FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BE/HIN/2015/0005**
Property	**:**	**19 Relf Road, London SE15 4JS**
Applicant	**:**	**Mr T Hadjimina**
Representative	**:**	**In person**
Respondent	**:**	**London Borough of Southwark**
Representative	**:**	**Mr A Ranatunga, Counsel**
Also present	**:**	**Ms X Baldiviezo (Council Enforcement Officer), Mr G Magee (Council Enforcement Officer) and Ms S Malcolm (Council Unit Support Officer)**
Type of Application	**:**	**Appeal against an Improvement Notice under the Housing Act 2004**
Tribunal Members	**:**	**Judge P Korn (Chairman)** **Mr H Geddes RIBA MRTPI**
Date and venue of Hearing	**:**	**29th April 2015 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**19th May 2015**

DECISION

Decisions of the tribunal

(1) In Schedule 1 to the Improvement Notice the reference to "Falls associated with Baths etc" (second section on the second page of Schedule 1) is varied so as to read "Falling on Level Surfaces etc".

(2) In all other respects the Improvement Notice is confirmed.

(3) The Applicant's and the Respondent's respective cost applications are both refused.

The application

1. The Applicant has appealed to the tribunal, pursuant to paragraph 10(1) of Part 3 of Schedule 1 to the Housing Act 2004 ("the 2004 Act"), against an improvement notice (the "Improvement Notice") issued by the Respondent under sections 11 and 12 of the 2004 Act and dated 19th January 2015.

2. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

3. The Applicant appeared in person and the Respondent was represented by Mr Ranatunga of Counsel.

Preliminary point

4. At the hearing it was noted that two occupiers of the Property, Zako Navon and Geraud Maronne, had applied to be joined as co-Respondents. As explained at the hearing, we do not consider that any useful purpose would have been served by these persons being joined as co-Respondents and therefore the application was refused.

The background

5. The Property is described in the application as an 8 bedroom end of terrace house. We did not inspect the Property but were shown copy photographs. Neither party requested an inspection and we did not consider that an inspection was necessary, given the substantial amount of information (including the copy photographs) contained in the hearing bundle and the fact that both parties were afforded an opportunity to make oral submissions at the hearing on the relevant issues.

6. The Applicant's basic grounds for his application were attached to the application form itself. At a case management conference held on 3rd March 2015 the Applicant was directed to provide an expanded statement of the reasons for the appeal. However, no such expanded statement has been provided by the Applicant, and neither did the Applicant write to the tribunal at any stage to explain why – if such was the case – he was unable or unwilling to provide an expanded statement.

The Improvement Notice

7. The Improvement Notice states that in the Respondent's opinion category 1 hazards and a category 2 hazard exist on the Property. The alleged hazards are listed in schedule 1 to the Notice and the works allegedly required to remedy those hazards are set out in schedule 2 to the Notice.

The Applicant's case

8. The Applicant's position was set out in the document entitled "Grounds of application" attached to the application form, as supplemented by his comments at the hearing. The document consists of brief comments on each alleged hazard.

9. With regard to the cavity wall insulation being incomplete, his position was that only the insulation for the parapet wall above the roof was incomplete and that this had been caused by workmen reducing the height of the wall. With regard to the floor of the extension not being adequately insulated, this was because it was in his view not a requirement at the relevant time. He added that he had used silver foil to reflect the radiating heat back.

10. As regards the flat roof of the extension not being adequately insulated, he disputed this and said that the point could be tested with a thermal meter. At the hearing he said that the flat roof was packed with Rockwool insulation underneath in the void and that in his view the flat roof complied with building regulations. He accepted that there was no insulation over the joists.

11. As regards missing flashing to parts of the flat roof of the extension, he confirmed that this would be fixed. As regards the cold left wall of the extension, his written submission appeared to be that this had already been corrected.

12. As regards rainwater running down the left wall of the extension due to absence of guttering, his position was that there is guttering and that the rainwater falls onto the roof and then feeds into the guttering.

13. As regards the controls to the central heating system not being accessible to occupants, he accepted this but stated that the thermostat itself could be adjusted by occupants. At the hearing he said that the tenants had asked for the controls not to be accessible and that the Respondent had told him to lock the controls away.

