First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	**:**	**CHI/45UH/HNA/2021/0003**
Property	**:**	**Top Floor Flat, 2 Sugden Road, Worthing, BN11 2JQ**
Applicant	**:**	**Ian Sutherland Borrow**
Respondent Represented by	**:**	**Adur & Worthing District Councils Beverley Rayner – solicitor employee**
Application	**:**	**Appeal against a Financial Penalty Order (section 249A and paragraph 10 of Schedule 13A of the Housing Act 2004 ("the 2004 Act"))**
Application date	**:**	**21st January 2021**
Tribunal	**:**	**Judge Bruce Edgington Johanne Coupe FRICS Michael Jenkinson**
Date & place of hearing:		**27th May 2021 as a video hearing from Havant Justice Centre in view of Covid pandemic restrictions**

DECISION

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1. **The financial penalty dated 4th January 2021 imposed by the Respondent on the Applicant is hereby cancelled.**

Reasons

Introduction

2. The Respondent has provided an e-bundle of documents for the Tribunal with page numbers. As both parties have that, any reference to a page number in this decision will be from that bundle.

3. The Applicant owns a freehold interest in the property and (1) he says that he has a mortgage and (2) he says, in paragraph 10 of his statement on page A19 that he has a 'co-freehold' with Ian Andrews. He let the flat to tenants Martyn and Penny Osborn and their 2 young boys many years ago. It was then a 1 bedroom flat but the Applicant made a 2nd small bedroom for 2 bunk beds "*by making the lounge smaller*". The local authority at the time approved this and paid the deposit and rent.

4. The 2 children are now teenagers and occupy the 2 bedrooms individually. Their parents sleep in the kitchen. On the 22nd October 2019, Ian Andrews complained to the Respondent that the subject property was in poor condition. This complaint set off a chain of events which culminated with the service of an Improvement Notice on 'Ian Burrow' at Brooklands, Cellen, Lampeter SA48 8HX on the 11th December 2019. The Applicant says that he received that notice and obtained quotations for the work.

5. The Improvement Notice listed a large number of matters which needed to be dealt with. The Category 1 Hazards include excess cold, falling on level surfaces, falling on stairs and electrical hazards. The Category 2 Hazards include damp and mould growth, entry by intruders, food safety, personal hygiene, sanitation and drainage, falling between levels, fire, structural collapse and falling elements.

6. There was also a crowding and space hazard said to be a Category 2 hazard which allocation the Tribunal considered to be a little odd. This related to the 2nd bedroom created years ago in the lounge. The room is said to be too small for sleeping accommodation. The work required involves removing the partition walls i.e. removing the 2nd bedroom entirely as a separate room. As this will reduce the flat down to a 1 bedroom flat again, the Respondent clearly thought this is to be a very serious matter as the Notice also says that "*the kitchen is being used as sleeping accommodation due to overcrowding*".

7. The Applicant, at page A19, says that the Respondent said at the outset that the flat was too small for 2 adults and 2 teenage boys. He also says that he agreed entirely with them. Thus, whilst he says that he obtained "*quotes for the work*", he didn't proceed because the work could not be done whilst the family was still living there.

8. There was no appeal against the Improvement Notice and the hazards have not been removed although work is now clearly under way to do so. On the 13th November 2020, a Notice of Intention to impose a financial penalty was served with £7,500 being the amount of the proposed penalty. The financial penalty was confirmed in that sum and served on the 4th January 2021. The occupants are said to have moved out of the property on 31st January 2021 (page A29).

9. There are statements in the bundle from the Applicant and Bruce Sean Reynolds, the Respondent's Private Sector Housing Manager. Sadly, there are a number of relatively minor issues between the parties in the statements. However, the end result of this evidence is that the main matters, save for the making of a financial penalty, are either agreed or not contested.

