Neutral Citation Number: [2024] UKUT 218 (LC)

Case No: LC-2024-148

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

FTT ref: MAN/00BY/HIN/2021/0013

30 July 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – IMPROVEMENT NOTICE – FTT unable to determine whether work specified in improvement notice was required – whether entitled to substitute investigative work and require compliance with third party recommendations – whether improvement notice may require replacement of building components not shown to be defective – ss. 2, 12, 13, and Sch. 1, Housing Act 2004 – appeal allowed

BETWEEN:

BRYAN G CURD
(trading as Glenwood Property Investments)

Appellant

-and-

LIVERPOOL CITY COUNCIL

Respondent

Re: 55 Kenmare Road, Wavertree, Liverpool L15

Martin Rodger KC, Deputy Chamber President

Liverpool Civil, Family and Tribunals Centre

18 July 2024

Mr Bryan Curd in person
Mr Brynmor Adams, for the respondent

© CROWN COPYRIGHT 2024

The following case is referred to in this decision:

Hussain (Nasim) and others v Waltham Forest LBC [2023] EWCA Civ 733

Introduction

1. This appeal is about an improvement notice served by a local housing authority under section 12, Housing Act 2004 (the 2004 Act). It raises the issue of how a decision maker (an authority or a tribunal exercising the same powers on an appeal) should proceed where because of uncertainty about the quality or specification of a building component, or for other reasons, there is doubt about whether a hazard exists. Is the decision maker entitled to require the replacement of the component with an alternative of a known specification, thereby removing any risk? Alternatively, is the decision maker entitled to require the owner of the property to commission tests to establish whether a hazard exists and to carry out any remedial work necessary to bring the building up to standard?

2. The issue arises in the appeal of Mr Bryan Curd against a decision of the First-tier Tribunal, Property Chamber (the FTT) handed down on 10 March 2023. The decision concerned Mr Curd's challenge to an improvement notice served on him by Liverpool City Council on 21 June 2021. The improvement notice required work to be carried out to a house in multiple occupation which he owned at 55 Kenmare Road (the HMO). The work required by the notice included work to seven fire doors in the HMO, including the replacement of hinges and other door furniture where these did not carry a CE mark. Mr Curd appealed against the notice. When it considered the appeal, the FTT was not satisfied on the evidence what work, if any, was required to remedy any hazard which might exist. It therefore varied the improvement notice, not by omitting the work to the fire doors, but instead by substituting a requirement that Mr Curd obtain a report from an independent fire risk assessor and then follow the assessor's recommendations.

3. Mr Curd was granted permission to appeal by the FTT, although he also complied with the varied improvement notice by obtaining a new fire risk assessment (which did not recommend any significant further work). The City Council subsequently sought permission to cross appeal and I directed that its application be dealt with at the hearing of the appeal.

4. Mr Curd trades in partnership with Mr Barry Curd and the FTT's decision also dealt with other matters of concern to both partners, but the sole appellant against its decision on the improvement notice is Mr Bryan Curd.

5. Mr Curd is a chartered surveyor and at the hearing of the appeal he represented himself. The City Council was represented by Mr Brynmor Adams. I am grateful to them both for their helpful submissions.

Improvement Notices

6. Part 1 of the 2004 Act is concerned with the enforcement of housing standards and, by Chapter 1, it introduced a new system for assessing housing conditions by reference to the existence of category 1 and category 2 hazards.

7. A "hazard" is defined in section 2(1), as "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)".

8. Category 1 and 2 hazards are classified by reference to a numerical score ascertained under a scheme for calculating the seriousness of hazards prescribed by the Housing Health and Safety Rating System (England) Regulations 2005 and known as an HHSRS assessment. By section 2(1), 2004 Act a category 1 hazard is a hazard of a prescribed description which achieves an HHSRS score above a prescribed amount; a category 2 hazard is a hazard which achieves a score below that prescribed amount. A category 2 hazard is therefore less serious than a category 1 hazard but it is not simply a defect; to be a hazard of either category it must be a "risk of harm … which arises from a deficiency in the dwelling or HMO".

