



**FIRST – TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case reference(s) : BIR/41UD/HIN/2019/0007&8

**Property : Little Meadow St Chads Close
St Chads Road Lichfield WS13 7LZ**

Applicant(s) : Penelope Jane Barber

Respondent : Lichfield District Council

**Type of Application(s) : Appeals against Improvement
Notices under Schedule 1 to the
Housing Act 2004 (“the Act”)**

**Tribunal Members : V Ward BSc (Hons) FRICS
R Chumley - Roberts MCIEH CEnvH,
J.P.**

Date of Decision : 18 September 2019

Date of Costs Decision : 19 December 2019

**DECISION
ADDENDUM ON COSTS**

BACKGROUND

1. On 11 June 2019, Lichfield District Council, the Local Housing Authority and Respondent, served two Improvement Notices on the Applicant, Penelope Jane Barber, in respect of Little Meadow, St. Chads Close, St. Chads Road, Lichfield WS13 7LZ (“the Property”).
2. The first Improvement Notice “(the Fire Improvement Notice)”, served under section 11 of the Act, confirmed that the Respondent was satisfied that a Category 1 hazard of Fire existed on the premises.

An electrical inspection carried out in response to these concerns has confirmed an unsatisfactory wiring installation.

No earthing to the lighting with metal light fittings.

Outside light full of water.

Cooker point and twin socket not working.

No RCD protection for any circuit in the dwelling.

Main earthing conductor requires upgrading.

3. The deficiencies noted were as follows:

There are signs of burn marks on electrical components to do with the incoming supply

Clutter prevented further investigation in either bedroom, cannot be done due to problems with accessing sockets, switches etc. Further investigation required.

4. The specification of works to be carried out were as follows:

Full rewire is required

5. The Fire Improvement Notice stated that works specified were suspended, they were to be begun one month after the Property becomes vacant, or, not later, than 10 June 2020 and to be completed within one month.
6. The second Improvement Notice (“the Damp Improvement Notice”), served under section 12 of the Act, confirmed that the Respondent was satisfied that the Category 2 hazard of Damp and Mould existed on the premises.
7. The deficiencies noted were as follows:

The roof leaks into the main bedroom.

A lack of background heating in the bathroom causes the structure to be several degrees colder than the rest of the property. This causes mould to grow and the associated musty smell is apparent.

The dormer window is in a dilapidated (sic) state, rotten (sic) and warped timbers are unlikely to be weather tight.

8. The specification of works to be carried out were as follows:

Thoroughly overhaul, repair and make sound and weatherproof the roof, including the dormer. Replace all missing, damaged and slipped tiles. Rake out and replace all perished pointing to the ridge and perished verge and eaves fillets. Leave the entire roof, including the dormer in a sound and watertight condition.

9. The Damp Improvement Notice stated that works specified were to be begun not later than 5 August 2019 and to be completed within one month.
10. The Applicant appealed to the Tribunal by way of an application form dated 28 June 2019. The Applicant also appealed the fees allied to the Notices in the sum of £390.74.

INSPECTION

11. The Tribunal carried out an inspection of the Property on 5 September 2019. Access was facilitated by Brian Harmon, the tenant. Present at the inspection were Michael Collins, the husband of the Applicant, and Roy Ohren and Jack Twomey representing the Respondent, Lichfield District Council.
12. The Property comprises a single storey dwelling situated off an unmade driveway leading from St. Chads Road, known as St. Chads Close. Information given at the hearing later, indicated that the Property was probably constructed circa 1920 and converted to residential use in 1964.
13. The accommodation offered by the Property is as follows:
- Open hall/kitchen; lounge; two bedrooms, bathroom with full suite incorporating shower over bath.
- Externally there was a garage.

14. The Property is constructed of brick surmounted by a pitched roof with dormer window and a small flat roofed area that abuts the main roof. The dwelling benefits from some double-glazed units and a gas fired heating system. In addition, there was an electrical down draught "fan" heater and electrical radiant "bar" heater within the bathroom, but no mechanical extract ventilation device in this room
15. The tenant lived in conditions that are best described as cluttered. These conditions limited the inspection the Tribunal could carry out.
16. The Tribunal found that the property was in a generally poor condition given its age and character with evidence of; -

structural cracking to the brickwork over the front entrance door,
structural dampness to the dividing wall between the kitchen and hallway,
rainwater leakage through the main roof, the tiles covering which were loose and uneven at the ridge,
decayed timberwork to the dormer structure on the main roof,

There were numerous (mainly internal) items of disrepair including a broken sealed glazing unit to the rear "patio" door off the lounge and the premises internal arrangement was not ideal as the separating wall between the kitchen and hallway, was not complete.

