First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	**:**	**CHI/00HE/HIN/2021/0007**
Property	**:**	**32 Woodlane,** **Falmouth,** **Cornwall TR11 4RF**
Applicant	**:**	**Patrick Walsh – self representing**
Respondent **Represented by**	**:**	**Cornwall Council** **Kingsley Keat (solicitor)**
Application	**:**	**Appeal against Improvement Notice (paragraph 10 of Schedule 1 of the Housing Act 2004 ("the Act"))**
Application date	**:**	**28th April 2021**
Tribunal	**:**	**Judge Bruce Edgington (chair)** **Johanne Coupe FRICS, chartered surveyor &** **Patricia Gravell MCIEH, professional member**
Date & place of hearing:		**18th August 2021 as a video/telephone hearing from Havant Justice Centre in view of Covid pandemic restrictions**

DECISION

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1. The decision of the Tribunal is that the Improvement Notice dated 8th April 2021 alleging a Category 1 hazard of excess cold is quashed.

2. The fee charged to the Applicant by the Respondent of £253.00 is not payable

Reasons

Introduction

3. On or about the 8th April 2021, the Respondent served an Improvement Notice on the Applicant alleging a category 1 hazard of Excess Cold in respect of the second-floor roof void at the property and the first-floor bathroom. The

Respondent also demanded £253.00 being the alleged cost of the assessment and Improvement Notice.

4. The said bundle has numbered pages which are known to the parties. When page numbers are quoted in this decision, they will be of the particular numbered page(s) in the bundle. It is unfortunate, to say the least, that the bundle contains (a) so many documents and photographs which are irrelevant to this determination and (b) so many duplicates. Obviously the Tribunal members have had to consider all the pages in the bundle to ensure their relevance which has created a great deal of wasted time.

5. This appeal was lodged on time but the service of the Improvement Notice seems to have been part of an ongoing process whereby the Respondent has been attempting to change a number of things in the property because of alleged breaches of other safety matters which, it is claimed, are in breach of the Applicant's licence enabling him to manage this House in Multiple Occupation ("HMO"). The application form mentions this in some detail. As far as the Improvement Notice is concerned the Applicant states the following:-

> "*I confirmed with Mr. Kenney and then Mr. Fink that contrary to their intent to prove the heating was inadequate in the attic rooms, their measurements had proved the exact opposite. The only reason they are proceeding is based on the guess that there is no insulation behind the ceiling panels, and that this imagined lack was causing a heat hazard, which their measuring instruments couldn't detect! (The sole reason for the 2nd inspection was the measurement of the heating which Mr. Fink said would clearly prove his 'suspicions')*"

6. The Respondent said, at the hearing of this matter, that no-one else had been served with the Improvement Notice apart from the Applicant. For the avoidance of doubt, they should be aware that paragraph 5 of Schedule 1, Part 1 of the Act, states that copies of any Improvement Notice must be served on an owner of a freehold interest in the property and any occupier.

7. On the 10th June 2021, Judge Whitney made a directions order timetabling this case to this hearing. He took the opportunity of clarifying that "The Tribunal has accepted the application as an Appeal of the Improvement Notice" dated 8th April 2021. As has been said, much of the bundle does not relate to this issue.

The Statutory Framework

8. The Act introduced a Statutory scheme enabling local authorities to assess the condition of a property based on risk to occupants with power to serve notices and orders on owners requiring action to be taken to reduce risk or restrict the use of a property.

9. The scheme is based on an assessment of risk using the Housing Health and Safety Rating System ("HHSRS"). The most serious risk of harm to a person creates a Category 1 hazard and if a local authority makes a Category 1 hazard

assessment, it becomes mandatory under Section 5(1) of the Act for the local authority to take appropriate enforcement action. All other risks simply enable the local authority, in its discretion, to take such action.

10. A person served with an Improvement Notice can appeal to this Tribunal which "may by order confirm, quash or vary the improvement notice" (Schedule 1, paragraph 15(3) to the Act). By paragraph 13 of Schedule 1, a person receiving an Improvement Notice has 21 days to appeal to this Tribunal. Any appeal is by way of a re-hearing although the Tribunal must look at the evidence available to the Council at the time as an initial exercise.