9. Where a local housing authority becomes aware that a category 2 hazard exists in residential premises it has a discretion to take action. If it decides to do so it has a range of powers including the service of an improvement notice under section 12 or a hazard awareness notice under section 29. An improvement notice is "a notice requiring the person on whom it is served to take such remedial action in respect of the hazard concerned as is specified in the notice" (section 12(2)). Non-compliance with an improvement notice is a criminal offence.

10. Section 13(2), 2004 Act provides for the contents of an improvement notice. Amongst other requirements the notice must specify the nature of the hazard and the residential premises on which it exists, the deficiency giving rise to the hazard, the premises in relation to which remedial action is to be taken and the nature of that remedial action.

11. The taking of action in relation to a particular hazard does not prevent an authority from taking the same or a different form of action in relation to the same hazard, where they consider that the action taken so far has not proved satisfactory (section 7(3), 2004 Act). For example, if an authority serves a hazard awareness notice it may later serve an improvement notice covering the same hazard.

Appeals against improvement notices

12. Paragraph 10(1) of Schedule 1, 2004 Act provides for appeals against improvement notices to the FTT. Paragraph 15(2) and (3) sets out the powers of the FTT on an appeal:

> (2) The appeal–
>
> (a) is to be by way of a re-hearing, but
>
> (b) may be determined having regard to matters of which the authority were unaware.
>
> (3) The tribunal may by order confirm, quash or vary the improvement notice.

13. In *Hussain (Nasim) v Waltham Forest LBC* [2023] EWCA Civ 733, the Court of Appeal considered the identically-worded paragraph 34 of Schedule 5, 2004 Act (concerning appeals against local authority decisions relating to licensing). It was common ground that although an appeal was to take the form of a re-hearing, that did not mean that the FTT should disregard the view of the local authority and begin its own consideration entirely afresh. On the contrary, because the local authority is the body entrusted by Parliament with the primary responsibility for making such decisions, the FTT should accord its views special weight or deference and should only conclude that one of its

decisions is wrong if it disagrees with the decision despite having accorded it that special weight.

14. The Court of Appeal also concluded in *Hussain* that the FTT was required to consider whether the decision under appeal was wrong at the time when the decision was taken (and not at the date of the appeal). The matters to which it was entitled to have regard therefore comprised only those which had occurred by the time the decision was taken and which could have been taken into account by the authority if it had been made aware of them.

15. There was some debate in the current appeal over the material which a local authority should be expected to make available on an appeal to the FTT against a decision to serve an improvement notice. In this case Mr Curd had requested the City Council's HHSRS assessment but the City Council had refused to provide it. Mr Adams suggested that, since any hazard below the category 1 threshold is necessarily a category 2 hazard, the scoring was irrelevant in a case where only category 2 hazards were alleged. I do not agree. The decision to serve an improvement notice in response to a category 2 hazard is a discretionary one, and the seriousness of the hazard (as measured on the HHSRS scale) is obviously a relevant consideration. Not all category 2 hazards require the service of an improvement notice. It is therefore relevant to the exercise of the discretion by the FTT for it to know the details of the assessment.

The facts

16. The HMO is a mid-terrace, three storey house of traditional solid brick construction. As originally designed it had living accommodation on two floors with an attic above, but in about 2001 the whole house was acquired and refurbished by Mr Curd and the attic was converted into an additional bedroom. At the material time the HMO comprised a kitchen, lounge and one bedroom on the ground floor, with three further bedrooms on the first floor and one in the attic. More recently the building has been extended to the rear at ground floor level.

17. The HMO has been licensed under the 2004 Act since at least 2010. Conditions included in licences granted in 2013 and 2016 required that all existing fire doors must provide 30 minute fire resistance (denoted by the reference FD30 or FD30s if cold smoke seals are incorporated).

