UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2010] UKUT 351 (LC)
LT Case Number: HA/7/2009

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – prohibition notice – hazard relevance of Building Regulations – error of law on part of LVT – held result would be the same if no error made – appeal dismissed.

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE RESIDENTIAL PROPERTY TRIBUNAL DATED 20TH JUNE 2009

BETWEEN **SAMANTHA JAYNE HANLEY** **Appellant**

and

TAMESIDE METROPOLITAN BOROUGH COUNCIL **Respondent**

Re: 101, Market Street, Via Hyde, Cheshire, SK14 8JA.

Before: HIS HONOUR JUDGE MOLE QC

Sitting at 43-45 Bedford Square, London, WC1B 3AS
on 9th September 2010

Mr Hanley with permission of the Tribunal for the appellant
Ms Davies appeared on behalf of the respondent

DECISION

Introduction

1. This is an appeal by way of review against the decision of the Residential Property Tribunal dated 20 June 2009. It concerns a Prohibition Order served by Tameside Metropolitan Borough Council under the provisions of the Housing Act 2004 on Mrs Hanley in respect of property she owns at 101 Market St, Hollingworth, Via Hyde, SK14 8JA. Mrs Hanley appealed against that prohibition order under paragraph 7 (1) of schedule 2, part 3 of the Housing Act 2004. The RPT dismissed that appeal but granted leave on the 14th of July 2009 to appeal to this tribunal because "the grounds for appeal disclose an arguable point of law in respect of the relationship between the requirements of the Housing Act 2004 and the Building Regulations."

2. The property in question is a stone built, slate roofed end of terrace house built in about 1824. It was originally built with two bedrooms on the first floor and a loft on the second. Comparatively recently, probably in about 2006, the loft had been converted to a bedroom. This bedroom is reached by a steep staircase and has restricted headroom. A family of four are tenants in the house. In early 2009 a complaint was made about water getting in. The Council inspected the property and, as a result of what was seen, decided to serve a Prohibition Order on Mrs Hanley.

3. The prohibition order (hereafter the order) was dated 12 March 2009. It recited that Mrs Hanley was the owner of the premises and that the Council was satisfied that Category 1 and 2 hazards existed on those premises. The order said that it was made because the deficiencies specified in schedule 1 gave rise to hazards also specified in that schedule. Consequently the order prohibited the use of the second floor attic room as bedroom or living area. The remedial action in respect of the hazard which the council considered would result in the council revoking the order was specified in schedule 2. The order recited that the council considered this to be the most appropriate course of action for the reasons they set out. The reason why the authority had decided to take the action it had rather than any other kind of action was because

> "It is considered that significant category 1 or 2 hazards exist at the premises and it is reasonable to prohibit the use of the 2nd floor attic bedroom for use as a habitable room. Therefore the making of a Prohibition Order is considered the most appropriate action in this case.
>
> It is considered that the service of an Improvement Notice is not the most appropriate action to deal with the significant Category 1 or 2 hazards identified in the premises because it is not possible to carry out works whilst in occupation to remove or reduce the hazard."

4. Schedule 1 specified as hazards

"Falls on Stairs - Extremely steep staircase to the attic bedroom with low bulkheads ceiling and solid wall within three feet at the foot of the stairs. The staircase also opens directly into the bedroom. (Cat. 1)

"Collision and entrapment - the lack of adequate ceiling height in the first floor attic bedroom (under 1.9m). The usable floor area is less than 8.37sq.m. (Hazard No 26 HHSRS) (Cat 2)

Falling between Levels - the poorly positioned window in the first floor attic bedroom, the low sill height and fully openable casement. (Cat 2)

Dampness and Mould growth - moisture penetration from the roof due to disrepair (cat 2) condensation moisture on sloping ceiling and wall.

Fire - there is no interlinked Grade D Mains-powered heat or smoke alarm."

5. The works specified under schedule 2 were

"Falls on stairs -- Replace the current staircase with one constructed in accordance with current Building Regulations.

Collision and Entrapment -- Construct a dormer extension in the roof which would increase the usable floor area.

Falling between Levels -- provide and fit .. a stay to the attic bedroom window to prevent it opening more than 100mm.

Fire -- Provide and fit an interlinked Grade D Mains-powered heat or smoke alarm with integral battery standby supply in the property."

