FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/00CN/HIN/2021/0008**
Property	**:**	**Flat 1, 32 St Peters Road, Handsworth, Birmingham B20 3RR**
Applicant	**:**	**Mr Barket Hussain**
Respondent	**:**	**Birmingham City Council**
Type of Application	**:**	**An appeal against an Improvement Notice and a Demand for recovery of expenses under Schedules 1 and 3 to the Housing Act 2004**
Tribunal Members	**:**	**Judge M K Gandham** **Mr R Chumley-Roberts MCIEH, JP**
Date and venue of Hearing	**:**	**Paper Determination**
Date of Decision	**:**	**02 February 2022**

DECISION

Decision

1. The Tribunal finds that the Improvement Notice dated 8 September 2021 is defective and orders that both it and the Demand for Payment, of the same date, be quashed.

2. The Tribunal orders, under Rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, that Birmingham City Council reimburse Mr Barket Hussain the whole of the tribunal application fee, being the sum of £100.

Reasons for Decision

Introduction

3. On 7 October 2021, the First-tier Tribunal (Property Chamber) received an application from Mr Barket Hussain ('the Applicant') for appeals under paragraph 10 of Schedule 1 and paragraph 11 of Schedule 3 to the Housing Act 2004 ('the Act'). The appeals related to an improvement notice dated 8 September 2021 ('the Improvement Notice') and an associated Demand for Payment ('the Demand for Payment'), served upon him by Birmingham City Council ('the Respondent') relating to the property known as Flat 1, 32 St Peters Road, Birmingham, B20 3RR ('the Property').

4. The Improvement Notice was served on the Applicant on 8 September 2021 and detailed, in Schedule 1 of the notice, various defects at the Property. These defects were categorised as category 1 hazards in respect of 'Excess Cold' and 'Personal Hygiene, Sanitation and Drainage'. The Respondent served, with the Improvement Notice, a statement of reasons as to why the decision to take enforcement action had been taken and the Demand for Payment, which demanded a sum of £366.94 in respect of the Respondent's costs for serving the Improvement Notice.

5. The Tribunal issued Directions on 7 October 2021. Although the application was received out of time, the Tribunal considered that there was a good reason for the failure to appeal in time and used its discretionary powers under the Act to allow the appeals. The Tribunal also confirmed, in the Directions, that it would not be carrying out an inspection of the Property.

6. On 18 November 2021, the Tribunal received the Respondent's bundle and the Applicant's bundle was received on 19 November 2021.

7. Neither party requested an oral hearing.

The Law

8. The Act introduced a new system for the assessment of housing conditions and for the enforcement of housing standards. The Housing Health and Safety Rating System (the 'HHSRS') replaces the system imposed by the Housing Act 1985, which was based upon the concept of unfitness. The HHSRS places the emphasis on the risk to health and safety by identifying specified housing related hazards and the assessment of their seriousness by reference to (1) the likelihood over the period of 12 months of an occurrence that could result in harm to the occupier and (2) the range of harms that could result from such an occurrence. These two factors are combined in a prescribed formula to give a numerical score for each hazard. The range of numerical scores are banded into ten hazard bands, with band A denoting the most dangerous hazards and Band J the least dangerous. Hazards in Bands A to C (which cover numerical scores of 1000 or more) are classified as 'category 1 hazards' and those in bands D to J (which cover numerical scores of less than 1000) are classified as 'category 2 hazards'.

9. Where the application of the HHSRS identifies a category 1 hazard the local housing authority has a duty under section 5(1) of the Act to take appropriate enforcement action. Section 5(2) sets out the courses of action (which include the serving of an improvement notice) which may constitute appropriate enforcement action. Where the application of the HHSRS identifies a category 2 hazard the local housing authority has a power under section 7(1) of the Act to take enforcement action. The serving of an improvement notice is one of the types of enforcement action which may be taken.

