



**FIRST – TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case reference : **BIR/00FN/HER/2019/0001**

Property : **9 Dupont Close, Glenfield, Leicester,
LE3 8LB**

Applicant : **Antonio Francisco Mendes**

Respondent : **Leicester City Council**

Type of Application : **An appeal against an Emergency
Remedial Action Notice under section
45 of the Housing Act 2004**

Tribunal Members : **V Ward BSc (Hons) FRICS
G Freckleton FRICS
A Lavender BSc (Hons) Dip Law
Dip Surv**

Date of Decision : **14 May 2019**

DECISION

BACKGROUND

1. On 4 January 2019, Leicester City Council, the Local Housing Authority and Respondent, served an Emergency Remedial Action Notice (“the Notice”) on the Applicant, Antonio Francisco Mendes and Patricia Ann Mendes, in respect of 9 Dupont Close, Glenfield, Leicester LE3 8LB (“the Property”).
2. The Notice stated that the Respondent considered that a category 1 hazard under Personal hygiene, sanitation and drainage existed at the Property.
3. The deficiency that gave giving rise to the hazard was listed as follows:

Sewerage leaking out of a blocked soil stack flooding the bathroom and the kitchen. The toilet was blocked and could not be used. The bath and wash hand basin could not be used without flooding the bathroom and kitchen.
4. The nature of the remedial action taken was given as follows:

Cleared the blockage to the soil stack, re-sealed the toilet pan connector where it fitted inside the soil stack collar and left the toilet, bath and wash hand basin in a free flowing condition.
5. The Notice gave the date on which the remedial action was started as 2 January 2019.
6. On 22 January 2019, the Applicant appealed to the Tribunal.
7. Neither party requested an oral hearing.

INSPECTION

8. The Tribunal attended at the Property on 29 April 2019. Unfortunately, neither of the parties attended the inspection and hence the Tribunal could not carry out an internal inspection.
9. From an external inspection of the Property from the front elevation, it comprises a mid-terraced house standing behind an area of public open space.

The Submissions of the Parties

10. The Tribunal finds it appropriate to initially detail the Respondent’s submissions.

The Respondent's Submissions

11. Within the Respondent's statement of case is the witness statement of Matthew Peter Elliot, employed as an Environmental Health Officer in the Private Sector Housing team of the Respondent's Neighbourhood and Environment Services department. The Respondent relies on this witness statement for setting out its detailed position on this matter
12. The witness statement sets out a timeline of events from the Respondent's perspective which is briefly as follows:

27 December 2018 The Respondent received a complaint from the tenant of the Property, Sophie Kintara. Ms Kintara reported a severe water leak at the Property which had caused the kitchen ceiling to collapse, the electricity supply to fail with the leak also affecting the kitchen ceiling. It was alleged that the problem had been reported to the Applicant's agents, Platinum Homes on 23 December 2018 but the tenant had heard nothing in terms of the resolution of the problem or alternative accommodation.

31 December 2018 Mr Elliot made contact with the tenant and was advised that the toilet was leaking and there was no electricity and further Ms Kintara was staying at a friend's house. Mr Elliot made arrangements to inspect the Property at 2.00 pm on 2 January 2019, the earliest the tenant could meet. He also phoned Platinum Homes. There was a recorded message saying that the offices were now closed but no facility to leave a message or an emergency contact number.

2 January 2019 Mr Elliot arrived at the Property shortly before 2.00 pm. He found that there was water pouring through the kitchen ceiling with several buckets and containers to catch the same. There was, in some places, water pouring onto the food preparation surfaces. The bathroom floor was found to be flooded with both the toilet and bath blocked. The tenant said that the water was emanating from around the toilet. Mr Elliot could not find the source of the leak but suspected due to the water flow, that it was a burst water supply and unfortunately could not locate a stop tap to turn the water off. At 13.57, Mr Elliot phoned the agents and explained the issue to a Mr Hussain, and advised that a plumber was urgently required. Mr Hussain advised that he would find out who was dealing with the Property and would call Mr Elliot back. Mr Elliot requested a call back within 5 minutes. Whilst at the Property, Mr Elliot advised that he emptied several containers and also removed several pieces of the damaged ceiling.

As he did not receive a call back, at 14.19, Mr Elliot again phoned the agents and once more spoke to Mr Hussain, reiterating the urgency of the situation and that

immediate action was required, he was then put on hold. After several minutes without response, he terminated the call and called back at 14.25 and spoke to a Mr Omar, the office manager. Mr Omar explained the history of the problem and explained that it was the tenant's fault and she had not co-operated. Mr Elliot stated that as water was still pouring through the kitchen ceiling, the history behind the problem was irrelevant, as the conditions were prejudicial to health and in addition, seriously damaging the Property, therefore a plumber was urgently required. Mr Elliot requested details of a plumber and when they would be attending the Property. Mr Omar did not provide any assurances in this regard and Mr Elliot advised him that he would be arranging for the necessary works to be carried out under the Respondent's emergency powers under the Housing Act 2004. The call was then terminated.

