

Y TRIBIWNLYS EIDDO PRESWYL

RESIDENTIAL PROPERTY TRIBUNAL

Reference: RPT/0013/08/23

In the matter of Section 25 and Schedule 2, paragraph 5 of the Housing Act 2004 –
Refusal to Vary or Revoke a Prohibition Order

Applicant: Mr Thomas Edwards

Respondent: Flintshire County Council

Tribunal: Mrs Siân Westby (Legal Chair)
Mr Hefin Lewis (Surveyor Member)
Mr Hywel Jones JP (Lay Member)

Reasons and Decision of the Residential Property Tribunal

1. This is an appeal by Mr Thomas Edwards (“the Applicant”), the freehold owner of the property known as 30 High Street, Mold and registered at H.M Land Registry with title number WA611623.
2. The appeal is made pursuant to paragraph 9(b) of Part 3 of Schedule 2 to the Housing Act 2004. The appeal was heard on 6 December 2023 and concerned refusals by the local housing authority, Flintshire County Council (“the Respondent”), to vary or revoke a Prohibition Order dated 23 May 2022 (“the Prohibition Order”). Together with the Prohibition Order, the Respondent served a demand for recovery of expenses, in the sum of £300, incurred in determining whether to make the Prohibition Order and serving copies of the order on the Applicant.
3. The Prohibition Order prohibits *‘using any part of the premises for living, resting and sleeping purposes’* and the schedule attached to the Prohibition Order states that there is a Category 1 hazard at the Property relating to *‘Damp and Mould Growth’*. The schedule also refers to there being inadequate or defective damp proofing at the Property, with significant areas of damp staining and cracking to the external render and, internally, there being visible damp stains, damp odours, perishing plasterwork, surface salts and high relative moisture readings.
4. The Prohibition Order requires the Applicant to *‘employ a specialist contractor to thoroughly investigate all areas of damp render, brickwork, plaster and flooring and obtain Listed Building Consent to: dry out, repair, renew and/or improve the dwelling as is necessary to remedy the dampness and prevent a recurrence’*.

5. Since serving the Prohibition Order, the Respondent has issued three further Notices refusing to vary or revoke the Prohibition Order. These refusals are dated 7 September 2022, 21 November 2022 and 28 July 2023 and all state that the Prohibition Order will not be varied or revoked because '*the remedial action specified has not been completed*'.
6. Pursuant to the Directions Order issued by this Tribunal on 31 August 2023, the issues that the Tribunal now has to consider include:
 - a. As a preliminary issue, does the Tribunal have jurisdiction to deal with this matter given the nature of the Applicant's case?
 - b. Has the Respondent gone through the necessary steps prior to the issue of the Prohibition Order?
 - c. Do hazards (for example excess cold) exist and, if so, what category is applicable?
 - d. Is there a management order in force?
 - e. Should the Respondent have taken enforcement action?
 - f. If so, what enforcement action is appropriate and is it the case that serving a Prohibition Order would be the best course of action in relation to any relevant hazard(s)?
 - g. If a prohibition order is the correct action, do the contents of the order comply with the requirements of section 22 of the Act?
 - h. Should the tribunal confirm, quash or vary the prohibition order and/or should the operation of the prohibition order be suspended for any reason, in accordance with section 23 of the Act?
 - i. The reasonableness of the charges made by the Respondent for taking enforcement action.

Inspection

7. The Surveyor Member and the Lay Member inspected the Property at 11.30am on 24 November 2023. The Applicant attended the inspection, as did the Applicant's agent, Mr David Lloyd Jones. The Respondent was represented at the inspection by Mr Aidan Kelly and Ms Caron McKinney, both Environmental Health Officers at Flintshire County Council.
8. The subject Property is an end of terrace two-storey dwelling house built in the mid to late 1700s of traditional construction. The Property is Grade II listed and is located on the upper end of the High Street in Mold. It is recorded in its listing document as being '*an unusual early building type of modest appearance*'.

9. At the time of the Tribunal's inspection, the Property was unoccupied and was absent of any furniture or personal belongings.
10. During the inspection, patch repairs and hairline cracks were noted to the external gable end of the Property and the Surveyor Member noted that the external gable end appeared to have an inappropriate sand and cement render.
11. The Tribunal noted that the front elevation of the Property was in reasonably good order. Localised hairline cracks were noted but the render was considered to be relatively sound.
12. The Tribunal did not consider that the condition of the rear elevation of the Property was as good, with poorly applied plaster patch repairs having been undertaken.
13. The roof and chimney stack were found to be satisfactory, allowing for age and type of construction.
14. Inside the Property, the ground floor appeared to retain the original quarry tile which presumably is laid upon levelled earth and unlikely to incorporate any form of damp proof membrane.
15. During the inspection, the Applicant stated that the internal gable end wall had been lined with a breathable board with a lime-based render/plaster applied. Protimeter moisture meter readings were taken in 'pinless' mode on this wall by the Surveyor member and were found to be low and, in the Tribunal's opinion, considered to be within acceptable parameters for a property of this type and age. This is in line with the respondent's findings at paragraph 11 of the statement by Mr. Aidan Kelly.
16. The Tribunal found that the internal front, rear and party walls of the property recorded high readings where similarly tested using a Protimeter moisture meter in 'pinless' mode.

