FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/22UG/HIN/2018/0002**
Property	**:**	**Second Floor Flat, 17 Alexandra Road, Colchester CO3 3DB**
Applicant	**:**	**David Sharpe**
Respondent	**:**	**Colchester Borough Council**
Representative	**:**	**Ms Jempson (counsel)**
Type of application	**:**	**Appeal against an Improvement Notice and expenses**
Tribunal member(s)	**:**	**Judge Wayte** **Mrs E Flint DMS FRICS IRRV** **Mr N Miller**
Date and venue of hearing	**:**	**15 July 2019 at Colchester Magistrates Court**
Date of decision	**:**	**25 July 2019**

DECISION

The tribunal determines that:

(1) The Improvement Notice is quashed.

(2) The charge for the Notice is reduced to £300.

Application

1. This is an appeal against the decision of the Council to issue an improvement notice, pursuant to paragraph 10 of Schedule 1 to the Housing Act 2004 and the decision to charge £500 expenses for issuing the notice.

2. The application was issued on 6 February 2018 and listed for hearing on 3 May 2018. On that day, the tribunal were unable to gain access to the Property and an order was made adjourning the matter generally. The parties were to use their reasonable endeavours to agree the works, with provision for reinstatement of the application in the event that agreement could not be reached. The tribunal was subsequently informed that an agreement had not proven possible and the matter was relisted for hearing on 15 July 2019.

3. At the hearing Mr Sharpe represented himself. The Council were represented by counsel Ms Jempson and their witness Mr Torben Wood, formerly employed as an Environmental Health Officer for the Council but now working for Ipswich Borough Council.

Background

4. The Property is a second floor flat on the top floor of a Victorian house on four storeys, which was converted into four self-contained flats in the early 1980s. At the time of the service of the Improvement Notice the Property was occupied by an assured shorthold tenant, Ms Moran. By the date of the hearing the Applicant had obtained vacant possession and had decided to sell the flat, placing it in an auction commencing the week of the hearing.

5. The Applicant became the registered proprietor of the Property on 13 December 1988 and lived there as a graduate before moving on, since when the Property had been rented out to various tenants, Ms Moran being the latest. The Applicant lives in Guildford and employs agents, Essex & Suffolk Lettings, to manage the property on his behalf.

6. The Council were first contacted by Ms Moran on 30 August 2017 and had what Mr Wood described as a "difficult conversation". It appears that her main concern at the time was alleged harassment by Essex and Suffolk Lettings in respect of entry to the flat to show it to prospective new tenants, presumably on the assumption that she would be vacating the property. Ms Moran also raised a number of concerns about the condition of the property, including "excess cold" –one of the hazards assessed by the Housing Health and Safety Rating System (HHSRS) which are assessed by local housing authorities and can be enforced

through improvement notices. The note of that telephone conversation refers to an Energy Performance Certificate (EPC) in respect of the Property with a G rating, which is below the minimum energy efficiency standard of E required for re-letting since April 2018. It is not clear whether the tenant was aware of these issues, or whether this information was subsequently discovered by Mr Wood and recorded in the telephone attendance note.

7. Following that conversation Mr Wood wrote to Essex & Suffolk Lettings both in respect of the alleged harassment but also setting out Ms Moran's concerns in respect of the heating system and other issues. Mr Wood referred to the Council's responsibilities under Part 1 of the Housing Act 2004 to investigate and take appropriate action to remedy any significant health and safety hazards. He proposed an inspection of the Property on 18 September 2017, subsequently postponed at the request of the tenant to 25 September.

8. Following the inspection Mr Wood identified a number of hazards and on 29 September 2017 he sent an email to Essex and Suffolk with details of his findings. He also raised a potential issue that due to the age of the conversion of the property, additional management regulations may apply (the "HMO" issue) and asked for information about ownership of the property. On 2 October 2017 he spoke to the agents who confirmed they would "*start dialogue with the landlord*", he also spoke to the tenant who was dissatisfied with the response and eventually terminated the call.

9. On 25 October 2017, Mr Wood wrote again to Essex and Suffolk, as he had received no response to his request for information or any update in respect of the hazards. On 27 October 2017 he issued formal consultation in respect of the Schedule of Works proposed to remedy the hazards. That prompted a further telephone call on 31 October 2017 with Karen from Essex and Suffolk.