13. Mr Elliot was satisfied of the following:

- The leaking of sewerage onto the bathroom floor and into the kitchen posed a category 1 hazard under Personal hygiene, sanitation and drainage
- The hazard involved an imminent risk of serious harm to the health or safety of the occupiers.
- There was no management order in force under the Act.

14. At 14.30 the same day, Mr Elliot contacted Gap Property Services Leicester Limited who are one of the Respondent's nominated building services contractors and requested their urgent assistance. Whilst waiting for their arrival, Mr Elliot investigated the likely cause of the leak and concluded that the soil stack was probably blocked. At 15.00, the contractor from Gap arrived. After some investigations, the contractor found that water was pouring from the toilet and soil stack joint. The contractor then rodded the soil stack from where it terminated above the roof and cleared the blockage. The toilet and bath then all ran clear with no leaks. The RCD (residual current detector) unit had tripped as a result of the leak. After a light fitting was emptied of water, the RCD was reset. After advising the tenant to sanitise the surfaces, Mr Elliot left the Property at 15.51. At 16.10 he responded to an answerphone message left by the agents but as there was no answer he left a message.

15. An email was received from Platinum Homes at 16.51. This said that their contractor had tried to contact the tenant on 26 December 2018 and had also placed 5 – 6 calls after this. The tenant cancelled the original appointment and failed to call the contractor back to rearrange. The email included a complaint about Mr Elliot and lastly stated that their contractor had considered it a possibility that the tenant had caused the blockage.

16. At 17.05, Mr Elliot spoke with Mr Omar about the efforts made to resolve the problem which are essentially as outlined in the email above. Mr Elliot explained that a Notice and letter would follow setting out the reasons for the action taken.
17. Using Local Authority sources, Mr Elliot obtained details of the owners of the Property, the Applicant and Patricia Ann Mendes, and on 4 January 2019, the following documentation was hand delivered to the home address of the owners:
 - A letter explaining the action taken with a summary of the events. The letter also included a list of other repairs required and advised that a further notice to recover the costs of the repair in the sum of £280.00 would follow subsequent to the expiration of the appeal period.
 - A statement of reasons for the decision to take enforcement action.
 - The Notice
 - A demand for payment of a charge for enforcement action in the sum of £132.00.
 - Requisition for Information (ownership questionnaires) (one for each owner) issued under section 16 Local Government (Misc Provisions) Act 1976.
18. On the same day, the Applicant contacted Mr Elliot direct and said that it was the first he had heard of the problem.
19. Within his statement, Mr Elliot stated that he considered that sewerage leaking out of a blocked soil stack, flooding the bathroom floor and leaking through to the kitchen below, including onto food preparation surfaces, posed an imminent and serious risk to the health and safety of the occupier and he considered the most appropriate course of action was to utilise his statutory powers under section 40 of the Housing Act 2004. The occupiers, a pregnant lady and two children could not use the bathroom or kitchen. There were no other toilet facilities on site or washing facilities. Mr Elliot considered that his intervention enabled the family to continue living in the Property in safety.
20. Mr Elliot considered the conditions on site using hazard profile number 17, Personal hygiene, sanitation and drainage contained in the HHRSR Operating Guidance.
21. On 3 January 2019, Mr Elliot returned to the Property and checked there had been no further problems.

