection of the Property, with both the Applicant and the Respondent (via its representative, Ms Edwards) present.

The Law

4. The Respondent local authority is responsible for the operation of a regime designed to evaluate potential risks to health and safety from deficiencies in dwellings, and to enforce compliance where mandated or appropriate. That scheme is called the Housing Health and Safety Rating System (HHSRS), which was established under the Housing Act 2004 ("the Act"), supplemented by the Housing Health and Safety Rating System (England) Regulations 2005 ("the Regulations").

5. The scheme set out in the Act is as follows:

    a. Section 1 (1) provides for a system of assessing the condition of residential dwellings and for that system to be used in the enforcement of housing standards in relation to such premises. The system (which is the HHSRS system) operates by reference to the existence of Category 1 or Category 2 hazards on residential premises.

    b. Section 2 (1) defines a Category 1 hazard as one which achieves a numerical score under a prescribed method of calculating the seriousness of a hazard. A Category 2 hazard is one that does not score highly enough to be a Category 1 hazard.

    c. "Hazard" means any risk of harm to the health or safety of an actual or potential occupier of a dwelling which arises from a deficiency in the dwelling.

6. The HHSRS requires an assessment of the likelihood that a hazard, resulting from a deficiency in the premises, would cause harm to any occupier, within a 12 month period, from the date of that assessment. The HHSRS operating guidance advises of the "*most vulnerable age group*" that would be affected by each of the 29 hazard (profiles) set out within it. However, the age and characteristics of the actual occupiers are not relevant for the actual assessment.

7. Section 4 of the Act provides the procedure to be followed by a local authority before commencing any enforcement action. If the local authority becomes aware that it would be appropriate for any property to be inspected with a view to determining whether a hazard exists, it must carry out an inspection for that purpose.

8. Section 5(1) of the Act provides that:

"If a local authority considers that a category 1 hazard exists on any residential premises, they have a duty to take the appropriate enforcement action in relation to the hazard".

9. Section 5(2) says that the appropriate enforcement action means whichever of the following courses of action is indicated. Those courses of action are:

    a. Improvement notice
    b. Prohibition order
    c. Hazard awareness notice
    d. Emergency remedial action
    e. Emergency prohibition order
    f. Demolition order
    g. Declaration of a clearance area

10. Section 5(4) says that if two or more courses of action within subsection (2) are available to the authority in respect of the hazard, they must take the course of action which they consider to be the most appropriate of those available. Section 5(3) says that if only one course of action within section 5(2) is available to the authority in relation to the hazard, they must take that course of action.

11. By section 7 the authority has a power (but not a duty) to take action in respect of category 2 hazards. The enforcement options for a category 2 include the power to issue an improvement notice, make a prohibition order, or issue a hazard awareness notice.

12. Section 43 contains provides a power to the local authority to make an emergency prohibition order, of the kind issued in this case. It is useful to set out the statutory provision insofar as relevant:

    " 43 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.

...

(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."

(*our emphasis added*)

13. The jurisdictional gateway to the issue of an emergency prohibition order is therefore the requirement for an "*imminent risk*" of "*serious harm*" to "*any of the occupiers of those or any other residential premises*". In a departure therefore to the HHSRS approach of deeming occupier ages to be irrelevant when determining the "*hazard score*", when considering the making of an emergency prohibition order, the local authority must have regard to the risk to the actual occupiers, when assessing the imminency of any risk.

14. There is a power in section 20 of the Act, that allows a local authority to make a prohibition order (i.e. as distinct from an emergency prohibition order) where a category 1 hazard exists on residential premises and no management order in is force in respect of the property. There is no requirement, as with an emergency prohibition order, for there be to an "*imminent risk*" of "*serious harm*" to "*any of the occupiers of those or any other residential premises*".

15. Section 9 of the Act provides that the UK Government may publish guidance to local authorities about exercising their functions under the Act. The local authority must have regard to that guidance. Two relevant sets of guidance have been issued the first called Operating Guidance and the second called Enforcement Guidance, both dated February 2006 (for convenience, they are both referred to together in this decision as "the Guidance").

16. If the premises are an HMO or a dwelling, the local authority may prohibit the use of the dwelling or the HMO. Section 21 allows a Prohibition Order to be made in respect of category 2 hazards.

17. There are various provisions as to what must be contained within an emergency prohibition order (section 44) and a prohibition order (section 22).

