HA/6/2007

LANDS TRIBUNAL ACT 1949

HOUSING – emergency remedial action – whether council following correct procedure – RPT holding appropriate enforcement action to be emergency prohibition order – held correct procedure followed – council right to take emergency remedial action – appeal allowed – Housing Act 2004 ss 40 and 43

IN THE MATTER OF AN APPEAL UNDER THE HOUSING ACT 2004

BETWEEN **LUTON BOROUGH COUNCIL** **Claimant**

and

UNIVERSAL GROUP **Respondent**

Re: Regency Place,
15-17 Chapel Street,
Luton,
Beds LU1 2SE

Before: HH Judge Reid QC

Sitting at: 43-45 Bedford Square, London WC1V 6JL
on 6 April 2009

Simon A Birks, instructed by RJ Stevens, solicitor to the Council, Luton Borough Council Town Hall, Luton Beds LU1 2BQ for the Appellant.
The Respondent was not represented.

The following cases are referred to in this decision:

Cosic v Croatia: ECHR Application 28261/06
Kay v Lambeth LBC [2006] UKHL 10
Doherty v Birmingham City Council [2008] UKHL 57

DECISION

Introduction

1. This is an appeal from a decision of the Eastern Rent Assessment Panel Residential Property Tribunal ("RPT") following a hearing on 15 August 2007. The Tribunal made its decision on the 30 August 2007 and it was distributed to the parties on 3 September 2007. The matter before the RPT was an appeal by Universal Group ("Universal") against an emergency remedial notice served by Luton Borough Council ("Luton") in respect of Flat 11, Regency Place, 15-17 Chapel Street, Luton, Bedfordshire under section 41 of the Housing Act 2004 and the remedial action under the notice. Universal's appeal was on the basis that the notice was invalid because the Council had failed to follow the correct procedure and that (even if the procedure followed was correct) the course of action followed was not the appropriate enforcement action and Luton should have made an emergency prohibition order. The RPT accepted Universal's contentions and therefore "reverse[d] the decision of [Luton] in accordance with section 45(6)(a) of the Act."

2. Luton appeals against that decision. Universal does not appear to oppose the appeal, having come to an agreement with Luton that if it did not do so Luton would not seek an order for costs against Universal were the appeal to be successful and would not seek to recover the costs of the remedial works it had done to the property in question at a cost of £215.

3. The appeal was conducted under the standard procedure, rather than the simplified procedure and took the form of a complete re-hearing. It follows that the evidence before the Lands Tribunal was not the same as that before the RPT. In particular none of the evidence adduced by Universal before the RPT was presented before the Lands Tribunal and the evidence called by Luton was more extensive than it had been before the RPT.

The Legislative framework

4. Local authorities have been given wide powers to deal with deficiencies in the standard of housing provided to tenants. The powers range from requiring works to be done, to carrying out the works themselves, to prohibiting use of the premises. The local authority's officer will have to inspect the premises, consider whether specified hazards exist, categorise the hazards, see what courses of action are available, and decide what course to follow. The legislation under which they operate is contained in Part 1 of the Housing Act 2004 which introduced a new system for assessing the condition of residential premises and for the use of the system for enforcing housing standards. The Housing Health and Safety Rating System (England) Regulations 2005 S.I. 2005 No. 3208 are the regulations made under that Act. Section 9 of the Act provides for "the appropriate national authority" to give guidance to local housing authorities about exercising their functions under the Act. Section 9(2) requires local authorities to have regard to any guidance. There is "Operating Guidance" given under the regulations in a publication by the Office of the Deputy Prime Minister which runs to 187 pages and costs £50.

5. The new system set up by the Act operates by reference to the existence of "category 1" and "category 2" hazards on residential premises. The categories are defined in section 2(1) of the Act in these terms:

> "In this Act-
>
> "category 1 hazard" means a hazard of a prescribed description which falls within a prescribed band as a result of achieving, under a prescribed method for calculating the seriousness of hazards of that description, a numerical score of or above a prescribed amount;
>
> "category 2 hazard" means a hazard of a prescribed description which falls within a prescribed band as a result of achieving, under a prescribed method for calculating the seriousness of hazards of that description, a numerical score below the minimum amount prescribed for a category 1 hazard of that description; and
>
> "hazard" means any risk of harm to the health or safety of an actual or potential occupier of a dwelling or HMO which arises from a deficiency in the dwelling or HMO or in any building or land in the vicinity (whether the deficiency arises as a result of the construction of any building, an absence of maintenance or repair, or otherwise)."

