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RESIDENTIAL PROPERTY TRIBUNAL

Reference: RPT/0062/01/19

In the Matter of Flats 1,2,3 at 4 to 6, Chester Street, Mold, Flintshire, CH7 1EG.

And In the matter of an Application under Sections 10, 11 and 12 of Part 3 of Schedule 1 of the Housing Act 2004.

APPLICANT Tramstack Limited

RESPONDENT Flintshire County Council

TRIBUNAL: Mr Andrew Grant
Mr Hefin Lewis
Mr Eifion Jones

Decision

The Notice dated the 14th December 2018 is varied to the extent that the requirement to carry out the works to Flats 1 and 2 is removed.

The works to Flat 3 are suspended until the 1st August 2019. If on that date Flat 3 remains occupied then the works must be carried out by the 1st October 2019. If Flat 3 is unoccupied as at the 1st August 2019 the Notice will be quashed as at that date.

Reasons

Introduction

1. The application before the Tribunal is an appeal against an Improvement Notice dated the 14th December 2018 ("the Notice") and which was served upon Tramstack Limited ("the Applicant") by Flintshire County Council ("the Respondent") on the 14th December 2018.

2. By way of an application dated the 1st January 2019 the Applicant appealed to this Tribunal pursuant to Part 3 of Schedule 1 to the Housing Act 2004 ("the Act").

3. A directions order was made on the 6th February 2019.

4. A hearing was listed to be heard on the 25th April 2019 at the Town Hall, Earl Road, Mold, Flintshire. Prior to the hearing the Tribunal inspected the Property.

5. Mr Hallows appeared on behalf of the Applicant. He is the Company Secretary. Mr Kelly and Mrs Prendergast appeared on behalf of the Respondent.

Background

6. The Applicant is the Freehold owner of 3 Flats situated at number 4 – 6, Chester Road, Mold, Flintshire, CH7 1EG ("the Property")

7. The Property consists of 1 office and 3 Residential Flats which are all situated at first floor level.

8. The Tribunal inspected all of the Residential Flats at the Property. It did not inspect the office as it did not form part of the appeal to this Tribunal.

9. At the time of the inspection, Flats numbered 1 and 2 were empty. Flat number 3 was occupied.

10. The Tribunal was informed by Mr Hallows that Flat 2 had been vacant since mid – 2018 and that Flat 1 was vacated on the 21st November 2018.

11. In any event, during the months of August and September 2018 the Respondent inspected the Property.

12. Following the inspection, the Respondent wrote to the Applicant on the 12th September 2018 informing it that it considered that there were category 1 and 2 hazards present at the Property. It indicated that it was considering taking enforcement action against the Applicant and invited the Applicant to contact the Respondent to inform it as to how the Applicant proposed to remedy the position.

13. Thereafter, on the 14th September 2018, Mr Hallows telephoned the Respondent and spoke with Mr Aidan Kelly. Mr Kelly was the Environmental Health Officer that was responsible for the matter. The fact that the conversation took place is not in issue although the content of the conversation is very much an issue between the parties.

14. Mr Hallows asserts that during the course of the conversation he informed Mr Kelly that Flat 2 was vacant. He further informed Mr Kelly that in order to review the state of the Flats and assess the work, vacant possession was required. In that regard he said that he had served a notice terminating the tenancies in respect of Flats number 1 and 3 and once vacant possession was obtained, he proposed to send a schedule of works to the Council for possible agreement. He said that his future intentions for the Property depended upon the cost of the work. Mr Hallows asserts that Mr Kelly agreed with the proposed way forward and said to Mr Hallows that in light of the proposals, the Respondent would not proceed with enforcement action. It is the latter part of the alleged agreement that Mr Hallows primarily relies upon in appealing the subsequent Improvement Notice.

15. Mr Kelly acknowledges that the conversation took place but denies reaching any agreement along the lines suggested by Mr Hallows that the Respondent would refrain from taking enforcement action.

