

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

*HOUSING – ENFORCEMENT ACTION – demolition order – First-tier Tribunal procedure
– adequacy of evidence*

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

BETWEEN:

PETER DENNIS BATHURST

Appellant

and

ARUN DISTRICT COUNCIL

Respondent

**Re: 12 The Layne,
Elmer Sands,
Bognor Regis,
West Sussex, PO22 6JL**

Determination on written representations

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Introduction

1. Mr Peter Bathurst, the appellant, moved into 12 The Layne, Elmer Sands, Bognor Regis in 1963 with his parents and his grandmother and is now the registered proprietor. It has been damaged by a burst pipe and he has had to move out. The respondent local authority made a demolition order on 23 July 2018, pursuant to section 265 of the Housing Act 1985, requiring the appellant to have the house demolished. He appealed to the First-tier Tribunal (“the FTT”), which confirmed the demolition order on 19 December 2018.
2. On 8 May 2019 the Tribunal gave the appellant permission to appeal, and directed that the appeal was to be a review of the decision of the FTT. A hearing was listed on 5 November 2019, but was postponed due to the appellant’s ill-health. A further hearing on 24 March 2020 was vacated because of the difficulties arising from the pandemic and directions were given for the appeal to be determined on the basis of the parties’ written representations. Both parties had invited the Tribunal to conduct a site visit but it did not do so because its task is not to make a judgment about the state of the property or about the most appropriate course of action but to determine whether the FTT made a fair decision.
3. The respondent’s case has been presented by its own legal department; the appellant has not been legally represented.
4. In the paragraphs that follow I set out the relevant law; I summarise the factual background, the evidence that was before the FTT and the reasons the FTT gave for its decision, and then consider the grounds of appeal and explain my conclusion that the appeal succeeds. I remit the matter to the FTT for a re-hearing, subject to an adjournment which will allow the appellant either to sell the property or to make progress in putting it to rights.

The law

5. The Housing Act 2004 (“the 2004 Act”) introduced a system for assessing housing conditions and enforcing housing standards, replacing the former system based on a test of fitness for human habitation in section 604 of the Housing Act 1985 (“the 1985 Act”). The new system operates by reference to the existence of category 1 and category 2 hazards on residential premises.
6. Category 1 and category 2 hazards are defined in the Housing Health and Safety Rating System (England) Regulations 2005 by to descriptions of hazards, classes of harm, and the likelihood of types of harm occurring as a result of a given hazard. Obviously category 1 hazards entail a higher risk of more serious harm than do category 2 hazards.
7. Section 5 of the 2004 Act requires a local authority, if it considers that a category 1 hazard exists on any residential premises, to take “the appropriate enforcement action”. That means one of a list of actions set out in section 5(2), including an improvement notice under section 11 of the 2004 Act, a prohibition order under section 20 of the 2004 Act, and a demolition order under section 265(1) or (2) of the 1985 Act. If only one of the listed actions is available, that course of action must be taken; if more than one is available, the

authority must take the course of action that it considers to be the most appropriate of those available.

8. Section 7 of the 2004 Act gives the local authority power to take a number of enforcement actions in relation to category 2 hazards, again including a demolition order under section 265 of the Housing Act 1985.
9. Section 265 of the 1985 Act reads, so far as relevant, as follows:

“(1)If— (a) the local housing authority are satisfied that a category 1 hazard exists in a dwelling or HMO which is not a flat, ...

making a demolition order in respect of the dwelling or HMO is a course of action available to the authority in relation to the hazard for the purposes of section 5 of the Housing Act 2004 (category 1 hazards: general duty to take enforcement action).”

10. Section 267 of the 1985 Act defines a demolition order as:

“... an order requiring that the premises—

(a) be vacated within a specified period (of at least 28 days) from the date on which the order becomes operative, and

(b) be demolished within six weeks after the end of that period or, if it is not vacated before the end of that period, after the date on which it is vacated or, in either case, within such longer period as in the circumstances the local housing authority consider it reasonable to specify.”

11. Section 269 enables a person aggrieved by a demolition order to appeal to the FTT.

The factual background

12. As I said above, the appellant has lived at the property for many years. He had to move out a while ago – perhaps two years ago; the date has not been provided – after a burst pipe caused damage. Since then the property has deteriorated, and complaints have been made to the respondent about its condition and particularly about evidence of rats.
13. Mrs Helen Stevens, one of the respondent’s Empty Homes Officers, inspected the property in summer 2018. She took the view that there were category 1 and category 2 hazards there. I do not need to set them out in detail; the FTT summarised them as follows:

“Category 1:

- Lack of fixed heating system
- Water supply turned off

- Damaged floors due to rotting and volume of belongings
- Ceilings collapsed due to water damage
- Electricity supply connected but in disrepair

Category 2

- Widespread damp and mould
 - Entry points for rodents
 - Kitchen in poor condition
 - All doors and windows in disrepair
 - Internal disrepair resulting in kitchen ceiling and staircase collapsing”
14. The respondent made a demolition order on 23 July 2018. The notice was accompanied by a list of the hazards considered to be present and explained why a demolition order was appropriate. The explanation focused on the effect of the ingress of water, the damp and disrepair, and the impossibility of accessing the first floor. It went on to say:

“Due to the lack of maintenance and habitation at this property it is assessed that it has fallen so far into disrepair that it cannot be brought back into habitable use at a reasonable cost. An Improvement Notice would therefore not be appropriate. The property has already been designated as uninhabitable for Council tax purposes, so a Prohibition Order or Emergency Prohibition order is not necessary or appropriate.”