Inspection

11. Judge Whitney's directions order makes it clear that the Tribunal will probably not be inspecting the property although any application by a party for such an inspection will be considered if it is received on or before 30th July 2021. No such application has been received.

The Hearing

12. The hearing was attended by the Applicant, Kingsley Keat, a solicitor member of the Respondent's legal team and the witnesses James Fink and Stuart Kenney. The Tribunal's case worker explained practical formalities in respect of the hearing.

13. The Tribunal Judge then introduced himself and the other Tribunal members. He then explained that he would ask some questions which arose from the papers and then invite each side to put their case. The Tribunal wing members would be invited to put any questions they had at the appropriate time. That was how the hearing proceeded.

14. The Applicant gave opening remarks and evidence in accordance with his written statement. He confirmed that he had not yet dealt with the heater in the 1st floor bathroom but this would be dealt with. There was another bathroom on the ground floor. No-one had asked for a heater in the 1st floor bathroom. It is constantly in use for showers and the window is always open. There is no heater in there and Mr. Walsh said that even if one is put there it won't be used.

15. He went on to say that the property has had an HMO licence for 15 years. In 2012, the Environmental Health Officer who inspected was Martin Diamond and he told Mr. Walsh that he knew the property which presumably meant that he had inspected it before then. He said that the students paid the electricity and gas bills separately to the suppliers.

16. There had never been complaints about the amount paid but the students had, on occasions, turned off the gas central heating on the floors below. They had also turned off the night storage heaters. Mr. Walsh said that he had told them very clearly that it was a term of their tenancy agreement that they should not do that because the fixed heating kept the whole property warm. He had removed portable heaters but understood that some had been returned by the students. Finally, he said that the tenants at the time of the assessment had moved out on

24th July 2021 and a new set of tenants had taken up residence on the 1st August. In the intervening period he had given the property a deep clean and he had dealt with some running repairs. He added that all his tenants tend to be 2nd year university students who are each others' friends. The chances of anyone living there who is over 65 years old are "*nil*".

17. Mr. Fink then gave evidence in accordance with his written statement in the bundle. Unfortunately, his video link was not good and he joined the hearing by conference telephone call with everyone's agreement. He had been qualified for some 14 years and had worked for Bristol City Council and Cornwall Council. He said that there were no records since 2012. Following that agreed visit, he could not produce any records of Mr. Diamond's findings although there were some notices about fire precautions. They could not be produced either.

18. The Tribunal chair pointed out to him that on the face of it this seemed rather odd. A person known to be an Environmental Health Officer employed by the Respondent had inspected the property in 2012. At the time the same night storage heaters were there and the insulation was the same subject to any unidentified deterioration. However that person had not found any hazards, let alone a Category 1 hazard. He could give no explanation for that. He alleged other deficiencies with the 2 rooms in question which were vehemently denied by Mr. Walsh. As to holes in the roof and defective windows, it is noted that there are no close up photographs of such problems.

19. Mr. Fink confirmed that on his visits to the property, it was "*warm enough*". He referred to the night storage heaters not being efficient enough but confirmed that he had then assessed them and found them to be adequate on the assumption that the insulation was in order. He confirmed that he had not questioned the occupiers in any detail about any drop in temperature or any health problems.

20. He did say that one had told him that the coldness started in the afternoon but had to concede that neither his statement nor other records said this. They all said that any drop in temperature was in the evening just before the heaters started to be re-charged. He agreed that there were other heaters there which could have been switched on to ensure a reasonable ambient temperature. He was asked by a Tribunal member about whether he had measured any drop in temperature and/or the temperature when the other heaters were switched on. He said that he had no equipment to do that which the Tribunal members find to be unusual to say the least.

21. When challenged by Mr. Walsh about the attitude of neighbours, Mr. Fink became noticeably agitated and said that "*his neighbours are sick and tired of him*". As none of the neighbours had mentioned any heating problem and were not at the hearing to give evidence, the Tribunal chair asked that the evidence move on.

