UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – enforcement action – category 1 hazard – fire – prohibition order – whether windows in an inner room are an acceptable means of escape – change of circumstances since RPT hearing – LACORS guidance – appeal allowed – prohibition order quashed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE RESIDENTIAL PROPERTY TRIBUNAL FOR THE NORTHERN RENT ASSESSMENT PANEL

BETWEEN **SATHAVAHANA VADDARAM** **Appellant**

and

EAST LINDSEY DISTRICT COUNCIL **Respondent**

Re: Flat 23B
Witham Road
Woodhall Spa
Lincolnshire
LN10 6RW

Before: A J Trott FRICS

Sitting at 43-45 Bedford Square, London WC1B 3AS
on 18 April 2012

The appellant in person
The respondent did not appear and was not represented

The following case is referred to in this decision:

Hanley v Tameside Metropolitan Borough Council [2010] UKUT 351(LC).

DECISION

Introduction

1. This is an appeal by Mr Sathavahana Vaddaram against a decision of the Residential Property Tribunal for the Northern Rent Assessment Panel given on 15 March 2011 confirming a prohibition order made by the respondent council under section 20 of the Housing Act 2004. The prohibition order was dated 8 October 2010 and related to Flat 23B, Witham Road, Woodhall Spa, Lincolnshire, LN10 6RW. The subject property is a one bedroom first floor flat located at the rear of the building.

2. 23 Witham Road was constructed as a three-storey house which was converted into four flats at or around 1996. At the time of the RPT hearing there were two flats on the ground floor, No.23 at the rear and No.23A at the front. On the first floor was No.23B at the rear and No.23C which occupied the front of the first floor with an internal staircase leading to the second floor where there were two bedrooms. Subsequent to the RPT hearing the appellant has proposed to split No.23C into two flats, with the second floor accommodation forming a new flat 23D. The appellant acquired the freehold interest in the property on 21 April 2008.

3. The prohibition order prohibited the use of Flat 23B as residential living accommodation. The order stated the hazard to be a category 1 hazard: fire, and it described the deficiencies resulting in the hazard as follows:

> "The property is a one bedroom, first floor flat immediately to the right as you come onto the first floor landing area. When entering the flat you come into the living room. Once in the living room you then go through the kitchen and then into the bedroom at the rear of the flat. This layout is completely unacceptable as the tenant has no chance of escape if a fire were to start within either the kitchen or living room.
>
> The windows to the rear bedroom would not be suitable for escape windows.
>
> The tenant is forced to use portable electric heaters as there is no heating within the flat and this greatly increases the risk of a fire starting."

4. Schedule 2 of the order specified the action that would be necessary to remedy the hazard:

> "1. Revise the layout of this flat to provide an adequate and suitable means of escape.
>
> 2. When the layout of the property has been revised, discussed and agreed, an automatic fire detection system will be required within this flat. This must comply with BS5839 Part 6: 2004 and shall be a Grade D, type LD2 system.
>
> 3. When the layout has been revised and an appropriate fire detection system installed, suitable fire doors must be installed within the property to give 30 minute fire protection to the fire protected escape route. These doors must comply with 'Appendix A' a copy of which is attached."

5. On 23 November 2010 the respondent served an improvement notice on Mr Vaddaram under sections 11 and 12 of the Housing Act 2004 in connection with both category 1 and category 2 hazards. Items 20-23 of schedule 2 to the improvement notice specified the necessary works to remedy the hazards (category 1: fire) identified in respect of Flat 23B.

6. Mr Vaddaram appealed against both the prohibition order and the improvement notice. His case was that an occupant in the bedroom of Flat 23B had an alternative means of escape through the rear and side windows which did not pose an immediate and unacceptably high risk to health and safety in the event of a fire. Planning permission was granted for the conversion of the dwelling into four self-contained flats in 1996 and Building Regulations approval for the works was obtained on 1 October 1996. The respondent's building officer had confirmed in October 2010 that the existing wooden windows in the bedroom complied with Building Regulations regarding means of escape.

7. In its decision the RPT accepted that compliance with the Building Regulations was a material consideration in determining the existence of a category 1 hazard but the RPT found that the building officer had given a "qualified response" about the suitability of the windows as a means of escape from the bedroom and that Mr Vaddaram would also need to satisfy the standards for residential dwellings under the Housing Act 2004. The RPT said that:

> "…the evidence of the Fire Officer carried more weight than that of the Building Officer, particularly as the disputed issue concerned the fire hazard. The Fire Officer was explicit about the unsuitability of the layout from the prospective of a fire hazard and that an alternative escape route should be found which did not require an occupant to pass through a kitchen."

8. The evidence of the fire officer to which the RPT referred was a letter dated 12 July 2002. The RPT relied upon the following quotation from that letter:

> "The area highlighted is not acceptable as the bedroom constitutes an inner inner room. It is also not acceptable to have to pass through a room of greater risk of fire as an escape room. Therefore, an alternative arrangement must be sought.
>
> Premises such as this do not fall within the scope of the Fire Precautions Act 1971, and therefore would never have a fire certificate."

