FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BH/HIN/2016/0027**
Property	**:**	**148 Wallwood Road, London E11 1AN**
Applicant	**:**	**Hadi Tolui**
Respondent	**:**	**London Borough of Waltham Forest**
Representative	**:**	**Mr Ron Cheriyan**
Type of application	**:**	**Appeal against an Improvement Notice**
Tribunal member(s)	**:**	**Ruth Wayte (Tribunal Judge)** **Christopher Gowman (MCIEH)**
Date and venue of hearing	**:**	**9 February 2017 at 10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**3 March 2017**

DECISION

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Decisions of the tribunal

(1) The tribunal determines that the Improvement Notice is quashed.

Background

1. The Property is a Victorian house on three storeys, which at the time of the service of the Improvement Notice was occupied by a protected tenant, Mrs Shelly and her two sons. By the date of the hearing the Applicant had obtained vacant possession and was considering his options in relation to remodelling, selling or re-letting the Property.

2. There had been some history of outstanding works to the Property, although the Applicant maintained that the tenant had failed to maintain the Property in accordance with the terms of her agreement and had refused him access to inspect the Property and/or carry out any necessary works. He produced a letter from the Respondent dated 14 April 2015 which gave details of an inspection by Mr Mohammed Sajid, an Environmental Health Enforcement Officer. Mr Sajid had identified a number of defects which he had categorised as Category 2 hazards in accordance with the Housing Act 2004 and had provided a Schedule of Works to be carried out to remedy those defects. The Applicant stated that he had made that approach to try and force the tenant's hand.

3. It seems that despite that intervention nothing was progressed until after the tenant approached the Respondent in April 2016, raising concerns about how the works could take place with her and her family in occupation of the property. Ms Lovett, Housing Standards and Food and Safety Manager, states in her witness statement that the Applicant "*seemed very keen to get started*" on the works. Following a meeting with all the parties at the Property, an agreement was reached as to the order of the works, with the structural works to remedy damp being carried out first and installation of central heating to follow. Works started in May 2016.

4. On 21 June 2016 Ms Lovett and a colleague Ms Howard, an Environmental Health Enforcement Officer, visited the Property to check on the progress of the works. Ms Howard wrote to the Applicant after that visit confirming "*that the Service is happy with the progress of the works*" but required hot water to be provided to the Property within the next two weeks. The tenant and one of her sons had vacated the Property while the works were ongoing, although one son remained behind and the Respondent was concerned that he had no access to hot water at the date of their inspection.

5. Ms Lovett and Ms Howard returned to the Property on 23 August 2016. It was during that visit that the deficiencies and hazards listed in the Improvement Notice were identified. Ms Howard's statement confirms that generally the works that had been carried out were satisfactory, apart from the absence of heating in the kitchen and some remaining damp in the basement. Ms Howard subsequently drew up a further Schedule of Works dated 12 September 2016. In the letter accompanying the Schedule she had identified one Category 1 hazard and 6 Category 2 hazards. Her letter requested that the Applicant inform her of his intentions within the next 14 days.

6. On 19 September the Applicant left the country for Iran, he accepted that he did not respond to the letter within 14 days, stating that he was occupied with urgent family business. On 3 October 2016 Ms Howard sent him an email asking for him to contact her by 4pm on Friday 7 October 2016. On 8 October the Applicant replied, stating that "*due to personal circumstance I cannot carry out any work or respond comprehensively to your emails before 5 November as I am not in London*." Ms Howard responded to that email on 11 October stating: "*You have had a considerable amount of time since our last joint visit to the above property which took place on 23 August 2016 and so delaying any works carried out until the earliest 5th November 2016 is not considered reasonable*." In the circumstances the Council stated that it intended to serve an Improvement Notice. The Applicant replied to that email on 13 October 2016 confirming he was out of the country and he needed to obtain legal advice back in London before he could respond in relation to the list of works.

7. The Respondent subsequently served an Improvement Notice on 26 October 2016. That Notice gave an operative date of 16 November 2016, with the works to be carried out within 2 months of that operative date. The Notice identified 9 hazards in total: one category 1 hazard in relation to excess cold and 8 category 2 hazards covering a range of items. The Applicant gave evidence that he had fitted window restrictors in response to one of those category 2 hazards but in any event he appealed against the Notice on 16 November 2016.

Grounds of Appeal

8. The Applicant's Grounds of Appeal set out the fact that he had already carried out major works to the Property and in the circumstances the Respondent should have allowed him additional time to carry out the further works for which he was responsible, particularly in the circumstances when they were aware that he was out of the country. He also queried his responsibility for several of the hazards on the basis that he considered the works were the tenant's responsibility under the terms of her agreement.