14. As regards the claim that gaps around masonry in the extension were creating draughts, he disputed this. The only gaps were air vents.

15. Another alleged hazard was that access from the kitchen to the bedrooms in the extension was via a shower room/WC. His written response, essentially, was that the shower room/WC had internal locks which were fitted because the local authority was not happy with there being an escape route through the kitchen. He also added that the bathroom has a wooden mat.

16. As regards the fire alarm system in the extension not being linked to the one in the main house, he accepted that this was the case but his written submissions indicated that he did not see this as a problem as in the event of fire the occupiers of the extension could leave through the rear door. At the hearing he said that the fire authority was mistaken in its belief that the two alarm systems should be linked. With regard to missing smoke seals and intumescent strips on some doors, he accepted that some seals were missing and he would fit these. Similarly with missing self closers on some fire doors.

17. As regards the fridge/freezer being located in the hallway of the extension, his written response was that there was a half hour fire check door between the tenants and the fridge/freezer. As regards there being stored items on the flat roof of the extension, his response was that he would ensure that any materials do not collapse or fall off the flat roof.

18. Regarding the complaints made by tenants, the Applicant said that one tenant had dried clothes in his room and that this had caused the mould growth.

Cross-examination of the Applicant by the Respondent

19. Mr Ranatunga, quoting from the schedule of works served on the Applicant, put it to the Applicant that he had been required to expose the suspended timber floor to help the Respondent look at the insulation but that he had not done so. The tribunal therefore only had the Applicant's word for it as to what insulation was in place. The Applicant had also provided no evidence that the work complied with building regulations.

20. Mr Ranatunga also put it to the Applicant that one consequence of locking the shower/WC in the extension was that the kitchen could only be accessed by occupiers of the extension by going out through the back door and then round to and through the front door of the main building.

21. In cross-examination the Applicant accepted that occupiers had made complaints about the cold. When asked why he had not taken steps to comply with the notice in this regard he said that he had more urgent works to do and that it was difficult to carry out these works with the occupiers in place. Mr Ranatunga put it to him that the Respondent had been raising these issues since December 2012 and that he had been continuing to rent out the space.

22. As regards the Applicant's assertion that the Respondent had asked him to lock away all electrical equipment and access to heating controls, Mr Ranatunga noted that he had not been able to produce a copy letter or other evidence to support this assertion.

The Respondent's case

23. In written submissions the Respondent stated that on 4th December 2012 it had received a referral concerning tenants living in the extension to the Property who were suffering from cold and damp conditions. The Respondent's Private Sector Housing Team attended the Property on 10th December 2012 together with the Applicant and found that the Property was being occupied as a House in Multiple Occupation ("HMO"), the main part of the Property being occupied by 6 adults. Members of the Team spoke to the occupiers and inspected the Property.

24. On 23rd January 2013 the Respondent issued the Applicant with an informal schedule of works needing to be carried out, it being the Respondent's policy to try to deal with matters informally where possible rather than simply serving formal improvement notices or other notices. There then followed an exchange of correspondence between the parties in relation to the works. Matters were seemingly complicated by the Applicant having lodged an appeal against a refusal of planning permission in relation to use of the extension as a self-contained flat. That appeal was dismissed in or around March 2013.

25. On 5th July 2013 the Respondent met with the Applicant again at the Property and noted that the works required by the schedule of works had not been completed. The Applicant said that he would complete them on his return from holiday on 20th August 2013. In compliance with the planning enforcement notice to cease to use the extension as a self-contained flat, the Applicant made certain changes to the access to cooking facilities. This resulted in the extension becoming part of the

HMO, and the Respondent accordingly served a further schedule of works to include works necessitated by this change.

26. There was further correspondence in which the Applicant objected to certain of the Respondent's requirements and there were extensive negotiations between the parties in relation to the kitchen facilities. A further schedule of works was served on the Applicant on 15th September 2014, in response to which the Applicant made representations and the parties then met again at the Property. Based on (presumably) the Respondent's further inspection, the Applicant's responses to its questions and HHSRS assessments carried out by the Respondent regarding the various potential hazards which it believed still to be present at the Property, the Respondent served an Improvement Notice on the Applicant on 19th January 2015. In February 2015 the Respondent received a complaint from a tenant of the extension about cold conditions and was also told by occupiers of the main part of the Property that this too was cold because they had no control over when the heating was on.