22. Mr. Kenney then gave evidence. He is Mr. Fink's superior. He has 17 years' experience. His evidence concentrated on the decision making process. He

agreed that the law had not changed since the Act but said that assessments had changed because the CIEH guidance had changed over the years. When the Tribunal chair read out the extract from the 2011 guidance referred to below which points out that between the Act coming into force and 2011, there had been changes to the HHSRS assessments of risk in this sort of case because the evidence upon which the Operating Guidance had been based had changed, he could not answer. Excess cold was, in 2011, being over assessed as compared with when the Act was brought into effect

Discussion

23. In the Upper Tribunal case of **Herefordshire Council v Rhode** [2016] UKUT 39 (LC), Judge Cooke assisted Tribunals by setting out her determination of what a 're-hearing' was. The Tribunal's task was to look at the local authority's decision and then consider the evidence available to the local authority at the time it made its decision. It should then consider whether the correct decision had been made. In other words, the Tribunal's task was not to simply consider the state of a property on the day of the Tribunal's determination and then make a decision based purely on that.

24. In this case, the chronology of events appears to be:-

Feb. 2000	Applicant buys the mid terraced Georgian property with his wife Tanja where they live for 6 years (page E1)
Sept. 2006	property is let to students attending Falmouth University and continues to be similarly let (page E1)
May 2012	property inspected by the Respondent's Environmental Health Officer ("EHO"), Mr. Diamond, who makes no mention of any excess cold hazard (page E1).
23.09.19	Energy Performance Certificate prepared by a qualified energy assessor which says that the property's energy efficiency rating is E (pages H162 onwards). This assesses the walls, single glazed windows and roof rooms (assuming no insulation) as 'very poor'. However is does say that the 200mm loft insulation in the pitched roof is 'good'.
06.10.20	Stuart Kenney, a Respondent witness, received a referral from a councillor about the condition of the property with no reference to any complaint about excess cold (page G15).
07.10.20	another EHO from the Respondent, the witness James Fink, telephones the Applicant asking for an inspection which is agreed.
12.10.20	inspection takes place. Mr. Fink says that the students present "said that if they had any issues, they phone the landlord Mr. Walsh and he would send someone to fix the problem. I asked about the storage heating to the first/second floor bedrooms and they said it was fine until late evening when temperatures dropped, and the stored heat output dropped" (page G3)
08.12.20	Mr. Fink and Mr. Kenney inspect again and Mr. Fink says "I noted portable heaters in both attic rooms and on questioning one of the occupants if they were needed, she confirmed that it was cold in the evening before the storage heater re-charged". He says that he

shined a torch into gaps in the ceilings of the attic rooms and could not see any insulation (page G5).

07.04.21 HHSRS assessment finalised and Improvement Notice prepared and served on the following day (page G7).

08.12.21 date by which work in the Improvement Notice should be completed.

25. It seems to the Tribunal to be important to note that on page F7 there is a record of a test undertaken by Mr. Fink, namely a test undertaken on the automatic night storage heaters which concludes that they are adequate for the sizes of the rooms in question.

26. The Respondent places great importance on the Chartered Institute of Environmental Health ("CIEH") guidance and their December 2019 version is in the bundle at pages I4 onwards. There have been a number of versions of this over the years, starting in 2006. The guidance makes it absolutely clear that it does not change the Act. It is interesting to note that the 2019 version seems to concentrate more on enforcement and the benefit of property improvements rather than assessing whether a risk under the Act exists.

27. In the Upper Tribunal case of **Bristol City Council v Aldford Two LLP** [2011] UKUT 130 (LC), the then President, George Bartlett QC, dealt with an appeal against an Improvement Notice in circumstances quite similar to this case. The issue in that case was the form of heating which was by convector heaters. The Council had ordered that the works under the Improvement Notice should be the replacement of the convectors with gas central heating or electric night storage heaters.

28. In their assessment of the hazard, the Council classified the property as a pre-1920 flat and then said that "*The second floor is built into the roof space, however, there is access to a loft which has been provided with 200mm insulation. The level of insulation, if any, between the rafters and plaster to the sloping ceiling is unknown*". The assessments by the case officer were exactly the same as for this case i.e. Class I 31.6, Class II 4.6, Class III 21.5 and Class IV 42.3. This produced a hazard rating score of 1819, putting the hazard in band C. Mr. Fink's assessment in the case now being considered is 1820 (page H158).

