FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference:	**MAN/00FA/HIN/2021/0027**
HMCTS code (audio,video,paper):	**P:PAPERREMOTE**
Property:	**1 West Stobswood, Ulgham, Morpeth NE61 3AZ**
Applicant:	**Mr E.R.Astley**
Applicant's Representative:	**Clarke Mairs LLP**
Respondent:	**Northumberland County Council**
Type of Application:	**Housing Act 2004 – Schedule 1, Paragraph 10(1)**
Tribunal Members:	**Judge J.M.Going** **H.Lewis FRICS**
Date of Hearing:	**16 January 2023**
Date of Decision:	**17 January 2023**

DECISION

The Decision and Order

The Tribunal allows the appeal against the Improvement Notice which should not have been served on Mr Astley and hereby orders it to be quashed. It also quashes the requirement to repay the charges set out in the Demand Notice.

Preliminary

1. By an Application dated 6 July 2021 the Applicant ("Mr Astley") appealed to the First-Tier Tribunal Property Chamber (Residential Property) ("the Tribunal") under paragraph 10(1) of Schedule 1 of the Housing Act 2004 ("the Act") against the Respondent ("the Council")'s issue of an Improvement Notice ("the Improvement Notice") dated 16 June 2021 relating to the property.

2. The Tribunal issued Directions on 19 April 2022 setting out the timetable to be followed.

3. The bundles provided included (inter-alia) copies of the Improvement Notice, the Demand Notice, the Lease, Land Registry entries both of Mr Astley's freehold title and his mother's leasehold title, various correspondence between the parties, and letters sent by Mr Astley's solicitors to Mrs Astley, photographs, position summaries, a witness statement by the Council's Environmental Health Technical Officer and paperwork relating to the property's boiler and oil tank.

4. Mr Astley requested, and the Council agreed, that the Application be determined on the papers without the need for an oral hearing.

5. The Tribunal convened on 16 January 2023.

The property

6. The Tribunal did not inspect the property but understands that it is a 3-bedroom house with a conservatory, in a rural location within a farm complex containing various agricultural buildings and 2 further dwellings.

The facts and background

7. The following matters are evident from the papers or are of public record and have not been disputed unless specifically referred to.

8. Land Registry entries show that Mr Astley is the freehold owner of the property which is part of West Stobswood Farm transferred to him by his parents on 21 December 2018 and mortgaged to Lloyds Bank plc.

9. On the same day a Lease ("the Lease") was completed between Mr Astley and his mother whereby the property was leased to her for a sixty-year term, with a break option following her death, and at a rent of "a peppercorn if so demanded".

10. On 2 June 2021, after a complaint made by Mrs Astley that the property was very cold due to disrepair and defective heating, the Council carried out an inspection and made an assessment using the Housing Health and Safety Rating System ("HHSRS").

11. It thereafter decided that enforcement action should be taken to address the hazards that it had identified and served the Improvement Notice on Mr Astley.

12. On 22 June 2021 Mr Astley's solicitors emailed a letter to the Council in response to the Improvement Notice, maintaining that it should not have been served on Mr Astley and that Mrs Astley was responsible for any necessary remedial works. Extracts from that letter are more particularly referred to later. On the same day they also sent a further letter to Mrs Astley including copies of the correspondence and notices received by Mr Astley from the Council.

13. The Council replied on 1 July 2021 stating its view that Improvement Notice had been properly served on Mr Astley. Mr Astley's solicitors copied that letter on to Mrs Astley confirming that he would now proceed with an appeal to the Tribunal and with formal notice referring to paragraph 16 of Schedule 2 to the Lease and making specific reference to paragraph 7 of the same schedule.

14. The Application to the Tribunal was made on 6 July 2021.

15. It is understood that certain works have subsequently been undertaken to the property but that the Council concluded when reinspecting on 14 June 2022 that the hazards identified in the Improvement Notice remained unaddressed.