27. The Respondent's written statement of case also includes observations on the Applicant's grounds of appeal. It notes that various points have been conceded by him. It also states that building control consent was not sought when the extension was constructed and that the flat roof has not been constructed in accordance with building control requirements. The Applicant also does not state how the cold wall has been corrected. An exhibit to Ms Baldiviezo's witness statement shows gaps creating draughts in the masonry.

28. In the Respondent's submission, the Applicant should not have placed himself in a position whereby planning enforcement action by the Respondent was required such that the Applicant was then offering accommodation without access to a kitchen.

29. As regards the wooden mat in the bathroom, the Respondent had not seen a wooden mat during any visits, but in any event such a mat would only have been effective when being used for its designated purpose, not when being used by occupiers passing through the bathroom using footwear not usually worn in bathrooms.

30. As regards the fridge/freezer, the main issue in the Respondent's view was that it was located in a fire escape route. As a general point, the Property was an HMO and therefore had to comply with the Respondent's HMO standards.

Ms Baldiviezo's witness evidence

31. Ms Baldiviezo is a Council Enforcement Officer, and her witness statement formed part of the hearing bundle. Her view was that the

Property was an HMO but not one which required a licence under the mandatory licensing provisions because it was only two storeys high.

32. Her witness statement summarised her dealings with the Applicant and her findings and included as exhibits copy correspondence, layout plans, meeting notes, photographs, details of the Respondent's Standards for Houses in Multiple Occupation, details of advice from the Fire Authority, hazard assessments and details of complaints from occupiers. Ms Baldiviezo took the tribunal through a number of points contained in or referred to in her witness statement.

33. Ms Baldiviezo also took the tribunal through her analysis and workings in relation to the excess cold hazard by way of example as to how she had approached the calculation of the seriousness of potential hazards. Her analysis used the official guidance combined with her own factual observations, information received from the Applicant and from others, and advice received from building control.

34. On being asked why a prohibition order was not considered more appropriate, she said that this would require eviction proceedings which could take 2 to 3 months and would make the occupiers homeless. In her view the works could be done with the tenants in situ and could be completed before the weather turned cold again. Specifically as regards the roof works, in her view these could be done within 1½ to 2 weeks if done intensively. She also added that a prohibition order would require close monitoring to ensure that it was being complied with.

Cross-examination of Ms Baldiviezo by the Applicant

35. In cross-examination by the Applicant Ms Baldiviezo said that on the joint inspection she found that the flat roof had inadequate insulation. She accepted that she did not use an instrument to measure heat loss but said that she was not an expert on heat loss.

36. As regards condensation, she accepted that some condensation could have resulted from tenant behaviour but did not accept that this was the sole cause of condensation.

Respondent's closing submissions

37. In Mr Ranatunga's submission, the Respondent has gone through all of the necessary procedures correctly, and in any event the Applicant has not raised any objections based on any alleged failure to follow the correct procedures or on the categorisation of the hazards. The hearing bundle contains a full statement from Ms Baldiviezo on the existence and nature of the relevant hazards.

38. The Respondent has noticed a minor error in the description of one of the hazards which in its submission needs to be corrected. In the second section on the second page of Schedule 1 to the improvement notice the reference to "Falls associated with Baths etc" should instead be a reference to "Falls on level".

39. The matter was referred to the Respondent in December 2012 and the hazards had still not been dealt with. Occupiers had complained and there had been three separate schedules of works via which the Respondent had tried to secure informal compliance. However, the Applicant had not complied other than in a very limited way by boosting the cooking facilities and had dragged his heels throughout the process.

40. As regards the appropriate enforcement action, serving an improvement notice was considered to be the most appropriate course of action as conditions at the Property presented risks to the health and safety of occupiers, a hazard awareness notice provided no guarantee that occupiers would be protected from the hazards and the options of a prohibition or a demolition order were both considered inappropriate and excessive. Specifically as regards the possibility of a prohibition order, another reason why this was considered inappropriate was that there was a history of non-compliance by the Applicant and a prohibition order would need to be constantly monitored to ensure compliance.