In rather plainer terms, category 1 hazards are serious dangers: category 2 hazards are rather less serious matters

6. Section 4 provides for inspections of property by local housing authorities to determine whether category 1 or category 2 hazards exist and for the making of regulations as to how inspections of premises and assessments of hazards are to be carried out. Amongst other provisions, by section 4(6) where an inspection has been carried out and the proper officer of the local housing authority is of the opinion that a category 1 or category 2 hazard exists on any residential premises in the authority's district 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. Section 5 imposes a duty on a local housing authority to take appropriate enforcement action where it considers a category hazard exists. Under the section the local housing authority "must take the appropriate enforcement action". The appropriate enforcement action has to be one from the list in subsection (2). The list includes emergency remedial action under section 40 or an emergency prohibition order under section 43. However by subsections (3) and (4) if only one of the listed courses of action is available, it must take that course but if two or more courses of action are available the local housing authority must take whichever they consider to be the most appropriate.

7. Under regulation 5 an inspector must (a) have regard to any guidance under section 9, (b) inspect the premises with a view to preparing an accurate record of their state and condition, and (c) prepare and keep such a record in written or in electronic form. The regulations provide an extremely complicated scoring system for the assessment and categorisation of hazards: hence the use of computer programmes to assist in working them out.

8. Chapter 3 of the Act is headed "Emergency Measures". Under section 40(1) if the local housing authority is satisfied that a category 1 hazard exists, and it is 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 no management order is in force under Chapter 1 or 2 of Part 4 in relation to the premises, emergency remedial action 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. Under section 43 a similar power exists to make an emergency prohibition order prohibiting any use of the premises specified in the order. Breach of a prohibition order is a criminal offence.

Facts

9. Regency Place, 15-17 Chapel Street is a 12 storey building. On the ground floor there is a night club. On the upper floors there are 13 flats. In late April 2007 Luton was contacted by Mr Andrew Skepelhorn, the tenant of flat 11 in the premises. He complained that the electricity supply to the building had been disconnected and the water supply to the building had been turned off. The effect on him was that the common parts, which included the staircase, were in darkness, and his flat had no electricity or water. It was thus impossible for Mr Skepelhorn properly to occupy the flat as his home. Mr Skepelhorn was a single man and if made homeless would have been eligible for assistance and advice from Luton but would not have been regarded as having priority need for housing accommodation under section 189 of the Housing Act 1996.

10. On 26 April 2007 Mr. Kostarz, an experienced and well-qualified officer employed of Luton, attended the premises. He was familiar with the premises as a result of receiving previous complaints and having visited the property on 18 January 2007 in respect of a complaint by another tenant about the hot water being cut off. When he attended the premises on 26 April 2007 he saw that the building's entrances were being boarded up, and that there were various people working there under the supervision of a Mr. Luigi Malone. Mr. Malone said that the building was unsafe, that he was boarding it up to force the remaining tenants out and that it was legal for him to do so. There appeared still to be occupants in flats 7 and 10 as well as Mr Skepelhorn in flat 11. Mr. Kostarz carried out a brief inspection and saw that both the electricity and the water supply had been cut off. On the evidence before me Universal were engaged in the unlawful eviction of the occupiers of the three flats.

11. On Friday 27 April 2007 Mr Kostarz returned to the premises accompanied by two other Council Officers, Mr Davey and Mr Fenney. There they discovered a carpenter who said he was boarding the building up but could not do so because flats 10 and 11 were still occupied. While they were there the occupant of Flat 10 emerged and said he was leaving. Mr Kostarz carried out a rapid assessment of the premises and considered that it was obvious that there were category 1 hazards. These hazards arose as a result of the lack of the electricity supply and the lack of a water supply. He considered that emergency remedial action ought to be taken. Mr Kostarz, before making any final decision, contacted his line manager Mr Hudson and spoke to him over the telephone. Following the discussion, Mr Hudson carried out his own desktop calculation of the risk. He too concluded that there were category 1 hazards

present in the premises as a result of the lack of a water supply and an electricity supply. He decided to take emergency remedial action under section 40 and Schedule 3, para 3 of the Housing Act 2004. Notices of intention to take that action were hand delivered to flats 7, 10 and 11.

12. The action consisted of sending one of the Council's plumbers to the premises together with an electrician. Their instructions were to restore the water supply and the supply of electricity to the premises. The plumber was readily able to restore the supply of water, but on doing so discovered that the fire hoses had been turned on and they were pouring large quantities of water into the premises. The fire hoses were then turned off by the plumber and the source of the flooding of the premises ceased. Had there been any evidence of any other leaks the plumber would not have left the water turned on. The electrician was unable to carry out any work because the equipment for the supply of electricity had been tampered with in a section owned by the electricity company EDF.