10. On 13 November 2017 Mr Wood wrote to Mr Sharpe, enclosing a copy of the Schedule of Works and raising the HMO issue. Mr Sharpe stated that this was the first time he became aware of any problems with the Council.

11. On 21 November 2017 Mr Wood wrote to Essex and Suffolk to confirm that the consultation period has closed without any clear proposals for works to remedy the hazards. In the circumstances, he had requested legal advice. That email appears to have prompted a second visit to the property on 23 November 2017. At that visit the tenant appeared to have had a change of heart, confirmed that the property was warm and stated that other than replacement windows, no additional works to improve energy efficiency were required. She and Essex and Suffolk requested a further 2 weeks to chase contractors and refine proposals for any work necessary.

12. On 28 November 2017 Mr Wood wrote to Mr Sharpe stating that Essex and Suffolk had "*been largely uncooperative*" and therefore he was writing to him directly to request clear proposals for addressing the hazards and information regarding the ownership and management of the building in respect of the HMO issue.

13. On 8 December 2017 Mr Wood spoke to Rob Parry at Essex and Suffolk who apologised for the delay and promised to provide the proposals, which he sent on 11 December 2017. On 12 December Mr Sharpe responded to the documents sent directly to him, focussing on the HMO issue. He subsequently sent the Requisition for Information Form to the Council, stamped as received on 15 December 2014 (sic).

14. On 20 December 2017 Mr Wood wrote to Essex and Suffolk and separately to Mr Sharpe. His email to Essex and Suffolk stated that the works appeared "likely to address most of the significant hazards identified" but raised issues, in particular, with the excess cold hazard and proposals for heating and insulation, set in the context of the very low Band G EPC for the Property. Mr Wood's email to Mr Sharpe confirmed that the HMO issue had now been resolved, following discussion with a building control officer. However, the proposals received from Essex and Suffolk to address the hazards were inadequate and in view of the lack of cooperation and progress to date the case would be subject to a management review and legal advice. He appeared to be unaware that the Requisition for Information had been received and presumably, although he had made a request under section 235 of the Housing Act 2004 for information in respect of the freehold ownership, this was no longer necessary given that the HMO issue was resolved i.e. the property was not in fact an HMO.

15. On 2 January 2018 Ms Moran rang the Council to complain that she had been extremely cold over Christmas and was now fully supportive of the Council serving an improvement notice and would allow full access for the works and Council inspections. That led to the service of an Improvement Notice on 16 January 2018 and confirmation that the Council would charge a fee of £500 pursuant to section 49 of the Housing Act 2004.

16. Following the service of the notice Ms Moran refused to allow Mr Sharpe or Essex and Suffolk access to the Property, although she complained that a heater had broken and a guest damaged a window, meaning that the property was very cold. Mr Sharpe wrote to Mr Wood on 6 February 2018 to update him on events and confirm that he had authorised replacement of the heater in the living room. Mr Wood replied on 12 February 2018 stating that the works detailed in the Improvement Notice were due to start on 16 February unless an appeal was made before then. By this date, Mr Sharpe had already issued his appeal, mainly due to the access issues, suspending the notice.

17. Ms Moran vacated the property in October 2018. Mr Sharpe wrote to Mr Wood on 26 November 2018 to confirm that he had finally gained access to the Property and would like to arrange a visit to reach agreement on any outstanding works. He subsequently sent a survey from Hyltreat Limited dated 5 November 2018 confirming that there was no penetrating damp at the Property caused by external defects (one of the hazards previously identified). In their view, any damp or mould was likely to be due to condensation.

18. The Respondent provided a note of the site visit on 4 December 2018 between Mr Wood, Mr Sharpe and Vincent Whyte, also of the Council. Mr Wood wrote to Mr Sharpe after that meeting to confirm that there were now two outstanding matters: excess cold, due mainly to the fact that the electrical radiator had high running costs and the hot surfaces hazard due to the proximity of the cooker to the sink. Mr Sharpe replied the following day, stating that he would arrange a new EPC survey and suggesting that the problem with the cooker could be solved by swapping it with the fridge on the other side of the kitchen. Mr Wood replied on 7 December 2018 agreeing that the idea would help but raising other issues which appear to have irritated Mr Sharpe, who responded with a long email of complaint about his dealings with Mr Wood.