41. In Mr Ranatunga's submission, the Applicant's written submissions were very thin and his oral evidence could not carry much weight compared with the much more substantial evidence provided by the Respondent.

Applicant's closing submissions

42. The Applicant said that he would only be able to carry out the works when the occupiers leave or go on holiday. In his view the fridge/freezer is in an alcove and not in anyone's way. As regards any complaints from occupiers, when they raise an issue of disrepair with him he repairs the relevant item the next day.

The tribunal's analysis

43. The tribunal notes the oral evidence and written submissions from the parties and has considered the copy documents provided.

44. We are satisfied that the Respondent went through all of the necessary procedures correctly. It served the correct notices, sought representations from the relevant people and undertook joint inspections with the Applicant. There is evidence that the Respondent,

in particular Ms Baldiviezo, went out of its way to apply the procedures in a fair and flexible way, first by trying to deal with the matter informally and then by showing significant flexibility as regards what would be an acceptable solution to the kitchen-related hazards. In any event the Applicant has not raised any objections on the basis of any alleged failure to follow the correct procedures.

45. The evidence also indicates that the Respondent went through a proper and competent process to establish whether there were any hazards at the Property and, if so, how to rate those hazards and what follow-up action needed to be taken. In so doing, the evidence indicates that the Respondent carried out a risk calculation in a proper manner, applying the relevant guidance. The Applicant has not challenged this aspect of the process either, and nor has he challenged the Respondent's calculations or its view that the Property is and was an HMO.

46. As regards the Respondent's factual evidence, we consider its written evidence to be strong and we consider Ms Baldiviezo to have been a credible witness. In her witness statement Ms Baldiviezo has described the chronology and her findings in detail, and her witness evidence is supported by relevant copy correspondence, layout plans, meeting notes, photographs, details of the Respondent's Standards for Houses in Multiple Occupation, details of advice from the Fire Authority, her detailed hazard assessments, copies of complaints from occupiers and a persuasive rebuttal of certain points made by the Applicant.

47. By contrast, we consider the Applicant's evidence to be weak. At the case management conference the Applicant was directed to provide an expanded statement of the reasons for his appeal but he has failed to do so. As a result his appeal rests on a series of assertions but very little (if anything) by way of hard evidence. In his "Grounds of application" many of the comments made do not contradict the Respondent's own statement as to the existence of the relevant hazard, and therefore in places it is unclear what point he is seeking to make.

48. In relation to the flat roof insulation, the Applicant makes a bald assertion that there is adequate insulation but has provided no evidence in support of this statement. In addition, he did not expose the suspended timber floor to help the Respondent look at the insulation, as he was required in the schedule of works to do. There is also no evidence that the work done by the Applicant complied with building regulations. As regards the locking of the shower/WC in the extension, even if it could be argued that this was a partial solution to one of the problems identified by the Respondent, it has simply created another problem in that the kitchen can only be accessed by occupiers of the extension by their going out through the back door and then all the way round to and through the front door of the main building. The Applicant's comment that one of the occupiers has caused condensation

through his own actions is not in our view a plausible explanation for the whole of the condensation and mould problem.

49. The Applicant's statement that he has not had time to deal with the issue of occupiers being cold, despite the issue first having been raised by the Respondent in December 2012, also lacks credibility. We are also not persuaded by his bald statement that the fire authority was mistaken in its interpretation of the relevant fire regulations. He has produced no evidence for his assertion that the Respondent asked him to lock away all electrical equipment and access to heating controls. An exhibit to Ms Baldiviezo's witness statement appears to show gaps creating draughts in the masonry. The Applicant states that the cold wall has been corrected but does not state how. As regards the existence or otherwise of a wooden mat in the shower room and the location of the fridge/freezer, on the basis of the information provided we prefer the Respondent's evidence.