10. In essence, the Applicant is saying that he agrees that the flat is too small for his tenants and (a) the tenants asked the Respondent for accommodation in 2019, (b) the work was so substantial that it could not be done whilst they were still there, (c) he didn't have the money to pay for the work and (d) in any event, he wanted his flat back so that he could sell it. Although it is no longer relevant, the Respondent has said that the work to the property could have been done whilst the tenants were still in occupation (page A27). The Tribunal respectfully disagrees.

11. Judge Morrison made a directions order on the 1st February 2021 timetabling the case to the hearing.

Inspection

12. As the Tribunal was supplied with photographic evidence of the property, and no indication of any desire for an inspection has been received, there has been no such inspection.

The Law

13. The only relevant law at the moment is contained in Section 249A of the 2004 Act which was inserted by the **Housing and Planning Act 2016**. This states that one of the options available to a local housing authority when there has been a breach of section 30 of the 2004 Act i.e. an offence of failing to comply with an Improvement Notice, is that a financial penalty can be imposed up to a maximum of £30,000.00.

14. There are set procedures to be followed and the Applicant does not raise any specific technical issue relating to compliance with the procedures adopted by the Respondent or the amount of the penalty itself. He says that the Respondent has simply failed to recognise the realities of his position and the decision to impose a financial penalty was wrong.

The Hearing

15. Those attending the hearing were the Applicant, the Respondent's witness, Bruce Reynolds and its representative, Beverley Rayner who is a solicitor.

16. The Tribunal case officer introduced the attendees and the Tribunal chair then introduced himself and the Tribunal members.

17. He then said that he had some questions to raise on the papers filed. He would do that and then ask the parties to put their cases and, finally, he would ask the other Tribunal members to ask any questions they had. That is in fact how the hearing was dealt with although, at the end, he did ask either party if they had anything else to say. They said that they did not.

18. Questions were raised with Bruce Reynolds by the chair. The 1st issue was that the works required included a new heating system, new floor coverings, extensive electrical work in all rooms, work to cure damp penetration, removing stud walls to the 2nd bedroom, renovating kitchen units and cooking equipment, hot water supply to the bathroom, opening limiters to the window and new WC floorboards. However, on page A27, it was said that the work could be done whilst the tenants remained in occupation. Mr. Reynolds confirmed that this was still his view.

19. He was asked whether he accepted that if the Improvement Notice was complied with, the property would be even more overcrowded than the Notice said at page A72 which meant, in effect, that this must be a category 1 hazard as complying with the Improvement Notice would make the overcrowding worse. He just said that the situation would have had to be reassessed if the work had been done. He simply refused to answer the direct question.

20. Mr. Borrow then presented his case and gave evidence. In addition to those matters in his written statement, he said that it would have been absolutely impossible to do all the work required with the tenants still in occupation. He also said that in 2004 or 5, it was Worthing Council which has asked him to put in the 2nd bedroom. Having done that, they then approved the property for occupation by the tenants and their young sons, paid their deposit and the rent.

21. He accepted that he had not regularly inspected the property but had relied upon the tenants – whom he described as being his 'friends' – to keep the property in good internal condition and let him know if anything went wrong. Despite what the Respondent asserted, he did not take all the rent from the tenants after the Improvement Notice but allowed them to keep back sufficient money to pay a deposit on new premises. He then helped them move early in 2021. He was shocked to see the condition of the property and had assumed that one or both of the sons had moved out. As this had not happened, he agreed to the suggestion that the property was overcrowded.

22. Since the property had become vacant, he had moved into a van outside the property and was undertaking the work himself with help from people such as an electrician. He was paying for this with the help of a 'start-up loan' from the government arranged as part of the pandemic process. He had discovered that the loft was being used by the tenants as part of living accommodation and that the flooring in the WC had rotted because the males had not been careful about ensuring that urine went into the toilet.

23. Mr. Reynolds then gave his evidence. He confirmed that he had inspected the property again on the 28th April 2021 and had found that it was being stripped out. The stud wall to the small bedroom had gone and rewiring had taken place. He said that some work still had to be done and the reports required by the Improvement Notice had not been provided.