16. In any event, on the 6th December 2018 the Respondent served upon the Applicant an Improvement Notice in respect of Flats 1, 2 and 3. The Improvement Notice was not amongst the papers before the Tribunal as the Improvement Notice was subsequently withdrawn by the Respondent. The Improvement Notice was withdrawn after the Applicant complained that it had not been properly served upon the Applicant.

17. A subsequent Improvement Notice was served on the 14th December 2018 and it is that Notice which is the subject of the current application.

The hearing

18. At the start of the hearing the Tribunal raised two preliminary matters.

19. Firstly, it enquired of the Applicant whether, subject to its principal arguments, it accepted the content of the Notice as being an accurate record of the condition of the property. Mr Hallows confirmed that he accepted the content of the Notice as being an accurate record of the state of the property at the date of service of the Notice.

20. The second point was in relation to the Applicant's appeal against the Respondent's claim to expenses. The Tribunal enquired whether it had issued an application in accordance with direction number 5 of the directions order dated the 6th February 2019. The Applicant said that it had not issued a separate appeal in relation to the expenses but considered it formed part of the Application dated the 1st January 2019.

The Applicants submissions

21. The Applicant advances its case in 3 ways. Firstly, it asserts that in essence the Respondent was estopped from serving the Notice by virtue of the agreement which it asserts was made with the Applicant on the 14th September 2018.Secondly, it asserts that if it is found that there was no agreement, then the proposals which it put forward were a reasonable way of dealing with the matter. Finally, as regards Flats 1 and 2, the Applicant contends that at the time that the Notice was served, the Respondent had no jurisdiction to serve the Notice.

The Respondent's submissions

22. Firstly, the Respondent asserts that there was no agreement with the Applicant that the Respondent would refrain from taking enforcement action. As regards the second issue, the Respondent submitted that the proposals were not an appropriate way of dealing with the matter as it has a duty to act where hazards were identified. Finally, it submitted that it did have jurisdiction to serve the Notice on the 14th December 2018.

The Applicant's evidence

23. The Applicant relied upon both the grounds of appeal which accompanied the application to the Tribunal together with a written statement from Mr Hallows dated the 6th March 2019.

24. On behalf of the Applicant, Mr Hallows gave evidence to the Tribunal that on the 14th September 2018 he had spoken with Mr Kelly in response to the letter dated the 12th September 2018. He said that an agreement had been reached whereby he had outlined the Applicant's proposed response to the Respondents letter dated the 12th September 2018 and that in consequence the Respondent had agreed not to take any enforcement action against the Applicant.

25. He said that he followed up the conversation by sending an e mail to the Respondent on the 27th September 2018 which set out the terms of the agreement that had been reached on the 14th September 2018. A copy of that e mail was in the bundle at page 15. Mr Hallows suggested that the e mail was critical to the Applicant's case.

26. Thereafter, on the 1st October 2018 the Applicant served a notice on the tenants of Flats 1 and 3 at the Property terminating their respective tenancies on the 5th December 2018. It was suggested that those notices may not have been received so they were re – served on the 16th October 2018.

27. In his evidence, Mr Hallows confirmed that Flat 1 was vacated on the 21st November 2018. Thereafter, it had been occupied by squatters until they were removed by the police. He said that Flat 2 had been vacated sometime earlier in August 2018. He said that no further action could be taken in respect of Flat 3 until the notice seeking possession expired on the 6th December 2018.

28. Mr Hallows took the Tribunal to the e mail from the Respondent to the Applicant and which is dated the 16th October 2018 (page 30 in the bundle). He said that this prompted him to call the Respondent and to send a written response on the same day by e mail. This appears at page 42 of the bundle. It again set out Mr Hallows' understanding of the terms of the Agreement reached in his discussion with Mr Kelly on the 14th September 2018.

29. On the 7th December 2018 the Respondent purported to serve an Improvement Notice upon the Applicant by e mail. Mr Hallows took the Tribunal to his response which was an e mail dated the 7th December 2018 (page 45 of the bundle) and a further e mail dated the 12th December 2018 (page 46 of the bundle).

30. Mr Hallows then informed the Tribunal that the original Improvement Notice was withdrawn and subsequently replaced with a Notice dated the 14th December 2018.