50. If anything, the evidence would seem to indicate that the Respondent may have been too indulgent in its dealings with the Applicant. Whilst it is unclear precisely when the Respondent formed the view that category 1 hazards existed at the Property, it clearly had concerns as far back as December 2012. In the circumstances, and given its statutory obligation to take enforcement action in relation to (in particular) category 1 hazards, it is of some concern that the Respondent spent quite so long negotiating with the Applicant on the basis of informal schedules of works. It may be appropriate for the Respondent to review its procedures in the light of this case.

51. Nevertheless, having identified – to its satisfaction – certain category 1 and category 2 hazards, and being under a statutory obligation to take enforcement action, the question for the Respondent was then what type of enforcement action was the most appropriate to take. The possible options are set out in section 5(2) of the 2004 Act. Of the options available, the Applicant has not sought to argue that a hazard awareness notice would have been appropriate, and we agree with the Respondent that it would not have been sufficient to address the hazards, given the seriousness of the hazards and the length of time during which the Applicant has been aware of the hazards but has not noticeably made serious efforts to address them. On the other hand, the hazards are not in our view sufficiently serious to justify taking emergency remedial action, and the circumstances do not exist to justify making a demolition order or declaring the area in which the Property is situated to be a clearance area.

52. That leaves two possible options, serving an improvement notice or making a prohibition order. The Respondent has argued that a prohibition order would be inappropriate. It would require eviction proceedings, which could take 2 to 3 months and would obviously render the current occupiers homeless (subject to re-housing). In Ms

Baldiviezo's view the works could be done with the tenants in situ and could be completed before the weather turned cold again. The roof works could in her view be carried out within 1½ to 2 weeks if done intensively. The Respondent also expressed a concern that a prohibition order would require close monitoring to ensure that it was being complied with.

53. We have some concerns as to how practical it would be to carry out the remedial works specified in the Improvement Notice – in particular the roof works – with the tenants in situ. However, we share the Respondent's concerns about how effective a prohibition order would be in practice and whether the making of a prohibition order would be the most appropriate way for it to comply with its statutory obligation. As noted above, the Respondent first raised these issues in 2012, and on the basis of the evidence provided we agree with the Respondent that the Applicant seems to have been dragging his heels throughout. The Respondent has given the Applicant an enormous amount of time within which to comply, in particular with the various informal schedules of works prior to service of the formal Improvement Notice, and in response the Applicant has either raised unsubstantiated objections, or come up with his own inadequate solutions, or seemingly simply played for time. We agree with the Respondent that it would be labour-intensive and difficult to monitor the prohibition order and consider that the Respondent has reasonable grounds for being concerned that any such prohibition order might not be complied with and that, consequently, tenants/occupiers would continue to be exposed to serious hazards.

54. Therefore, although we have concerns about the precise practicalities of carrying out some of the works with the existing tenants in situ, on balance we consider that the preferred option is for the Applicant to be required to carry out the necessary works to alleviate the identified hazards before the colder weather arrives. The work will then have been completed and the hazards will no longer exist. Whilst it follows that the tenants would be remaining in occupation with the hazards continuing (until remedied), on balance – given the relatively short amount of time that it should take to remedy those hazards – in our view it would be disproportionate to require the tenants to vacate in the light also of the concern that the prohibition order might not be complied with.

55. Paragraph 15(2) of Part 3 of Schedule 1 to the 2004 Act states that *"The appeal (a) is to be by way of a re-hearing, but (b) may be determined having regard to matters of which the authority were unaware"*. No relevant matters of which the local housing authority was previously unaware have been raised by either party or otherwise come to our attention.

56. Paragraph 15(3) of Part 3 of Schedule 1 to the 2004 Act, as well as giving the tribunal the power to confirm or quash an improvement notice, gives the tribunal the power to vary an improvement notice. The Respondent has requested a small variation to reflect the fact that – on consideration – it believes that it would be more accurate to refer to "Falls on Level" instead of "Falls associated with Baths etc" in the second section on the second page of Schedule 1 to the Improvement Notice. Whilst we agree with this point in principle, it should technically be changed to "Falling on Level Surfaces etc".