18. Section 45(2) contains a right to appeal to the First Tier Tribunal in respect of any emergency prohibition order made under section 43. That appeal must be made within 28 days beginning with the date specified in the prohibition order as to the date on which the order was made. This application was made within that time period.

19. Section 45(5) states that the appeal to a tribunal is to be dealt with by way of - re-hearing, but may be determined having regard to matters of which the authority were unaware. The tribunal may, by section 45(6)(b), confirm or vary the emergency prohibition order or make an order revoking it as from a date specified in that order. There is no power for the tribunal to substitute an emergency prohibition order with some other form of enforcement action, for example, a prohibition order or an improvement notice.

20. Turning to the method of determining whether a category 1 or category 2 hazard exists (i.e., the operation of the HHSRS), and the overall hazard score, this is set out in the Regulations and the Guidance. The procedure is broadly summarised as follows:

    a. There are 29 specific hazards that are identified in Schedule 1 of the Regulations and these are known as "*prescribed hazards*".

    b. The first step is for an assessor to establish, in relation to a prescribed hazard, the likelihood, during the period of 12 months beginning with the date of the assessment, of a relevant occupier suffering harm as a result of that hazard. Guidance under s9 of the Act gives national average likelihoods for each prescribed hazard but the assessor makes an individual assessment.

    c. The assessor's assessment of the likelihood is converted into one of representative scale points on a range of likelihoods, 1:1 (i.e., certain) to 1:5600 (i.e., very unlikely). The scale points are set out in paragraph 6 of the Regulations.

    d. The second judgement for the assessor is the possible harm outcomes, that could affect a relevant person as a result of the hazard actually occurring. This is done by reference to four classes of potential health

outcomes or "harms". Class I harm is such extreme harm as is reasonably foreseeable as a result of the hazard in question, including death and 80% burn injuries. Class II harm is severe harm including, for example, cardio-respiratory disease. Class III harm is serious harm including, for example, serious burns to hands. Class IV harm is moderate harm, such as serious coughs or colds. Taken into account in the assessment are the characteristics of and conditions at the relevant dwelling. Each of the four classes of harm are attributed a representational scale point which are the harm outcome scores.

e. The assessor then uses the two judgements made (the representational scale points for the likelihood of harm for the prescribed hazard and the four harm classes) to produce a hazard score and therefore a hazard rating .

This Appeal

21. The EPO identified the following hazards:

a. *ITEM 1: Fire (category 1) (whole property)*. The deficiencies said to give rise to the hazard were set out as being:

i. the lack of certified interlinked detection between the commercial unit and the residential flat;
ii. the lack of certified 60 minute fire separation along roof walkway and between commercial and residential accommodation;
iii. that the entrance/exit to the property was through a high-risk room (kitchen); and
iv. the lack of safe protected escape route.

b. *ITEM 2: Excess cold (category 1) (Attic room).* The deficiencies said to give rise to the hazard were set out as being:

i. lack of permanent/fixed form of heating in the bedroom.

c. *ITEM 3: Falls between levels (category 1) (first floor bedroom and roof walkway).* The deficiencies said to give rise to the hazard were set out as being:

i. lack of restrictor to first floor bedroom window;
ii. the lack of guarding/barriers to some sections of the roof walkway.

d. *ITEM 4: Falls on the stairs (category 1) (rear elevation and internal stairs).* The deficiencies said to give rise to the hazard were set out as being:

i. Lack of PIR/Emergency lighting to illuminate entrance/exit stairwell to roof access and across roof walkway.
ii. Lack of handrail to kitewinder leading up to the Attic room.

e. *ITEM 5: Position and operability of amenities (category 2) (whole property).* The deficiencies said to give rise to the hazard were set out as being:

    i. Lack of individual gas and electric meters for residential flat.

22. The Respondent accepted that nothing turned on Item 5, given it was a category 2 hazard, and that an EPO could not be made in relation to anything other than a category 1 hazard. It might, however, be relevant in relation to other types of enforcement action, but it has no significance in this particular case for reasons that will become apparent.