16. Mr Astley's solicitors have confirmed that copies of the Application and his bundle were served on Mrs Astley.

17. Mrs Astley has not asked to be joined into the proceedings nor sought to be represented before the Tribunal.

The provisions of the Lease as referred to by the parties

18. The Lease in clause 2 of Schedule 3 confirms a covenant by Mr Astley as the Landlord: -
"2.1 To use reasonable endeavours to repair the structure of the Property but the Landlord shall not be obliged to carry out any repairs where the need for those repairs has arisen by reason of an act or omission of the Tenant".

19. Clause 4 of the Lease reserves to him as Landlord (inter alia) the right to enter the Property….:-
"4.2.1 to repair, maintain or replace any Service Media….
4.2.2 to inspect its condition and state of repair following which the Landlord may give the Tenant a notice of any breach of the Tenant covenants of this Lease relating to the condition of repair of the Property;
4.2.3 to carry out any works needed to remedy the breach set out in a notice served under clause 4.2.2 if the works had not been carried out by the Tenant to the reasonable satisfaction of the Landlord within the time specified in the notice; …."

20. Schedule 2 of the Lease contains various covenants by Mrs Astley as the Tenant, including the following: –
"7. COSTS
To pay to the Landlord on demand the costs and expenses… reasonable and properly incurred by the Landlord…. in connection with or in contemplation of any of the following:
7.1 the enforcement of the tenant covenants of this lease…

10. ASSIGNMENT AND UNDERLETTING
Not to assign, underlet or part with or share possession of the whole or any part of the Property.

11. REPAIR AND DECORATION
11.1 To keep the Property in good repair and condition throughout the Term and, when necessary, renew and rebuild the Property save that the Tenant shall not be responsible for repairs to the structure of the Property.
11.2 To renew and replace from time to time all Landlord's fixtures and fittings at the Property which may become beyond repair at any time during the term
…..
16. COMPLIANCE WITH LAWS AND NOTICES
16.1 To comply with all laws relating to the Property, its use by the Tenant and any works carried out at it.
16.2 To carry out all works that are required under any law to be carried out at the Property (without prejudice to any obligation on the Tenant to obtain any consent under this Lease).
16.3 Within one week after receipt of any notice or other communication affecting the Property (and whether or not served pursuant to any law) to:
16.3.1 send a copy of the relevant document to the Landlord; and
16.3. 2 in so far as it relates to the Property take all steps necessary to comply with the notice or other communication and take any other action in connection with it as the Landlord may reasonably require.
…..
20.REMEDY BREACHES
20.1 If the Landlord has given the Tenant notice under clause 4.2.2, of any breach of any of the Tenant covenants in this Lease relating to the repair or condition of the Property, to carry out all works needed to remedy that breach as quickly as possible, and in any event within the time period specified In the notice (or immediately if works are required as a matter of emergency) to the reasonable satisfaction of the Landlord.

20.2 To pay to the Landlord on demand the costs properly incurred by the Landlord in carrying out any works pursuant to clause 4.2.3 (including any solicitors; surveyors' or other professionals costs and expenses, and any VAT on them, assessed on a full indemnity basis)

....

21. INDEMNITY

21.1 To indemnify the Landlord against all liabilities, expenses, costs (including but not limited to any solicitors', surveyors', other professionals' costs and expenses, and any VAT on them, assessed on a full indemnity basis), claims, damages and losses (including but not limited to any diminution in the value of the Landlord's interest in the loss of amenity of the Property) suffered or incurred by the Landlord arising out of or in connection with:

21.1.1 any breach of the Tenant covenants of this Lease;....".

The Contents of the Improvement Notice and Demand Notice

21. The detailed contents of the Improvement Notice are on record and known to the parties. It referred to a Category 1 hazard of Excess cold and a Category 2 hazard of Damp and mould growth and specified that remedial action and works should be started within one month and completed within three months.

22. Notes were included with the Improvement Notice setting out in detail the rights of appeal.

23. The Council also issued a separate Notice under section 49 of the Act (the "Demand Notice") demanding payment of £275 to cover expenses that the Council had incurred "in determining whether to serve the (Improvement) notice, identifying any action to be specified in the notice; and serving the notice..".