24. He was asked by Mr. Borrow whether the other freeholder had been served with a notice to deal with the last category 2 problem i.e. the indication that the roof tiles were too heavy. Mr. Reynolds said 'no' but did not explain why when it was suggested to him that this was unfair. Having said that, the Applicant should be aware that it is only mandatory for a local authority to take action to remedy a category 1 hazard. It is discretionary to take action for a category 2 hazard and there does not seem to be any evidence that the joint freeholder has any category 1 hazards to remedy.

Discussion

25. As has been indicated above, the matter which troubles the Tribunal in this case is the hazard identified in the Improvement Notice as a Category 2 hazard relating to 'crowding and space'. The Respondent has helpfully put into the bundle, the Operating Guidance for the Housing Health and Safety Rating System. At page A202 is the section on crowding and space which comes under the heading of 'Psychological Requirements – Space, Security, Light and Noise'.

26. In looking at the hazard assessment, the guidance says that the assessment for this hazard has to be looked at in 2 stages. The first stage is to assess the dwelling disregarding the current occupants and the second stage involves determining whether the particular dwelling being assessed is over-occupied. It adds the words:

> "*For example, whereas a two bedroomed house with one living room may be suitable for occupation by up to four people (irrespective of their ages), if it is occupied by a couple with their teenage son and daughter, it would be over-occupied, as the son and daughter require separate bedrooms*".

27. The reality in this case is that one of the bedrooms is too small for sleeping accommodation according to the standards set by the Respondent council. Thus, it is already a hazard for the current occupants. The only remedy set out in the Improvement Notice is to destroy the second, small bedroom which will bring the property down to one bedroom which is clearly not going to remove the kitchen overcrowding hazard identified in the Notice.

28. The evidence indicates that the occupants have been trying to find larger accommodation for some time, without success until recently. The Respondent has, rightly, said that if the work cannot be dealt whilst the current occupants are in place, then it is the landlord's responsibility to house them until the work is done. However, in this case, the occupants would have to move out permanently in which case the cost of future accommodation away from the

property would not fall on the Applicant which means that he would have to obtain vacant possession. The protection from eviction legislation would prevent the Applicant from just throwing his tenants out.

29. The Tribunal then turned to the reasons which the Respondent has set out in the Improvement Notice at page A73 as to why it has adopted an Improvement Notice rather than any other course of action. It says that emergency remedial action was not considered proportionate despite then saying that the hazards identified 'pose a serious risk to occupiers'. It then says that formal action is warranted in order 'to ensure that occupation of the property does not result in a significant adverse health outcome'. As the work required would not have removed the overcrowding hazard, the Tribunal had some difficulty in making sense of these words.

30. This Tribunal is not seized with the task of considering whether the Improvement Notice was the proper remedy. However, it must say that dictating remedial work making the property even less suitable for 2 adults and their 2 teenage children when the landlord would find it virtually impossible to obtain vacant possession should have been properly considered. One is led to the conclusion that the Respondent's use of the word 'proportionate' when considering emergency remedial action is simply saying that it is not proportionate to the Respondent. As it is, 'the serious risk to the occupiers' (the Respondent's words) continued for well over a year after the initial complaint, which hardly seems to be proportionate to such occupiers.

Financial Penalty

31. At the time when the penalty was being considered after the inspection on the 4th June 2020, the government was putting steps in place to cope with the corona virus. One of them was to avoid people being evicted from their home in the event that they could not afford their rent or mortgage payments. From the 26th March 2020, the minimum period for a notice to quit was increased to 3 months and that was increased to 6 months on the 29th August 2020.

32. As from the 20th November 2020, no possession order could be enforced pursuant to the **Public Health (Coronavirus) (Protection from Eviction) (England) (No.2) Regulations 2020**. The notice of intention to issue a financial penalty was sent on the 13th November 2020 and the penalty notice itself was served on the 4th January 2021.

