FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/22UG/HER/2019/0001** **P : PAPERREMOTE**
Property	:	42b Alexandra Road, Colchester CO3 3DF
Applicant	:	IQTECH Limited
Respondent	:	Colchester Borough Council
Type of Application	:	Appeal against the service of a notice of emergency remedial action under s.41 [HA 2004, s.45]
Tribunal	:	Judge G K Sinclair
Date of determination	:	7th May 2020

DECISION

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1. This appeal is against the service on the applicant of a notice of emergency remedial action, dated 28th November 2019, under s.41 of the Housing Act 2004. Service of such a notice is a legal requirement where emergency remedial action has been taken under section 40 of the same Act. The appeal has been brought, in time, under section 45 of the Act. This entitles the applicant to challenge the action taken.

2. While the applicant was content to proceed without an oral hearing directions were given for a hearing and possible inspection on 5th May 2020. The Covid-19 pandemic then intervened, inspections and face-to-face hearings were halted, and the tribunal wrote to the parties enquiring how they wished to proceed. Faced with the option of a paper or telephone hearing or adjourning the case for perhaps upwards of six months (which was the respondent's initial suggestion) the parties both agreed that it be dealt with on paper. The tribunal therefore proceeded on that basis.

3. For the reasons set out below the tribunal dismisses the appeal against service of the notice under section 41.

Expenses incurred

4. While the applicant formally appealed against the service of the notice under section 41 the main issue troubling it was the cost of the remedial work and its administration, which the respondent local authority has invoiced for :

a.	*Inv 20171251 dated 04-Dec-19*		
	Emergency remedial action notice		£520.00
b.	*Inv 20171979 dated 14-Jan-20*		
	Cost of emergency remedial action works	£798.00	
	Cost of Officer time 8 hours @ £50 per hour	£600.00	£1398.00
			£1918.00

5. Section 42 provides for the recovery of expenses reasonably incurred in taking emergency remedial action under section 40. The expenses become payable after the expiry of 28 days from the date of the notice but, as an appeal against it has been brought under section 45, the "operative time" for doing so is suspended until the end of the period for appealing against this decision to the Upper Tribunal or, if an appeal be brought, until after a decision has been reached on appeal confirming the local authority's decision. Enforcement of payment, and any appeal against the sum demanded, are formally dealt with by Schedule 3 to the Act.

6. As the section 45 appeal was filed on 16th December 2019, less than 28 days from service of the section 41 notice, no invoice already served has yet become payable, and so the time for appealing under Part 3 of Schedule 3 has not yet begun.

7. While the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 give tribunals considerable latitude to do justice where the parties have not been entirely compliant with the tribunal's rules and procedures rule 2 makes plain that :

> Nothing in these Rules overrides any specific provision that is contained in an enactment which confers jurisdiction on the Tribunal.

8. The tribunal cannot therefore make any finding on the reasonableness of the fees, costs and other expenses which the respondent wishes to recover. A few general observations might be made, but these are non-binding and are not intended to prejudge the decision of any tribunal which, in the absence of agreement and/or a sense of proportionality between the parties, may later have to determine the issue.

Material statutory provisions and guidance

9. Part 1 of the Housing Act 2004, which concerns housing conditions, replaces concepts of fitness for habitation are replaced by a new Housing Health & Safety Rating System. This is a system founded on the analysis of 29 specified hazards, 51 types of potential harm (grouped in 4 classes ranging from extreme to moderate, by severity of outcome), the likelihood of an occurrence that could result in harm to a member of a vulnerable group within the next 12 months, and the spread of possible outcomes resulting from it, expressed as a percentage for each of the classes of harm – to which representative scale points are assigned. Essentially mathematical, the result of these calculations for each identified hazard produces a numerical score placing the hazard within one of a number of bands, ranging from A to C (collectively Category 1) and D to J (collectively Category 2).[1]

10. By section 3 a local housing authority must keep the housing conditions in their area under review with a view to identifying any action that may need to be taken. Section 4 states that if the authority consider, as a result of any matters of which they have become aware in carrying out their duty under section 3, or for any other reason, that it would be appropriate for any residential premises in their district to be inspected with a view to determining whether any category 1 or 2 hazard exists on those premises, the authority must arrange for such an inspection to be carried out.