18. Before granting the 2021 licence the Council's officers carried out an inspection and formed the view that Category 2 hazards existed in the HMO and that remedial work was required. On 10 November 2020 an enforcement officer sent Mr Curd a list of matters of concern informing him that an improvement notice would be served once a new licence had been issued but that any matters in the list which had been fully addressed would be omitted from the notice. The list included work to improve the standard of protection against fire. It identified that four of the fire doors did not snap shut and that in six examples the gaps between the floor or door frame and the door exceeded the required width (4mm at the top or sides and 8mm at the bottom). The performance of the attic door was also said to have been compromised by the way it had been trimmed to fit the door frame.

19. The Council's November 2020 list did not specify remedial work, other than that the issues identified should be "fully addressed", but Mr Curd commissioned work and

supplied details to the Council. It then arranged a further inspection by its own officers and an independent fire door inspector, Mr Whelan.

20. Mr Curd was present during the inspection and he said that Mr Whelan had not asked any questions about the doors and had asked him not to comment while he carried out his work. Mr Whelan reported to the Council on his observations and recommendations on 23 April 2021 and he later informed the FTT that he had been instructed to apply the British Standard for the installation and maintenance of fire doors.

21. In his report Mr Whelan reported that the doors were all FD30 doors (except the kitchen door which was FD30s) but described them as "nominal" rather than "certificated". He explained that a "certificated" door was one manufactured under a product certification scheme, while a "nominal" door was "a fire door without any documentary evidence in support of its intended performance but that in the opinion of the inspector is likely to provide fire resistance for the required time period". Nevertheless he identified defects with each door which should be remedied to enable the door to achieve its intended fire rating.

22. Mr Whelan recorded 76 issues affecting the seven doors (although one issue, the absence of smoke seals, was recorded three times in relation to each door). Many of his recommendations involved small adjustments of 2mm or less to achieve the required separation between door and frame, or to ensure that the doors fitted flush with their frames. Others required what appear to be quite modest works such as adjustments to self-closers, the application of mastic around locks and hinges or additional signage.

23. Some of Mr Whelan's recommendations did not identify defects but instead recorded areas of uncertainty. In particular, the kitchen door mortice latch and the hinges on each door were said not to be CE marked and Mr Whelan recommended their replacement with CE graded components. He also recorded that he was unable to confirm whether fire stopping had been installed behind the door frames, as this would have required an intrusive inspection involving the removal of the frame architraves.

24. No copy of the report was supplied to Mr Curd by Mr Whelan, and the Council's officers waited two months before serving an improvement notice on 21 June 2021. The main hazard identified in the notice was fire and the main remedy was to carry out all of the recommended work identified in Mr Whelan's report. This requirement was qualified by the statement: "should the sleeping rooms not contain a mains wired smoke alarm linked to the existing fire alarm system, the requirement for cold smoke seals will not be applicable". None of the bedrooms had mains wired smoke alarms at the time of the Council's inspection, nor did the notice require that they be provided; the effect of the qualification was therefore to remove 21 of the 76 items from Mr Whelan's list of recommended works. The notice did not require any intrusive investigation to establish whether the fire stopping behind the door frames was satisfactory. It did require the replacement of unmarked hinges with CE graded substitutes.

25. The notice required that all of the work be completed by 26 December 2021 but when Mr Curd lodged his appeal to the FTT that deadline was automatically extended by

section 15(5) and paragraph 19, 2004 Act and the notice has not yet become effective. The notice will not become operative unless and until it is confirmed on appeal.

The FTT appeal and decision

26. The appeal to the FTT was managed and heard alongside other appeals by Mr Curd and his business partner relating to the revocation and regrant of HMO licences for other properties. Those aspects of the FTT decisions are not the subject of this appeal but they appear to have contributed significantly to the proceedings becoming unwieldy (Mr Curd submitted detailed statements of case running to more than 100 pages, at least two thirds of which were concerned with the other matters).