9. The RPT inspected Flat 23B and observed:

> "19(12) The Tribunal noted at its inspection of the property that a potential escape through the rear window would involve a drop onto the flat roof of 23 Witham Road which left a putative escapee isolated at the rear of the property and not easily accessible to the Fire and Rescue Service. An escape through the side window would involve a fall from the first floor onto a hard service.
>
> …
>
> 22 The Tribunal formed the view from its inspection of 23B Witham Road that an escape route via the windows was not feasible in view of the drops involved and the potential isolation

of any occupant at the rear of the building. The Tribunal decides that the only escape route for an occupant located in the bedroom at the rear of 23B Witham Road was through two high risk rooms, which created an unacceptable risk to the occupant's health and safety."

10. The RPT confirmed the prohibition order on its terms as issued by the respondent on 8 October 2010. At the same time the RPT confirmed the terms of the improvement notice issued on 23 November 2010 except that it accepted Mr Vaddaram's case on the sole issue in dispute, namely that the installation of electric panel heaters was a potential option in the remedial action required to deal with the hazard of excess cold.

11. Mr Vaddaram sought permission to appeal from the RPT on 4 April 2011 in relation to both the prohibition order and the improvement notice. The main grounds of appeal regarding the prohibition notice were twofold. Firstly, that the RPT had erred in law by not giving precedence to the fact that the current layout of the premises conformed with the Building Regulations and, secondly, that the RPT had erred in its conclusion that the windows in the bedroom of Flat 23B were unsuitable for use as a fire escape. In refusing permission to appeal on 20 April 2011 the RPT said that it had accurately stated the law with regard to the relevance of compliance with Building Regulations in connection with prohibition orders and referred to the decision of the Upper Tribunal, His Honour Judge Mole QC, in *Hanley v Tameside Metropolitan Borough Council* [2010] UKUT 351(LC). With regard to the second point the RPT said that Mr Vaddaram had not demonstrated any error with its findings about the unsuitability of the fire escape route. The RPT also rejected seven subsidiary grounds of appeal in respect of the prohibition order. The RPT said that it had found in favour of Mr Vaddaram on the only issue in dispute concerning the improvement notice. Consequently it did not understand Mr Vaddaram's grounds for permission to appeal in respect of the improvement notice and refused such permission.

12. Mr Vaddaram applied to this Tribunal on 3 May 2011 for permission to appeal against the RPT's decision in respect of both the prohibition order and the improvement notice. The main ground of appeal in respect of the prohibition order was again that there was an adequate fire escape route, via either one of two windows, from the bedroom in Flat 23B. Mr Vaddaram referred in his grounds of appeal to the National Guidance on Fire Safety in Residential Accommodation that was published by LACORS (Local Authorities Co-ordinators of Regulatory Services) in July 2008, a document that was not considered by the RPT.

13. In granting permission to appeal on 29 August 2011 the President made the following observations:

> "The LACORS guidance is clearly important and ought to be given great weight in a case such as this. It appears that the guidance was not drawn to the RPT's attention, and it cannot be criticised for not referring to it. But the council undoubtedly should have drawn the report to the tribunal's attention and it is appropriate in these circumstances that permission to appeal should be granted. There is no merit in the other matters raised in relation to the Prohibition Notice.

> The RPT found in favour of the applicant on the only disputed issue in relation to the Improvement Notice, and there is no basis therefore for an appeal.
>
> The appeal will be by way of rehearing and limited to the issue whether, in the light of the LACORS guidance, the appeal against a prohibition notice ought to succeed and the notice ought to be quashed."

14. The council served a notice of intention to respond to the appeal on 22 September 2011 and in a letter dated 29 September 2011 it stated:

> "Although this Council wishes to respond, it does not wish to be party in any appeal hearing, with regards to the decision made by the RPT."

The council went on to say that it considered "that it would be advantageous" for the Tribunal to take account of eight numbered documents that it enclosed with its letter. I have taken these documents into account when reaching my decision.

15. The appellant appeared in person and the respondent, in accordance with its expressed intention, did not appear or send a representative.

16. I made an accompanied internal inspection of Flat 23B and the outside of the subject property on 15 May 2012.

Statutory provisions

17. Part 1 of the Housing Act 2004 introduced a new system for assessing housing conditions which is to be used in the enforcement of housing standards. The new system operates by reference to the existence of category 1 or category 2 hazards on residential premises.

18. The new system is known as the Housing Health and Safety Rating System (HHSRS). Under section 5(1) of the 2004 Act, 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.

19. A "category 1 hazard" is defined under section 2(1) of the 2004 Act as a hazard of a prescribed description which falls within a prescribed band as a result of achieving, under a prescribed method for calculating the seriousness of hazards of that description, a numerical score of or above a prescribed amount. "Prescribed" means prescribed by regulations. In England those regulations are the Housing Health and Safety Rating System (England) Regulations 2005 (the 2005 Regulations).

20. Under the 2005 Regulations a hazard is of a prescribed description for the purposes of the 2004 Act where the risk of harm is associated with the occurrence of any of the 29 matters or circumstances listed in Schedule 1.