23. The Applicant's grounds of challenge to the EPO, as clarified at the hearing on 5 December 2023, can broadly be summarised as follows:

    a. That the Respondent had been involved in the development of the commercial premises on the ground floor, and that Items 1, 3, 4 and 5 on the EPO are all associated with potential hazards that arise due to the interaction with the commercial premises;

    b. Information taken account of by the Respondent in its assessment of the Property came from the occupier at the Property and not the owner; and

    c. That the issue of an EPO was unnecessary, that it was not the most appropriate form of resolution; and

    d. That the costs incurred by the Respondent in connection with the EPO, being £539.41, is unreasonable;

24. There is no dispute by the Applicant of the scoring of the various hazards identified in the HHSRS assessment. There is no dispute that the hazards identified were reasonably assessed and indeed, fundamentally, that the category 1 hazards were indeed category 1 hazards such that would entitle, all other criteria being met, the issue of an emergency prohibition order. Indeed, the Respondent had, by the time we undertook the inspection, carried out most of the rectification works and we address those as relevant below. Indeed, the correspondence between the Applicant and Respondent prior to the application being made to the tribunal related principally to the costs incurred by the Respondent for which it sought recovery against the Applicant rather than the assessment from the local authority of the hazards said to exist.

25. There was an issue about the information provided by the Respondent as to the time for lodging an appeal, but that is not a ground of appeal in respect of the application against the substantive decision to impose the EPO; in any event, the Applicant's application was lodged in time and no issue arises in relation to that.

26. The Respondent's position, put simply, is that it was entitled to make the assessments that it did, as a result of its own inspection at the property and that it was justified in making an EPO.

27. We take each of the grounds of appeal as before the tribunal separately as follows.

That the Respondent had been involved in the development of the commercial premises on the ground floor, and that Items 1, 3 4 and 5 on the EPO are all associated with potential hazards that arise due to the interaction with the commercial premises.

28. This point was not pursued, because, during the course of the inspection, Mr Nazim Hussein had identified to Moghies Hussein that it was not in fact a representative of the local authority that was involved in ensuring compliance with building regulations during the redevelopment of the commercial premises, but an independent, private Building Control contractor. At the hearing, the Applicant appeared to abandon this ground of challenge, but for the sake of record, we consider that there is no merit in this ground of appeal because, as the Applicant noted, it was a private contractor instructed by him that had the involvement that was said to give rise to this ground, not the local authority.

Information taken account of by the Respondent in its assessment of the Property came from the occupier at the Property and not the owner.

29. Ms Edwards gave evidence that she sent a letter to the Applicant on 10 January 2023 to advise she wished to carry out an inspection of the property. We accept her evidence in relation to this. That letter was sent to the address at HM Land Registry for the registered proprietor of the property. The letter stated that she intended to inspect the premises on 19 January 2023 and requested that the Applicant make available access to all parts of the property.

30. There was no answer to that letter, it seems that there was some issue as to whether it was received, but ultimately, it was sent to the registered address and we are satisfied it was properly served.

31. The Respondent's position is that its assessment came from its inspection of the property. Whilst it is true that only the occupant was present during the inspection, there is no obligation for the owner to be present during the inspection and the Respondent was entitled to carry out the inspection without the owner present. That said, the owner was given advance notice of the inspection in this case with the Respondent.

32. Accordingly, this ground provides no proper basis to challenge the substantive decision of the Respondent to issue the EPO.

That the issue of an EPO was unnecessary, that it was not the most appropriate form of resolution.

(a) The legal test

33. As noted above, in order for a local authority to issue an EPO, it must be satisfied as follows:

a. that a category 1 hazard exists at the property;
b. that the hazard involves an imminent risk of serious harm to the health and safety of any of the occupiers of those or other residential premises; and
c. that there is no management order in force pursuant to Chapters 1 or 2 of Part 4 of the 2004 Act.

34. There is no management order in force in relation to the property. There are category 1 hazards at the property. The starting point, then, is to determine whether the category 1 hazards that exist, whether of themselves or taken together, present an "*imminent risk*" of "*serious harm*", such that would open the jurisdictional gateway to an emergency prohibition order. On the assumption that there is, there is then the question of whether such an order is the most appropriate form of enforcement action to take.

35. The Applicant was not professionally represented at the hearing and could not identify to us what measure short of the EPO was appropriate in this case, only in the broad sense, that the measures taken were too harsh in light of the risk.

36. We start therefore by considering whether there is in fact an "*imminent risk*" of "*serious harm*". The parties appeared to accept that the reality was that the risk which provides the real candidate for imminency of serious harm in this case is that of fire given (a) the property being above a shop containing a take-away kitchen, and (b) the identified deficiencies set out in the EPO.