31. The Tribunal enquired of Mr Hallows as to whether he was essentially raising an estoppel and if so, what did he say was the nature of the estoppel. He indicated that he had not originally considered that point but felt that the agreement raised an estoppel in the nature of a promissory estoppel.

Cross examination

32. Mr Hallows was asked if his original proposals set out a timescale for works to be done. He said that it did not. He said that he had to obtain possession first which is why he served the tenants with notice.

33. Mr Hallows was asked if it was his choice to obtain possession to which he replied that it was his reasonable response.

The Respondents evidence

34. The Respondent's evidence was given by Mr Kelly. He had filed a witness statement dated the 14th March 2019.

35. He opened by informing the Tribunal that he had been caused to inspect the Property after receiving a complaint from a relative of the tenant occupying Flat 2.

36. At this point, Mr Hallows raised an objection, submitting that Mr Kelly should not be permitted to stray from his witness statement. The Tribunal noted the objection but allowed Mr Kelly to continue as the Tribunal wanted to hear the background to the matter.

37. Mr Kelly stated that after receiving the complaint he investigated and found that the Property contained 3 separate Flats.

38. He said that he had not reached any agreement with Mr Hallows as had been suggested. He said that they had spoken and that once he heard what Mr Hallows had said he replied that it was "fine". He did not say anything else. He said that he had a duty to investigate if complaints were received.

Cross examination

39. Mr Hallows asked Mr Kelly to confirm the truth of his statement which he duly did.

40. Mr Hallows asked if Mr Kelly had ever replied to the e mail dated the 27th September 2018. Initially, Mr Kelly said that he believed that he had and that he served an Improvement Notice. When pressed by Mr Hallows as to whether he had sent a specific reply to the e mail Mr Kelly confirmed that he had not.

41. Mr Hallows asked if Mr Kelly had received the letter dated the 12th December 2018. Mr Kelly confirmed that he had received it.

42. Mr Hallows then asked if Mr Kelly accepted the content of that letter. He said that he did not.

43. Mr Kelly was asked if he accepted that Flats 1 and 2 were empty as at the 1st December 2018. Mr Kelly said that he did accept that the Flats had been empty. Mr Hallows then asked that if it was accepted that the Flats were empty why did he serve the Notice. Mr Kelly said that he referred to the statement of reasons in

the Notice and stated that the Local Authority has a duty to act when it appeared that the property was being prepared to be let.

44. Mr Hallows asked if Mr Kelly remembered a conversation in which Mr Kelly confirmed that he had been told to serve an Improvement Notice despite having reached an agreement to the contrary. Mr Kelly said that he did remember but that they (the local authority) had reached a decision.

45. Mr Hallows asked if the change was because he (meaning Mr Kelly) had spoken to Corrine Edwards. Mr Kelly replied that he did speak with Ms Edwards as she worked in the Housing Department.

46. Mr Hallows then asked if Mr Kelly has seen the letter at page 50 of the bundle. Mr Kelly stated that he had seen the letter. Mr Hallows then asked why the original notice had been cancelled. Mr Kelly replied that it was cancelled because Mr Hallows had said that the notice had not been served correctly.

47. Mr Kelly was asked what evidence he had to show that Flats 1 and 2 were being prepared to be re – let. Mr Kelly said that they were being decorated. He said that he had 5 sets of photographs for the Tribunal and asked for permission to put them in evidence. Mr Hallows objected. In light of the objection the Tribunal did not allow the photographs into evidence.

48. Mr Kelly was then questioned about paragraph 1 of his statement. Mr Hallows suggested it was incorrect and referred to his own statement dated the 6th March 2019 and in particular paragraph 43 which had not been challenged in cross examination by the Council.

49. Mr Hallows then asked Mr Kelly to confirm that the discussion on the 14th September 2018 had taken place as he suggested. Mr Kelly said that they had spoken on the 14th.

50. Mr Hallows asked if Mr Kelly had responded to any of his letters. Mr Kelly replied “no”.

51. Mr Hallows put it to Mr Kelly that he had not responded as he had agreed with Mr Hallows proposals. Mr Kelly stated that he had responded by saying that the proposals were “fine” and that was recorded on his file.