9. In January 2017 the Applicant confirmed that the tenant had left the Property. At the hearing he stated that he thought it was a consequence of the increase of rent due to the works.

10. Directions were given in relation to the application on 25 November 2016, they identified the following issues:

    - Has the council gone through the necessary steps prior to the issue of the improvement notice?
    - Do hazards exist and if so what category?
    - Should the council have taken enforcement action?
    - If so, what enforcement action is appropriate?
    - In an improvement notice is the correct action, should the terms be varied (specified remedial works and/or timescale)?
    - If works in the schedule are found to require vacant possession would a prohibition order be more appropriate?

11. The parties agreed that the final issue was irrelevant, given the fact that the Property was vacant at the date of the hearing. The Respondent had also already offered to give the Applicant more time to carry out the works, provided they were completed before the Property was reoccupied.

12. The tribunal's powers on appeal are set out in Schedule 1 to the Housing Act 2004 at paragraphs 15. The appeal is to be by way of a re-hearing but may be determined having regard to matters of which the authority were unaware. It is common ground that the tribunal should have regard to relevant matters at the date of the hearing and that the tribunal has the power to confirm, quash or vary the improvement notice.

<u>Necessary steps prior to issue</u>

13. Improvement notices are described in sections 11 to 19 of the Housing Act 2004. Essentially, section 11 sets out the duty to serve a notice where the local housing authority is satisfied that a category 1 hazard exists (or take other enforcement action) and a power to serve a notice in respect of category 2 hazards. The Act does not set out any steps prior to issue of a notice for either category, although the established practice is for the local authority to send the owner of the property the schedule of works and ask for a response before proceeding to a notice.

14. The Applicant's case was that in relation to the works identified in the Respondent's letter dated 12 September 2016 they had failed to allow him a reasonable time to respond. He had notified them he was out of the country and they were aware he had queried whether he was in fact liable for some of the works, which he felt were the responsibility of the tenant. In his Grounds of Appeal, the Applicant had identified four of the hazards identified as questionable for this reason.

15. In response, Mr Cheriyan stated that the Respondent was entitled to take the view that the Applicant would not attend to the works without service of an Improvement Notice. As to whether the works were in fact the Applicant's responsibility, he relied on the fact that the Improvement Notice must be served on the person having control of the dwelling. There was no dispute that this was the Applicant.

16. With respect to Mr Cheriyan, this did not answer the question raised by the Applicant. In her second witness statement Ms Lovett had referred to the Housing Act 2004 Operating Guidance and attached the section titled "Landlord's Responsibility". This made it clear that for enforcement purposes, the rating System is concerned with those matters which can properly be considered the responsibility of the owner or landlord.

17. The Applicant's case was that he was not responsible for certain works on the basis that the damage had been caused by the tenant or the hazards raised were in relation to items for which the tenant was responsible, in particular the:
    - damage to the plug sockets on the second floor;
    - damage to the bannister;
    - lack of floor coverings in the hallways, living room and bedroom;
    - removal of the derelict garden shed with an asbestos roof;
    - testing of the gas appliances.

    Ms Howard confirmed that the bannister appeared to have been damaged deliberately, by cutting through the spindles. The Applicant gave evidence that the shed and the gas appliances belonged to the tenant and that under the terms of the tenancy, the tenant was responsible for carpets and curtains.

18. A3 of the Operating Guidance states: "*The landlord (or owner) however, is not responsible for the state of any fixtures or fittings provided by the occupier unless they have been adopted by the landlord (or owner) and are not removable*." Paragraph A8 confirms that responsibility for installations is "*not intended to include any removable equipment or appliances which use gas or electricity as a source of power…unless these are provided by the landlord*." The Applicant maintained that in these circumstances he should have been given the opportunity to discuss his concerns about the works with the Respondent before the Notice was issued.

<u>Do hazards exist and if so what category?</u>

19. The key hazard which gave rise to the service of the Notice was the finding of a category 1 hazard in respect of excess cold, based on the lack of heating to the basement kitchen and WC and the gap between the floor and the wall in the basement living room. The justification in Ms Howard's report stated that the lack of heating meant a healthy indoor temperature cannot be achieved and the gap at the bottom of the wall could lead to an uncontrollable draught and the risk that the living room will have difficulty maintaining a healthy indoor temperature.

20. A rating score of 10,234 had been calculated by Ms Howard, who confirmed that any score over 1,000 would lead to the hazard being classified as category 1. The main reason for such a high score was due to the increase in the likelihood of harm from the national average of 1 in 330 to 1 in 32. This was based on the vulnerability of the tenant who was in her 80s.