15. The appellant appealed to the FTT.

The evidence before the FTT and the reasons given by the FTT for its decision

The evidence

16. The appellant’s case before the FTT was that the appropriate course of action for the respondent to have taken was an improvement notice. It is clear from the parties’ statements of case that they disagreed about the condition of the property and the seriousness of the hazards found there. The applicant provided a “Personal Statement” in which he explained that the problems at the property had been caused by a burst water pipe; he had moved out, and health problems had prevented him taking action. He said that his health had improved and that he had “made a start”, and that he had discovered that he had insurance through his gas contract which was likely to cover the plumbing, and electrical work. He had cut back the front garden (and provided “before and after” photographs to demonstrate this). He went on to list the hazards identified by the respondent; some he denied – in particular he said there were no collapsed ceilings and no floor damage – and in general he presented matters as relatively easy to remedy.
17. The respondent’s evidence was a witness statement by Mrs Stevens which described the state of the property; she also provided a “survey report” in which she enumerated the hazards and went through the risk assessment required for the assessment of hazards under the Housing Health and Safety Rating System (England) Regulations 2005. The respondent also provided copies of complaints it had received, and photographs of the property. In response, the appellant provided his own “survey report” setting out his own

calculations under the regulations, and again went through the hazards one by one giving his own view.

18. At the case management hearing the parties agreed that expert evidence was not required, and that the matter could be decided on the papers after the FTT carried out a site visit.
19. The FTT visited the property on 6 November 2018. On 23 November 2018 it wrote to the respondent asking for details to substantiate its view that the property could not be brought back into habitable use at reasonable cost. The respondent wrote back on 30 November and said that the cost of demolition would be in the region of £25,000. The cost of removing the hazards and bringing the property to a habitable condition would be £55,000 excluding external repairs, decoration, eradication of vermin etc bringing the cost to £75,000. The letter said that the costings were “obtained from the Council’s contractor and the empty property officer’s experience of properties of similar size and condition.” A copy of that response was sent to the applicant, who replied on 4 December 2019 taking issue with the amount of work needed and its cost.

The FTT’s reasons for its decision

20. On the basis of its inspection the FTT disagreed with some of the respondent’s assessments of hazards. At its paragraph 32 it said that there were no collapsed ceilings. The roof was sound. The windows it saw were double glazed and serviceable. It accepted that the water was turned off and could be turned on again. Subject to those matters it accepted the respondent’s assessment of the hazards. It said:

“33. We were concerned that whilst some estimates of costs had been provided no detailed and professional advice appeared to have been taken. The Tribunal would have expected to have seen a cost/benefit analysis of the various options which led to the decision to make a demolition order. This would have required a professional assessment of the value of the property before and after the various options had been undertaken which would then have provided the Tribunal with a firm basis in determining whether to approve such a draconian proposal as demolishing an owner’s property.”

21. However, it went on:

“35. Mr Bathurst does not appear to recognise the scale of the work involved as demonstrated by his suggestion that the contents need not be cleared and the work carried out by himself and his friends.

36. In considering whether an Improvement Notice may be more appropriate we have considered whether it is possible that the property could be brought back into repair albeit at some considerable cost. Whilst determining that may be a possibility we are not persuaded that Mr Bathurst is capable of recognising the amount of work involved. While he continues to deny the existence of the very obvious defects that we identified on our inspection we have little hope that any works specified in an Improvement Notice would ever be concluded.”

22. For those reasons, the FTT said, it confirmed the demolition order and dismissed the appeal.

The grounds of appeal

23. The FTT on the basis of what it saw and on the evidence of the parties found that there were both category 1 and category 2 hazards on the property, and there is no appeal on that determination of fact. Because there are category 1 hazards present the respondent is under a duty to take action, but the question is whether a demolition order or an Improvement Notice was the most appropriate course to take.
24. The FTT's remarks at its paragraph 33, quoted above, make it clear that it was not comfortable with the evidence provided to it and was unhappy about the absence of professional evidence of the cost of works. Reading that paragraph one expects the appeal to be successful, but the FTT proceeded to confirm the demolition order, despite the evidential shortcomings, for the reasons it set out in its paragraphs 35 and 36. They are not about the work needed to put the property back into habitable condition but about Mr Bathurst himself. That is an obvious matter for concern where the FTT had made a decision on the papers and, apart from meeting him at the site visit, had not had the opportunity to hear what Mr Bathurst had to say about his capacity to understand what needed to be done.
25. The Deputy President in giving permission to appeal identified three reasons why an appeal might succeed, and I treat them as the grounds of appeal.