The Applicant's Submissions

22. Submissions on behalf of the Applicant were made in the form of a witness statement by Mr Hussain Sidat of Platinum Homes, the Applicant's representative and the managing agents of the Property.
23. The witness statement indicated that the fault was first reported to Platinum Homes on 24 December 2018 by way of an answerphone left by the tenant. An email on 25 December 2019 to the Tenant confirmed that a contractor would be in touch with her. Arrangements were subsequently made for a contractor to visit the Property on Tuesday, 25 December 2018.
24. Some of the evidence provided by the Applicant is mobile phone screen shots of a WhatsApp messaging conversation between the contractor, Mr Rayhan, and a representative of Platinum Homes, presumably Mr Sidat. These show that at 20.25 on 25 December, Mr Rayhan messaged Platinum Homes with a video of a presumably flooded area (the video was not provided to the Tribunal only a still) with a request for £75 towards materials.
25. In his statement, Mr Sidat says that Mr Rayhan advised the tenant at the time of his visit that he would return the following day, 26 December 2018, to remedy the problem and also the costs for the repair would be charged to them if the blockage was due to their negligence. At 11.00 pm on 25 December, the tenant cancelled the plumber's visit the following day. Mr Sidat believes the reason for the appointment being cancelled was due to the fact that the tenant did not want to pay for the cost of the repair and accordingly contacted the Respondent for the same reason.
26. It was then left for the contractor to try and arrange an alternative appointment with the tenant. The WhatsApp evidence between Mr Rayhan and Platinum Homes confirms that the agents instructed the plumber to do this. Mr Rayhan stated that the tenant wasn't answering but that he would try again later.
27. When the Platinum Homes office reopened on 3 January 2019, a call was received from Matthew Elliot. The Applicant's statement states that Mr Elliot was not prepared to listen to their explanation and gave them "2 minutes to get down to the property and sort this issue out". Continuing Mr Sidat says that they refused to give Mr Elliot authority to carry out the works as they had already incurred costs by sending two plumbers. Following that telephone conversation, a further contractor was instructed to deal with the problem however by that time that had found out that Mr Elliot had instructed contractors to carry the works.
28. The Applicant considers that Mr Elliot was not co-operative in resolving the issue and took it upon himself to instruct contractors to carry out the repair which they

did not accept and do not consider fair, hence the appeal particularly since an inspection of the Property on 12 December 2019 had not revealed any issues.

29. **THE LAW**

30. The relevant sections of the Housing Act 2004 are as follows.

40 Emergency remedial action

(1) If—

- (a) *the local housing authority are satisfied that a category 1 hazard exists on any residential premises, and*
- (b) *they are further satisfied that the hazard involves an imminent risk of serious harm to the health or safety of any of the occupiers of those or any other residential premises, and*
- (c) *no management order is in force under Chapter 1 or 2 of Part 4 in relation to the premises mentioned in paragraph (a),*

the taking by the authority of emergency remedial action under this section in respect of the hazard is a course of action available to the authority in relation to the hazard for the purposes of section 5 (category 1 hazards: general duty to take enforcement action).

- (2) *“Emergency remedial action” means such remedial action in respect of the hazard concerned as the authority consider immediately necessary in order to remove the imminent risk of serious harm within subsection (1)(b).*
- (3) *Emergency remedial action under this section may be taken by the authority in relation to any premises in relation to which remedial action could be required to be taken by an improvement notice under section 11 (see subsections (3) and (4) of that section).*
- (4) *Emergency remedial action under this section may be taken by the authority in respect of more than one category 1 hazard on the same premises or in the same building containing one or more flats.*
- (5) *Paragraphs 3 to 5 of Schedule 3 (improvement notices: enforcement action by local authorities) apply in connection with the taking of emergency remedial action under this section as they apply in connection*

with the taking of the remedial action required by an improvement notice which has become operative but has not been complied with.

But those paragraphs so apply with the modifications set out in subsection (6).

- (6) *The modifications are as follows—*
- a) *the right of entry conferred by paragraph 3(4) may be exercised at any time; and*
 - b) *the notice required by paragraph 4 (notice before entering premises) must (instead of being served in accordance with that paragraph) be served on every person, who to the authority's knowledge—*
 - (i) *is an occupier of the premises in relation to which the authority propose to take emergency remedial action, or*
 - (ii) *if those premises are common parts of a building containing one or more flats, is an occupier of any part of the building; but*
 - c) *that notice is to be regarded as so served if a copy of it is fixed to some conspicuous part of the premises or building.*
- (7) *Within the period of seven days beginning with the date when the authority start taking emergency remedial action, the authority must serve—*
- (a) *a notice under section 41, and*
 - (b) *copies of such a notice,*
- on the persons on whom the authority would be required under Part 1 of Schedule 1 to serve an improvement notice and copies of it.*
- (8) *Section 240 (warrant to authorise entry) applies for the purpose of enabling a local housing authority to enter any premises to take emergency remedial action under this section in relation to the premises, as if—*
- (a) *that purpose were mentioned in subsection (2) of that section, and*
 - (b) *the circumstances as to which the justice of the peace must be satisfied under subsection (4) were that there are reasonable*

grounds for believing that the authority will not be able to gain admission to the premises without a warrant.