19. That complaint and its escalation formed a large part of Mr Sharpe's bundle for the hearing, although he also included a new Energy Performance Certificate dated 27 April 2019 which gave the Property a D rating, information from the manufacturer of the radiator indicating its low cost compared to other forms of heating and a Domestic Electrical Installation Condition Report dated 31 December 2016 which confirmed there were no issues requiring immediate attention.

Inspection

20. The tribunal inspected the Property before the hearing in the presence of the parties and Ms Jempson. It is a compact studio flat in the eaves of a Victorian house, with one main bed-sitting room and a small kitchen and bathroom. The flat had clearly been recently redecorated and the Applicant had installed new double-glazed windows to the kitchen and main room. The original velux window in the bathroom had been redecorated and secondary glazing added to the small window in the hall. There was a new electric radiator in the bed-sitting room and rather elderly heaters in the kitchen and bathroom. The kitchen was small and cramped and the electric cooker jutted out from the workspace. It was clear to the tribunal that anyone using the sink would be at risk of injury if the hob was being used to heat food or still hot after use. There was no gas supply to the flat or building, as far as the Applicant was aware.

The Issues

21. At the hearing it was agreed that the only outstanding issues in respect of the Schedule of Works were whether any further works were required in respect of the excess cold hazard (initially assessed by the Council as category 1) and/or the hot surfaces and materials hazard (initially assessed by the Council as category 2). Mr Sharpe confirmed that he also wanted to challenge the issue of the Improvement Notice in the first place, he acknowledged that improvements were required but felt that the way the Council proceeded defied common sense. In particular, he cited the HMO issue as evidence of Mr Wood's incompetence and the fact that he couldn't get into the Property made service of the notice and the demand for costs unreasonable.

22. The tribunal's powers on appeal are set out in Schedule 1 to the Housing Act 2004 at paragraph 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. The tribunal has the power to confirm, quash or vary the improvement notice. In the circumstances the tribunal will consider the initial assessment, the decision to serve the Notice on 16 January 2018 and then consider whether the position has changed, given the subsequent works and evidence provided by the Applicant in his hearing bundle.

The assessment of the hazards

23. Mr Sharpe did not raise any objection to the assessment of the hazards, apart from the HMO issue which was resolved prior to service of the Improvement Notice. That said, the tribunal needs to be satisfied that an improvement notice was the appropriate enforcement action in this case.

24. Mr Wood's written statement dated 8 March 2018 exhibited copies of his hazard assessments. As stated above, the tribunal is only concerned with those said to be outstanding: excess cold (assessed as category one) and hot surfaces and materials (assessed as category two).

25. In respect of the excess cold hazard Mr Wood assessed the likelihood of harm to be one in 56, compared to the average for this age of property of one in 330. He relied on: a mixture of old night storage and newer convector heaters running on a single rate tariff; heat loss on three sides of the property through 9 inch solid walls, dormer window and suspected uninsulated sloping ceilings/roof space; aged aluminium windows and an EPC G rating. His assessment produced a score of 5,848 and a rating of A on the HHSR system, a high category 1 hazard which required enforcement by the council. The only aspect of this initial assessment which Mr Sharpe challenged was in respect of insulation, as the inspection in December 2018 established that the roof space was in fact insulated.

26. There does not appear to be a copy of the assessment of the hot surfaces and materials hazard in the bundle. The improvement notice refers to the layout of the kitchen with the cooker in very close proximity to the sink. No separate calculation has been produced to support Mr Wood's evidence that it would justify a high category 2 rating, although the tribunal is satisfied that there is a high likelihood of harm as set out in paragraph 20 above. Mr Sharpe did enter into correspondence with the council about the kitchen (see paragraph 31 below) but again, only after service of the notice.

Service of the Improvement Notice

27. 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. Schedule 1 Part 1 of the 2004 Act contains provisions in respect of the service of improvement notices. In particular, in the circumstances of this property, the local housing authority must serve the notice on the owner of the flat.