21. Where a person carrying out an inspection on behalf of the local housing authority under section 4 of the 2004 Act determines that a hazard of a prescribed description exists and considers, having regard to any guidance for the time being given under section 9 of the 2004 Act in relation to the assessment of hazards, that it is appropriate to calculate the seriousness of that hazard, the seriousness of that hazard shall be calculated in accordance with regulation 6(2) to 6(4) of the 2005 Regulations.

22. The guidance to which the local housing authority must have regard under section 9 of the 2004 Act is the Housing Health and Safety Rating System: Enforcement Guidance and the Housing Health and Safety Rating System: Operating Guidance, both of which were published in February 2006.

23. Both the 2005 Regulations and the published guidance contain detailed and complex explanations of the prescribed method for calculating the seriousness of hazards which is to be expressed as a numerical score. Regulation 7 of the 2005 Regulations prescribes the bands applicable to the range of numerical scores and regulation 8 provides that where a hazard falls within bands A, B or C the hazard is a category 1 hazard which gives rise to a duty on the local housing authority to act. Where the numerical score falls within any other band (E to J) it is a category 2 hazard which gives rise to a discretion for the local housing authority to act.

24. Section 5(2) of the 2004 Act, insofar as relevant to the present reference, defines "the appropriate enforcement action" as whichever of the following courses is indicated by subsection (3) or (4):

(a) Serving an improvement notice (section 11),

(b) Making a prohibition order (section 20),

(c) Serving a hazard awareness notice (section 28),

(d) Taking emergency remedial action (section 40) and

(e) Making an emergency prohibition order (section 43).

25. Subsection 5(3) states that if only one course of action within subsection (2) is available to the authority in relation to the hazard, they must take that course of action.

26. Subsection 5(4) states that if two or more courses of action within subsection (2) are so available, the authority must take the course of action which they consider to be the most appropriate of those available to them.

The HHSRS Assessment of Flat 23B

27. The respondent (Mr Deardon) inspected Flat 23B on 14 June 2010 and again on 10 August 2010. Mr Deardon assessed the risks to health and safety from the potential fire hazard under the HHSRS and derived a score of 8,965. That placed the hazard into Category 1 Band A. The appropriate enforcement action was considered to be a prohibition order. The RPT recorded Mr Deardon's reasoning as follows:

> "19(8) Mr Deardon justified his assessment on the basis that 23B Witham Road did not have any heating, which required tenants to use various types of stand-alone electric heaters. The flat when inspected had no fire detection system and inadequate fire doors. The present layout of the flat with the bedroom at the rear meant that the escape route was through two high risk rooms, the kitchen and the lounge. In Mr Deardon's opinion, a fire at the property with Flat 23B in its present state would almost certainly result in the death of the occupant(s)."

The Building Regulations: means of escape

28. Building work must be carried out so that it complies with the applicable requirements set out in Parts A-P of Schedule 1 to the Building Regulations 2010. Part B of Schedule 1 deals with fire safety. The Building Act 1984 gives the Secretary of State power to approve and issue documents containing practical guidance with respect to the requirements contained in the regulations. Approved Document B – Fire Safety: 2006 edition (amended 2010) was originally approved for the purpose of the 2000 regulations and is approved for the purpose of the 2010 regulations.

29. Part B1 of Approved Document B aims to ensure the satisfactory provision of means of giving an alarm of fire and a satisfactory standard of means of escape for persons in the event of fire in a building. In the Secretary of State's view the requirement B1 of the Building Regulations will be met if:

(a) there is sufficient means for giving early warning of fire for persons in the building;

(b) there are routes of sufficient number and capacity, which are suitably located to enable persons to escape to a place of safety in the event of fire; and

(c) the routes are sufficiently protected from the effects of fire, where necessary.

The ultimate place of safety is the open air clear of the effects of fire.

30. Section 2 of Approved Document B1 deals with means of escape. The relevant provisions in this appeal are those for escape from upper floors not more than 4.5m above ground level. The means of escape can be a window which complies with paragraph 2.8. That paragraph states:

> "2.8 Any window provided for emergency egress purposes and any external door provided for escape should comply with the following conditions:
>
> (a) The window should have an unobstructed openable area that is at least $0.33m^2$ and at least 350mm high and 450mm wide (the route through the window may be at an

angle rather than straight through). The bottom of the openable area should not be more than 1,100mm above the floor; and

(b) The window or door should enable the person escaping to reach a place free from danger from fire. It is a matter for judgment in each case, but, in general, a courtyard or back garden from which there is no exit other than through other buildings would have to be at least as deep as the dwelling house is high to be acceptable…"

The notes to paragraph 2.8 refer to a minimum guarding height of 800mm; state that locks (with or without removable keys) and stays may be fitted to egress windows, subject to the stay being fitted with a release catch, which may be child resistant; and specify that windows should be designed to remain in the open position without needing to be held by a person making their escape.

31. Paragraph 2.9 deals with inner rooms. An inner room is a room whose only escape route is through another room. An inner room which is a bedroom is only acceptable where it is provided with an emergency egress window which complies with paragraph 2.8. The note to paragraph 2.9 states that a room accessed only via an inner room (an inner-inner room) may be acceptable if it complies with paragraph 2.9, not more than one door separates the room from an interlinked smoke alarm and none of the access rooms is a kitchen.