10. Section 13 of the Act confirms what information must be specified in an improvement notice and section 13(3) states:

> "*The notice may not require any remedial action to be started earlier than the 28th day after that on which the notice is served.*"

11. Section 49 of the Act confirms that a local housing authority may recover expenses relating to enforcement action and section 49 (1) states:

> *"(1) A local housing authority may make such reasonable charge as they consider appropriate as a means of recovering certain administrative and other expenses incurred by them in –*
> *(a) serving an improvement notice under section 11 or 12;"*

12. Part 1 of Schedule 1 to the Act deals with the service of improvement notices and paragraph 3 of Schedule 1 deals with the service of improvement notices for flats which are not licensed under Part 2 or 3 of the Act. Paragraph 3(2) provides as follows:

> "(2) *In the case of dwelling which is a flat, the local housing authority must serve the notice on a person who –*
> *(a) is an owner of the flat, and*

(b) *in the authority's opinion ought to take the action specified in the notice.*"

13. Section 262(7) of the Act defines an owner and states:

> *"(7) In this Act "owner", in relation to premises—*
> *(a) means a person (other than a mortgagee not in possession) who is for the time being entitled to dispose of the fee simple of the premises whether in possession or in reversion; and*
> *(b) includes also a person holding or entitled to the rents and profits of the premises under a lease of which the unexpired term exceeds 3 years."*

14. The person upon whom an improvement notice and demand for expenses is served may appeal to the First-tier Tribunal (Property Chamber). In respect of both appeals, the Tribunal may confirm, quash or vary the notice and/or demand.

Property

15. No physical inspection was carried out by the Tribunal but information from the bundles provided by both parties, along with online street view information, shows that the Property is a residential flat located on the first floor of the building known as 32 St Peters Road ('the Building'). There is a further self-contained flat on the ground floor.

16. The Building is a two storey mid-terraced premises, built probably at the end of the nineteenth century. The Property is accessed via an accessway on the left-hand side of the Building, with part of the Property comprising a flying freehold over the said accessway.

Submissions

The Applicant's submissions

17. The Applicant provided a bundle of documents, which included his submissions, a copy of the Improvement Notice and Demand for Payment served on him by the Respondent, a letter from AM Electrical Installations Limited dated 7 October 2021 and a letter from Alliance Gas and Recertify Solutions.

18. The Applicant submitted that the Improvement Notice should not have been issued as the works detailed in the schedule to it were either not required or had already been carried out.

19. The Applicant stated that the Property had originally been bought by him from Midlands Heart who had purchased the same from the Respondent. He stated that the gas and electric supplies to the two flats in the Building had, historically, been split and that, Ms Clift (an Environmental Health Officer employed by the Respondent) should have been aware of the same.

20. The Applicant stated that the tenant's claim – that he was responsible for the whole of the heating to the Building and that he had no control over the same – was incorrect, as the ground floor flat had no gas supply and the boiler to the Property was situated in the stairwell to the first floor flat, which should have been fully evident to Ms Clift on her inspection.

21. The letter from AM Electrical Installations Limited confirmed, following a site survey, that there were two separate electric meters in the Building, one serving the ground floor flat and the other serving the Property. The letter also stated that the electric meter for the Property was situated in a meter cupboard located outside the Building near the front door and that the consumer unit was located inside the Property.

22. The letter from Alliance Gas and Recertify Solutions, again following an inspection of the Building, confirmed that there were no shared gas connections between the ground floor and the Property, as the ground floor flat had no gas supply. It confirmed that hot water to the ground floor flat was supplied by an electric operated tank, hence the gas meter solely related to the gas supply for the Property.

23. The Applicant submitted that Ms Clift's stance – that the supplies were not separated – was based on her own lack of knowledge and expertise and incorrect submissions made by the tenant. He also stated that, even though he had provided letters from the gas and electrical contractors confirming the status of the supplies, instead of accepting the same, Ms Clift began querying the professional status of the engineers and investigating them, which he said amounted to harassment.

24. In relation to the water leak at the Property, the Applicant stated that this had been caused by the tenant's negligence and had never been reported to him by the tenant. Despite this, he stated that he had repaired the same. He stated that the tenant wished to acquire a council house, however, as the Applicant refused to evict him, he believed that the tenant had contacted Ms Clift to demonstrate that there were hazards at the Property and that it was unsafe to be occupied.