52. It was suggested by Mr Hallows that Mr Kelly had changed his mind after discussions with the Housing Department. The implication being that it wanted to delay their legal obligation to house the tenant. Mr Kelly replied “that was one of the reasons as the tenant had approached the housing team”.

53. Mr Hallows asked why Mr Kelly had been expecting a schedule of works when he never agreed to provide one until he had obtained possession. Mr Kelly said that the Applicant could have provided a schedule.

54. Mr Hallows then asked whether Mr Kelly had ever explored the suggestion raised at paragraph F on page 4 of his witness statement. Mr Kelly replied that a Prohibition Order was considered.

55. Finally, Mr Hallows asked Mr Kelly if he genuinely believed that Flats 1 and 2 could really have been let out in their current condition. Mr Kelly replied "yes".

Deliberations

Agreement

56. The Applicant's primary case is that an agreement was reached between the parties on the 14th September 2018 that the Applicant's proposed response to the initial approach from the Respondent was reasonable and in consequence the Respondent would not be taking any further enforcement action against the Applicant. In consequence of the said agreement, the Respondent is estopped from serving the Notice on the Applicant.

57. The Applicant suggests that aside from the oral evidence of the agreement given by Mr Hallows, the evidence of the agreement appears primarily from the e mails dated the 27th September 2018, the 16th October 2018, the 7th December 2018 and the e mail dated the 12th December 2018 all of which confirm the terms of the agreement reached on the 14th September 2018. Mr Hallows put great weight on the fact that the Respondent never challenged the content of any of his e mails and the fact that Mr Kelly did not reply at all, as being evidence of the Respondent's agreement to the Applicant's alleged version of events.

58. In responding to a question from the Tribunal Mr Hallows stated that in his conversation on the 14th September 2018 with Mr Kelly, he was assured that no enforcement action would be taken in respect of the property.

59. Mr Hallows was very forthright in giving his evidence. He went to lengths to suggest that he had evidenced the discussion by way of e mails which he asserts set out the terms of the agreement reached.

60. However, if what Mr Hallows suggests is correct, one would expect to see a specific reference in the e mails upon which Mr Hallows seeks to rely to the effect that the Respondent had agreed not to take further action. However, a consideration of the first e mail dated the 27th September 2018 shows that there is no such reference in the e - mail. In his evidence Mr Hallows referred to this e mail as being "critical". Similarly, there is no mention of such an agreement in the e mail dated the 16th October 2018. The first and only reference to the Respondent agreeing to take no action is in the e mail dated the 7th December 2018. The subsequent e mail dated the 12th December 2018 makes no reference to any such agreement at all.

61. Given the manner in which the evidence was given and given the significance of this particular point, it seems inconceivable that Mr Hallows would not have

included specific reference to that term of the agreement in his first e mails if such a term had in fact been offered by the Respondent.

62. Mr Kelly was adamant in his evidence that he did not make any such agreement but rather confirmed that Mr Hallows suggestion was “fine”.

63. In order to establish an enforceable agreement or estoppel the Applicant would need to establish that the Respondent had made a clear and unambiguous promise not to take further action. The Tribunal finds that it did not do so. Mr Hallows made an assumption based upon Mr Kelly’s response and the fact that the Respondent did not seek to challenge any of his e mails or, in fact, send any reply at all. However, this is not enough to support Mr Hallows assertion that there was an express agreement not to take enforcement action. The early e mails make no mention of the Respondent having agreed to suspend enforcement action and it is in these early e mails that such an agreement would have appeared as Mr Hallows was thorough in setting out what had been discussed. It is unlikely that he would have left out such a significant point.

64. The fact that the Respondent did not respond to Mr Hallows subsequent e mails is not necessarily significant. The initial e mails did not refer to any agreement not to take action. Perhaps if they had, then a response may have been forthcoming. The e mails simply set out what had been discussed and Mr Kelly did not disagree that Mr Hallows had made the proposals that appeared in the e mail. He only disagreed with the suggestion that he had agreed not to take any enforcement action.