13. EDF was therefore contacted and sent its own engineer to visit the premises and inspect the equipment for the supply of electricity. He discovered the main fuse carriers on the incoming supplies had been removed. He replaced the cut out and power was restored by 6.49pm. Having carried out an inspection the engineers immediately reinstated the supply of electricity to flat 11. The EDF engineer carried out a sufficient inspection to be satisfied that (notwithstanding the flooding which had occurred) it was safe to restore the electricity supply to flat 11 and the common parts. Mr Andrew Skepelhorn was then able to return to the live in his flat where he continued to live until 25 June 2007 despite a possession order being made against him in the Luton County Court on 7 June requiring him to give possession of the flat on the 14 June.

14. The total cost of the works done was £215 to which in seeking recovery from Universal Luton added its administration charge of £50 (its charge is 14 per cent with a minimum of £50).

15. On 2 May 2007 Luton served remedial action notices under section 41 of the Housing Act 2004. The notices identified the category 1 hazards as: (1) falls on the stairs due to the lack of lighting in the stairwell as a result of the electricity supply having been cut off; (2) falls on level ground as a result of the lack of lighting in the flat due to the electricity supply having been cut off; and (3) the lack of a water supply for domestic purposes which had been caused by the mains water supply having been turned off.

16. Mr Kosartz (1) was familiar with the building having attended the premises in January 2007; (2) had made notes when he visited the building on 26 April 2007; (3) on 27 April 2007 spent some time in the premises, climbing the stairs to the 9th floor; and (4) had, on 27 April 2007, after visiting the building, returned to his office where he had carried out a desktop assessment of the hazards using a simple computer programme which identified in which category each hazard should be placed. He did not prepare a report in writing before service of the notices and did not carry out a full assessment until after the notices were served and the work had been done. The making of the full assessment is a time-consuming and detailed

process, the material being entered in a computer programme. Mr Kostarz said the task takes about half a working day. When he did carry it out, the assessment threw up additional hazards which he had not identified on 27 April and which were not referred to in the notice.

17. Universal appealed against the notice. The essence of the appeal, apart from the procedural point, was that category 1 hazards existed at the building but that the appropriate action for Luton to take was not emergency remedial action but an emergency prohibition order.

The RPT panel's decision

18. The RPT's decision dealt first with issues of law and then with issues of fact. Since the appeal to the Lands Tribunal was by way of re-hearing and the evidence adduced was different it is not necessary to traverse the RPT's findings of fact on the evidence before it. Its determinations of law are another matter.

19. There is however one apparent finding which straddles the borders of fact and law which should be noted. The RPT appears to have rejected evidence that EDF checked the electrical system for safety on the basis it was hearsay. There is no rule of law, practice or evidence that hearsay evidence will not be admitted in an RPT. Such weight of such evidence may be affected by the fact it is hearsay but it cannot be disregarded simply because it is hearsay, and if the RPT did reject that evidence (as it appears to have done) simply on the basis it was hearsay it was wrong to do so.

20. The next matter of law on which the RPT made a ruling was that it held that a local authority inspector must make a written report under section 4(6) before any action is taken. The RPT itself acknowledged it was wrong in so holding in its reasons for giving permission to appeal against that its finding that Luton had not complied with its procedural obligations. There is nothing in section 4(6) which requires that the written report must have been made before any action is commenced.

21. The RPT went on to hold that Mr Kostarz was obliged to produce a written report under regulation 5 before taking any action. Again, in my judgment the RPT was wrong. There is nothing in the regulations which requires it. There is no suggestion in the relevant paragraphs of the guidance (paras 4.02 and 4.03) or in the flow chart which appears later in the guidance. There are likely to be a number of occasions when matters should be dealt with first and a detailed report (which as Mr Kostarz testified can take hours to produce) should be produced afterwards. Obvious examples are vulnerable people left without heating in the depths of winter and premises that have been damaged by a gas explosion and left in precarious situation.

22. The RPT went on to criticise Luton for deciding to act without having a complete inspection and report. However Mr Kostarz had visited the building in January 2007. His

inspection was cut short on 26 April 2007, but was fuller on 27 April 2007. He carried out a desktop assessment of the hazards using his office computer, and he discussed matters with his manager. Luton submitted that that a local housing authority must do sufficient to ensure that it has sufficient material to enable it to make a properly informed decision. The Guidance at p.28 appears to envisage a fairly rapid assessment of the hazards using a paper scoring form, a scoring programme for a handheld computer or a scoring programme for a desktop PC. Annex B of the Guidance (p40) makes it clear that inspection should be sufficiently through to enable all relevant material to be collected, but the Guidance accepts that practical considerations mean that there are very real limits to the extent to which an inspector is required to go.