The Statutory Framework and Guidance

24. The Act introduced the HHSRS for assessing the condition of residential premises to be used in the enforcement of housing standards. The system entails identifying specified hazards and calculating their seriousness as a numerical score by a prescribed method.

25. Those hazards which score 1000 or above are classed as Category 1 hazards. If a local housing authority makes a Category 1 hazard assessment, it becomes mandatory under Section 5(1) of the Act for it to take appropriate enforcement action. Hazards with a score below 1000 are Category 2 hazards, in respect of which the authority has a discretion whether to take enforcement action.

26. Section 5(2) of the Act sets out seven types of enforcement action which are "appropriate" for a Category 1 hazard. These include serving an Improvement Notice.

27. An Improvement Notice is a notice requiring the person on whom it is served to take such remedial action in respect of the hazard concerned as is

specified in the notice: Section 11(2). If the authority serves an Improvement Notice in respect of a Category 1 hazard, the remedial action must be such as to ensure that the hazard ceases to be a Category 1 hazard but may extend beyond that: Section 11(5).

28. Part 1 of Schedule 1 of the Act sets out the procedures for service of an Improvement Notice and for premises which are neither licensed nor flats and states in paragraph 2(2) that "the local housing authority must serve the notice – (a) (in the case of the dwelling) on the person having control of the dwelling;"

29. Section 263 states: -
"(1) In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.
(2) In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises…".

30. The person on whom an Improvement Notice is served may appeal to the Tribunal against the notice (Schedule 1, paragraph 10(1) of the Act). Paragraphs 11 and 12 the same Schedule set out 2 specific grounds on which an appeal be made but do not affect the generality of paragraph 10(1). The ground referred in paragraph 11 is "that one or more other persons, as the owner or owners of the specified premises, ought to – (a) take the action concerned or (b) pay the whole or part of the cost of taking that action".

31. The appeal is by way of re-hearing (paragraph 15(2)(a)).

32. The Tribunal may confirm, quash or vary an Improvement Notice (paragraph 15(3)).

Submissions

33. Mr Astley's solicitor described the background to the matter and made the following submissions in the letter emailed to the Council on 22 June 2021, stating: -
"We first became involved with our client in early 2018 as a consequence of two unfortunate sets of circumstances, albeit not unconnected.
My client's parents, Simon and Helen Astley, were involved in a rather acrimonious marriage breakdown and the business was facing demands for repayment of banking facilities from Clydesdale Bank, secured on the West Stobswood property.
Following discussion and some delicate negotiation between all parties, a solution was agreed on the basis that my client's parents would transfer the property to my client, new banking facilities were made available by Lloyds Bank sufficient to clear Clydesdale and provide some much needed working capital, and my client would then grant long leases to each of his parents of separate residential units at the property, such that the whole family could then continue living at the property albeit then in their own separate households.