The bundle and the hearing

17. Pursuant to the Tribunal's Directions Order dated 31 August 2023, the Applicant and the Respondent both provided to the Tribunal, and to each other, a bundle of documents for use at the hearing. Within the bundle from the Applicant is a statement from the Applicant confirming that he has appointed Mr. David Jones (FRICS) (FAAV) of Jones Peckover to advise and assist him in this matter, as well as a statement from Mr. Jones himself dated 15 September 2023.
18. By way of a letter dated 17 November 2023, a copy of which was also sent to the Respondent, Mr. Jones on behalf of the Applicant, requested to include additional documentation within the Applicant's bundle in light of some points which were raised by the Respondent and which '*require clarification from the Applicant*'. Mr.

Jones also stated that additional documentation had been obtained which he hoped would '*clarify some of the matters raised and be helpful to the Tribunal*'.

19. In furtherance of the overriding objective at regulation 3 of the Residential Property Tribunal Procedures & Fees (Wales) Regulations 2016, and in the interests of dealing fairly and justly with the application, the Tribunal decided to include the letter from Mr. Jones, dated 17 November 2023, and its enclosures ("the Secondary Statement") within the Applicant's bundle. The Tribunal also permitted the Respondent to file a reply to the letter if it wished to do so. The Respondent did not, and this was confirmed to be the case by Mr. Kelly of the Respondent Council at the hearing.
20. The hearing was convened remotely by Microsoft Teams on 6 December 2023 commencing at 10.00am. The Applicant attended and was represented by Mr. David Jones (MRICS)(FAAV) of Jones Peckover. The Respondent was represented by Mr. Kelly.

Evidence

21. The Applicant contends that he has carried out the works required by the Prohibition Order, bearing in mind the listed nature of the building and the nature of the works that can be undertaken in such a building.
22. Upon receiving the first Notice of Refusal dated 7 September 2022, the Applicant commissioned a historic building conservation specialist, Recclesia, to inspect the Property and provide a report on the presence of damp at the Property.
23. The Applicant claims that all of the recommendations suggested by Recclesia were carried out. However, the Respondent refused to vary or revoke the Prohibition Order, issuing a second Notice of Refusal dated 21 November 2022.
24. Consequently, the Applicant commissioned a survey from Peter Cox Limited which is stated to be a specialist damp proofing company. The report made one recommendation to '*renew wall plaster to full height of the right elevation within the ground floor front room*'. The Applicant states that he then met with a Conservation Officer from the Respondent Council and agreed that the best course of action would be to dry line with fibre board/lime plaster to the full height of the ground floor front room and stairs (the gable end wall) and this work was carried out in June 2023.
25. Following another inspection by the Respondent, a further Notice of Refusal to vary or revoke the Prohibition Order was issued. This notice was dated 28 June 2023 but referred to the decision to refuse to vary or revoke the Prohibition Order having been made on 26 July 2023. A statement provided by Mr. Jones, dated 15 September 2023 calls into question the validity of this document given the discrepancy with the dates.

26. The Respondent's evidence is that the taking of enforcement action and the serving of the Prohibition Order was the correct decision for it to make, having regard to the HHSRS Operating and Enforcement Guidance.
27. The statement of Mr. Aidan Kelly, on behalf of the Respondent, refers to advice notes and statements from various bodies relating to damp in older buildings. Mr. Kelly alleges that the advice contained in these reports has not been followed and that any remedial work undertaken has been insufficient to remedy the damp. Mr. Kelly also notes that no applications for listed building consent have been made for the remedial works undertaken.
28. Mr. Kelly calls into question the reports of Recclesia and Peter Cox and details where he disagrees with those reports or where he considers them deficient.
29. With regard to the discrepancy regarding the date of the last Notice of Refusal, Mr. Kelly notes that the first version of this notice did contain an error in that the date of the notice was stated to be '28 June 2023' with the decision not to vary or revoke stated to have been made at a later date on 26 July 2023. The notice was sent to the Applicant by post and electronically under cover of email dated 28 July timed at 10.30am. The error was then noted by the Respondent and Mr. Kelly states that the notice sent by post could not be intercepted but that a second email was sent to the Applicant on the same date, 28 July 2023, at 10.45am stating that there was an error in the notice and attaching a corrected copy with the date of the notice being amended to 28 July 2023.
30. Although the Respondent acknowledges that '*some work has been carried out which may have helped to alleviate some minor issues*', overall, the Respondent considers that the Property remains damp.
31. The Secondary Statement of Mr. Jones is, in essence, a response to Mr. Kelly's statement and provides the name of the main contractor who has carried out works to the Property, as well as commentary on some of Mr. Kelly's criticisms of both the Recclesia report and Peter Cox report.
32. Mr. Jones also refers to the previous tenant's complaint and alleges that the tenant's use of the Property exacerbated dampness in the Property.
33. During the hearing, the Tribunal asked the parties a number of questions. It was accepted by Mr. Kelly of the Respondent Council that the works undertaken to the internal gable wall have brought the moisture levels in that wall to within acceptable levels. Mr. Kelly maintains that the other 3 walls within the Property, being the rear, front and party walls, are still damp, although did concede that, following the inspection of the Property with the Tribunal last month, the dampness at the Property was no longer as serious as it had been. Mr. Kelly conceded that the dampness at the Property could now be classed as a Category 2 hazard, rather than a Category 1 hazard. Consequently, Mr. Kelly accepted that,