33. The effect of all this was to ensure that by the time a financial penalty was actually issued, there was no prospect whatsoever of the Applicant being able to comply with the Improvement Notice unless the occupiers agreed to move out. As has been said, that was probably the situation when the Improvement Notice was served. The evidence existing at the time was that they had been looking for accommodation but one can only infer that they were unable to find any until recently.

34. As to the amount of the penalty, the Tribunal was concerned to note the apparent conclusion reached by the Respondent that the Applicant's financial status was

irrelevant. Their own guidance at page A96 says "*In setting a financial penalty, the Councils may conclude that the offender is able to pay any financial penalty imposed unless the offender has supplied any financial information to the contrary*". In this case, the Applicant said that he could not afford to pay for the work. The guidance goes on to say that with the financial information given, the 'adjusted penalty' should not be less than the cost of complying with the Improvement Notice. However, there is no evidence to suggest that this information was considered or even prepared.

35. The national guidance commences at page A338 and includes the comment (on page A350) that "*Local housing authorities should use their existing powers to, as far as possible, make an assessment of a landlord's assets and any income they receive (not just rental income) when determining an appropriate penalty*".

36. It is the Tribunal's conclusion that the Respondent did not comply with this guidance. It simply drew broad conclusions as to what it thought this Applicant's income and outgoings were without undertaking any sort of actual assessment of total income excluding rent. The suggestion made to the Applicant by Ms. Raynor that this was a professional landlord is hardly supported by the evidence i.e. that this was the only property the Applicant rented out.

Conclusions

37. Taking all the evidence and submissions into account, the Tribunal concludes that the particular facts of this case do not warrant a financial penalty and such penalty is hereby cancelled.

38. The Applicant clearly got himself into this situation by, in effect, being too generous with the tenants by not inspecting the property regularly and not evicting them when it was clear that there were hazards created by them and there was overcrowding. Before the pandemic, it would have been relatively easy for the Applicant to obtain a possession order either by serving notice at the end of an assured shorthold tenancy or claiming breach of contract based on the condition of the interior of the property if it was an assured periodic tenancy.

39. However, when the Respondent became involved, the position had changed. Both the Applicant and the Respondent agreed that the property was overcrowded which meant either that someone had to move out voluntarily or possession proceedings would have had to be started. As no-one else had moved into the property since the tenancy started and the Respondent had approved the number of occupiers, the Applicant would have had great difficulty in alleging breach of contract because of overcrowding. The Applicant says that he served a notice to quit but no-one moved out.

40. The Improvement Notice rightly required a great deal of work to be done but despite the views expressed by Mr. Reynolds, the Tribunal simply does not accept that this work could reasonably have been undertaken with the tenants still in occupation of what – by the Respondent's standards – was clearly overcrowded accommodation. The result was that even if the work had been done, the

overcrowding hazard would have been worse and as the tenants were clearly not able to move out voluntarily at the time, possession proceedings would have been inevitable.

41. The Applicant clearly gave the Respondent notice of this problem together with the secondary problem that he could not then afford to pay for all of this work. The Respondent would not change its position and decided to proceed with a Financial Penalty at a time when the courts would not enforce a possession order, even if one could have been obtained.

42. Thus this had become what is sometimes referred to as a 'Catch 22' situation with an Improvement Notice not complied with, the overcrowding problem continuing even if the work could be done and the courts refusing to enforce any possession order. The Respondent should have re-considered its position, particularly as the tenants had suffered the 'serious risk to occupiers' alleged in the Improvement Notice for a considerable period of time.

43. The Tribunal's conclusion is that the Respondent, as the local housing authority, should have housed these tenants and made a prohibition order. Its statement that the Improvement Notice was 'proportionate' was wrong in a situation where compliance would not resolve the overcrowding problem. Before making a financial penalty, it should have reconsidered its position particularly as complete compliance with the overcrowding hazard in the Improvement Notice had, in effect, become impossible.

ANNEX - RIGHTS OF APPEAL

i. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

iii. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

iv. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.