Under those leases, other than my client agreeing to be responsible for the main structure of each property (essentially that responsibility would be covered by the continuing business these arrangements facilitated), each of his parents would then be entirely responsible for the property they then occupied as their home.
No money was paid for the grant of these leases and no rent is payable under them. They are each for periods of 60 years subject to an earlier termination on the death of the parent who has that lease.
….. the lease of the Property is for a term of 60 years under which, in effect, no rent is payable (the standard position in such a case is that the rent is identified as a peppercorn if so demanded). The intention of the arrangements is that the lease provided a mechanism whereby my client's mother would be entitled to live in the Property as her home rent free with my client being responsible for maintaining the structure of the Property but otherwise with his mother being responsible for all her own outgoings and all other repair and decoration required….
Consequently under the terms of the lease of the Property my client has no obligation in respect of the works required as identified in your letter and the accompanying Notices and additionally the implied repairing covenants under the Landlord and Tenant Act 1985 do not apply to this lease and there is no other statutory implication of any similar liability which overrides the position as set out in the lease….
Whilst I accept that the ability to serve notices under the Housing Act 2004 is not specifically a method of enforcement of a landlord's obligations arising elsewhere, nevertheless understanding the respective obligations of the parties is fundamental to how those powers under the 2004 Act should be applied and, in my submission, in the particular circumstances I have set out here, the equity of those respective positions simply cannot be ignored. Had my client not been instrumental in achieving these arrangements, the inevitable outcome would have been Clydesdale taking possession of the Property, the family business being brought to an insolvent end and all parties being turfed out of the property, where they had lived for many years.
However, I do not need to simply rely on that type of subjective approach. Rather, I can point you to paragraph 2 of Schedule 1 to the 2004 Act which is relevant for identifying on whom any notice must be served, given that the dwelling involved here is not licensed under Part 3 of the Act and is not an HMO.
Consequently, by reference to paragraph 2(2)(a), the notices must be served "on the person having control of the dwelling".
I then refer you to section 263 of the 2004 Act to provide the meaning of "person having control".
By reference to section 263(1), that person is either "the person who receives the rack-rent of the premises … or who would so receive it if the premises were let at a rack-rent".
That person is Helen Astley. She is the person entitled to immediate occupation and possession of the Property under the terms of the lease. My client is not, and has no entitlement under the lease to receive a rack-rent or to now let the Property in order to do so.
Consequently, for the purposes of the 2004 Act, my client is not "the person having control of the dwelling" and therefore not an individual on whom notices under the 2004 Act may be served."

34. The Council has made the following points in response, and to the Tribunal :-

- "It is the position of the Council that the correct person has been served with the Improvement Notice. Mr Edward Astley was served with the notice, being identified as the "person having control of the dwelling" defined in s.263 Housing Act 2004 as being "the person who receives rack rent … or would so receive it if the premises were let at rack-rent".
- The Council has received correspondence from those representing Mr Astley stating that the leaseholder Ms Astley is actually the person entitled to receive the rack-rent, however the Council remains of the view that Mr Astley, the Freeholder and Landlord of the premises is the only person who could receive rack- rent for the following reasons;

  1. The Tenant will never be in a position to receive the rack-rent. The Lease is subject to a clause at Schedule 2 clause 10 which prevents the Tenant from assigning, sub-letting or making any other disposal of the premises for the entire duration of the lease.

  2. The Landlord will at some point be the person entitled to receive rack-rent ie. when the lease comes to an end. The Tenant as it stands will never be a person so entitled.

  3. Any provisions within the Lease placing liability on the Tenant to carry out any works or to bear the cost of them are simply a private contractual matter between the Landlord and Tenant. We note that the Landlord has the right and is able to serve the tenant with a Notice to take remedial action in relation to the condition of the premises and can also serve a Notice bringing the lease to an end if the tenant fails to comply."

The Tribunal's Reasons and Conclusions

35. The Tribunal began with a general and careful review of the papers to decide whether the case could be dealt with properly without holding an oral hearing. Its procedural rules permit this, provided that the parties give their consent, which both have volunteered.

36. The Tribunal found the issues in dispute clearly identified within the written submissions and suitable to be determined without the necessity of a hearing.

37. It also found no need to inspect the property. The single ground for the appeal is restricted to an interpretation of the relevant law as applied to agreed factual circumstances, rather than any dispute as to the condition of the property.

38. The Tribunal then turned to a detailed consideration of Mr Astley's appeal against the Improvement Notice being that his mother as the owner of the property, not he, ought to (a) take the action concerned or (b) pay the whole or part of the cost of taking that action.

39. The Council's notes attached to the Improvement Notice when referring to possible rights of appeal explain an "owner" of the premises responsible for

the remedial action means "a person who has the freehold or a lease with more than 3 years to run."

40. The Tribunal agrees with both parties that in order to answer the question as to who is the correct person to receive the Improvement Notice the focus must be on the statutory definition of the person having control of the property as set out in section 263(1) of the Act. Paragraph 2 2(a) of Schedule 1 to the Act states that local housing authority *must* serve the notice on the person having control of the dwelling.