6. The Prohibition Order was made under part I of the Housing Act 2004. Section 1 (1) sets out that this part of that Act provides for a new system of assessing the condition of residential premises and for that system to be used in the enforcement of housing standards in relation to such premises. The new system operates by reference to the existence of Category 1 or Category 2 hazards on residential premises and replaces the former system based on the test of fitness for human habitation. Section 2 (1) defines a Category 1 hazard as one which achieves a numerical score under a prescribed method of calculating the seriousness of hazard. A Category 2 hazard is one that does not score highly enough to be a Category 1 hazard. "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.

7. Section 5 (1) of the Act provides that

"If a local authority consider 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".

8. Sub section (2) says that the appropriate enforcement action means whichever of the following courses of action is indicated. Those courses of action include serving an Improvement notice, making a Prohibition order or serving a hazard awareness notice. Section 5(3) says that if only one course of action within subsection (2) is available to the authority in relation to the hazard, they must take that course of action. Section 5 (4) says that if two or more courses of action within subsection (2) are available to the authority in relation to the hazard, they must take the course of action which they consider to be the most appropriate of those available to them. By section 7 of the Act the authority have a similar power to take action in respect of a category 2 hazard. Section 20 of the Act specifies the making of a Prohibition order as a course of action they may take if they are satisfied that a category 1 hazard exists on any residential premises. Section 12 gives the power to serve an improvement notice if they are satisfied that a category 2 hazard exists on residential premises. Schedule 2, part 3 deals with appeals in relation to Prohibition orders. Paragraph 11 sets out that an appeal to a Residential Property Tribunal is to be by way of a rehearing but may be determined having regard to matters of which the authority were unaware. The tribunal may confirm, quash or vary the prohibition order.

9. Mr Hanley appeared at the RPT and his representations were noted in their decision at paragraph 17. He challenged the calculation of the usable area of the bedroom in relation to the alleged collusion and entrapment hazard. As for the falls on stairs, Mr Hanley identified four elements in this alleged hazard and in respect of each of them made the submission that the position either already complied with the building regulations or could easily be made to comply with them. He submitted, therefore, that any remedial work needed would not be extensive and could properly have been included in an improvement notice. The fire hazard was also capable of simple remedy and could have been included in an improvement notice.

10. The RPT recorded the evidence (in paragraph 16) thus:

> "Mr Oakley outlined the investigations undertaken by and on behalf of the Respondent. In particular he explained the process of assessment, which had been undertaken in response to a complaint made by a person who occupied the Property, and indicated that the hazards considered to be present at the property had been assessed in accordance with the Housing Health and Safety Rating System (England) Regulations 2005. That assessment concluded that (a) the hazard arising from the falls on the stairs was scored at 6449.7, placing it in Band A; (b) the collision and entrapment hazard was scored at 811, placing it in Band D; and (c) the falling between levels hazard was scored at 58.65, placing it in Band G. The dampness and mould growth hazard which was the original cause of complaint had been remedied and was no longer in issue. Hazard (a) was assessed as a category 1 hazard and hazards (b) and (c) were assessed as category 2 hazards. It was agreed by the parties that Hazard (c) had been remedied by the Applicants and was no longer in issue. In addition, there was found to be no interlinked Grade D Mains-powered heat or smoke alarm."

11. After setting out the legislation, the RPT proceeded to its determination and started by addressing the relationship between the Building Regulations and the Housing Act in the following way.

“22. At the outset, it is necessary to address the relationship between the Building Regulations and the Housing Act 2004. The Building Regulations prescribe minimum standards for the design and construction of buildings. It is a living document, changed from time to time to keep abreast of modern developments and more sophisticated concepts and techniques. The Housing Act 2004 introduced a new concept for the assessment of housing conditions based on the identification and removal of hazards. In many respects, the purposes of the Building Regulations and the Housing Act 2004 are the same: the provision of safe accommodation for occupants. Nonetheless the application of two different, albeit similar in purpose, regimes will necessarily give rise to inconsistency and conflict. Where that arises the provisions of the Housing Act 2004 prevail. First, those provisions are contained in primary legislation, once the Building Regulations are contained in subordinate Legislation. Secondly, under the doctrine of implied repeal, there is a presumption that Parliament knows what it is doing and that any statutory provision which is inconsistent with a later statutory provision is deemed to be implicitly repealed by the later provision in so far as there is inconsistency.

23. The effect of this in relation to places such as the present case is twofold. First, where a hazard has been identified under the provisions of the Housing Act 2004, compliance with the building regulations is not a material consideration; and, secondly, compliance with the building regulations in any remedial work will only be material to the extent that it removes the identified hazard. The tribunal has assessed the issues on that basis.