Specifically, the Tribunal noted that the electrical cables leading to the scorched fuse box component had been cut and it did not appear to be connected to the mains supply.

In addition, the dwelling, which appeared to be a converted garage, was unlikely to have been provided with suitable damp-proof membranes in its floors and damp-proof courses at the base of its walls.

The hearing

17. A hearing was held later the same day at the Tribunal Hearing Rooms, Centre City Tower, Hill Street, Birmingham. Present at the hearing were those who attended the hearing (with the exception of the tenant) and also the Applicant, Penelope Jane Barber.
18. The salient written and oral submissions of the parties are listed below. At the hearing, the Tribunal found it convenient to initially invite the Respondent to present their submissions as to the circumstances that had led to the service of the Notices.

The Respondent's Submissions

19. Submissions on behalf of the Respondent were given by Roy Ohren who had qualified as an Environmental Health technician in 1981 and was employed by the Respondent as a Private Sector Housing Officer. The matter initially came to the notice of the Respondent's Housing department following a referral on 4 March 2019, that originated from Accord Housing Association on behalf of the tenant. The referral made reference to the Property being unfit for human habitation and requested a HHSRS (Housing Health and Safety Rating System) assessment be carried out.
20. An inspection of the Property was carried out by Mr Ohren on 11 March 2019. The dilapidated condition of the dormer window was noted with rotten and warped timbers and additionally the window lacked paint and putty. In respect of the pitched roof, it was noted that the ridge line was uneven and loose tiles were noted and plants needed clearing out of the gutter. A leak into the bedroom was also noted. Within the bathroom were a bar heater and fan heater but no heat emitter which connected with the gas fired heating system. In Mr Ohren's opinion this could lead to condensation and dampness in the bathroom due to the lack of background heat.
21. During the inspection it was noted that a sign had been attached to a component of the fuse box which stated that:

“DO NOT Switch this on. Obsolete fuse box and circuits.
22. Scorch marks were also noted to one of the fuse box components and when checked with a field tester the results suggested that it was still in use.
23. On 12 March 2019, Mr Ohren contacted Ms Barber advising of the findings of his inspection in general and, in particular, concerns about the electrical installation, including the need for an examination and the associated costs, and the roof. Mr Ohren arranged for an electrical contractor to visit the Property.
24. The subsequent Domestic Visual Condition Report prepared by Darwin Electrical Services and dated by 19/3/19 noted the following Code C2 (“Potentially Dangerous” Urgent remedial action required) items:
 - No earthing to lighting circuit with metal fittings in place.
 - Outside light full of water.
 - No RCD protection to any circuit in the house.
 - Main earthing conductor requires upgrading.
25. The Applicant paid for the cost of the Report.

26. This Report ultimately led to the service of the Fire Improvement Notice on the basis of the Category 1 hazard of Fire based on the HHSRS Hazard Profile No 24.
27. At the hearing the Tribunal led Mr Ohren through the Report and the individual C2 items and asked which items were particularly relevant to Hazard Profile No 24 – Fire. At the end of this discourse, Mr Ohren admitted the defects noted were more relevant to Hazard Profile No 23 – Electrical Hazards.
28. In respect of the roof, there were abortive efforts by Mr Ohren to obtain a report on the same. The following factors were then considered by Mr Ohren:
 - The roof leaks into the bedroom
 - A lack of background heating in the bathroom causes the structure to be several degrees colder than the rest of the Property.
 - A dormer window has been installed in the roof (not counted as a storey due to a lack of a staircase). Its roof appears like it has been recently resurfaced. The sides and window are dilapidated with rotten and warped timbers. There is evidence of recent attempts the flashing watertight (sic) by coating it with a sealant.
29. Following being advised about concerns about the heating to the bathroom, Ms Barber installed a wall mounted electric heater.
30. However, following consideration of all the factors above, the Respondent served the Damp Improvement Notice on the basis of Hazard Profile 1 – Damp and Mould Growth.
31. In respect of the expenses related to the service of the Notices, the Respondent provided details of their charging rates and time sheets in respect of their actions. The charging rate for Mr Ohren was £41.13 per hour and 9.5 hours were charged leading to a total of £390.74 although the time sheets did indicate 11 hours were actually spent on the matter.