29. It is said that the Residential Property Tribunal ("RPT") "*...had noted from their inspection firstly that the tenants themselves had no complaint about the heating and were happy to control it for the time and the hours that they wanted in the respective rooms. Secondly that notwithstanding that it was a cold day outside the premises appeared to be warm. Thirdly and based on the Tribunal members' own knowledge and inspection of many similar premises, that the heating system that was provided at these premises should be perfectly adequate and is not abnormal for these types of premises*".

30. The RPT quashed the Improvement Notice. The Council argued that the reasons for the decision were inadequate and had failed to give any proper consideration of the assessment of the hazard upon which the Council's case

depended. The Upper Tribunal disagreed with the Council but said that as the RPT had found that there was a Category 1 hazard, they should have gone on to consider the alternatives. His view was that a hazard awareness notice was appropriate.

31. As to the reasons, the then President said that in his view, RPTs "*should not shy away from making their own assessment of the hazard and should not treat the figures given for national averages as compelling…..the tribunal will bring its knowledge and experience to bear in evaluating the evidence and reaching its conclusion, and it will, importantly, bring common sense to bear in the judgment that it makes*".

32. He had already said that "*The needs and preferences of the actual occupiers, as well as those of the vulnerable group considered for the purpose of the assessment, are in my judgment material to the choice of enforcement action to be taken. Moreover even on the council's assessment the hazard is a band C hazard, the bottom band in category 1, and that assessment, as I have said, is likely to be too high. So far from being reasonable in these circumstances to require a new heating system to be installed it would in my judgment be palpably unreasonable to require this.*"

33. The then President said that the 2004 Act, the Regulations and the statutory guidance have created a system of assessment that is complex. He went on to say "*By reducing to numerical terms essentially subjective judgments of risk the system may give a misleading impression of scientific precision to the assessment results. The objective standards provided to guide the subjective judgments – national averages of the incidence of harm and distribution between the four classes – have a statistical basis that is self-evidently fragile. What has been done is to produce a national average probability of the incidence* (of harm) *Such average values are only as dependable as the statistics that underlie them, and it is evident that they have been derived by routes that, in the absence of direct statistical evidence, are inevitably indirect. The Operating Guidance itself makes this clear.*"

34. The **Bristol City Council v Aldford** case dealt with a Council assessment undertaken following an inspection on 11th May 2009. Two years later, in the 2011 version of the CIEH guidance, there is a specific section on assessing excess cold hazards. It points out that the Operating Guidance published at the same time as the Act relied upon data from 1997 to 1999 when the average number of excess winter deaths per year was about 40,000 whereas the average in 2011 was 25,000. It then goes on to say:

> "*The average likelihood and health outcomes in the Operational Guidance for excess cold now provide an over-estimate of the potential for harm. This is due to improvements in energy efficiency and changes in evidence for winter deaths since publication. These changes mean that the current 'average' for many built types no longer scores above the 1000 threshold. It is important that practitioners do not automatically consider a type*

of dwelling to be a Category 1 hazard, but considers deficiencies which exist which could lead to sub-optimal temperatures".

35. In the Operating Guidance itself on page I119 it says that "*….the inspector should assess the likelihood of a member of the vulnerable age group suffering a potentially harmful occurrence in the next twelve months*". It goes on to say on page I69:

> "*…a hazard might be significant only in relation to a category of occupant who is not in residence and would not reasonably be expected to live there in the medium to long term…..action might be suspended and changes of occupation monitored….where it appears unlikely that vulnerable occupants will occupy the premises in the medium to long term (perhaps because they are let by an educational body to their students) it may be that hazard awareness advice is appropriate. Even in the case of student tenancies however, hazards may be a threat to young and fit people. Some student accommodation is let out during vacations. Much will depend on the extent to which students and their visitors are exposed to any hazards*".

36. The guidance also makes it clear on page I119 that "*to fully assess some hazards, destructive investigations may be necessary*". This would presumably include removing a section of wall covering to find out whether any form of insulation actually exists.