37. What is an imminent risk? As noted in *Bolton Metropolitan Borough Council -v- Patel [2010] UKUT 334*, there was little authority on the point, but in that judgment the Upper Tribunal noted that the requirement of imminency of serious harm sets a high threshold for the availability of emergency relief. The existence of such a risk opens up a draconian form of remedy, which may prevent the use of property completely by tenants (as in this case).

38. Although *Bolton* was not cited to us in argument, we consider that it represents the best legal authority from which we can find support when determining whether there is meaning of "*imminent risk of serious harm*". We have in mind the Shorter Oxford English Dictionary, 6th Edition, defines imminent as:

"Of an event, esp. danger or disaster; impending, soon to happen."

39. We must apply the ordinary meaning of the legislation, essentially, seeking to identify by reference to the specific hazards in this case whether there present a risk of impending danger or disaster, such that it may soon happen. In so doing, we seek to give a common sense meaning to the words of the statute when assessing the imminency of any risk of serious harm.

40. (b) *The category 1 hazards*

ITEM 1: Fire

41. There were numerous category 1 hazards identified as set out above. But, the real focus for argument at the final hearing was in relation to the fire hazard.

42. In her HHSRS assessment, Ms Edwards identified the likelihood of fire at the property as being 1 in 10, down from the national average of 1 in 3,372. The Guidance refers to the fire hazard statistics upon which the assessment is based as covering threats from exposure to uncontrolled fire and associated smoke and includes injuries from clothing catching alight on exposure to uncontrolled fires but does not include clothes catching alight from controlled fires.

43. It seems that Ms Edwards was persuaded that the likelihood of fire was incredibly high in the property, and her evidence suggested to us that her assessment of that level of risk arises principally from the existence of a commercial kitchen below the property, in ground floor below, although she offered no evidence as to why the commercial premises were said to present such a high likelihood of fire, beyond there being a commercial kitchen.

44. Although strictly, it is not necessary for us to carry out our own assessment under HHSRS to determine the hazard score, it is perhaps worth noting that the recorded justification in the HHSRS sheet for changing the likelihood from the national average was stated as:

"due to lack of interlinked detection, there is no early warning of fire from shop to flat. Entry/exit through high risk room with no other means of escape from the property".

45. A conclusion of 1 in 10, or 10% likelihood of harm in the next 12 months is high. We recognise that the existence of a commercial kitchen will increase the level of risk, as indeed, would the absence of appropriate fire control mechanisms. Such assessments under the HHSRS are always a value judgment, of course, based on the experience of the individual assessing, and the weighing relevant factors, but we note that whilst the outcome hazard score if formulaic, the input into that formula is very much subjective. For our part, we doubt that a likelihood rating of 1 in 10 was appropriate, by reason of the issues identified in the HHSRS assessment.

46. We take on board the points made in *Bolton* as to the meaning of "*imminent*", especially from paragraph 34 onwards in that judgment. The Upper Tribunal concluded in that case that the purpose of section 40 of the Act requires a sense of imminency of the serious harm occurring. In other words, applying the Oxford English definition of imminent, that there is a good chance that the harm is soon to happen.

47. As to serious harm, there is no definition in the legislation as to what this is, but as noted in Bolton, it is reasonable to assume it suggests significant injury or illness. There is no reference back to the HHSRS Class criteria of harm, albeit, it seems to us, the issue of serious harm in this case, from fire at least, can be taken as being the likely result of an uncontrolled fire at the property. We are satisfied that burns from an uncontrolled fire are likely to be considered serious harm for these purposes.

48. There can be no doubt, in our view, that the absence of interlinked fire detection and 60-minute fire insulation, would lead to a significant increased risk of

serious harm arising. As to what that risk is, it is difficult to say, not least because, one of the most important factors in this case is the existence of the commercial kitchen on the ground floor. But, no evidence was provided to the tribunal, and none was obtained on the inspection (the focus principally being the residential premises and an inspection of the gas and electric meters in the commercial premises), as to the measures engaged (if any) by the commercial premises to reduce the risk of uncontrolled fire. We do not know the hours of operation in the commercial premises, the equipment used, the training of staff, the history of accidents/fires, and so on.

49. Most residential properties have kitchens, of course, and that fact would be built into the statistical national average in the HHSSRS assessments. Although less common than sole electrical installations, some apartment complexes have gas infrastructure too. It may well be true to say that a commercial operation with a likely greater use of its kitchen might have a greater risk of the escape of fire simply by reason of the increased use of gas or electric cooking appliances. The difficulty in this case, is that we know nothing about the operations in the commercial kitchen on the ground floor. There was no evidence before us about the commercial kitchen operations.