28. In this case, the initial dialogue was with Mr Sharpe's agents and it was not until 13 November that he was contacted directly by the council. Unfortunately, Mr Sharpe was at that stage focussed on the HMO issue rather than the improvement notice and therefore did not engage with it to any great extent until after it was served on him. The tribunal do not consider that Essex and Suffolk were as uncooperative as Mr Wood made out in his correspondence but they do not appear to have acted as responsible managing agents in terms of advising Mr Sharpe at the earliest opportunity of the issues and, in particular, the importance of action in respect of the hazards identified.

29. Mr Sharpe described himself as "mystified" by the process, with which the tribunal has some sympathy. He only rents out this property and cannot be described as a professional landlord. Mr Wood should also have checked he was right about the HMO issue before writing to Mr Sharpe about it as that clearly added to the confusion. That said, Mr Sharpe had employed agents to manage the property on his behalf and they should have had a much better understanding of the risk to Mr Sharpe of the ongoing delay.

30. The Government's Housing Health and Safety Rating System Enforcement Guidance was published in February 2006 ("the Guidance"). Section 9 of the 2004 Act confirms that the local housing authority must have regard to such guidance when considering enforcement action. Paragraph 4.9 of the Guidance makes it clear that account should be taken of the current occupant in determining which

action to take. Paragraph 4.12 states that an improvement notice will be the appropriate action to mitigate a category 1 hazard where works of mitigation are practical but that occupancy factors may suggest that action can be suspended pending a future change of circumstances.

31. Mr Sharpe has not challenged the initial assessment of the hazards by the council to any great extent but focussed his appeal on the issues with Ms Moran, which he only really appreciated once he saw the disclosure in these proceedings. That said, prior to the service of the improvement notice, Ms Moran had said she would allow access for the works to be carried out and in the circumstances of the apparent escalation of problems with the heating and the high category 1 hazard already identified by the council, the tribunal considers that it was appropriate to serve the notice on 16 January 2017.

Developments following service of the notice

32. As stated above, immediately after service of the notice Ms Moran refused access to Mr Sharpe or his agents. On 6 February 2018 Mr Sharpe wrote to Mr Wood to confirm that he had given the go ahead to replace the heater but also querying whether there were any regulations dealing with the distance between sinks and cookers and the need to totally redesign the kitchen as indicated in the notice. He also notified Mr Wood that he had been refused access to the property, although his agent had been advised by the tenant that "a friend" had broken one of the windows which was adding to the cold conditions in the flat.

33. Mr Wood responded on 12 February 2018, he copied part of a previous email to Essex and Suffolk where he confirmed that "*the Council will not act as broker or project manager in arranging for works to take place as this responsibility rests with the landlord (or their appointed managing agent) and their tenant to resolve in accordance with the tenancy agreement*" and suggested that Mr Sharpe could apply to court for an order to obtain access. He also confirmed that there were no regulations that applied to the property in relation to the cooker and pointed Mr Sharpe in the direction of the HHSRS.

34. At that stage the tribunal considers that the council should have had regard to the Guidance and considered suspending the notice until Mr Sharpe could gain access. Having said that, by that date Mr Sharpe had issued proceedings with the effect that the notice was suspended in any event. The council should also consider whether it would be helpful to provide some clearer assistance to landlords to explain the HHSRS, this may well have prevented Mr Sharpe's complaint and/or assisted in bringing the matter to a consensual conclusion.

35. Matters were therefore no further forward when this matter was first listed for hearing on 3 May 2018. The tribunal was unable to gain access to the property due to the tenant's ill health and therefore the matter could not proceed. The tribunal on that day appeared to be of

the view that it would be better for Mr Sharpe to obtain vacant possession of the property and were hopeful of an agreement after that.

36. As stated above in paragraphs 17 and 18, the parties were in contact after Ms Moran vacated the property and by the December 2018 visit, the council confirmed that the other hazards had been dealt with. Unfortunately, no agreement was possible in respect of works to remedy the outstanding hazards.

37. In respect of excess cold, the council's main objection expressed in Mr Wood's email of 5 December 2018 was that adequate temperatures could not be maintained on an economical basis due to the comparatively high running costs of a peak rate electric radiator compared to fan assisted storage heaters. Mr Wood also stated that he considered the energy performance of the flat would be unlikely to meet the minimum energy efficiency standard required for re-letting.