Conclusions

37. The Applicant is clearly very upset by the actions taken by the Respondent's witnesses. The Tribunal makes it clear that it has not considered his complaints about behaviour. The Respondent's witnesses clearly feel that they have acted in the public interest by seeking to protect occupiers of the property. The decision of the Tribunal is based purely on the factual evidence and the legal submissions.

38. Having said that, there are a number of matters which concern the Tribunal about the Respondent's investigation. Examples are:

- It is not disputed that the Respondent's EHO inspected the property in 2012 and apparently found no evidence of either a Category 1 or a Category 2 hazard. There is no dispute about the account of that inspection in the evidence nor any suggestion that the state of the property has changed since then. The heaters and insulation are the same.
- The only comment from the present occupiers is that the night storage heaters in the 6th and 7th rooms in the top floor lose heat in the evening before they re-charge themselves. One reportedly says 'evening' and the other says 'late evening'. However the evidence is that there are other heaters in the rooms to cope with that and there is no suggestion by the occupiers of excess cold or their health being affected.
- The tests undertaken show that the night storage heaters have enough output for the size of the rooms.

- There is no evidence that the cost of heating is excessive.
- There is little of the other evidence which often exists when there is excess cold e.g. damp and mould growth. There is some evidence of mould around a window but none on the walls or ceilings.
- There is no dispute that the occupiers are university students and are highly unlikely to be in the vulnerable age group i.e. over 65 years old.
- There is no clear evidence that the rooms have insufficient insulation save for the EPC which suggests that there is some insulation somewhere in the roof and categorises the property as having an E energy rating which is acceptable to letting property. All other assessments simply assume that there is inadequate insulation. Mr. Fink says that he shone a torch through holes or cracks in the ceiling but the photographs do not show any gaps large enough for an accurate assessment.

39. The Tribunal concludes that (a) there is no reliable evidence about the thickness or effectiveness of any insulation, (b) there is clear evidence that the automatic night storage heaters are adequate for the size of rooms, (c) there is no evidence from any past or present occupier that there is excess cold at any time save for a reduction in temperature in the evening before the heaters start to recharge and when there is back-up heating available, (d) there is no evidence that the cost of heating is excessive and (e) there is evidence that the Respondents then Environmental Health Officer, Mr. Diamond, inspected the property in 2012 and found no need to undertake a full assessment of any excess cold hazard. He must have realised that Sections 3 and 55(5)(c) of the Act say that housing authorities must keeping housing conditions under review to identify any action which may be needed under the Act, particularly those with HMO licences.

40. In the **Bristol** case, the hazard and potential harm assessment was almost exactly the same as in this case but the surrounding circumstances lead the RPT and the Upper Tribunal to quash the Improvement Notice. The Upper Tribunal said that a hazard awareness notice was appropriate as the RPT had confirmed that there was a Category 1 hazard in that case. Section 5 of the Act says that where there is a category 1 hazard, some action must be taken.

41. Since then the CIEH, in 2011, released information that clearly said that the average likelihood and health outcomes in the Operational Guidance for excess cold were then an over estimate of the potential for harm and that the current 'average' for many types of building were no longer above the 1000 threshold. It may be that Mr. Diamond, in 2012, had this in mind. There seems to be no other explanation for Mr. Diamond and Mr. Fink to be so much at odds with each other on what are, in effect, the same facts.

42. As far as the 1st floor bathroom is concerned, the Tribunal had little evidence about this. However, the Applicant agreed that there was no heater in that room and he would rectify that. He must do so as soon as possible or risk further action for him to comply with his HMO licence.

43. It is worth adding that so far as Mr. Walsh is concerned, he must understand that we all have to be aware that there are legislative moves to improve the

environmental efficiency of all buildings, particularly residences. As the CIEH guidance makes clear, properties that are fully and generously insulated save fuel and improve the environment. At the moment, these changes do not change the Act and its consequences save for the matters mentioned in this decision.

44. However, he must understand that the property seen in the photographs does indicate that general maintenance to walls, window frames etc. is required. Such maintenance should include, as a matter of reasonableness and common sense, ensuring that there is full and generous insulation above rooms 6 and 7.

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Judge Edgington
19th August 2021

ANNEX - RIGHTS OF APPEAL

i. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. 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.

iii. 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.

iv. 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.