27. The substance of Mr Curd's case to the FTT was that, applying the relevant LACORS guidance, FD30 fire doors were not a requirement in lower risk HMOs of this type where a satisfactory escape route and other fire precautions were provided; he also suggested that the inclusion by Mr Whelan of a requirement for smoke seals discredited his report. In his response to the Council's evidence, which had included a statement by Mr Whelan, Mr Curd also asserted that contrary to Mr Whelan's understanding the fire doors were not "nominal" but were certificated "Premdor" doors. In section 6 of his response he addressed each of the defects identified in relation to one of the doors (the kitchen door) and suggested that simple maintenance work would cure some of them while disputing the need for remedial work to address others.

28. Although Mr Curd did not rely on expert evidence, it is apparent from the written material put before the FTT that there was a live issue about whether much of the work specified in the improvement notice was required at all and about the inclusion of routine maintenance work. Mr Curd asserted that the Council had failed to justify service of the notice and suggested that the appropriate way to deal with such minor works was informally or by the service of a hazard awareness notice.

29. Before it heard the appeal the FTT conducted an inspection of the HMO accompanied by the parties and by Mr Whelan. It handed down its decision on 30 March 2023, almost two years after the inspection of the doors by Mr Whelan and 21 months after the service of the improvement notice. It recorded the evidence and submissions in respect of the fire doors in only two paragraphs, as follows:

> 36. The internal fire doors to the individual bedrooms and common parts were viewed by the Tribunal with the parties and Mr Whelan in some detail and the Tribunal was able to see at first hand the issues raised in the report that accompanied the improvement notice. The Applicant's view is that the issues identified were not necessarily real. The difficulty for the Council is that in the absence of clear identification of the standard to which the doors are manufactured and installed there is no proof that they are satisfactory for the purposes for which they are intended.
>
> 38. The interior doors were the issue that took up some considerable time at the hearing whilst the Tribunal considered at length the views of the parties as to their adequacy, based largely upon the premise that they were satisfactory and compliant with relevant guidance and law, but that this may, or may not, be sufficiently documented and, in the absence of such documentation what remedial work was required.

30. The FTT's findings in relation to the fire doors were contained in two further paragraphs:

> 51. The internal fire doors
>
> These may or may not pose a significant risk to the safety of occupiers in the event of fire. The problem is that the answer to that is unknown, but there is clearly insufficient evidence that the doors, to some extent, from door to door, in the manner of their hanging, fitting and alteration are not sufficiently documented as being compliant to fire regulations or guidance. Once again, the Tribunal has some sympathy with the Applicant's position and is of the view that the situation is best remedied by obtaining a report from an independent, suitably qualified fire risk assessor as to the fire safety provision within the building with particular reference to the internal doors and compliance, or otherwise, with the relevant fire regulations and guidance. The Applicant should then act appropriately upon the findings of that report.

31. The FTT then considered whether the outstanding matters of concern to the City Council could be addressed by a hazard awareness notice but said that, because fire can bring serious risks in an HMO, they should be addressed in an improvement notice. It therefore allowed the appeal and varied the notice, removing reference to hazards and remedial work which had already been attended to, leaving the reference to the hazard of fire and specifying the following remedial action to be taken by Mr Curd:

> Obtain a report from an independent, suitably qualified fire risk assessor as to fire safety provision within the building with particular reference to the internal doors and thereafter act appropriately upon the findings.

The FTT varied the date for completion of the remedial work to 31 July 2023, but added that it was aware that further work had already been carried out to the doors since the original hearing.

32. Mr Curd applied for permission to appeal but he also obtained a fire door report by an independent assessor, as the FTT had directed. This assessment, dated 17 August 2023, concluded that all doors were FD30 fire doors and "functioned as required".

33. In his application for permission to appeal Mr Curd presented a rather more focused explanation of his case than he had previously done, and this appears to have made a favourable impression on the FTT. When it invited a response from the Council it commented that "there is evidence which suggests that it is more likely than not that the doors are sufficiently compliant, notwithstanding they may not satisfy a 30-minute test". I do not know if the Council responded to the FTT's invitation but, on 5 February 2024 it granted permission to appeal. It described the issue for which it gave permission as "the suitability of the doors currently fitted to provide adequate fire protection to the occupants of the property".