25. In relation to the calculations of the hazard scores, the Applicant submitted that these were incorrect as they were based on Ms Clift's false assumptions regarding the gas and electric supply at the Property. With regard to any communication issues between himself and the Respondent, the Applicant stated that, despite him suffering from a mental health condition which he had informed Ms Clift of, he had been complied with her instructions and had replied to her emails.

The Respondent's Submissions

26. The bundle of documents received from the Respondent comprised a witness statement by Ms Clift, with a number of exhibits, together with a copy of her HHSRS calculations in relation to each of the hazards. In her witness statement,

Ms Clift confirmed that she had 14 years' experience working as an environmental health officer.

27. Ms Clift stated that, on 30 October 2020, she received a complaint from the occupiers of the Property with regards to, amongst other things, them having no control of the heating or hot water to the Property and them being liable for payment of the whole of the gas and electric supply to the Building, as the gas and electric to both the Property and the ground floor flat were connected.

28. Ms Clift stated that she inspected the Property on 5 November 2020 in the presence of the Applicant and the occupiers of the Property. She stated that there were some issues of disrepair but the main point of contention related to the joint gas and electric supply. Following the inspection, she confirmed that, although the Applicant carried out the repairs, the gas and electric supplies had not been separated. On 26 January 2021, she emailed the Applicant advising that, as the ground floor flat was currently empty, the sharing of services was not in issue, however, this would change should the ground floor flat became occupied in the future.

29. On 26 May 2021, Ms Clift stated that she received a further call from the tenant of the Property who stated that the ground floor flat had now been occupied and that, in addition, there was a leak from the bathroom into the external accessway. Following this call, Ms Clift stated that she visited the Property on 21 June 2021 but was unable to gain access to the ground floor flat so she emailed the Applicant requesting the tenant be given access to read his electric meter. As the tenant was adamant that the ground floor flat was occupied, she emailed the Applicant again, on 5 July 2021, with a formal letter asking him to split the gas and electric supply to the Property.

30. Ms Clift stated that she emailed both the landlord and the tenant on 27 July 2021 informing them that she would be inspecting the Property on 9 August 2021 to see if the works to rectify the leak had been completed and if the electric and gas supply had been separated. She stated that, if they had not, she would strongly consider whether to issue an improvement notice.

31. Ms Clift stated that, on her inspection, she witnessed a significant leak to the external side accessway to the Property, which she believed emanated from either the kitchen sink or the bathroom of the Property, and was, again, advised by the tenant that the ground floor flat was being occupied.

32. On 16 August 2021, Ms Clift stated that she carried out a HHSRS assessment of each of the two hazards. She assessed the Excess Cold hazard – due to lack of controllability, affordability and accessibility of the heating system by the occupants of the Property – as a category 1 hazard (Band C). The leak was considered as a Personal Hygiene, Sanitation and Drainage hazard and, again, this was assessed as a category 1 hazard (Band C.)

33. Ms Clift confirmed that the Improvement Notice was hand-delivered to 42 Flint Green Road, the Applicant's home address, on 8 September 2021 and was also

emailed to both the Applicant and the tenant on 15 September 2021. She stated that the statement of reasons and payment demand were attached to the Improvement Notice.

34. On 20 September 2021, Ms Clift stated that she received an email from the Applicant referring to his mental health condition and stating that he did not have the funds to carry out the repairs. She stated that she received a further email from him, on the same day, stating that both flats had separate electric meters, that the tenant had his own gas meter and that there was no gas supply to the ground floor flat.

35. On 22 September 2021, Ms Clift stated that she received an email from the Applicant stating that the leak had been repaired. She stated that she, subsequently, received letters from AM Electrical Installations Limited and Alliance Gas and Recertify Solutions and she tried contacting both contractors to verify their credentials and the contents of their letters.

36. Ms Clift queried why, if the Applicant knew that there was no gas supply to the ground floor flat, this was not specified when the Respondent's intervention began in October 2020. She stated that she had constantly requested evidence of the separation of the supplies and had allowed the Applicant sufficient time to comply with this request prior to formal action having been taken. In addition, she stated that the Applicant had also been notified of the leak in May 2021 and this was not rectified until September 2021.

37. She confirmed that, following an inspection on 9 November 2021, it appeared that the leak had ceased, however, she considered that the wooden elements of the ceiling appeared to be wet and she was still unable to determine whether the gas and electric supply to each flat had been separated.