11. Where the proper officer of the local housing authority considers that a survey or examination of any premises is necessary in order to carry out an inspection under section 4(2) then he may enter the premises in question at any reasonable time for the purpose of carrying out a survey or examination of the premises. However, before doing so he must have given at least 24 hours' notice of his intention to do so to the owner of the premises (if known), and to the occupier (if any).[2]

12. Section 5(1) of the Act goes on to provide that if a local housing authority consider that a category 1 hazard exists on any residential premises, they must take the appropriate enforcement action in relation to the hazard.

13. Section 9 provides that :

(1) The appropriate national authority may give guidance to local housing authorities about exercising –

(a) their functions under this Chapter in relation to the inspection of premises and the assessment of hazards,

(b) their functions under Chapter 2 of this Part in relation to improvement notices, prohibition orders or hazard awareness notices,

[etc.]

(2) A local housing authority must have regard to any guidance for the time being given under this section.

[1] Housing Health and Safety Rating System (England) Regulations 2005 [SI 2005/3208]

[2] HA 2004, s.239 (Powers of entry)

14. To assist Environmental Health Officers in carrying out their duties under this Part of the Act, and in making their HHSRS hazard assessments, the ODPM (now the MHCLG) has published two documents providing Operating Guidance and Enforcement Guidance.[3]

15. By section 11 of the Act if the local housing authority are satisfied that a category 1 hazard exists on any residential premises, and no management order is in force in relation to the premises under Chapter 1 or 2 of Part 4, then serving an improvement notice under that 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. The notice may require the person on whom it is served to take such remedial action in respect of the hazard concerned as is specified in the notice in accordance with subsections (3) to (5) and section 13 (which specifies the required content of a valid notice).

16. By section 40, if the local housing authority are satisfied that a category 1 hazard exists on any residential premises, 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 no management order is in force under Chapter 1 or 2 of Part 4 in relation to the premises, then the taking by the authority of emergency remedial action 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.

17. "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), and such action can 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.

18. Section 40(7) provides that within the period of seven days beginning with the date when the authority start taking emergency remedial action, it must serve a notice under section 41, and 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. An appeal against service of such a notice is brought under section 45, and upon considering the matter the tribunal may confirm, reverse or vary the decision of the authority.

19. As mentioned above, a local authority may seek to recover its reasonable expenses incurred in carrying out emergency remedial action as provided for in section 42 and Schedule 3.

The evidence

20. Each party has, as directed, submitted a bundle of evidence for the hearing. As well as the application and directions the documentation before the tribunal included the respondent council's statement of case, witness statement by Anna Watson (Private Sector Housing Manager), emails, photographs, invoices, the notice served under section 21, HHSRS assessment and scoring relied upon, the council's invoices sent to the applicant, and other helpful documents.

[3] 05 HMD 03485/A and 05 HMD 03485/B respectively

21. The applicant produced witness statements by Chika Nwosu (director), Lauren Mattison (hotelier, concerning accommodation that Mr Nwosu had arranged for the tenants) and Andy Bruce (the applicant's handyman who was stood down on the night in question). In addition he produced contract documents from W W Home Improvements Ltd (trading as WindoWorld), the company that installed and then removed the door and window pane, photographs, and some alternative quotes for the repair work.

22. The facts leading up to the respondent's decision to take emergency remedial action can be set out quite briefly. At 16:54 on Friday 22nd November 2019, as light was failing, the respondent council was contacted via its website by Ms Holly Blackburn, tenant of the subject first and second floor flat and mother of a 10-month-old baby. She and her partner had arranged with the applicant, their landlord, that it would arrange for the replacement of a bedroom window/fire escape and the front door. A fitter had attended that day and installed a new PVCu window and entrance door but, after phoning the landlord to discuss payment, was evidently dissatisfied with the outcome and removed the pane of glass from the window and the entire door from its frame. They were left open to the elements in late November, and the premises insecure, at the start of a weekend.