The appeal

34. Mr Curd presented detailed statement of his position which included the contention that not only were the Premdor doors certificated, rather than nominal fire doors, but that he held a certificate for them which had been issued on 26 July 2000 under the "Certifire"

scheme. The significance of this certification, Mr Curd explained, was that the installation tolerances (specifically the required gaps between the doors and the door frames) were different from those under the British Standard to which Mr Whelan had referred. The certificate, a copy of which he produced, had not featured in his case to the FTT, which cannot therefore be criticized for failing to have regard to it.

35. In its statement of case in response to the appeal the City Council did not seek to uphold the reasoning of the FTT and conceded that its approach had been wrong in law. The FTT had not been entitled to vary the improvement notice to require Mr Curd to obtain a report from a third-party assessor to determine whether a hazard existed and then to act on the assessor's findings.

36. Mr Adams reasoned, correctly in my view, that a local housing authority's discretion to serve an improvement notice under section 12, 2004 Act arises only if they are "satisfied that a category 2 hazard exists" (section 12(1)(a)). If an authority was not satisfied that a hazard existed it could not serve a notice. Moreover, section 13(2) requires an improvement notice to specify the nature of the hazard and the remedial action required, neither of which could be done if the authority had not first satisfied itself that a hazard existed. It was clear, therefore, that the City Council could not have served an improvement notice which required Mr Curd to take steps to ascertain whether a hazard existed on the premises. On an appeal, the FTT has no greater or different powers from those of the local authority and it may only vary an improvement notice if it is satisfied that a hazard exists.

37. Mr Adams rightly distinguished between testing to establish whether a hazard exists and testing to determine the extent of a hazard which an authority has already satisfied itself exists, or to demonstrate that remedial work has been completed successfully. For example, an authority which is not satisfied that the electrical installations in a building give rise to a hazard, may not serve an improvement notice requiring testing to determine whether the installations are free of defects. If, as a result of its own observations or monitoring, the authority is satisfied that there is a hazard (i.e. that the installations are deficient in some way, and that the deficiency gives rise to a risk of harm to the health or safety of an occupier), the remedial work which it may specify in an improvement notice could include proper testing to establish the extent of the deficiencies. An improvement notice could also require proper testing or certification of remedial work to demonstrate that the hazard has been successfully dealt with, since that would be a normal part of any scheme of work to remedy a defect.

38. The FTT was unable to reach a conclusion on the critical question of whether the condition of the fire doors gave rise to a hazard, saying only that "These may or may not pose a significant risk to the safety of occupiers in the event of fire". There was insufficient evidence to be satisfied that they were compliant, yet it was "unknown" whether they posed a risk. The FTT could have quashed the improvement notice on that basis, but it could not vary it without first being satisfied that there was a hazard, which was a conclusion it felt unable to reach.

39. Mr Adams submitted that there was a further difficulty with the FTT's decision, which was that it had considered the condition of the doors as they were at the time of its own inspection in March 2023, and not as they had been in June 2021 when the notice had been given. As the Court of Appeal explained in *Hussain v Waltham Forest*, the question whether a local authority's decision was wrong must be judged as at the date

the decision was made by the local authority and, while matters which had existed at that time but were not known to the authority may be taken into account, matters which could not have been known because they occurred only after the decision was taken are irrelevant. The FTT did not appreciate that distinction and referred in paragraph 47 of its decision both to the fact that it was entitled to take into account matters not known to the parties at the time the notice was given, and to the assistance it had received during the inspection in identifying the work carried out by Mr Curd after the notice. In the second of two paragraphs numbered 51 it referred again to the work done by Mr Curd and to "the change of circumstances since the appeal was submitted".

40. What is not clear, however, is whether any of the changed circumstances which the FTT observed concerned the fire doors. The notice included other (relatively minor) items of work and these had certainly been attended to by the time of the inspection. Work had also been done to the fire doors before the notice was served (in response to the list served on 10 November 2020). It was later stated by the assessor engaged by Mr Curd in compliance with the FTT's decision that the doors were functioning properly. But whether that favourable assessment was the result of a difference of view between the assessor and Mr Whelan or whether further work had been done after Mr Whelan's inspection is entirely unclear.