65. Accordingly, on the basis of the evidence the Tribunal finds on a balance of probability that there was no express representation or agreement between the parties that, in light of the Applicant’s proposals, the council would take no enforcement action against the Applicant.

66. It seems more likely that Mr Hallows mistakenly assumed that because Mr Kelly had said that his proposals were acceptable that it would automatically follow that enforcement action would be placed on hold. Indeed, it seems somewhat unfair on the Applicant that the Council subsequently took action without providing a proper explanation. However, although it may be seen as unfair their decision to proceed was not so unfair as to amount to an abuse of power given that a tenant still remained in occupation of Flat 3 and it was admitted by the Applicant that category 1 and 2 hazards existed at the Property. As Mr Kelly said in his evidence, in those circumstances the Respondent had a duty to act.

Were the proposals reasonable?

67. Mr Hallows, on behalf of the Applicant, asserts that the Applicant’s proposals were reasonable and in consequence no action should have been taken by the Respondent.

68. In the Tribunal’s view the matter must be considered at two points. Firstly, as at the 14th September 2018, when the initial proposal was made and again at the

14th December 2018 when the Respondent served the Notice as the factual position had changed by that stage.

69. In the Tribunal's view the proposals made on the 14th September 2018 were not reasonable as regards Flats number 1 and 3 because at the time they were occupied. It is common ground between the parties that Flats 1 and 3 were subject to category 1 and 2 Hazards at that point in time and in those circumstances, it would have been reasonable for the Respondent to have served an Improvement Notice or indeed a Prohibition Order in respect of those properties.

70. However, the Applicant took the view that the works could not be done with the tenants in situ and decided to remove the tenants before making any decision as to the future use of the Property. There was no evidence before the Tribunal to confirm whether the suggestion that vacant possession was required was a reasonable assumption or not. However, if the Respondent had not agreed with that approach no doubt it would have objected but it did not.

71. Furthermore, the Respondent had confirmed that the Applicant's proposals were "fine" thereby giving the Applicant the impression that it was happy with the suggested approach.

72. Finally, Carina Edwards from the Respondent's homelessness unit contacted Mr Hallows on the 4th December 2018 and asked if the Applicant would work with the Respondent to re - house the tenant at number 3. Mr Hallows, replying on behalf of the Applicant, responded stating that it would assist. The Respondent sent a further e mail on the 5th December 2018 asking if some repairs could be carried out, what the cost would be and did the Applicant have the funds to do the work? Mr Hallows does not appear to have addressed that question and the next communication from him is dated the 12th December 2018 insisting that the tenant vacates the property. He did not address the questions raised in the earlier e mail by Ms Edwards. He followed this up with a similar e mail on the 4th January 2019.

73. By the 14th December 2018, the date upon which the Notice was served, Flat 1 had been vacated and was empty. In those circumstances the Tribunal consider that the reasonable course of action would have been to serve a Prohibition Order in respect of Flat 1 as opposed to an Improvement Notice.

74. As regards Flat number 2, the evidence was that this had been vacant since August 2018. In those circumstances the Applicant's suggestion (insofar as far as it related to Flat 2) would have been reasonable as at the 14th September 2018 and the Applicant indicated in evidence that he may have agreed a Prohibition Order in respect of Flat 2 at that stage. However, he said in evidence that the Respondent did not enter into any discussions with him about any alternative course of action.

75. When the Respondent served the Notice on the 14th December 2018, Flat 2 remained vacant. However, in evidence Mr Kelly indicated that he had reason to

believe that the Flat had had been decorated in readiness to be let and that provided his justification for including Flat 2 in the Improvement Notice.

76. Mr Hallows strongly denied the suggestion that the Flat had been decorated in readiness for occupation.

77. The Tribunal found during the inspection that whilst there was some evidence that the property had been painted, it was clearly not in a position to have been let.

78. In those circumstances it seems unreasonable to have included Flat 2 in the Improvement Notice dated the 7th December 2018. A Prohibition Order should have been served.