38. At the hearing, Mr Wood also relied on a report generated by the BRE Excess Cold Calculator software tool dated 4 March 2019. This indicated annual energy costs for the property of over £1,600 with the current heating, as opposed to £1,300 with electric storage heaters. Both compared unfavourably with 10% of pensioner income for a single person of £756. The most affordable option from this report was gas central heating, although Mr Wood conceded that there was no gas supply to the property which would make this an expensive option for Mr Sharpe. Mr Wood also conceded that he had no evidence of the actual heating costs for the property.

39. At the site meeting in December 2018 Mr Sharpe stated he would take his lead from a newly commissioned EPC survey, which he obtained on 27 April 2019. This gave a rating of D, which is the average energy efficiency rating for a dwelling in England and Wales. He also provided information from Haverland, the manufacturers of the electric radiator, on its likely cost. This indicated that for a three bedroom house the cost of heating using Haverland radiators was lower than storage heaters or central heating. On this basis he challenged the council's assessment of excess cold and the improvement notice served as a consequence.

40. Mr Wood queried both the EPC on the basis that the heating was wrongly described as mainly electric storage heaters and the information from Haverland as it applied to a three bedroom house rather than a studio flat. His view was that all electric radiators were the same in terms of efficiency, although he conceded he was not a heating engineer.

41. Mr Sharpe's new EPC is an official certificate by an accredited assessor on which he and the tribunal are entitled to rely. Given the central importance of the old EPC to Mr Wood's assessment, the tribunal considers that the property should now be reassessed on the basis that it has been certified as meeting the average energy efficiency rating for

a dwelling in England and Wales. The EPC also indicates that the estimated energy costs would be some £600 per year, below the 10% threshold proposed by Mr Wood as economical. That rating is supported to some extent by the Haverland manufacturer's guidance and in the circumstances the tribunal finds that Mr Sharpe has demonstrated that no further works are required to satisfy the improvement notice in respect of the excess cold hazard.

42. That leaves the hot surfaces hazard which was assessed by the council as category 2. The tribunal consider that this hazard can easily be dealt with by swapping the position of the cooker and fridge as suggested by Mr Sharpe back in December 2018. The kitchen would benefit from a professional redesign but this is not essential and given Mr Sharpe's decision to sell the flat is something for the new owner to take forward.

43. In these circumstances the tribunal's decision is to quash the notice. Mr Sharpe has complied with it in relation to the excess cold hazard and section 16(1) of the 2004 Act states that where the council are satisfied that the requirements of an improvement notice have been complied with, they must revoke the notice or at least the part applying to the relevant hazard. The hot surfaces hazard would not have merited an improvement notice on its own and in any event can be easily remedied. In the circumstances, including the fact that the property is currently vacant and for sale, the tribunal considers that the whole notice should be quashed.

Appeal against the council's costs of £500

44. Section 49 of the Housing Act 2004 gives the local housing authority the power to charge for serving an improvement notice, limited to the reasonable costs incurred in determining whether to serve the notice, identifying any action to be specified in the notice and serving the notice. Section 49(7) of the 2004 Act states that where a tribunal allows an appeal against the underlying notice it may make such order as it considers appropriate reducing, quashing or requiring the repayment of any charge under this section made in respect of the notice or order.

45. The council made a charge of £500 in this case, with the demand for payment made on 16 January 2018. Mr Sharpe appealed that demand relying on the exceptional and difficult circumstances of his case and, in particular, his tenant.

46. The tribunal has decided that the notice was properly issued. However, the tribunal has also indicated that the council did not take proper regard of the difficulties with Ms Moran after service of the notice or of the works carried out by Mr Sharpe which resulted in the notice being quashed.

47. Mr Sharpe has incurred application and hearing fees of £300 in these proceedings. Mr Sharpe did not apply for the fees to be paid by the

council at the hearing, although his email dated 29 April 2019 in his bundles clearly states that he will be making a claim for additional costs.

48. Taking all the circumstances into account, the tribunal reduces the charge for the improvement notice to £300. This effectively gives Mr Sharpe credit for the hearing fee which would not have been necessary had the council engaged with him after the tenant indicated she would not allow him or his agents access to the property. That said, Mr Sharpe and his agents did not respond effectively to the council's initial assessment and therefore there should be some liability for the costs of issuing the notice and these proceedings which bought Mr Sharpe the extra time to do the works.

Name: Judge Wayte **Date:** 25 July 2019

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).