The Applicant's Submissions

32. Initially, Ms Barber provided details of her involvement with the Property and, in particular, her involvement with Mr Ohren in 2017 over concerns at that time. In 2017, the evidence showed that Ms Barber cooperated fully with the Respondent and no formal action was taken by the latter. In 2019, Ms Barber again reacted positively when Mr Ohren contacted her. However, the communications were made more difficult by Mr Ohren taking an extended holiday and Ms Barber working overseas. The Applicant was in discussion with the Respondent by email up until 4 April 2019 and then heard nothing until 4

June 2019 and then on 11 June 2019, the Improvement Notices were served. The Applicant could not understand why in 2017 matters had been dealt with informally but in 2019 formal Notices had been served?

33. In respect of the Fire Improvement Notice, Ms Barber stated that the component noted by Mr Ohren with scorch marks had been disconnected sometime before and hence wasn't live. The Tribunal does not need to detail any more of the Applicant's submissions in respect of this Notice.
34. In respect of the Damp Improvement Notice, Ms Barber tried assiduously to obtain from Mr Ohren the details of the roofing contractor he had engaged to provide a report on the roof. The Applicant had also made efforts to deal with the roof leak which had been frustrated by the actions of the tenant however at the hearing she advised that the leak into the bedroom had been dealt with.
35. The tenant has been in occupation since 2015 and the Applicant stated that she has no intention of re-letting the Property in its existing condition to a new tenant. The Applicant confirmed to the Tribunal that she is aware that Property is reaching the end of its useful life and provided evidence that she has been in contact with the planning department of the Respondent regarding redevelopment of the site.
36. The Applicant confirmed that she had served notice to bring the tenancy to an end in November 2019, but in any event, the tenant was due to be rehoused by a social housing provider in September 2019. The Respondent confirmed the latter.
37. In terms of the expenses claimed by the Respondent, the Applicant considered the costs are too high. The Applicant also requested that in the event of her appeals succeeding, that the Tribunal give consideration towards the Respondent reimbursing the Tribunal fees and substantial costs (including legal fees) that had been incurred by her as a result of the unreasonable actions of the Respondent. These amounted to over £6,000 in total.

THE LAW

38. The relevant sections of the Housing Act 2004 are as follows.
39. Following an appeal under Schedule 1 against a decision by a Local Housing Authority to issue an Improvement Notice, the Tribunal may under section 15 (3) of that Schedule:

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

DETERMINATION

40. The Tribunal can appreciate the Applicant's confusion as to why in 2017 matters were dealt with relatively informally whilst in 2019, the Respondent moved to issue Improvement Notices after what (for Ms Barber) can only be described as an exasperating period of communication particularly in respect of the reports for the electrical installation and the roof. The Tribunal further accepts that Ms Barber does not intend to continue to let the Property after the current tenant vacates.
41. However, the Respondent has to work on the basis that for some reason either the existing tenancy goes on longer than expected or it is re-let and once the hazards are noted, they have a duty to act (in respect of hazards that they determine as category 1) hence the service of the Improvement Notices.
42. Considering initially the Fire Improvement Notice, the Tribunal noted that the electrical cables leading to the scorched fuse box component had been cut and it did not appear to be connected to the mains supply.
43. In any event, and as admitted by the Respondent at the hearing, the wrong Hazard Profile had been used; Hazard Profile No 24 – Fire whilst the defects noted on the Visual Inspection Report were more relevant to Hazard Profile No 23 – Electrical Hazards.
44. Accordingly, the Tribunal quashes the Fire Improvement Notice.
45. Considering the Damp Improvement Notice, the Tribunal notes and accepts Ms Barber's comments that the leak into the bedroom has been fixed. However, the roof is in need of a complete overhaul if the Property continues to be occupied and hence the Respondent was correct in issuing the Notice. The Tribunal will not therefore quash it but to allow for the existing tenant to vacate, orders that the paragraph 4. of the Damp Improvement Notice be varied to allow the works specified to be started within 6 weeks of the date of this decision and to complete them within 6 weeks. Assuming the tenant vacates, the Applicant will be able to apply to the Respondent to withdraw or suspend the Notice or if necessary substitute it with a Hazard Awareness Notice.
46. In respect of the expenses claimed by the Respondent, the Tribunal considers that the charging rate claimed of £41.13 per hour is reasonable. Discounting the time spent to allow for the actions in respect of the Fire Improvement Notice, the Tribunal allows expenses for five hours therefore £205.65.