Ground 1: procedural fairness

26. The first problem identified in the grant of permission was that the FTT had initially decided that expert evidence was not required, but then invited evidence from the local authority about the cost of the works without making it clear to the applicant that he too was entitled to provide such evidence.
27. The respondent in its skeleton argument says that the information it provided in its letter of 30 December 2018 was "opinion not expert evidence"; but the nature of expert evidence is that an expert is entitled to give an opinion, whereas other witnesses may give evidence only of fact. What the FTT asked for amounted to expert evidence and it appears to have given an invitation to the respondent to provide it, at a point when the parties had already complied with the FTT's directions and had agreed that expert evidence was not required. It was not fair for the FTT to depart from that decision by inviting one party, but not the other, to provide additional evidence.
28. Ground 1 therefore succeeds, as the FTT adopted an unfair procedure in its request for information about costings.

Ground 2: Absence of evidence of incapacity

29. What impelled the FTT to uphold the demolition order despite its misgivings about the evidence was its view of the appellant's ability to accept what needed to be done and to get it done. Yet he was not in complete denial of the problems with the property, only in disagreement about their extent. In the absence of an oral hearing it is difficult to see how the FTT reached the conclusion it did.
30. The respondent of course maintains that the appellant is not able to take on board the extent of the works, and points out that he has not given any evidence of his financial ability to get things done, that he is in receipt of benefits and in poor health, and has not produced quotes, work schedules or time scales. It points out that the Tribunal made its own assessment on the basis of what it saw at the property.
31. The FTT recognised in its paragraph 33 that the demolition order would be draconian. It recognised that it did not have the expert evidence it would expect to justify that order. Yet it confirmed the order on the basis of its view of the appellant's capacity to comply with an Improvement Notice; the FTT had not heard live evidence from the appellant about how he would respond to such an order, made on the basis of the FTT's findings about the hazards at the property rather than on either the respondent's view or the appellant's own opinion. It is difficult to see why in those circumstances the FTT did not either indicate (as it is able to do under section 269A of the 1985 Act) that an Improvement Notice would be the appropriate course of action; or it could have suspended the demolition order on terms requiring remedial action on a specified timescale. Its decision to go straight to the "nuclear option" of demolition was made on inadequate evidence, and accordingly the appellant succeeds on ground 2.

Ground 3: absence of consideration of value

32. The FTT asked about the cost of repairs. But it did not have evidence of the value of the property either as a cleared site or after restoration.
33. The applicant in his application to the First-tier Tribunal for permission to appeal gave his own view about valuation, based on the respondent's own figures for the cost of the work. He said that the value of the cleared land would be £150,000, the cost of demolition £25,000, making the residual value £125,000. He claimed that the value of the restored property would be £350,000, less cost of renovation as given by the respondent at £75,000, giving a residual value of £275,000. His figure of £350,000 was, he said, provided by Henry Adams Estate Agents.
34. The FTT refused permission to appeal on the basis that that information could and should have been provided at the hearing. But the question is whether the FTT should have made its decision in the absence of valuation evidence.
35. The respondent has sought to provide valuation evidence now by appending a second witness statement of Mrs Stevens to its statement of case on appeal; but the Tribunal is undertaking a review of the FTT's decision and has not given permission for either party to adduce fresh evidence now. I will not therefore discuss the evidence given in that second witness statement nor the appellant's comments on it.

36. There was no expert evidence about the value of the property; even if Mrs Stevens and the appellant had consulted valuers, there was no valuation evidence before the FTT in the absence of an expert's report from a valuer. It is clear from its paragraph 33, quoted above, that the FTT did itself have misgivings about the absence of valuation evidence. In my judgment those misgivings should have prevented it making a demolition order. Ground 3 is successful; the FTT's decision was taken without proper consideration of a relevant matter and it must be set aside.

Conclusion

37. Accordingly the appeal succeeds and the matter is remitted to the FTT for a re-hearing.
38. I also adjourn the matter for 12 months, in order to give the appellant an opportunity and a choice. He could make substantial progress in putting the property to rights before the matter is re-heard. In support of his appeal the appellant has produced paperwork relating to his insurance policy, provided evidence that he has the means to store his belongings so that work can take place, and expressed willingness to get work done by professional builders. So he has taken some small steps towards restoring the property. There are of course difficulties in the getting anything done in the current lockdown, but repair work is not impossible. Nothing prevents the appellant from making his insurance claim and getting quotations, and it is likely that substantial work can take place within the next 12 months. He now has the opportunity, before the matter is re-heard, to turn words into actions. Alternatively he may choose to sell the property to a builder so that he does not have to bear the cost of demolition himself. Either way, it may be that a re-hearing will prove to be unnecessary. What happens next is therefore very much in the appellant's hands.
39. The FTT will no doubt give directions about what is to happen after 12 months. If a re-hearing is necessary, expert evidence is likely to be needed and it may be appropriate to consider giving directions for the appointment of a single joint expert.

Judge Elizabeth Cooke

22 April 2020

A handwritten signature in black ink, appearing to read 'E Cooke', written in a cursive style. The signature is enclosed in a faint rectangular border.