32. Paragraph 2.10 sets out the compliance requirements for balconies and flat roofs:

"(a) The roof should be part of the same building from which escape is being made;

(b) The route across the roof should lead to a storey exit or external escape route; and

(c) The part of the roof forming the escape route and its supporting structure, together with any opening within 3m of the escape route, should provide 30 minutes fire resistance…"

33. Paragraph 2.11 states that where a balcony or flat roof is provided for escape purposes guarding may be needed.

LACORS

34. LACORS (now known as Local Government Regulation) is the local government central body responsible for overseeing local authority regulatory and related services in the UK. It is responsible for providing specialist advice and guidance; promoting good practice; influencing and lobbying on behalf of local government; and leading and partnering initiatives to enhance the reputation of regulatory services.

35. On 23 July 2008 LACORS published new National Guidance on Fire Safety in Residential Accommodation. The guidance covers certain existing residential accommodation including flats. It

is not aimed at new housing built to modern Building Regulations. The guidance adopts the risk based approach to fire safety that will satisfy both the Housing Act 2004 and the Regulatory Reform (Fire Safety) Order 2005.

36. The guidance does not introduce new standards or regulations but builds upon existing good practice and guidance currently in place around the country. It aims to provide landlords and enforcing officers with assistance in complying with the legislative requirements in a consistent and reasonable manner. It does not set prescriptive standards but provides recommendations and guidance for use when assessing the adequacy of fire precautions. It recognises that in practice the HHSRS is the principal tool used to assess and regulate fire safety standards.

37. The LACORS guidance does not apply to properties constructed or converted to a standard in compliance with the Building Regulations 1991 or later (and which still comply). Where a building did comply but has deteriorated significantly through lack of maintenance, damage or other alteration then it may require additional measures and the guidance should be applied.

38. Part C of the guidance outlines the general principles of fire safety in residential accommodation. Paragraph 12 deals with inner rooms. Under paragraph 12.2 an inner room which is a bedroom should only be accepted if:

- "The inner room has access to a suitable door opening onto an alternative safe route of escape, or it is situated on a floor which is not more than 4.5m above ground level and has an escape window leading directly to a place of ultimate safety;
- An adequate automatic fire detection and warning system is in place …; and
- A fire-resisting door of an appropriate standard is fitted between the inner and outer rooms (typically FD30S standard for non-high-risk outer rooms)."

Paragraph 12 continues –

"12.3 Escape windows are only acceptable if they meet the requirements of paragraph 14.

12.4 In addition to the precautions outlined in paragraphs 12.1-12.3 above, in all cases the following additional requirements must apply for the arrangement to be acceptable:

- Outer rooms should be under the control of the same person as the inner room;
- Nobody should have to pass through more than one outer room while making their escape; and
- Ideally the outer room should not be an area of high fire risk, but if this is impracticable and there is no other option it could be accepted in this situation as exit via an escape window provides an alternative."

39. Paragraph 14 of the LACORS guidance deals with the requirements for escape windows and provides:

> "14.1 Any window provided for emergency escape purposes should have an unobstructed openable area that is at least 0.33 m^2 and have a minimum 450mm height and 450mm width. The bottom of the openable area should not be more than 1,100mm above the floor.
>
> 14.2 Escape windows can only be considered if satisfied that it will be safe to use them in an emergency. They should meet the following criteria:
>
> - they serve rooms whose floor level is no more than 4.5m from the ground;
> - every room served by the escape window has access to it without entering another habitable room with a lockable door (unless of a type that can be overridden from outside the room without the use of a key, tool or numerical code) and any tenancy agreement should ideally prohibit the fitting of alternative or additional locks. (This will usually be achievable in single household occupancies and most shared houses, but is unlikely in a bedsit-type HMO);
> - if it is necessary to pass through the common escape route to reach the escape window, consideration should be had to the travel distance involved. Where the common escape route is not a protected route, unusually long travel distances may be unacceptable and other fire precautions may be necessary (this will not usually be the case in conventional houses);
> - occupiers are able-bodied individuals with no specific high-risk characteristics and who can reasonably be expected to exit via the window unaided;
> - there is no basement well or other encumbrance beneath the window such as railings or a conservatory;
> - the escape window is openable from the inside without the use of a removable key; and the ground below is level and free of obstructions; and
> - the window or door should lead to a place of ultimate safety, clear of the building. However, if there is no practical way of avoiding escape into a courtyard or back garden from where there is no exit, it should be at least as deep as the building is high.
>
> …
>
> 14.3 If any of the above requirements cannot be met, the use of the escape window should not be accepted and an alternative solution should be adopted."

The case for the appellant

40. I restrict my consideration of the appellant's evidence to that part of it relevant to the sole issue for which permission to appeal was granted.

41. Mr Vaddaram emphasised that Flat 23B conformed with the Building Regulations in respect of means of escape. He said that the two windows in the flat were compliant as fire escape windows and satisfied the dimensional criteria described in paragraph 30 above.