presently, the Property was capable of being occupied as the dampness in the Property had been reduced sufficiently.

34. The Prohibition Order requires the applicant '*to thoroughly investigate all areas of damp render, brickwork, plaster and flooring*'. When questioned, Mr. Kelly accepted that due to the listed nature of the property, further remedial works to the floors was not an option. Instead, it was suggested that the floor is not covered with impervious modern coverings such as vinyl and fitted carpets.
35. Mr. Kelly, did, however, make it clear that he considered that the damp levels at the Property would increase again, to potentially unacceptable levels, if further remedial works were not undertaken.
36. On this basis, Mr. Kelly stated that he would be content for the Prohibition Notice to be revoked and stated that, if this was the order of the Tribunal, he would then serve a Hazard Awareness Notice upon the Applicant in respect of the residual damp at the Property. This could then be followed up with further inspections of the Property, if and when necessary.
37. The Applicant stated that he was also happy for this approach to be taken.

The Law

38. The relevant law is as follows: the Housing Act 2004 ("the Act") introduced the Housing Health and Safety Rating System ("HHSRS"). This is a system for assessing housing conditions, enabling local authorities to assess the condition of a property based on risk to occupants, with power to serve notices and orders on owners requiring action to be taken to reduce risk or restrict the use of a property.
39. The most serious risk of harm creates a category 1 hazard in respect of which it is mandatory under section 5(1) for the local authority to take appropriate enforcement action. All other risks enable the local authority, in its discretion, to take particular kinds of enforcement action. Section 5(2) sets out seven types of action which are 'appropriate' for a category 1 hazard. If two or more of these courses of action are available, the authority must take the course which they consider to be most appropriate. Sections 20 and 21 empower the local housing authority to make a prohibition order if a category 1 or category 2 hazard is found at the property. Such an order prohibits the use of the property for certain purposes.
40. Section 27 states that Schedule 2, which deals with the service of prohibition orders and notices relating to their revocation and variation, and with related appeals, has effect. A person served with a prohibition order can appeal to the Residential Property Tribunal which may by Order confirm, quash or vary the order.

41. In exercising its functions under the HHSRS provisions, a local authority must have regard to any guidance for the time being given by the appropriate national authority (Section 9(2)). There are two sets of guidance in relation to the HHSRS, issued by the Welsh Government: The Operating Guidance and the Housing Conditions: Enforcement Guidance.

Discussion

42. It was clear to the Tribunal that there was a significant impasse between the two parties on what can be achieved and what is acceptable in terms of damp-proofing in a listed building. It is unfortunate, although somewhat inevitable, that this impasse has resulted in the Property being unavailable to rent for some considerable time.

43. It was accepted by both parties at the hearing that the internal dry lining of the gable end wall has achieved its objective of reducing the moisture permeating to acceptable levels. The Respondent may well have legitimate concerns as to the long-term effectiveness of the remedial works given the condition and materials used on the external fabric and the previous high moisture readings recorded. However, as a matter of fact, the Tribunal found at their inspection that the levels of damp affecting this wall are currently within acceptable parameters.

44. In the expert opinion of this Tribunal, if similar internal dry lining works were carried out to the internal front, rear and party wall elevations, there is a reasonable expectation that this would reduce damp levels in the Property further. However, the condition of external finishes particularly to the rear of the Property and the materials used in the external render (which the Tribunal understands were present prior to the Applicant's ownership of the Property), would also need attention to achieve long-term results.

45. The Tribunal welcomed Mr. Kelly's pragmatic and sensible approach to the matter during the hearing, as well as the acceptance by Mr. Edwards of Mr. Kelly's suggestion that a hazard awareness notice be issued in place of the Prohibition Order.