41. Mr Adams sought to raise this issue by means of a cross-appeal, for which permission is required, but as I am satisfied that the FTT's decision must be set aside in any event because the remedy it prescribed is insupportable, and as I am not satisfied that the error it made in taking recent work into account affected its consideration of the fire doors, I refuse permission to cross-appeal.

42. Mr Adams nevertheless invited me to set aside the FTT's decision and to reinstate the improvement notice in its original form on the basis that there was no evidence to challenge it. That would not be a proper course. Although he is not independent, Mr Curd is certainly knowledgeable and he challenged Mr Whelan's assessment both on numerous points of detail and on the need for FD30 doors. He also challenged the City Council's determination that an improvement notice was an appropriate form of enforcement. Those challenges were not identified or considered in any systematic way by the FTT so far as the fire doors were concerned. I have not inspected the HMO or been shown material which would enable me to form a view of my own on the disputed aspects of Mr Whelan's schedule, and Mr Curd has the support of the relevant LACORS guidance on fire safety provisions for his case that while FD30 doors are "ideal" they "need not be insisted on" in low risk shared houses.

43. Mr Adams also acknowledged that the improvement notice should not have required the replacement of parts of the fire doors which were not defective. Mr Whelan's recommendation to replace the mortice latch on the kitchen door and the hinges on all of the doors was made because he believed they were not CE marked so that their quality could not be guaranteed, and not because he considered that they were unsuitable or defective. Mr Adams accepted that the City Council could not insist on that approach and that the notice would require variation at least to that extent.

44. As the City Council refused Mr Curd's requests for disclosure of its HHSRS assessment, it is not possible to determine what impact the omission of the replacement hinges and latch would have had on the total fire risk score. Nor is it known how the issue of smoke seals was taken into account in the HHSRS assessment; Mr Whelan's

schedule required their installation, but the notice itself made that requirement conditional on the absence of a linked, mains wired smoke alarm in the bedrooms.

45. The position that has been reached is therefore that I am prepared to set aside the FTT's decision, but I am not in a position to make a decision of my own on Mr Curd's original appeal against either the principle or the detail of the improvement notice. In most cases the obvious course of action in that situation would be to remit the appeal to the FTT for reconsideration. But Mr Adams urged me not to do that, and for good reason. The notice is now more than three years old and the HMO has been in continuous occupation since the inspection of 23 April 2021. The fire doors require periodic maintenance in any event, and one has been replaced as part of a more recent programme of works to extend the kitchen. The question whether the works in Mr Whelan's schedule were required to remedy a hazard which existed at that time is now almost entirely academic and the expenditure of further time and money in investigating it would be disproportionate.

46. The City Council has more extensive powers under the 2004 Act than the Tribunal. It can, for example, revoke an improvement notice made under section 12 if it considers it is appropriate to do so (section 16(2)(b)). Unlike the Tribunal, it would be entitled to exercise that power without first being satisfied that the original decision to serve the notice had been wrong. One course of action open to the Council would therefore be for it to undertake a further inspection of the HMO to determine whether any continuing hazard exists. If there is no such hazard the Council may wish to revoke the notice (and to the extent that it finds that the work has been done it would be required by section 16(1) to revoke it). If, after considering the relevant LACORS guidance, it finds the same or different hazards it may wish to consider serving a new improvement notice.

47. The improvement notice has not yet become operative, and it will not become operative unless and until it is confirmed on appeal (section 15(5), 2004 Act). I am unable to confirm the notice, and neither the City Council nor Mr Curd wishes the matter to be remitted to the FTT for further consideration. In those circumstances the notice will remain inoperative indefinitely.

Disposal

48. For these reasons the appeal is allowed and the decision of the FTT is set aside. The improvement notice nevertheless remains unconfirmed and therefore inoperative.

Martin Rodger KC,

Deputy Chamber President

30 July 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.