50. If a fire broke out, then the deemed absence of 60-minute fire stopping, and the interlinked detection system, is likely in our view to increase the risk from the national averages, but again, to what extent, is difficult to say. There was no suggestion in this case that there was any likelihood of fire arising within the next days, weeks or months and no specific circumstances identified that would lead to that conclusion. No unsafe practices, for example, were identified in the commercial premises. The nature of the cooking appliances was not in evidence.

51. We recognise that escape through a high-risk room, in this case, the kitchen in the premises, is far from ideal. It increases the likelihood of harm, and account must be taken of that too.

52. Insofar as the source of any fire is the commercial kitchen, then we do not accept that the simple existence of the commercial kitchen means that there is an imminent risk of serious harm. We consider the increased risk of harms from the absence of certified fire stopping, interlinked detection systems and so on, but we cannot accept that these means that there is an "*imminent risk*" of "*serious harm*". It is the issue of imminency that causes us real concern and the evidence does not, in our view, justify a conclusion that there is an imminency of such harm.

ITEM 2: Excess cold

53. There was no evidence before us as to why cold would affect the occupants of this property and give rise to an imminent risk of serious harm. We noted that a fixed electrical heating appliance had been installed in the attic room.

54. We would not consider an emergency prohibition order appropriate on the basis of this hazard in any event, there being no evidence of any weather

conditions at the time of making the EPO and the potential impact of such upon the occupants.

ITEM 3: Falls between levels

55. Upon our inspection, we noted the absence of appropriate guard rails or something similar to protect from potentials falls, on the righthand side of the rear flat roof which forms the entrance walkway to the dwelling. We have no details of the actual occupants at the property prior to the making of the EPO and the risk that this particular issue would present to them. Certainly, we have no evidence as to the imminency of the risk.

56. As to the lack of restrictor on the first-floor window, we do not consider that this represents an imminent risk of falling. The height of the window was sufficient that only those seeking to exit through it would likely fall through it, and that would need to be a conscious decision in reality to exit through it. It is not so much a risk of falling as a risk of climbing through it.

57. It is difficult to see that there is an imminent risk to the occupiers of this or neighbouring properties by reason of the deficiencies said to exist and we are not persuaded that there was such a risk.

ITEM 4: Falls on the stairs (category 1) (rear elevation and internal stairs)

58. Again, this item was not the focus of submissions from either party as to the imminency of risk, but having had the benefit of inspecting the property, we can say that although the staircases were narrow, we are satisfied that they do not present an imminent risk of falling and/or serious harm being caused.

ITEM 5: Position and operability of amenities (category 2) (whole property)

59. We do not need to address this issue, it is a category 2 hazard and not something that would form the basis for an EPO being issued.

Conclusions

60. Considering matters afresh, we do not consider that we would have made the EPO when the local authority did, and that given the absence of any imminent risk of serious harm, we cannot sustain the EPO. As such, we revoke the EPO with immediate effect.

61. We do not consider that we have the power to substitute a prohibition order in place of the EPO, given the wording of section 45(6)(b), which refers to variations to the emergency prohibition order.

62. Further, it follows in our view that costs of making the EPO, which we would have not made given the absence of any imminent risk of serious harm, cannot be recovered against the Applicant. As such, to the extent such costs have been paid by the Applicant to the Respondent already, they must be repaid by the Respondent to the Applicant, and if not already paid, they need not be paid.

TRIBUNAL JUDGE C KELLY

Postscript

63. On 26 January 2024, the tribunal received via the tribunal office, a certificate from "Initial Fire & Electrical Ltd" which appears to have been issued after an inspection on 5 January 2024. It seeks to address the evidential deficit, and indeed, one of the risks identified by the Respondent, relating to the absence of fire-proofing between levels.

64. This documentation was received after tribunal members had discussed the case and agreed their findings. Further, this is a document that was not in existence at the time the EPO was made.

APPEALS

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission to appeal must be made to the First-tier Tribunal at the Regional Office which has been dealing with this 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 for an extension of time and the reasons for not complying with the 28-day time limit; the Tribunal will then look at such reasons and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. Any application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. provide the date, the property and case number) and set out the grounds of appeal and state the result the party making the application is seeking.