47. In terms of the costs claimed by the Applicant, the Tribunal only has limited cost shifting powers which are contained in Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (“the Rules”).
48. If the Applicant wishes to make an application under Rule 13 (1) (a) or (b), she must within the next 14 days provide to the Tribunal and the Respondent Local Authority a written submission setting out the grounds relied upon under Rule 13 and setting out an itemised schedule of costs claimed.

APPEAL

49. A party seeking permission to appeal this decision must make a written application to the Tribunal for permission to appeal. This application must be received by the Tribunal no later than 28 days after this decision is sent to the parties. Further information is contained within Part 6 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (S.I. 2013 No. 1169).

V Ward

ADDENDUM ON COSTS

- a) On 3 October 2019, the Applicant made an application for costs under Rule 13 (1) (b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. On 15 October 2019, the Tribunal issued Directions. As neither party requested an oral hearing the Tribunal determined the matter on the basis of the written submissions of the parties.

- b) The Applicant sought costs as follows:

i.	Lichfield District Council Invoice	£390.74
ii.	Lichfield District Council Credit Note	-£185.09
iii.	Fee Application to Improvement Notice	£100.00
iv.	Fee Application to Improvement Notice	£100.00
v.	Tribunal Hearing Fee	£200.00
vi.	Solicitor’s invoice	£960.00
vii.	Solicitor’s invoice	£3,318.00
viii.	Annual leave taken to prepare for Tribunal	£881.03
ix.	Printing Costs	<u>£75.00</u>
		£5,839.68

Submissions of the Applicant on Costs

- c) In her submissions on costs, the Applicant reiterated that she had co-operated fully with the Respondent both on this occasion and also in 2017. Further, no

opportunity was given to attend the roof inspection on 7 June 2019 and in addition, no contact details were provided for the firm that carried out the inspection or a copy of the report from them.

- d) Continuing, the Applicant says that the Respondent was aware of the likelihood of the Tenant being rehoused and further that the Applicant had no intention of re-letting the Property after the expiry of the existing tenancy. The Tenant did in fact vacate on 19 September 2019.
- e) The Tribunal decision to quash the Fire Improvement Notice evidences that it should not have been issued as it did not match the electrical hazard described.
- f) The Applicant states that she understands the comments on the Damp Improvement Notice however given her history of co-operation with the Respondent, it was wholly unreasonable not to allow the matter to be resolved without the service of a formal notice.
- g) The points made in paragraph 34 above were re-stated by the Applicant.
- h) The Applicant took legal advice due to the unexpected change of approach adopted by the Respondent particularly as the appeal period is limited, although costs incurred in this regard were minimised as far as possible. The firm were chosen on the basis of having the expertise to deal with matters of this kind.

Submissions of the Respondent on Costs

- i) The Respondent accepted that the wrong hazard profile was used for the Fire Improvement Notice however the use of the correct profile may have produced a different result hence whilst the service of the Improvement Notice was flawed it was not unreasonable. Given the hazards associated with the escape route from one of the bedrooms being only via the open plan hall and kitchen, it may have been necessary to service a Fire Improvement Notice or Prohibition Order anyway. The Respondent does not consider that the Tribunal fully considered the other electric hazards at the Property.
- j) The Respondent accepts that the period of leave taken by Mr Ohren hindered contact with the Applicant however, it was inevitable that at some point formal action would be taken unless the works were completed and the Applicant was aware of the required works for some months. The Respondent states that they could not work on the premise that the Tenant would be leaving as the tenancy may go on longer than necessary or in fact the dwelling may be re-let.
- k) In respect of the Damp Improvement Notice, the Respondent had to deal with the evidence before it; there was a leaking roof and a lack of repair for some

considerable time. If the Tenant were being obstructive, the Applicant could have considered involving the Police.

- l) The Respondent, whilst acknowledging that they were not fully aware of the level of contact and advice given to the Applicant by her solicitors, consider that their charges of £4,278.00, when they did not attend the hearing, to be extremely high.
- m) In summary, the Respondent disputes any claim for costs in this matter, they consider their actions in this matter were more than reasonable given the delays in undertaking work prior to the Notices being served. In any event, one of the Notices was in fact upheld.