24. In relation to the collision and entrapment hazard, the Respondent found that the floor area of the second-floor bedroom with a ceiling height below 1.9 metres (the height specified in the Guidance as affecting the likelihood and harm outcome) was 5.37 square metres and calculated the usable part of that floor area, after deducting the area taken by the open stairs and landings, as being around four square metres. The Applicant correctly inferred that the use of that figure was to demonstrate that the room was unsuitable for the purpose of Part X of the Housing Act 1985 and sought to address the position from that standpoint. That does not address the issue. Part X of the Housing Act 1985 is concerned with overcrowding. The issue before the Tribunal relates to a hazard identified under the provisions of the Housing Act 2004, not one of overcrowding. For the purpose of addressing the hazard, the Respondent accurately identified the material elements, made appropriate measurements and reached sustainable conclusions. The introduction of reference points to Part X of the Housing Act 1985 was unnecessary and, in the event, introduced confusion. The Tribunal is satisfied that there is a collision and entrapment hazard. It cannot be remedied whilst the Property is occupied and, even if the Property were unoccupied, could only be addressed at what might be considered to be prohibitive expense. In those circumstances, the Tribunal finds that the Respondent's view that the only appropriate means of dealing with the matter was by way of a prohibition order was right.

25. The Tribunal accepts the Applicant's contention that some of the aspects of the falls on stairs hazard could be addressed by undertaking work in accordance with the Building Regulations. The fact is, however, that, at present, the second-floor bedroom is accessed by a staircase which falls short of the Building Regulation standards and gives rise to the hazard described in the Order, for example, in respect of the required

minimum depth of going. That staircase will need to be replaced to remove the hazard. The Respondent was justified in requiring the hazard to be removed. It could have been addressed by way of an improvement notice, but Section 5 (four those bracket of the Housing Act 2004 provides that "if two or more courses of action... are available to the authority in relation to the hazard, they must take the course of action which they consider to be the most appropriate of those available to them." Having determined for sustainable reasons that the collision and entrapment hazard could only be dealt with by way of a prohibition order, it was reasonable and proper to include other hazards in the same order. The falls on stairs hazard was, therefore, properly included in the Order. For the same reasons, the falling between stairs (sic) hazard and the fire hazard were also properly included in the Order.

26. The Tribunal is satisfied from its own inspection and from the foregoing assessment of the evidence before them that the alleged hazards were present at the Property at the time the Respondent investigated and assessed the position. The Tribunal is also satisfied that the Respondent properly calculated the scores of the hazards and placed them in the correct Bands. The Tribunal finds as a matter of fact that, at that time, a category one hazard (falls on stairs) and two category to hazards (collision and entrapment and falling between levels) were present at the Property when the Order was made likewise, the fire hazards identified by the respondent were present at the Property as a matter of fact. One of the category to hazards (falling between levels) has now been removed.

27. In these circumstances, it was reasonable for the respondent to take action to prevent the second floor of the property being used as a drum. The order made by the risk Respondent satisfies all the requirements as to form and content and was properly served. The Tribunal finds that the Respondent's action was both reasonable and responsible.

28. The effect of Order is to prevent the use of that part of the Property which is in a hazardous condition. It does not prevent the use of the Property as two-bedroom accommodation, that is, the purpose for which the Property appears to have been originally designed and intended. The Tribunal is satisfied that the Order is a fair, reasonable and proportionate response to the hazardous state which the respondent found at the Property."

12. Mr Michael Hanley appeared, with the Tribunal's permission for Mrs Samantha Hanley. His submission was that the RPT had gone wrong in law in paragraphs 22 and 23.

13. In paragraph 22 the RPT had held that the application of the Housing Act regime and the Building Regulations regime 'would necessarily give rise to inconsistency and conflict'. This was not a correct statement of law, he said. The two regimes dealt with different matters and there was no reason why there should be any inconsistency or conflict between them. On the other hand, they were not irrelevant to each other.

14. More seriously, from Mr Hanley's point of view, the RPT was not correct, in paragraph 23, to say that where a hazard had been identified under the Housing Act, compliance with the Building Regulations was not a material consideration. It could be a very material consideration in considering first of all how to categorise the hazard and secondly what action would be appropriate in respect of it. There are several references in the operating guidance, the Housing Health and Safety Rating System, (hereafter the HHSRS) issued by the office of the Deputy Prime Minister in February 2006 where express reference is made to the building regulations in connection with preventive measures and the ideal; see, for example, in connection with falling on stairs, paragraph 21.29 of that document.