38. Within the exhibits to Ms Clift's statement were enclosed a further copy of the improvement notice and demand for payment, a copy of a tenancy agreement for the Property, Office Copy Entries of the freehold title and photographs taken on various inspections.

39. The tenancy agreement was dated 24 August 2015 and made between the Applicant (detailed as the landlord) and Mr Yusuf Mumin (detailed as the tenant) for a term of six months commencing on the date of the agreement.

40. The Office Copy Entries related to the freehold of the Building. The Property Register confirmed that the Applicant had purchased the Property from Midland Heart Limited on 19 May 2015, however, the current proprietor of the Property was detailed as Amatullah Armani Dean who, according to the Proprietorship Register, had been the owner of the freehold since 10 October 2019.

The Tribunal's Deliberations

41. The Tribunal considered all of the evidence submitted by the parties written and summarised above.

42. In relation to the Improvement Notice, having considered all of the evidence, the Tribunal not only had serious reservations with regard to the assessment of the two hazards identified within the notice (for the reasons detailed hereafter) but also found that the notice, itself, was fundamentally defective.

43. The introduction and first paragraph of the Improvement Notice stated as follows:

> "*TO: Mr Barkat Hussain*
>
> *OF: 42 Flint Green Road, Birmingham, B27 6QA*
>
> 1. *You are the person having control and receiving the rack rent for the residential premises know as Flat 1 (First floor flat), 32 St Peters Road, Birmingham, B20 3RR, ("the premises").*"

44. The Tribunal considered the simple typographical errors to the Applicant's name (and the word *known*) careless but not fatal, however, as the Property was a flat and, based on the evidence, was not licensed under Part 2 or Part 3 of the Act, paragraph 3(2) of Schedule 1 to the Act confirms that it should have been served on the "*owner*" of the Property, not on any person "*having control*" of it.

45. The Respondent had obtained Office Copy Entries which clearly indicated that the Applicant was not the owner of the freehold of the Property on the date on which the Improvement Notice was served. He had, previously, owned the freehold of the Property and did appear to have been the freeholder when the tenancy agreement was signed, however, the ownership of the Property had changed in 2019, so he did not fall within the definition of an owner under section 262(7)(a) of the Act. In relation to section 262(7)(b), though the Applicant held himself out to be the landlord, there was no evidence to suggest that the Applicant held a sublease of the Property. In the absence of any such evidence, any notice should have been served on Amatullah Armani Dean, in his capacity as the owner of the Property, not on the Applicant. The Tribunal found that this error meant that the notice was fundamentally defective.

46. In addition to this, Schedule 1 to the Improvement Notice, which detailed the nature of the hazards and remedial action to be taken, stated:

> "*The remedial action specified above must be started by* ***30th Sep 2021*** *and completed by the* ***1st November 2021***."

47. Section 13(3) of the Act provides that a notice "*may not require any remedial action to be started earlier than the 28th day after that on which the notice is*

served."

48. The Improvement Notice was dated 8 September 2021 and Ms Clift, in her witness statement, confirmed that it was hand-delivered on the same date.

49. In *Isaac Odeniran v Southend on Sea Borough Council* [2013] EWHC 3888 (Admin) ('*Odeniran*'), an appeal by way of Case Stated against a decision of the justices for the county of Essex sitting at Southend, the High Court considered the wording of section 13(3) of the Act. Mr Justice Collins stated at paragraphs 5 to 6 of his judgment:

> *"5. … the question that matters is whether they were correct in finding that the improvement notice was not invalid when it specified a commencement date for remedial action less than 28 days from the date of its service.*
>
> *6. In my view, they were not correct in so finding. The notice was clearly a defective notice, having regard to the mandatory terms of section 13(3)."*

50. The Tribunal noted that, in finding that the notice was clearly a defective notice having regard to the terms of section 13(3) of the Act, Mr Justice Collins referred solely to the wording of the section and did not seek to limit his judgment to the specific facts of the case before him.

51. In this matter, the starting date for remedial action was only 22 days after service, consequently, the notice was also defective in this regard.

52. As stated above, although the Tribunal considered that the Improvement Notice was fundamentally defective, it also questioned the service of an improvement notice based on the matters that had been identified at the Property.