57. For the reasons given above, we are satisfied that in all other respects the Improvement Notice should be confirmed. On the basis of the evidence, we accept that there are category 1 and category 2 hazards at the Property as set out in the Improvement Notice and that the works specified in the Improvement Notice are reasonable and proportionate ways of addressing those hazards. The service of an improvement notice was an option available to the Respondent, and on balance we are satisfied that the service of an improvement notice was the most appropriate course of action available to it.

Cost applications

58. The Respondent has applied for an order under paragraph 13(b)(ii) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("**the 2013 Rules**") that the Applicant reimburse its costs incurred in connection with these proceedings. Such an order can only be made if the other party "has acted unreasonably in bringing, defending or conducting proceedings". In the case of *Ridehalgh v Horsfield (1994) 3 All ER 848* Sir Thomas Bingham MR described the acid test of unreasonable conduct in the context of a cost application as being whether the conduct admits of a reasonable explanation. This formulation was adopted by the Upper Tribunal (Lands Chamber) in the case of *Halliard Property Company Ltd v Belmont Hall and Elm Court RTM Company Ltd LRX 130 2007.*

59. Whilst we consider the Applicant's case to have been weak, in our view there is insufficient evidence from which to conclude that his conduct does not admit of a reasonable explanation. In our view, on the balance of probabilities he genuinely believed his appeal to have some merit and he was entitled to lodge it. Whilst it is true that he did not properly comply with directions, a cost award can only be made on the basis that the unreasonable conduct has caused those costs to be incurred, and on the basis of the evidence provided we are not persuaded that the Respondent has shown that the Applicant's approach has caused it to spend more time putting together its defence than it would have had to spend if the Applicant had made more detailed submissions. As it turned out the Applicant did not really have anything to add, and therefore arguably all that would have happened – if he had considered the directions more carefully – is that the Applicant would simply have

confirmed prior to the hearing that he had nothing to add and in all likelihood the Respondent would have prepared in the same way. Therefore we do not consider that the Respondent has acted unreasonably within the meaning of – and for the purposes of – paragraph 13(b)(ii) of the 2013 Rules and accordingly we decline to make such an order.

60. The Applicant has applied for an order under paragraph 13(2) of the Rules that the Respondent reimburse to him the hearing fee. As the Respondent has been the successful party in this case and in our view has conducted itself reasonably we do not consider that there is a proper basis for making such an order and accordingly we decline to make such an order.

Name: Judge P. Korn **Date:** 19th May 2015

Appendix of relevant legislation

Housing Act 2004 (as amended)

Section 5

(1) 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.

(2) In subsection (1) "the appropriate enforcement action" means whichever of the following courses of action is indicated by subsection (3) or (4) … serving an improvement notice under section 11 …

(3) 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.

(4) If two or more courses of action within subsection (2) are available to the authority in relation to the hazard, they must take the course of action which they consider to be the most appropriate of those available to them.

Exact details of remainder of section 5 not directly in issue in this dispute.]

Section 11

(1) If (a) the local authority are satisfied that a category 1 hazard exists on any residential property, and (b) no management order is in force in relation to the premises under Chapter 1 or 2 of Part 4, serving an improvement notice under this section in respect of the hazard is a course of action available to the authority in relation to the hazard for the purposes of section 5 (category 1 hazards: general duty to take enforcement action).

(2) An improvement notice under this section is a notice requiring the person on whom it is served to take such remedial action in respect of the hazard concerned as is specified in the notice in accordance with subsections (3) to (5) and section 13.

(5) The remedial action required to be taken by the notice (a) must, as a minimum, be such as to ensure that the hazard ceases to be a category 1 hazard; but (b) may extend beyond such action.

[Exact details of remainder of section 11 not directly in issue in this dispute.]

Schedule 1, Part 3

10(1) The person on whom an improvement notice is served may appeal to the appropriate tribunal against the notice.

15(1) This paragraph applies to an appeal to the appropriate tribunal under paragraph 10.

(2) The appeal (a) is to be by way of a re-hearing, but (b) may be determined having regard to matters of which the authority were unaware.

(3) The tribunal may by order confirm, quash or vary the improvement notice.

[Exact details of remainder of Schedule 1, Part 3 not directly in issue in this dispute.]