21. The Applicant pointed out that the first Environmental Health Officer who attended the Property when it had no central heating whatsoever rated the hazard at category 2. When he fitted the central heating he was advised by the engineer that the three radiators in the basement would be sufficient to heat that floor – two in the living room and one in the hallway. The kitchen and WC were both small rooms in the rear extension which opened onto the hallway. The tenant had fitted the kitchen and there was no room for a radiator in that room, as had previously been discussed with the Respondent. In any event the boiler in the kitchen and any cooking would provide some heat and any occupier was unlikely to spend long periods of time in either room. He thought the gap identified in the living room had been caused by the tenant but in any event pointed out that the two large radiators would be more than adequate compensation in relation to any draught.

22. There was no evidence that Ms Howard had taken into account the heating provided elsewhere in the basement, the size or purpose of the rooms without heating, or the presence of the boiler or cooker in the kitchen. Ms Howard confirmed that she had not taken any actual temperature readings, although her inspection was of course in the summer.

Should the council have taken enforcement action and if so, what?

23. These questions really depend on the tribunal's findings in relation to the first two issues. Although the Respondent appeared to rely mainly on the alleged inaction on the part of the Applicant following its letter dated 12 September 2016; it appears likely to the tribunal that it was heavily influenced by Ms Howard's finding of a category 1 hazard, triggering the duty to take action. So did the evidence support this finding?

24. The tribunal determines that the Respondent has failed to provide sufficient evidence to support the finding of a category 1 hazard in respect of excess cold, following the installation of central heating by the Applicant. The Respondent had no answer to the Applicant's challenge set out in paragraph 20 above and the justification within the report appeared to ignore the obvious mitigating factors. Although it is right that the tenant was a woman in her 80s, she had lived in the Property for over 50 years without any central heating at all without apparent harm. The tribunal is unable to accept that the introduction of central heating to the Property with the exception of the small kitchen and WC would have such an apparently huge deleterious effect. No evidence was produced that the tenant herself had requested additional heating or raised concerns.

25. If the tribunal is wrong on this point and the Respondent has evidenced their finding, the tribunal considers that a Hazard Awareness Notice would have been sufficient action in all the circumstances. In particular, applying the facts set out in paragraph 21, the tribunal does not accept that remedial action was required in this instance.

26. Assuming that all of the identified hazards are category 2, the tribunal determines that the Respondent should have allowed the Applicant more time to address their letter before proceeding to enforcement. Although some of the hazards had been identified at the meeting on 23 August 2016, Ms Howard had told the Applicant that she would send a Schedule of Works and in those circumstances it was reasonable for him to wait for that schedule before incurring further expense. Of the hazards identified, the Applicant had some real concerns which appear to be supported, at least in part, by the operating guidance relied on by the Respondent. Given that the Respondent acknowledged that none of the works were urgent and against a backdrop of the Applicant having carried out major works with which the Respondent were largely satisfied, there was really no need to issue a notice. That said, the Applicant might have been more open about his reason for leaving the country. The tribunal accepts that he is entitled to privacy but if the Respondent had understood the nature of his absence, they may have been more inclined to await his return.

27. In the circumstances the tribunal considers that in the absence of any category 1 hazard, no enforcement action was justified prior to the Applicant's return to the country on 5 November. In the event that the Respondent had correctly assessed the Excess Cold hazard as Category 1, a Hazard Awareness Notice would have been more appropriate for the reasons set out in paragraph 25.

28. In addition to the Grounds of Appeal mentioned in paragraph 8 above, the Applicant alleged that there must have been another unrelated motive behind the Respondent's decision to issue a notice. That allegation was never spelt out by the Applicant and was strongly refuted by the Respondent. For the avoidance of doubt, the tribunal dismisses this allegation. There was no evidence to support it: the tribunal

considers that the Respondent was acting as a responsible local authority, even if the tribunal does not agree with the action taken.

29. Given its findings and the fact that the Property is currently vacant, the tribunal determines that the Improvement Notice should be quashed. It is clearly in the Applicant's interest to ensure that the Property is properly maintained but until he decides whether to sell, remodel or re-let the Property there is no need to attend to the works identified by the Respondent, which were in any event based on the previous occupation by Mrs Shelley.

30. The Applicant had applied for his application fee of £300 to be repaid by the Respondent. Taking all the circumstances into account, the tribunal declines to make such an order.

Name: Ruth Wayte **Date:** 3 March 2017

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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

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

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

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

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).