42. The fire officer's comments in his letter dated 24 February 1998 related to outdated legislation and an outdated layout for Flat 23B. Mr Vaddaram also thought that the fire officer had written the letter on the basis that the property was a house in multiple occupation in accordance with the Housing Act 1985. But the appeal property was not a HMO, it was a self-contained flat. Therefore he considered that the fire officer's comments had been based on legislation that did not apply to Flat 23B. He also drew attention to letters from the respondent council dated 31 July 2002 and 13 January 2005 which referred again to houses in multiple occupation under the Housing Act 1985. Such references were erroneous. The council had produced a letter from the fire officer dated 12 July 2002 at the RPT hearing but it had not provided Mr Vaddaram with a copy either then or subsequently. The RPT was wrong to place more weight on the fire officer's opinion than on the building officer's confirmation that the flat satisfied the requirements of the Building Regulations. Mr Vaddaram said that the LACORS guidance should be used as a "best practice" guide. He said that he wanted to ensure his tenants' safety and considered that Flat 23B conformed with the guidance in respect of fire safety. Mr Vaddaram said that the respondent was wrong to refer to paragraph 18.1 of LACORS since this dealt solely with the requirements for external stairways as secondary means of escape and there was no such stairway at the appeal property.

43. The RPT's view was that an escapee from a fire at Flat 23B via the bedroom window would be isolated at the rear of the property and not easily accessible to the fire service. Such an escapee would exit onto the flat roof and from there could jump into the car park in Cheshire Court or into neighbouring gardens. The car park was lit and surrounded by houses and the appeal property was located in the town centre, so it was never pitch black. A guard rail around the edge of the flat roof would increase rather than decrease the risk to an escapee. An escapee from the side window would have an unobstructed drop onto level ground from whence he could either go down the side access to the front of the property or, alternatively, go through the gate at the rear of the premises into the said car park. Either route was an acceptable means of escape.

44. Mr Vaddaram said that the photograph forming document 3 of the respondent's bundle was misleading. That picture showed a tree outside the side window and no such tree existed. Mr Vaddaram submitted a witness statement dated 18 November 2011 from Ms Juliette North who rented Flat 23A (one of the ground floor flats) between 6 September 2010 and 26 June 2011. The entrance to her flat was located in the rear yard of the property close to the first floor side window of Flat 23B. She stated:

> "During my tenancy the rear yard was always clear and there was no shrub or tree obstructing the entrance to my flat or passageway. I would certainly [have] been aware of any such obstacle as this was the only entrance to my flat, which I used to carry my large pushchair and shopping into my flat."

Mr Vaddaram's exhibited photographs showed that there was no tree or other obstruction blocking the escape route from the side window of Flat 23B.

45. The layout of Flat 23B had changed from when the fire officer and the RPT had inspected it. The bedroom was no longer an inner-inner room. New heating panels had been installed and smoke and heat detectors fitted. New uPVC windows had replaced the old wooden frame windows.

46. The plan that the respondent (Mr Stowe) had submitted to the RPT showing its preferred layout was unworkable for two reasons. Firstly, it showed a protected exit corridor from the new lounge/kitchen leading directly to the landing. Mr Vaddaram said that the building officer had advised him that the lack of a fire resisting lobby meant that this would not satisfy the Building Regulations. Secondly, it showed the bathroom for Flat 23B in a location that formed part of Flat 23C. The respondent's proposals meant that Flat 23C would no longer have a bathroom.

47. Mr Vaddaram also made a comparison between Flat 23B and Flat 23C, the flat at the front of the first floor. He said that the layout of Flat 23C also had a bedroom that was an inner room requiring exit via a living room but no prohibition notice had been served in respect of that flat.

48. Mr Vaddaram said, contrary to the respondent's statement, that there had never been a grade A fire alarm system at the property nor was there a requirement for one. The respondent's officers had failed to provide any evidence of the previous existence of such a system during their inspections of the property despite being asked to do so.

The case for the respondent

49. The respondent served a notice of intention to respond but did not wish to be a party in the appeal hearing. In a letter dated 29 September 2011 the respondent wrote that:

> "The council considers that it would be advantageous for the Tribunal to take into account the enclosed documents."

There were eight such documents.

50. Document 1 was a plan dated January 1998 prepared by the council and sent to the fire officer for comment. This plan showed the bedroom at Flat 23B as an inner-inner room with the escape route via the kitchen. The fire officer commented on this plan in his letter dated 24 February 1998 (document 2). He said that the arrangement of rooms was unacceptable.

51. Document 3 was a photograph from the side window of the bedroom. This showed the old wooden frame window and a tree (or large shrub) in the rear yard below. The respondent said that the means of escape was obstructed by the tree.

52. Document 4 was a photograph from the rear window. This showed the old wooden window with a casement opening on the left hand side. The respondent said:

> "Exit through this rear window would mean landing on a thin blue slate roof, which may cause injury and prevent the occupant escaping from the building, which then leads onto a flat roof area with no guard rails around the perimeter. During the night hours this area would be pitch black, and therefore in the opinion of the Council under the Housing Health and Safety Rating System, this window was unacceptable as a secondary means of escape."