41. The Tribunal also agrees that it is axiomatic that the legislation requires there must always be someone on whom a housing authority can serve an Improvement Notice after its general duty to take enforcement action under sections 5 and 11 of the Act has been engaged.

42. The definition of "person having control" derives from previous Housing Acts and is also similar to the definition of "owner" often used in public health and planning legislation. There are two limbs to the definition: where the premises are let at a rack-rent and where they are not.

43. In this case there is no dispute that at the present time no one is in receipt a rack-rent for the property which section 263(2) explains means at least two-thirds of its full net annual value, in other words, the market rent one might expect for an annual shorthold letting. Mrs Astley as the occupier receives no rent and Mr Astley is only entitled to receive a peppercorn at best.

44. The Tribunal has therefore to concentrate on the second limb of the definition contained in section 263(1) and answer the question "who would so receive it if the premises were let at a rack-rent".

45. Mr Astley contends that the proper person to take any action required by the Improvement Notice is his mother. The Council disagrees and submits that she "will never be in a position" to receive its rack-rent, but that he, being the Landlord and freehold owner, will be when the Lease ends.

46. The Tribunal does not agree that Mrs Astley can *never* be in a position to receive a rack-rent for the property. She is now its occupier and its leasehold owner for a term of up to 60 years. The possibility of her subletting is acknowledged in the Lease. If subletting had been impossible there would be no need for the Lease to mention it.

47. Nor can the Tribunal agree with the Council's contention that the answer is to be determined by what may be the position at an indeterminate time in the future when the Lease ends. There is, and can be, no certainty that Mr Astley will still be the landlord and freehold owner of the property when the Lease ends. He may, for example, have died in the interim, sold or given away his interest, or had it repossessed. The Tribunal is clear that the decision as to who is the correct person upon whom an improvement notice can be served has to be restricted to the circumstances at the time.

48. The question posed by the second limb of the definition of the "person having control" is inevitably a hypothetical one. It does not require the property to be actually let on a rack-rent, but instead a consideration of who would now be entitled to a receive rack-rent if it were.

49. As Lord Keith said in the leading House of Lords case of *London Corporation v Cusack-Smith [1955] AC 337 HL* "the natural way to construe the definition in its application to an actual case is, in my opinion, to ask, who is entitled to let the land at a rack-rent as things are today?".

50. Mr Astley is in no position to let the property at a rack-rent. He has no rights of occupation which he could now let to anyone else.

51. Mrs Astley, as the sole person in occupation and possession of the property, is now the only person who could arrange for the property to be let out a rack-rent. It is correct that if she did so, she would be in breach of one of the terms of the Lease, but that does not mean that letting out the property at a rack-rent is now an impossibility, simply that to do so would have consequences. In just the same way as the Council have submitted that the repairing and indemnity clauses under the Lease are private matters between the parties and not relevant to the present considerations, so too is Mrs Astley's covenant against assignment or subletting.

52. Such a conclusion accords with the decision in the *Cusack-Smith* case where it was determined that the person entitled to receive rack-rent was the leaseholder in possession, and not the freeholder.

53. The same result was upheld, again by the House of Lords, in the subsequent case of *Pollway Nominees Ltd v Croydon LBC [1987] A.C. 79; (1986) 18 H.L.R. 443* where it was held that the freeholders with only a reversionary interest and receiving only low rents were not the persons having control of the premises.

54. For all of these reasons, the Tribunal finds that Mr Astley and his solicitors rather than the Council have correctly interpreted the appropriate statutory provisions, and that Mrs Astley, not Mr Astley, is the person who has control of the property for the purposes of the Act.

55. Consequently, the Council was not entitled to serve the Improvement Notice on Mr Astley, and it follows that it must now be quashed.

The Council's costs relating to the Improvement Notice

56. Having found that the Improvement Notice must be quashed, the Tribunal also found it appropriate that the demand by the Council for £275 in respect of its costs incurred in serving the Improvement Notice should be quashed at the same time.