- (9) *For the purposes of the operation of any provision relating to improvement notices as it applies by virtue of this section in connection with emergency remedial action or a notice under section 41, any reference in that provision to the specified premises is to be read as a reference to the premises specified, in accordance with section 41(2)(c), as those in relation to which emergency remedial action has been (or is to be) taken.*

41 Notice of emergency remedial action

- (1) *The notice required by section 40(7) is a notice which complies with the following requirements of this section.*
- (2) *The notice must specify, in relation to the hazard (or each of the hazards) to which it relates—*
- (a) *the nature of the hazard and the residential premises on which it exists,*
 - (b) *the deficiency giving rise to the hazard,*
 - (c) *the premises in relation to which emergency remedial action has been (or is to be) taken by the authority under section 40 and the nature of that remedial action,*
 - (d) *the power under which that remedial action has been (or is to be) taken by the authority, and*
 - (e) *the date when that remedial action was (or is to be) started.*
- (3) *The notice must contain information about—*
- (a) *the right to appeal under section 45 against the decision of the authority to make the order, and*
 - (b) *the period within which an appeal may be made.*

42 Recovery of expenses of taking emergency remedial action

- (1) *This section relates to the recovery by a local housing authority of expenses reasonably incurred in taking emergency remedial action under section 40 (“emergency expenses”).*
- (2) *Paragraphs 6 to 14 of Schedule 3 (improvement notices: enforcement action by local authorities) apply for the purpose of enabling a local housing authority to recover emergency expenses as they apply for the purpose of enabling such an authority to recover expenses incurred in taking remedial action under paragraph 3 of that Schedule.*

But those paragraphs so apply with the modifications set out in subsection (3).

- (3) *The modifications are as follows—*
 - (a) *any reference to the improvement notice is to be read as a reference to the notice under section 41; and*
 - (b) *no amount is recoverable in respect of any emergency expenses until such time (if any) as is the operative time for the purposes of this subsection (see subsection (4)).*
- (4) *This subsection gives the meaning of “the operative time” for the purposes of subsection (3)—*
 - (a) *if no appeal against the authority’s decision to take the emergency remedial action is made under section 45 before the end of the period of 28 days mentioned in subsection (3)(a) of that section, “the operative time” is the end of that period;*
 - (b) *if an appeal is made under that section within that period and a decision is given on the appeal which confirms the authority’s decision, “the operative time” is as follows—*
 - (i) *if the period within which an appeal to the Upper Tribunal may be brought expires without such an appeal having been brought, “the operative time” is the end of that period;*
 - (ii) *if an appeal to the Upper Tribunal is brought, “the operative time” is the time when a decision is given on the appeal which confirms the authority’s decision.*

- (5) *For the purposes of subsection (4)—*

- (a) *the withdrawal of an appeal has the same effect as a decision which confirms the authority's decision, and*
- (b) *references to a decision which confirms the authority's decision are to a decision which confirms it with or without variation.*

45 Appeals relating to emergency measures

- (1) *A person on whom a notice under section 41 has been served in connection with the taking of emergency remedial action under section 40 may appeal to the appropriate tribunal against the decision of the local housing authority to take that action.*
- (2) *A relevant person may appeal to the appropriate tribunal against an emergency prohibition order.*
- (3) *An appeal under subsection (1) or (2) must be made within the period of 28 days beginning with—*
 - (a) *the date specified in the notice under section 41 as the date when the emergency remedial action was (or was to be) started, or*
 - (b) *the date specified in the emergency prohibition order as the date on which the order was made,**as the case may be.*
- (4) *The appropriate tribunal may allow an appeal to be made to it after the end of that period if it is satisfied that there is a good reason for the failure to appeal before the end of that period (and for any delay since then in applying for permission to appeal out of time).*
- (5) *An appeal under subsection (1) or (2)—*
 - (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.*
- (6) *The tribunal may—*
 - (a) *in the case of an appeal under subsection (1), confirm, reverse or vary the decision of the authority;*

(b) in the case of an appeal under subsection (2), confirm or vary the emergency prohibition order or make an order revoking it as from a date specified in that order.

(7) Paragraph 16 of Schedule 2 applies for the purpose of identifying who is a relevant person for the purposes of subsection (2) in relation to an emergency prohibition order as it applies for the purpose of identifying who is a relevant person for the purposes of Part 3 of that Schedule in relation to a prohibition order.

DETERMINATION

31. As indicated above in section 45 (5) of the Act, the appeal is to be way of re-hearing; it is necessary for the Tribunal to reach its own conclusion that Emergency Remedial Action under section 40 was necessary.