15. In answer to Ms Davies' submission that what the RPT meant was that simply because there has been compliance with the building regulations it does not mean that no hazard can be identified, he responded that if that is what they meant, it was not what they had said. The reader would be left with the clear impression that the RPT had taken an erroneous view of the law which had, or may have, tainted all subsequent consideration of the point. Indeed it had not been part of his submissions to the RPT that compliance with the building regulations meant that there could be no hazard. His submission had been that compliance with the building regulations was possible, so far as the staircase was concerned, and could be carried out with the tenants in occupation. Compliance with the building regulations would have been a material consideration indicating that the hazard had been reduced, possibly to an acceptable level but at least to a level where an improvement notice would have been the appropriate action instead of a prohibition notice.

16. It is not possible at this stage to separate out the various different hazards and to say that the decision, particularly the decision as to the appropriate action to take, must have been the same regardless of that mistake of law. The decision as to the appropriate action is plainly one that balances a number of considerations. The RPT's concluding words in paragraph 23 showed that it had assessed the issues on that - mistaken - basis. Had the RPT not started with the wrong view of the law the RPT might not have reached the same conclusion.

17. Ms Davies agreed that the statement that the two regimes would necessarily give rise to inconsistency and conflict was in error. She submitted that in paragraph 22 of the decision the RPT asked itself a question it did not need to ask, and gave itself the wrong answer but then it did not at any stage in its determination apply the wrong answer it had just given itself . Had it been necessary to do so she would have argued that it was right to say that if there were to be a conflict the provisions of the Housing Act 2004 would prevail, although she conceded that the reasons given by the RPT were open to argument.

18. As for what was said in paragraph 23, the second sentence had to be read as a whole, appreciating that it was in two parts. It was tolerably clear that the reference in the first part to compliance with the Building Regulations not being a material consideration simply meant that where a hazard had been identified it was not a sufficient answer simply to say that there had been compliance with the building regulations. In the second part of the sentence the RPT specifically acknowledged and dealt with the relevance of the building regulations to the issue of compliance.

19. Ms Davies acknowledged that it was not correct to say that "compliance with the Building Regulations in any remedial work will only be material to the extent that it removes the identified hazard" because it would also be material so far as it reduces the identified hazard. She pointed out that, to a degree, any staircase has a hazard rating. But while the word "removes" may have been inapt it does not indicate that the RPT had misdirected itself.

20. She submitted that even if the view were taken that the RPT had or may have erred in law, this Tribunal could be confident that the errors had not actually made any difference to the RPT's decision. In paragraph 24 the RPT had concentrated upon the collision and entrapment hazard. To this the building regulations had little or no relevance. The tribunal had inspected the property and were satisfied that the hazards were present when the respondent investigated and assessed the position. The RPT also declared itself satisfied that the scores of the hazards had been properly calculated and put in the correct bands. The RPT found as a matter of fact that at the time of the issuing of the order a Category 1 hazard (falls on stairs) and two Category 2 hazards (collision and entrapment and falling between levels) were present at the property when the Order was made. (See paragraph 26) On that basis, in paragraph 24, the RPT had declared itself satisfied that there was a collision and entrapment hazard. They said that it could not be remedied whilst the Property was occupied and even if it were unoccupied the hazard could only be addressed at what might be considered to be prohibitive expense. That was a matter of fact and degree for the RPT to decide.

21. In paragraph 25 the RPT said that having determined for sustainable reasons that the collision and entrapment hazard could only be dealt with by way of a prohibition order, it was reasonable and proper to include other hazards in the same order. The falls on stairs hazard was, therefore, properly included in the Order. For the same reasons, the falling between levels hazard and the fire hazard were also properly included in the Order. In other words, the RPT had approached its decision on the basis that the collision and entrapment hazard was the determining matter, which could not be remedied and justified a prohibition order. That being so the RPT found that it was reasonable to include the other hazards in the same order. Those were findings of fact open to the RPT which were not under appeal and indeed could not properly be challenged in these proceedings. To that process of reasoning, any errors of law concerning the relationship with the building regulations were irrelevant.

Conclusions

22. The function of the RPT on an appeal is, of course, not simply to review the decision of the authority. It rehears the matter and makes up its own mind about what it would do.