The Law

- n) The First-tier Tribunal is not a jurisdiction, unlike the courts, where the unsuccessful party is normally ordered to pay the costs of the successful party. An order for costs is exceptional, and can only come about through the application of Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The relevant parts of that rule to this matter are:

“Orders for costs, reimbursement of fees and interest on costs

13.—(1) The Tribunal may make an order in respect of costs only—

- (a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;*
- (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—*
 - (i) an agricultural land and drainage case,*
 - (ii) a residential property case, or*
 - (iii) a leasehold case; or*
- (c) in a land registration case.*

- (2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.
- (3) The Tribunal may make an order under this rule on an application or on its own initiative.
- (4) A person making an application for an order for costs—
 - (a) must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and

- (b) may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal.
 - (5) An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends—
 - (a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or
 - (b) notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.
 - (6) The Tribunal may not make an order for costs against a person (the “paying person”) without first giving that person an opportunity to make representations.
 - (7) The amount of costs to be paid under an order under this rule may be determined by—
 - (a) summary assessment by the Tribunal;
 - (b) agreement of a specified sum by the paying person and the person entitled to receive the costs (the “receiving person”);
 - (c) detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal or, if it so directs, on an application to a county court; and such assessment is to be on the standard basis or, if specified in the costs order, on the indemnity basis.
 - (8) The Civil Procedure Rules 1998(1), section 74 (interest on judgment debts, etc) of the County Courts Act 1984(2) and the County Court (Interest on Judgment Debts) Order 1991(3) shall apply, with necessary modifications, to a detailed assessment carried out under paragraph (7)(c) as if the proceedings in the Tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply.
 - (9) The Tribunal may order an amount to be paid on account before the costs or expenses are assessed.”
- o) The FTT’s power to award costs is derived from section 29 of the Tribunals, Courts and Enforcement Act 2007, which provides that “the relevant tribunal

shall have full power to determine by whom and to what extent the costs are to be paid”, subject to the tribunal’s procedural rules.

Determination

- p) In *Willow Court Management Co (1985) Ltd v Alexander* [2016] UKUT 290 (LC), the Upper Tribunal provided guidance on the correct approach to costs claims under Rule 13.
- q) Firstly, the Tribunal should adopt a three-stage process:
- a. Consider whether the person against whom an order is sought has behaved unreasonably;
 - b. If so, should the Tribunal exercise its discretion to award costs;
 - c. If so, how much should be paid.
- r) Secondly, “unreasonable” conduct is discussed in some detail. The distillation of that discussion in this section is not a substitute for a careful reading of the *Willow Court* decision itself. Nevertheless, it seems clear to the Tribunal that:
- a. The Upper Tribunal approved the following passage (from *Ridehalgh v Horsefield* [1994] Ch 2015) as encompassing “unreasonable” conduct:

“... conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on the practitioner’s judgement, but it is not unreasonable.”
 - b. It is improbable that the following behaviours would constitute unreasonable behaviour (without more): a party who fails adequately to prepare for a hearing; a party who fails to adduce proper evidence for their case; failure to state a case clearly, or the seeking of a wholly unrealistic or unachievable outcome.

- c. Tribunals should not be over-zealous in detecting unreasonable behaviour.
 - d. Lay people who are unfamiliar with the substantive law or tribunal procedure, or who fail to appreciate the strengths and weaknesses of theirs or their opponent's cases, or who lack skills in presentation, or who perform poorly in the tribunal room should not therefore be regarded as acting unreasonably.
 - e. The Tribunal must exercise its own value judgement on behaviours under consideration in the application.
- s) In this matter, it is clear that a fundamental issue as far as the Applicant was concerned was that in 2017, concerns of the Respondent were dealt with informally and without the need for the Respondent to take formal action. In 2019, an informal approach was taken initially but was then stymied by the Respondent and, in particular, during the period of leave taken by Mr Ohren. The behaviour of the Tenant and the difficulty of obtaining the roofing contractor's details and report only further frustrated the Applicant.
- t) However, following *Willow Court* and *Ridehalgh* does this amount to be unreasonable behaviour? Is there a reasonable explanation for the Respondent's actions in serving the Notices? The Tribunal considers that there was.
- u) Once the matter was referred to the Respondent they were duty bound to act or face possible censure if harm were to be caused to the Tenant due to the condition of the Property.
- v) Whilst the Fire Improvement Notice (concerning defects originally considered to be a category 1 hazard, by the Respondent) was quashed, it would have been possible (and correct under HHSRS operating guidance – hazard profile 23) for the Respondent to serve a section 12 Improvement Notice (i.e. a category 2 hazard) in respect of Electrical Hazards. If correctly served, such a notice would have been confirmed by the Tribunal, if it had been subject to appeal.
- w) For the Tribunal to make an award for costs, a high threshold of what is considered to be unreasonable behaviour has to be achieved. In the opinion of the Tribunal, that threshold has not been reached in this matter and hence declines to make an Order for costs.

APPEAL

- x) The Appeal mechanism is provided in paragraph 49 above.