53. Document 5 was an extract from the introduction to LACORS. The respondent highlighted the passage at paragraph 1.1 which stated that the document was intended as guidance only.

54. Document 6 was a copy of paragraph 2.3 of LACORS. The respondent said that LACORS would:

> "Not normally apply to this property as the building was converted under the 1991 Building Regulations.
>
> However, this property has significantly deteriorated and alterations have been carried out with regards to removing the existing installed "LD2 grade A" fire alarm system, which was in situ on the last inspection carried out by this council in 2005."

55. Document 7 was an extract of paragraph 18.1 of LACORS which the respondent said provided that an external stairway should not pass within 1.8m of any windows or doorways unless fire rated to a minimum of half an hour. The respondent said that none of the windows and doorways to the two ground floor flats within the rear yard complied with this guidance. The respondent recognised that paragraph 18.1 was "particularly dealing with secondary means of escape external staircases" but that these criteria had been applied in the past with regard to secondary means of escape windows, in conjunction with the fire authority prior to the publication of the LACORS guidance.

56. Document 8 was an extract from paragraph 14.2 of the LACORS guidance. This stated:

> "Escape windows can only be considered if satisfied that it would be safe to use them in an emergency."

The respondent did not consider at the time the prohibition order was served that either of the two windows in the bedroom at Flat 23B were safe to use as a secondary means of escape.

Conclusions

57. This is an appeal by rehearing. As such it is for me to determine, on the evidence before me, whether the appellant has discharged the onus of proof to show that the RPT decision was wrong. I am not concerned to see whether the RPT was right, on the evidence that it had before it, to decide the appeal as it did.

58. A factor of particular importance in the appeal is the physical change in the layout and condition of the appeal property since the RPT hearing. The RPT in describing "the present layout of 23B Witham Road" treated the bedroom as an inner-inner room. The respondent did likewise. As recorded at paragraph 19(8) of the RPT's decision:

> "The present layout of the flat with the bedroom at the rear meant that the escape route was through two high risk rooms, the kitchen and the lounge."

The fire officer in letters dated 24 February 1998 and 12 July 2002 (upon which the RPT placed significant weight) refers to the bedroom as an inner-inner room and therefore an unsatisfactory arrangement.

59. The bedroom is no longer an inner-inner room. It is now an inner room adjoining an outer room which is a recently fitted out lounge/kitchen. There is a fire door between these rooms. There are also newly installed heat (kitchen) and smoke (lounge) detectors. The two old wooden windows in the bedroom have been replaced with uPVC units. The rear window now has a casement that opens on the right hand side. Persons exiting through this window therefore step directly onto the flat roof below and not onto the sloping roof that lies underneath the left side of the window (which is where the wooden casement used to be). The side window is now horizontally hinged with a releasable restrictor stay which was installed because of the low sill height (below 800mm).

60. There is now a movement activated light positioned immediately above the rear window and a fluorescent paint strip one foot inside the edge of the flat roof. There is also now a fire escape sign affixed to the yard door leading to the car park at Cheshire Court. There are no obstructions to escape from the side window. Document 3 produced by the council is misleading in this respect. There is no tree or large shrub in the yard outside the side window of Flat 23B. Finally, the flat now has electric panel heating rather than stand-alone electric heaters. In my opinion the changes which have been made since the RPT's decision are material improvements to health and safety.

61. The RPT determined that it was not feasible to escape the bedroom via either of the windows because of the drops involved and the potential isolation of any occupant at the rear of the building. It said that the only escape route was through two high risk rooms which created an unacceptable risk.

62. It is not disputed that, at all relevant times, the appellant complied with the Building Regulations. Such compliance was said by the RPT to be a material consideration in determining the existence of a category 1 hazard. In its refusal to grant permission to appeal to this Tribunal the RPT referred to *Hanley*. In that appeal His Honour Judge Mole said at [25]:

> "I return to those matters that are of central relevance to this appeal. Firstly, in paragraph 23 of the decision the RPT says that where a hazard has been identified under the provisions of the Housing Act 2004, compliance with the Building Regulations is not a material consideration. I have no doubt that, stated thus bluntly, that is an error of law. It must be a "material consideration" whether something that is said to be a hazard either complies with the Building Regulations or might, without too much trouble, be made to comply with the Building

Regulations. It is evident from the HHSRS Operating Guidance that in many instances (hazards on stairs for example; see paragraph 21.29) the Building Regulations are directly relevant. Of course, the fact that a situation that is described as a hazard nonetheless complies with the Building Regulations does not mean that it cannot be a hazard. It is possible for a hazard under the Housing Act and HHSRS Regulations to comply with the Building Regulations, yet still be a hazard. It may be that this is all the RPT intended to convey and of course the words must be read in the context of the whole paragraph. But, as Mr Hanley fairly submitted, if that is what the RPT meant, it was certainly not what it said. Compliance with the Building Regulations, in my view, is plainly a material consideration that the Tribunal must bear in mind."