79. As regards Flat 3, it was clear that the tenant was still in situ. The Tribunal take the view that the Respondent should not have accepted the proposals as far as they related to Flat 3 as being acceptable. They were not. They suited the Applicant but not the tenant.

80. The Tribunal also does not accept the evidence of Mr Hallows that he worked with the Respondent following contact from Ms. Edwards. The e mail trail at exhibit "RH1" clearly shows that whilst he said the Applicant would assist, in fact, it did not. It had no intention of spending any money.

81. However, the fact remains that it would appear that some of the work cannot be carried out with the tenant in situ. In those circumstances the Tribunal has been informed that a possession hearing is due to take place on the 5th June 2019. In those circumstances there seems little point at this stage in directing the work in the Notice to be carried out until the tenant has vacated the property.

Did the Respondent have jurisdiction to include Flats numbered 1 and 2 in the Improvement Notice dated the 6th December 2018?

82. The Respondent's jurisdiction to serve an Improvement Notice is derived from sections 11 and 12 of the Act which allows a Local Housing Authority to serve an Improvement Notice if it is satisfied that a category 1 or 2 hazard exists on any residential premises.

83. Residential premises is defined in section 4 of the Act as including a "dwelling" which is defined at section 5 of the Act as being "a building or part of a building occupied or intended to be occupied as a separate dwelling".

84. The Applicant asserts that the Respondent had no jurisdiction to serve an Improvement Notice on the 14th December 2018 which included reference to Flats 1 and 2 as by that stage both Flats were vacant.

85. The Respondent asserts that (as far as Flat 2 was concerned) the Flat was being made ready to be let.

86. It seems to the Tribunal that the statutory requirements enabling the service of an Improvement Notice have been met. In those circumstances, the service of an Improvement notice was not outside of the Respondents jurisdiction and neither had the Respondent agreed to refrain from taking any action. However, although the Respondent had jurisdiction to serve a notice, it does not follow that it was reasonable to do so given the particular facts of this case.

87. The Tribunal consider that the service of an Improvement Notice on both Flats 1 and 2 as at the 14th December 2018 was unreasonable in light of the Applicant's stated intentions as, at the time that service of the Notice was affected, both Flats were vacant. Prohibition Orders should have been served in respect of both.

Conclusion

88. For the reasons set out above the Tribunal consider that there was no agreement between the parties that the Respondent would refrain from taking enforcement action against the Applicant.

89. However, it was unreasonable for the Respondent to have served an Improvement Notice upon the Applicant as regards Flats 1 and 2. The Tribunal vary the Improvement Notice to remove reference to Flats 1 and 2 from the Notice.

90. As regards Flat number 3, this has at all material times been occupied. The Tribunal heard evidence that the tenant will likely vacate the property imminently and that there is a possession hearing on the 5th June 2019. It will likely take some time further before the possession order is enforced. In the circumstances the works under the notice, in so far as they relate to Flat 3, are suspended until the 1st August 2019. If, by that date, Flat 3 is vacant then the Notice will be quashed as at that date. If Flat 3 continues to be occupied on the 1st August 2019, then the Notice will remain in force and the work must be carried out by no later than the 1st October 2019.

91. The Tribunal comment in passing that given the fact that Flats 1 and 2 are vacant it would seem appropriate that Prohibition Orders are served in respect of those properties unless agreement can be reached with the Applicant.

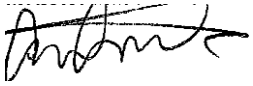
92. Finally, we have to deal with the issue of the Administration charges. Paragraph 5 of The Directions Order dated the 6th February 2019 set out what the Applicant was required to do if it wished to challenge the demand for recovery of expenses which had been served upon the Applicant by the Respondent.

93. The Applicant did not follow those steps but submitted that the Application to set aside the Improvement Notice also addresses the issue of the demand for the recovery of expenses.

94. The application form makes no reference to the demand for expenses and neither does the Applicant's statement of reasons which accompanied the application.

95. Accordingly, there is no application before the Tribunal and we make no order on that aspect.

Dated this 9th day of May 2019.



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Andrew Grant
Chairman