23. In my judgment (whatever may have been the position on the evidence before the RPT) it is clear that Mr Kostarz made a sufficient inspection to enable him to make a properly informed risk assessment. Unlike the RPT I do not accept that because the computer programme scored other less obvious hazards when he made up his full report from his notes his original assessment was inadequate.

24. The next point was as to whether an emergency prohibition order should have been made in place of Luton taking emergency remedial action. It is clear that this would have been to Universal's benefit. It wanted the whole building cleared and an emergency prohibition order would have achieved that aim without the (to it) tiresome business of having to go to the County Court, obtain a possession order and then have the warrant for possession lawfully executed. On the facts before it the RPT held that Luton was wrong to take emergency remedial action but that the "appropriate enforcement action" under section 5(2) of the 2004 Act would have been an emergency prohibition order.

25. On this point Luton made submissions to the Lands Tribunal which went far beyond anything made to the RPT. It was submitted that the draconian step of an emergency prohibition order could only be justified where no other measure can reasonably be expected to enable the tenant to occupy his home in safety. Any interference with the right to occupy must be necessary, not just desirable. It is a matter of proportionality. If, as in this case, the tenant could remain in his home if works costing £215.00 were carried out it would not have been proportionate to evict him from his home, probably putting him on the street. Article 8 of the Convention on Human Rights was applicable: see *Cosic v Croatia*: ECHR Application 28261/06 at para.22.

26. Interference would not, in Luton's submission, be in accordance with law if the decision could be set aside for deficiencies on general administrative law grounds. A council which sought to rely on a decision which was *Wednesbury* unreasonable would not be acting in accordance with law. A local authority seeking immediate possession by serving an emergency prohibition order must be able to show that its decision was justifiable. Reference was made to *Kay v Lambeth LBC* [2006] UKHL 10 at para. 110 and *Doherty v Birmingham City Council* [2008] UKHL 57 at para 55 where Lord Hope said "But the requisite scrutiny would not involve the judge substituting his own judgment for that of the local authority. In my opinion the test of reasonableness should be, as I said in *Kay* at para 101, whether the decision to recover possession was one which no reasonable person would have considered justifiable."

27. Before the RPT no mention was made of Article 8. In general a local authority may interfere with a person's right to respect for his home if, and only if, such interference can be justified. Any such interference must be in accordance with law, and it must be necessary in the interests of public safety, or for the protection of the health. This was not a matter which the RPT considered at all on the facts before it. Had the arguments addressed to the Lands Tribunal been addressed to it, it would never have reached the conclusion that the "appropriate enforcement action" would have been an emergency prohibition order.

28. The final matter which the RPT put into the balance in its decision was a point never raised in argument on either side and which neither party was ever given a chance to address, namely that the fact the fire alarm in the premises was not working was a factor which militated in favour of an emergency prohibition order. This was an error on the part of the RPT. Neither party was given a chance to address the issue. If a tribunal is going to take a point of its own motion the parties must be given a proper opportunity to address it. In this instance on the evidence before the Lands Tribunal the Bedfordshire and Luton Fire & Rescue Service were aware of the situation and required certain works to be done but were not pressing for the premises to be closed. In these circumstances the point was not one on which the RPT should have sought to rely because it failed to allow the parties a chance to address the point and (if it had) would have found that it could not properly rely on the point.

Conclusion

29. In the present case on the evidence before me (as opposed to the different evidence which was put before the RPT) there is no basis for assertion that Luton failed to carry out the necessary procedural steps in acting as it did. There were (as was common ground) category 1 hazards on the premises. Those could be dealt with, and were dealt with, at a cost of £215. No reasonable person would have considered it justifiable to deprive Mr Skepelhorn of his home in order to avoid executing work costing £215. Luton's decision to carry out its obligation to take appropriate enforcement action by taking emergency remedial action was the correct decision. If it had decided (as Universal suggested) that an emergency prohibition order would have been the proper course, that would have been an impeachable decision because the enforcement action would not have been the appropriate enforcement action.

30. It follows that the decision of the RPT must be set aside and Universal's appeal against the emergency remedial action must be rejected.

Dated 17 April 2009

His Honour Judge Reid QC