63. The compliance of the windows at Flat 23B with Approved Document B1 of the Building Regulations is a matter to which I attach significant weight. The LACORS guidance states in terms that it does not apply to properties converted to a standard in compliance with the Building Regulations. The appellant argues that notwithstanding this statement LACORS should be treated as a guide to best practice. The respondent suggested that the property had significantly deteriorated and asserted that a "LD2 Grade A" fire alarm system had been removed. (No evidence of such removal has been submitted to this Tribunal). The council referred to and relied upon LACORS in its submitted documents. In my opinion the LACORS guidance is a relevant consideration in this appeal.

64. The bedroom at Flat 23B appears to conform with paragraph 12.2 of LACORS. The bedroom has an escape window no more than 4.5m above ground level leading directly to a place of safety, there is a fire detection system in the flat (and, in any event its provision is a requirement of the improvement notice) and a fire door has been installed between the bedroom and the lounge/kitchen.

65. The subject bedroom also complies with paragraph 12.4 of the guidance. In particular Flat 23B is not a HMO (as the fire officer and, at least at certain times, the council appear to have believed) but is a self-contained flat. The outer room (lounge/kitchen) is therefore under the control of the same person as the inner room.

66. The requirements for the escape window(s) are set out in paragraph 14 of the LACORS guidance. Both windows satisfy the dimensional requirements set out in paragraph 14.1. Paragraph 14.2 states that escape windows can only be considered if satisfied that it would be safe to use them in an emergency. The respondent says that it considered that neither of the bedroom windows were safe to use as a secondary means of escape. The RPT agreed that the windows were unsuitable for escape; the rear window because it would leave an escapee isolated at the rear of the property and the side window because it involved a fall from the first floor onto a hard surface.

67. In reaching this conclusion neither the respondent nor the RPT applied the seven criteria that are set out in paragraph 14.2 of LACORS. In my opinion the application of those criteria is a material consideration when deciding whether or not a window is a satisfactory means of escape in an emergency. I consider these criteria in turn.

(i) *The window should serve a room whose floor level is no more than 4.5m from the ground.* The rear window gives direct access onto a flat roof, approximately 1.5m below the opening of the window. The flat roof is some 2.75m above ground level. The side window is 3.2m above ground level (from sill height).

(ii) *Every room served by the escape window has access to it without entering another habitable room with a lockable door.* The windows at Flat 23B only serve the bedroom as a means of escape.

(iii) *If it is necessary to pass through the common escape route to reach the escape window, consideration should be had to the travel distance involved.* This criterion does not apply to Flat 23B.

(iv) *Occupiers are able-bodied individuals with no specific high-risk characteristics.* This is a prospective condition of occupancy there being no current occupiers due to the prohibition notice. The appellant said at the hearing that it would conform with this requirement subject to compliance with the Disability Discrimination Act 1995. Under section 22 of that Act it is unlawful for a person with power to dispose of any premises to discriminate against a disabled person by refusing to dispose of those premises to them. Under section 24 a person discriminates against a disabled person for a reason relating to the disabled person's disability if he treats them less favourably than he does or would treat someone to whom that reason does not apply and he cannot show that the treatment in question is justified. One of the grounds justifying such treatment is that the treatment is necessary in order not to endanger the health or safety of any person, including a disabled person (section 24(3)(a)). The appellant states that a disabled person wishing to live at 23 Witham Road would, where possible, be offered a ground floor flat.

(v) *There is no basement well or other encumbrance beneath the window.* There is no such encumbrance beneath the side window. There is a flat roof directly below the rear window. This effectively reduces the vertical distance to be travelled by an escapee by dividing the escape into two distinct drops. I do not consider this to be an encumbrance. The casement window is now located on the right hand side which means that a person exiting from the flat does not have to step onto a sloping roof.

(vi) *The escape window is openable from the inside without the use of a removable key; and the ground below is level and free of obstructions.* Both windows have locks with removable keys. The side window has two locks, one to open it and one to release the restrictor stay. The LACORS guidance on lockable windows differs from the 2006 edition of Approved Document B1 of the Building Regulations which came into effect in April 2007. One of the main changes to that document was Note 2 to paragraph 2.8 which states that locks (with or without removable keys) and stays may be fitted to egress windows. This amendment followed a consultation exercise in May 2006 in which 83% of respondents supported the proposed guidance on locks and stays for emergency egress windows. In my opinion the Building Regulations should take precedence over the LACORS guidance on this point and the presence of lockable windows in Flat 23B should not, in itself, require the rejection of those windows as a means of escape.

The second part of this criterion requires the ground below the window to be level and free of obstructions. This is true of both windows but exit from the rear window requires a second drop from the flat roof either into the car park or into neighbouring gardens. While there were no cars parked against the ground floor flat at No.23 at the time of my site inspection there are car parking spaces marked in that location. There are also wheelie bins stored against this wall. There is no guarantee that at a time of emergency the ground below the flat roof of No.23 will be free of obstruction. However, unlike a direct escape from the side window, escape from the rear window means that a person can walk along the length of the flat roof of the ground floor flat and jump, or lower themselves, down at any point. They can also exit into the garden at the rear. Given that the roof is illuminated by a movement activated light I am satisfied that exit from the rear window satisfies this criterion.