23. Mr & Mrs Nwosu, the directors of the landlord company, were on their way to the airport for a weekend away in Prague when contacted by the council. They could not contact the window installation company and tried their handyman, but he was stuck on a job in Ipswich and could not guarantee when he could turn up. As Mr Nwosu admitted at a joint meeting with the council in February 2020, when the council officer made clear that unless the landlord could arrange for the work to be done by 21:00 it would arrange for it and invoice him for its expenditure and management time he authorised the respondent to proceed and invoice him for its work and stood down his handyman, Mr Bruce.

24. He had offered to put the tenants up short-term in a hotel in Clacton, and pay for their transport, but they declined the offer as they had a lot of baby equipment and did not want to leave their worldly possessions unattended for days in a flat with a wide open front door and a bedroom window missing its single double-glazed sealed unit. They preferred to stay and guard their belongings, regardless of the cold.

25. The council officer attending, Mr Whyte, conducted a swift HHSRS assessment and determined that Category 1 hazards were present. As there seemed no other means of arranging for the work to be done over the weekend while the landlord was out of the country and left no managing agent to deal with the problem, Mr Whyte decided that emergency remedial action under section 40 was required.

26. As appears from the section 41 notice, the nature of the hazards were described as :
    1. Excess cold
    2. Entry by intruders

    The deficiencies giving rise to the hazards were listed thus :
    1. No front door

2. No glazing to 2nd floor rear bedroom window
3. Solid brick construction
4. Large heat loss perimeter of 3 external walls
5. Property is accessed to the rear via a poorly lit shared alleyway
6. Property is overlooked and in a densely populated area

27. The works specified in Schedule 2 to the notice were :
    a. to fabricate and fit a temporary door to the entrance which allows egress and ingress, provides a degree of thermal comfort, prevents uncontrollable draughts and is lockable for security purposes, and sufficient to deter unauthorised access, and
    b. to supply and fit temporary boarding to the second floor rear bedroom window that prevents uncontrollable draughts and allows for egress in an emergency and is sufficient to deter unauthorised entry.

28. He contacted the fitter who had installed and then removed the door and glazing, but he refused to come back because of the landlord's refusal to pay for it. He contacted Mr Nwosu, but there was too much uncertainty about when or if his handyman – already on another job in Ipswich – would be able to attend and take the required action. He tried other firms, but many were reluctant. Eventually he found one willing to come out, provided Colchester would pay.

29. The work was done that night. A very unattractive but serviceable door was fabricated out of sterling board. The contractor who attended was concerned not to damage the PVCu door frame installed earlier, partly held in place by mastic that was still setting. He could not therefore use the old wooden door which had been taken off and left in an alley, and so secured the new door to the old timber door surround.

30. In his witness statement Mr Nwosu explains how on 27th September 2019 he appointed WindoWorld to replace one window and the entrance door to the flat. On 29th September he paid a £90 deposit, and the work was due to be undertaken on 14th November 2019. He then outlines how the appointment was cancelled by the company, rescheduled, and how it failed to show up more than once. On the day in question the fitter did not turn up until 12:00.

31. He explains how the fitter asked for the final payment before he proceeded to finish the work, whereupon Mr Nwosu reminded him that the contract stated :
    Payment of balance must be made on installation.
    The fitter continued and then rang back, asking for an immediate transfer into his bank account. Mr Nwosu was on a train, received a message from the fitter with photo of the door off, and then tried unsuccessfully to contact him again.

32. It was in these circumstances that an urgent alternative was required, but Mr Nwosu describes the council officer's approach as "bullish" and that the council's involvement was unnecessary. On his return from Prague arrangements were made and a replacement window was fitted on 6th December. His statement does not say when a new door was provided.