32. Guidance as to how the Tribunal should approach this was provided by His Honour Judge Huskinson in *Eli Zohar v Lancaster City Council* [2016] UKUT 510 LC (“Zohar”) where paragraph 24 states as follows. The Tribunal finds it convenient to list its considerations under each section:

24. Upon such an appeal the parties to the appeal (and in particular the local housing authority) can be expected to place before the F-tT full evidence and argument directed to enabling the F-tT to reach its own conclusions upon all relevant points including in particular the following points. The F-tT should then analyse the evidence and reach its own conclusions, with reasons, upon all the following points, namely:

(1) Whether a hazard existed at the relevant premises;

The Tribunal considers that it is clear that water and sewage flooding the Property constituted a serious hazard. The deficiencies at the property causing this hazard included a fully stopped up / blocked soil vent pipe and defective joint between the toilet pan connector connecting it to the internal cast iron soil stack. The blockage may have been caused by the conduct of the tenant or could have been as a result of deficiencies or defects in the drainage system.

No evidence has been provided to the Tribunal clearly showing that the blockage was as a result of the tenant conduct. In any event, the defective joint between the toilet pan connector would be the landlord’s responsibility under section 11 Landlord and Tenant Act 1985 - Repairing obligations in short leases:

(a) to keep in repair the structure and exterior of the dwelling-house (including drains, gutters and external pipes),

(b) to keep in repair and proper working order the installations in the dwelling-house for the supply of water, gas and electricity and for sanitation (including basins, sinks, baths and sanitary conveniences, but not other fixtures, fittings and appliances for making use of the supply of water, gas or electricity).....

(2) Whether this hazard was a “category 1 hazard”. This will involve examining whether the hazard was of a prescribed description and whether it fell within a prescribed band as a result of achieving, under the prescribed method for calculating the seriousness of hazards of that description, a numerical score of or above a prescribed amount -- see paragraph 6. It will be necessary to examine whether the numerical score fell within bands A or B or C of table 3 in paragraph 7 – because only such hazards constitute a category 1 hazard.

The Tribunal agreed that the release of water and sewage into the property (bathroom and kitchen) as well as creating secondary hazards such as collapsing ceiling and inability to use the electrical sockets and lighting due to the electrical installation tripping due to water penetration, constituted a category 1 hazard under Personal hygiene, sanitation and drainage.

(3) If the F-tT is satisfied that a category 1 hazard existed on the premises, it will next be necessary for the F-tT to consider whether it is satisfied that the hazard involved “an imminent risk of serious harm to the health or safety of any of the occupiers of those or any other residential premises.”

The Tribunal considers the presence of water and sewage within the Property and the lack of an electrical supply represented an imminent risk of serious harm to the health and safety of the occupiers; a pregnant lady with 2 children.

(4) The F-tT will next have to check that no management order was in force within section 40(1)(c).

There was no evidence to suggest that a management order was in place in respect of the Property.

(5) The F-tT will need to consider whether the emergency remedial action which has in fact been taken by the local housing authority was action which fell within section 40(2) namely whether it was such remedial action in respect of the hazard concerned as the F-tT considers was

immediately necessary in order to remove the imminent risk of serious harm.

The action taken by the Respondent was, in the opinion of the Tribunal, was immediately necessary in order to remove the imminent risk of serious harm and was reasonable and proportionate to deal with the problem.

(6) If the F-tT concludes that the taking of this emergency remedial action was a course of action available to the local housing authority, the F-tT must then conclude whether the taking of this emergency remedial action involved the taking of “the appropriate enforcement action” within section 5.

Of the measures available to the Respondent the one taken was the most appropriate. Immediate action was required to address the issue which other measures would not have facilitated. An improvement notice may not require any remedial action to be started earlier than 28 days after the notice is served, this would have led to an unacceptable delay. It is unfortunate that this problem arose over the Christmas and New Year and this undoubtedly exacerbated the issue. The Applicant’s agents had made efforts to rectify the problem however there is little evidence of how strenuous these efforts were after the initial visit of their contractor on 25 December 2019. This contractor should have dealt with the problem there and then, not waited for the payment of material costs before proceeding. On a similar basis, the issue of the Tenant being responsible for the blockage is one that should have been considered after the repair had been carried out particularly since the joint between the toilet pan and soil stack was defective. The Respondent’s contractor fixed the problem in under one hour.

33. The repair cost in the sum of £280.00 is considered by the Tribunal to be reasonable and further the Notice complies with section 41 of the Act.
34. The demand served under Section 49 for £132 in relation to the costs incurred by the Council is considered reasonable and proportionate.

DECISION

35. Under section 45 of the Act, the Tribunal confirms the decision of the Respondent Local Authority to take Emergency Remedial Action.

APPEAL

36. A party seeking permission to appeal this decision must make a written application to the Tribunal for permission to appeal. This application must be received by the Tribunal no later than 28 days after this decision is sent to the parties. Further information is contained within Part 6 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (S.I. 2013 No. 1169).

V Ward