46. With regard to the discrepancy in the date of the final notice of refusal, the Tribunal does not consider that anything turns on this issue but notes that, pursuant to paragraph 5(3) of Part 2, Schedule 2 to the Act, any such notice must be served on the relevant person(s) within the period of 7 days beginning with the day on which the decision was made. The decision to refuse to vary or revoke the Prohibition Order was made on 26 July and the notice was served on 28 July 2023, albeit that the notice was initially incorrectly dated 28 June 2023. This error was rectified by Mr Kelly re-issuing the amended notice by email just 15 minutes later.

47. The presence, or otherwise, of listed building consent for any of the remedial works undertaken by the Applicant is outside the jurisdiction of this Tribunal and so we make no determination in this regard, but do note that the Respondent may

well have recourse against the Applicant if it has unlawfully undertaken relevant works to the Property without such consent.

48. Pursuant to paragraph 6 above, the issues for the Tribunal to consider are:

48.1 Has the Tribunal Jurisdiction to deal with this matter given the nature of this case?

The Tribunal has jurisdiction to deal with this matter pursuant to paragraph 9(b) of Part 3 of Schedule 2 to the Act. Pursuant to paragraph 13(3) and (4) of Part 3, Schedule 2 to the Act the Tribunal may by order confirm, reverse or vary the decision of the local housing authority or, if the appeal is against a decision to refuse to revoke a prohibition order, the Tribunal may make an order revoking the prohibition order as from a date specified in its order.

48.2 Has the Council (Respondent) gone through the necessary steps prior to issue of the Prohibition Order?

The Tribunal is satisfied that the Respondent has gone through the necessary steps prior to the issue of the Prohibition Order and that it has complied with the requirements of the Act.

48.3 Do hazards (for example excess cold) exist and, if so, what category is applicable?

Although it is clear that attempts have been made to address dampness at the Property, the Tribunal, having had the benefit of an inspection of the Property, considers that high moisture levels remain to internal front, rear and party walls of the Property.

However, both parties are in agreement that the damp levels at the Property have reduced and, in light of Mr Kelly's concession that he would now be content to classify the dampness at the Property as a Category 2 hazard, the Tribunal determines that the dampness at the Property is now a Category 2 hazard.

48.4 Is there a management order in force?

The Tribunal is satisfied that the Property is not subject to a management order under Chapters 1 or 2 of Part 4 of the Housing Act 2004.

48.5 Should the council (Respondent) have taken enforcement action?

The Tribunal determines that, at the time the Prohibition Order was issued, there was a Category 1 hazard that existed at the Property. Accordingly, the Respondent was correct to take enforcement action.

48.6 If so, what enforcement action is appropriate and is it the case that serving an improvement notice would be the best course of action in relation to any relevant hazard(s)?

Here the Tribunal has regard to paragraph 8 of Part 3 of Schedule 2 to the Act. Due to the nature of the Category 1 hazard that was present at the Property, and its potential severity on the health of any occupants of the Property, the Tribunal is satisfied that the service of an improvement notice would not have been an appropriate course of action at the time the Prohibition Order was served. The Tribunal is satisfied that the service of the Prohibition Order was appropriate at the time and, indeed, was the best course of action in the circumstances.

However, as noted above, the Applicant has since undertaken remedial works to the Property which has reduced dampness in the Property. It is accepted by both parties that the dampness has been reduced to such a level that it is acceptable for the Property to be occupied at this present time. Accordingly, the Tribunal considers that the Prohibition Order is no longer appropriate and agrees with the parties that the issue of dampness can currently be dealt with by the Respondent by way of a hazard awareness notice.

48.7 If a prohibition order is the correct action, do the contents of the order comply with the requirements of section 22 of the Act?

The Tribunal refers to paragraph 49.6 above. The Tribunal considers that the Prohibition Order is no longer the correct action.

48.8 Should the Tribunal confirm, quash or vary the Prohibition Order and/or should the operation of the prohibition order be suspended for any reason, in accordance with section 23 of the Act?

For the reasons set out above, and based upon the evidence before it and its inspection of the Property, the Tribunal considers that the Prohibition Order should be revoked from the date of this decision, pursuant to its powers under paragraph 13(4) of Part 3, Schedule 2 to the Act.

48.9 The reasonableness of the charges made by the Respondent for taking enforcement action.

The Tribunal considers that the Respondent's charge of £300 for taking enforcement action, pursuant to s.49(1)(b) of the Act, is reasonable in the circumstances.

Order

49 The Tribunal allows the appeal and revokes the Prohibition Order from the date hereof, pursuant to paragraph 13(4), Part 3, Schedule 2 to the Act.

Either party may appeal this decision to the Upper Tribunal. An application for permission to appeal should in the first instance be made to this Tribunal within 21 days of the date upon which this decision is made.

Dated this 11th day of December 2023.

Siân Westby
LEGAL CHAIR