23. In paragraph 22 the RPT assert that the Building regulation and Housing Act regimes would 'necessarily' give rise to inconsistency and conflict. It does not seem to me that this is necessarily so when the different purposes of the two regimes is born in mind. It is also right to note that the RPT did not go on identify any conflict or inconsistency that troubled them in this particular case. Taken on its own perhaps this error might not matter much. However I am not confident that it can be completely set aside as being of no significance. Taken with the

remainder of the paragraph, what was said might be thought to indicate an erroneous view of the proper weight to be given to compliance with the building regulations.

24. It is not necessary for me to express any concluded view about the passages in which the RPT indicate how they think any inconsistency might be resolved, since I do not agree that there is any real inconsistency. Nonetheless I do have reservations about the approach the RPT sets out to that supposed conflict. It is not clear to me that if there were any inconsistency considering the precedence of primary and secondary legislation would provide a helpful solution. While the Housing Act, as primary legislation, indicates the significance of a Category 1 or 2 hazard, the vitally important calculation of the degree of hazard is undertaken under the Housing Health and Safety Rating System (England) Regulations 2005, which is subordinate legislation. I find it difficult to see a distinction in terms of precedence between that legislative machinery and the Building Act with the Building Regulations made under it. Nor is it apparent to me how the doctrine of implied repeal could have any relevance.

25. I return to those matters that are of central relevance to this appeal. Firstly, in paragraph 23 of the decision the RPT says that where a hazard has been identified under the provisions of the Housing Act 2004, compliance with the Building Regulations is not a material consideration. I have no doubt that, stated thus bluntly, that is an error of law. It must be a "material consideration" whether something that is said to be a hazard either complies with the building regulations or might, without too much trouble, be made to comply with the building regulations. It is evident from the HHSRS Operating Guidance that in many instances (hazards on stairs for example; see paragraph 21.29) the building regulations are directly relevant. Of course, the fact that a situation that is described as a hazard nonetheless complies with the building regulations does not mean that it cannot be a hazard. It is possible for a hazard under the Housing Act and HHSRS Regulations to comply with the building regulations, yet still be a hazard. It may be that this is all the RPT intended to convey and of course the words must be read in the context of the whole paragraph. But, as Mr Hanley fairly submitted, if that is what the RPT meant it was certainly not what it said. Compliance with the Building Regulations, in my view, is plainly a material consideration that the Tribunal must bear in mind.

26. Secondly it does not seem to me to be accurate to say that compliance with the Building Regulations in remedial work will only be material to the extent that it removes the identified hazard. (my underlining) In the case of stairs there will always be some residual hazard. Compliance with the building regulations might reduce the hazard. In the context of this legislation the distinction is important. The reduction in hazard might mean that if the matter was recalculated it would be a hazard of a different order. It might mean that the RPT or relevant authority might take a different view of the action that is required.

27. In that context I have not overlooked the evidence (recorded at paragraph 16)which shows that the hazard arising from falls on the stairs was scored at 6449.7, placing it in Band A, while the collision and entrapment hazard, scored at 811, was at Band D. The RPT said it was satisfied that calculation was correct. (Paragraph 26.) From that it seems to me that the collision and entrapment was seen as a much less serious hazard, indeed an order of magnitude less serious, than the falls on stairs hazard. It might be thought difficult to be certain that if the RPT

or Council had taken a different view of the ability to deal with the Class 1 'falls on stairs' hazard, where action was mandatory, they would still have concluded that the Class 2 'collision and entrapment' hazard, where action was discretionary, demanded a prohibition order rather than an improvement order.

28. However, as Ms Davies submitted, the RPT evidently approached its decision on the basis that the collision and entrapment hazard alone justified the prohibition order. This is set out unambiguously in paragraph 24. It does not seem to me that the errors of law that the RPT made had any bearing on the RPT's reasoning in relation to the collision and entrapment hazard. Its conclusions on that point were clear and were open to it on the evidence. In paragraph 25 the RPT said

> "Having determined for sustainable reasons that the collision and entrapment hazard could only be dealt with by way of a prohibition order, it was reasonable and proper to include other hazards in the same order."

29. I conclude that the RPT has made errors of law. Where the tribunal below has made mistakes of law it is only in clear cases that this Tribunal can leave the decision undisturbed on the ground that it is confident that the mistakes make no difference to the result. But this is a clear case, in my judgement. I am confident from the RPT's decision that the decision would have been the same despite the mistakes. For that reason the appeal must be dismissed.

Dated 30 September 2010

His Honour Judge David Mole QC,
Judge of the Upper Tribunal