The council's building officer said that escape from the rear window complies with the Building Regulations and so it appears that paragraph 2.10(c) of those regulations is satisfied, see paragraph 32 above. (The rear window escape route complies with paragraphs 2.10(a) and (b).)

The RPT referred to an escape through the side window involving a fall onto a hard surface. But the hardness of the surface is not a criterion that appears in either the Building Regulations or the LACORS guidance. What matters is that the surface is level and free of obstruction. It is not a requirement that there be a soft landing surface such as grass.

(vii) *The window should lead to place of ultimate safety, clear of the building.* The RPT considered that escape through the rear window would involve a drop onto the flat roof of No.23 which would leave an escapee "isolated at the rear of the property". It is not clear from this whether the RPT expected an escapee to remain on the flat roof. I see no reason to make that assumption. I am satisfied that an able-bodied individual will continue their escape to ground level, either into the car park or into the gardens at the rear of No.23. I consider that this would bring them to a place of ultimate safety, namely in the open air clear of the affects of fire. Escape from the side window means dropping into the yard between Flats 23 (rear) and 23A (front). From there an escapee can turn right and walk along the pathway to the front of the property or turn left, open the gate marked fire exit and enter the car park. Either way I consider that there is a viable means of reaching a place of ultimate safety.

68. In my opinion, subject to my comments about criterion (vi) where I give precedence to the Building Regulations, the means of escape via the bedroom windows of Flat 23B satisfy the LACORS guidance and the Building Regulations on this issue.

69. I would add three further comments:

(i) The respondent relies upon paragraph 18.1 of the LACORS guidance to support their argument that the windows do not provide a satisfactory means of escape. That paragraph is solely concerned with external stairways and does not apply in the present appeal.

(ii) The council submitted its own preferred design for Flat 23B in drawing no.106/RW 23 New. I do not consider this design to be satisfactory for the reasons given by the appellant at paragraph 46 above.

(iii) In their decision the RPT placed weight upon and quoted from the letter from the Lincolnshire Fire Service dated 12 July 2002. That letter did not form part of the council's bundle before the RPT but was handed to the tribunal at the hearing. It was shown, but apparently not copied, to the appellant. It has not been produced at this hearing. The council say that they cannot find a copy of that letter. The RPT have also been unable to find the copy that they relied upon in reaching their decision. I am concerned that such a potentially important document, upon which the RPT said in terms that it had placed more weight than the views of the building officer, has been mislaid and not produced before this Tribunal. That is not the appellant's fault since apparently he was not given a copy of the document by the council. I place no weight on the said letter other than to note that it apparently referred to the bedroom being an inner-inner room (see paragraph 8 above). This is incorrect given the current layout of Flat 23B.

70. I am satisfied on the evidence before me and the facts about the property as they now are, that the appellant has shown that the RPT decision was wrong. I therefore allow the appeal and quash the prohibition order. The appellant is reminded, however, that the terms of the improvement notice remain in force as amended by the RPT and as varied by the respondent in its notice of revocation and variation served under section 16 of the Housing Act 2004 on 8 February 2012.

71. A letter on costs accompanies this decision which will become final when any question of costs has been determined.

Dated 26 June 2012

A J Trott FRICS

Addendum on costs

72. I have now received submissions on costs from both parties.

73. The applicant submits that he has won his appeal and should therefore receive his costs. He argues that the respondent was confrontational and obstructive throughout the appeal and that it acted arbitrarily during the proceedings. It should have been possible to resolve the dispute which, fundamentally, consisted only of a difference of opinion regarding the layout of Flat B; the appellant having accepted most of the required works itemised under the prohibition notice. The appellant had made clear to the respondent his intention to undertake the specified improvements. In addition to his costs of the appeal the appellant also asks for damages comprising lost rent, marketing costs and additional development costs.

74. The respondent submits that each party should bear its own costs because the appellant had complied with the majority of requirements under the prohibition notice at some point between the RPT hearing and the hearing before this Tribunal. Had the appellant approached the respondent to inform it about these works then the issue might have been resolved directly without the need for the appeal hearing. The respondent says that it made a proper and reasonable decision to serve the prohibition order and the improvement notice and that this process would be undermined if the council cannot exercise its functions and powers without the fear of financial penalty.

75. The general rule is that the successful party ought to receive their costs. I have allowed the appeal and in my opinion there are no special reasons for not following the general rule. I therefore award the appellant his costs. The appellant has submitted a schedule of costs divided between "hearing costs" and "damages". I have no jurisdiction to consider a claim for damages and I make no award in respect of it. The hearing costs are claimed in the sum of £2,102 including the hearing fee of £500. I make a summary assessment of £1,000 which I consider to be proportionate. In addition the respondent shall also reimburse the hearing fee of £500 to the appellant in the event that the appellant's current application for remission of the hearing fee is unsuccessful and upon confirmation from the Tribunal that the fee has been received from the appellant.

Dated 13 August 2012

A J Trott FRICS