53. In relation to the Excess Cold hazard, the Tribunal noted that the Property had, for many years, neither shared its electric supply nor its gas supply with the ground floor flat. This had been stated by the Applicant and confirmed by his contractors, whom the Tribunal had no reason to doubt.

54. Although, based on the correspondence supplied by Ms Clift, this was not confirmed to her by the Applicant until 20 September 2021, this did not alleviate the Respondent of its obligations when considering whether to serve an improvement notice in the first place.

55. Both sections 11(1) [*in relation to a category 1 hazard*] and 12(1) [*in relation to a category 2 hazard*] of the Act, state that local authorities may serve an improvement notice if the local authority is "*satisfied*" that such a hazard exists.

56. The Tribunal noted that Ms Clift had, according to her witness statement, inspected the Property on at least two occasions and there was no evidence, other than what appeared to be the tenant's assertions, that the electric and gas

supply to both flats was connected.

57. The Tribunal did not consider that this alone would have, in any way, been sufficient for her to have been "*satisfied*" that the hazard existed. Especially since the information given in the letters from each of the contractors suggested that even a straightforward inspection of the location of the boiler, meters and any consumer unit would have alerted her to the fact that the tenant's assertions were wrong.

58. Furthermore, even if the gas and electric supplies had been connected, which was evidently not the case, the Tribunal does not agree with the Respondent's scoring of the hazard. Having carried out its own assessment, the Tribunal would have only assessed the hazard as a low scoring category 2 hazard.

59. With regard to the second hazard (the leak at the Property), Ms Clift had emailed the Applicant on 28 May 2021 referring to the leak, however, the Applicant, in his email reply of the same date, had stated that the tenant needed to repair the same. The leak was not referenced in the formal letter sent to the Applicant on 5 July 2021 and, though Ms Clift in her witness statement stated that her email of 27 July 2021 to the Applicant referred to her seriously considering serving an improvement notice if the works to the leak and the meters had not been completed, her email of that date (Exhibit 14) did not refer to the leak at all. Consequently, the Applicant appeared to have received no warning that this item of disrepair might also be included within any improvement notice the Respondent was considering.

60. In addition, having carried out its own assessment of the hazard, the Tribunal, again, found it to be a low scoring category 2 hazard. As such, even if the Improvement Notice had not been defective, the Tribunal would have had serious reservations as to whether the service of an improvement notice in this matter was the best course of action.

61. In any event, as the Improvement Notice was defective, the Tribunal orders that it be quashed.

62. In relation to the Demand for Payment, the Tribunal noted that the demand served on the Applicant, a copy of which was included within his application and bundle, also contained a fundamental error, as it referred to an improvement notice having been served on a completely different property – 60 Bell meadow Way. Although the demand for payment exhibited to Ms Clift's witness statement referred to the correct address, this did not appear to have been the copy which had been served on the Applicant.

63. Moreover, as section 49 of the Act only allows a local housing authority to make a charge for recovering administrative and other expenses incurred by them in serving an *improvement notice* and the Improvement Notice in this case was defective, the Tribunal considers that the Respondent is not able to make a charge for the same.

64. Accordingly, the Tribunal also orders that the Demand for Payment be quashed.

65. The Tribunal, under Rule 13 (2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, "*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…*". Such an order may be made by the Tribunal on an application by a party or on its own initiative.

66. Although the Tribunal does not consider that the Respondent's actions in this matter were deliberate or malicious, the Tribunal does consider that both the inspection of the Property and the assessment of the hazards was extremely poor. The Tribunal finds that these initial failings (irrespective of the subsequent drafting errors) led to the issuing of an unnecessary improvement notice, leaving the Applicant no choice but to appeal the same.

67. Accordingly, in addition to quashing both the Improvement Notice and the Demand for Payment, the Tribunal considers that it should exercise its discretion in this matter and orders that the Respondent reimburse to the Applicant the whole of the application fee, being a sum of £100.

Appeal

68. If either party is dissatisfied with this decision they may apply to this Tribunal for permission to appeal to the Upper tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties (rule 52 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).

M. K. GANDHAM
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Judge M. K. Gandham