Discussion and findings

33. Having considered all the evidence the tribunal is entirely satisfied that hazards

to the occupants were created by the applicant's contractor partly installing and then partly removing the new window and external door on a Friday evening in late autumn. Mr Nwosu may regard the company as unreliable, but he chose it. He also seems to disagree with a contractual requirement for payment on installation. The fitter was no doubt expecting the landlord or an agent to be present, with cash or a banker's draft as agreed, so that payment could be made that day; not sometime later, when the absent landlord returned from a short holiday and got around to it – if at all.

34. The tribunal is certainly not endorsing the action taken by the fitter, but as a result the tenants were placed in a very difficult position as businesses were closing on a Friday evening, and with no assurance that the landlord would or could act swiftly to remedy the problem. Mr Bruce was already committed to another job and could not say when that would finish or, taking traffic conditions on the A12 into account, when he would be able to reach the subject premises in Colchester.

35. An entirely open external door not only deprives the flat of heat but renders it completely vulnerable to ingress by wind, rain, birds, animals or human intruders. The door leads straight into the kitchen, where food is to be prepared and one might expect a baby to be fed. The large dormer window in the bedroom is equally essential for retaining heat and preventing the ingress of wind and rain.

36. The tribunal is satisfied that the hazards demonstrated are severe enough to fall within Category 1, and that emergency remedial action was required in this case.

37. That is sufficient to determine this appeal but, as explained in paragraphs 4–8 above, the applicant's real complaint is about how much the respondent council expects it to pay for the work. That is not formally the subject matter of this appeal, but a few general observations can be made :

a. The sums claimed are for officer's time spent on the case, for the amount charged by the council's contractor, and the costs or fees imposed for the issue and service of the section 41 notice.

b. Section 49 provides that the housing authority may make such reasonable charge as they consider appropriate as a means of recovering certain administrative and other expenses incurred by them in respect of their enforcement activities, and the respondent has provided the tribunal with a copy Private Sector Housing Enforcement and Civil Penalties Policy, reviewed in September 2019 and formally adopted in October.

c. In *Sutton v Norwich City Council*[4], in the context of civil penalties, the Upper Tribunal observed, at [245] that :

> If a local authority has adopted a policy, a tribunal should consider for itself what penalty is merited by the offence under the terms of the policy. If the authority has applied its own policy, the Tribunal should give weight to the assessment it has made of the seriousness of the offence and the culpability of the appellant in reaching its own decision

and at [248] (again in the context of penalties, but the principle is still relevant) :

> The penalty "matrix" produced by the Council is similar to those adopted

[4] [2020] UKUT 0090 (LC) (Martin Rodger QC, Deputy President, and Peter McCrea FRICS)

> by other local housing authorities (see for example the scale of penalties used by the Waltham Forest reproduced at paragraph 17 of the Tribunal's recent decision in *London Borough of Waltham Forest v Marshall*). It is not necessary that each of these matrixes be identical, and there is no requirement of absolute uniformity of approach as local authorities are entitled to respond to the circumstances of their own area. Within limits, consistency within a local authority area is more important than consistency between authorities, and tribunals should be slow to rely on the approach taken by a different authority, or on decisions on appeals in different areas, as justifying a departure from the policy.

d. On the other hand, in *R (Gaskin) v Richmond on Thames LBC*,[5] (an HMO licensing case) the Divisional Court held that any fees levied must be related to the cost of providing the service – not designed to make a profit.
e. As for the contractor's costs, it is easier to find a builder willing to work in normal hours rather than out of hours, and to repair something from scratch rather than finish repairing something that has already been partly repaired by someone else. This may require acceptance of a larger price then would be usual if there were no exceptional time constraints.
f. The total amount in dispute is less than £2,000, and the tribunal would encourage the parties to adopt a proportionate and commercial attitude to the resolution of this matter.

Dated 7th May 2020

Graham Sinclair
First-tier Tribunal Judge

[5] [2018] EWHC 1996 (Admin); [2018] HLR 47