FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**BIR/44UB/HIN/2022/0014**
Properties	**:**	**84 Shaftesbury Avenue, Keresley End, Coventry CV7 8NE**
Applicant	**:**	**Farsu Ahmed Chowdury**
Representative	**:**	**Mr Josh Radcliffe, Counsel**
Respondent	**:**	**Nuneaton & Bedworth Borough Council**
Representative	**:**	**Sarah Harper, Private Sector Housing Manager**
Type of application	**:**	**Appeal against an Improvement Notice pursuant to Schedule 1 para 10(1) of the Housing Act 2004**
Tribunal member	**:**	**Judge C Goodall** **Mr David Satchwell, FRICS**
Date and place of hearing	**:**	**4 April 2023 by video hearing**
Date of decision	**:**	**9 May 2023**

DECISION

Decision

The Improvement Notice dated 1 September 2022 and issued by Nuneaton & Bedworth Borough Council to Mr Farsu Ahmed Chowdhury in relation to 84 Shaftesbury Avenue, Keresley End, Coventry CV7 8NE is **confirmed** for the reasons set out below.

Background

1. On 1 September 2022, Nuneaton & Bedworth Borough Council ("the Council") issued an Improvement Notice ("the Notice") to Mr Farsu Ahmed Choudhury ("the Applicant") in relation to 84 Shaftesbury Avenue, Keresley End, Coventry CV7 8NE ("the Property").

2. The Notice stated there were twelve hazards at the Property, being:

    a. Excess cold

        i. Large gap in the front door UPVC panel

        ii. Boiler pressure too low likely to lead to the failure of the boiler to provide consistent hearing over the course of the next 12 months

    b. Personal hygiene

        i. No hot water provided to bathroom basin or bath taps for hand-washing or personal hygiene

        ii. No artificial light in the WC

        iii. No door on the bathroom

        iv. Water penetration through the vent pipe in the WC and water leaks when it rains

        v. No hand-basin in the WC

        vi. No extractor in the bathroom

    c. Food safety

        i. No hot water for food preparation purposes

        ii. No splashback to the kitchen worksurface

    d. Fire

        i. No smoke alarms are installed or early warning in the event of ignition

    e. Electrical safety

i. Loose hanging socket in the lounge

ii. Light switch in the living room is dislodged and not properly affixed to the wall

3. On 16 September 2022, the Applicant appealed the Notice.

4. Directions were issued by Regional Tribunal Judge Jackson on 29 September 2022 requiring the Council to provide a Statement of Case. The Applicant was to provide his Statement of Case thereafter. The Statements of Case were to set out all matters of fact and law relied upon in relation to the appeal.

5. The Council provided its Statement of Case on 26 October 2022. The Applicant provided his Statement of Case on 26 November 2022. Both Statements were within time (which had been extended by an email dated 26 October 2022 from the Tribunal Clerk).

6. Judge Jackson considered that the case was not suitable for a paper determination and should be listed for a hearing.

7. The parties were notified that the case would be heard on 4 April 2023, with an inspection to be carried out on the same day. Shortly before the hearing date, the Tribunal directed that the hearing should be by video to accommodate the Applicant's representative.

8. At the hearing on 4 April 2023, the Applicant, his barrister Mr Radcliffe, Ms Sarah Harper (who spoke on behalf of the Council) and Ms Dorren Katusiime (an employee of the Council) attended by video link.

9. This decision sets out the Tribunal's reasons for our decision.

Inspection

10. Neither of the parties attended the inspection, which the Tribunal conducted in the morning of 4 April 2023. The tenant (who told us she had been continuously the occupant of the Property since 2011) showed us round the Property.

11. The Property is a two-storey brick-built house with pitched tiled roof, set on a corner plot in a residential street with gardens to the side and rear.

12. The entrance door is in the middle of the right hand side wall of the Property (viewed from the road). A panel around 4 inches by 18 inches has broken in the door so there is a hole in it. The tenant has stuffed it with material to restrict the draft.

13. Inside the entrance door, there is a small hallway with bathroom to the left, kitchen in the front of the house, and a living room at the rear. Stairs on the right hand side of the hallway lead up to a landing off which there is a WC, and three bedrooms.

14. Most carpets have been taken up. The tenant said she had carpeted the Property herself when she had arrived, but now wished to re-carpet and had taken up the carpets in readiness. The tenant had also redecorated on the commencement of her tenancy, but now some wall-paper had been stripped off, partly because of damp, and partly because, again, she wished to redecorate.

15. In the kitchen, there is a boiler of some age. The tenant understood that it would still function (and does so for the provision of heating), but there is a failed part, called a diverter valve, and until it is replaced, the boiler does not provide hot water. The kitchen units were in good condition, again having been installed by the tenant, but there is no splashback to the kitchen worksurface.

16. In the back right hand corner of the living room, there is evidence of historic water ingress from the WC room immediately above. There is no ceiling plaster on the part of the living room that is under the stairs. The walls in that small area are partly plaster-boarded. There is an electric socket hanging loose from the ceiling in this area.

17. The bathroom is in a poor decorative state. There is no door, with a curtain being used for privacy. There is both a bath and a basin, but no WC. Hot water does not flow to either the bath or basin taps. There is an electric shower over the bath which does provide hot water.

18. Upstairs, there is clear evidence of water ingress into the WC, probably through a vent pipe which is installed to run into the roof void (and then externally), around two or three feet from the far right hand corner of the Property. The WC has no wash hand basin and no extractor fan. No light fitting is present, there being only an exposed ceiling rose.

19. The rear bedroom has evidence of some water ingress near the ceiling on the left hand side of the window.

20. There were no smoke alarms apparent to the Tribunal.

The law

21. The Council is responsible, under the Housing Act 2004 ("the Act"), for the operation of a regime designed to evaluate potential risks to health and safety from deficiencies in dwellings, and to enforce compliance with the standards required. The scheme is called the Housing Health and Safety Rating System (HHSRS). It is set up in the Act, supplemented by the Housing Health and Safety Rating System (England) Regulations 2005 (the Regulations).

22. The scheme set out in the Act is broadly as follows:

    a. Section 1 (1) provides for a system of assessing the condition of residential dwellings and for that system to be used in the enforcement of housing standards in relation to such premises. The

system (which is the HHSRS system) operates by reference to the existence of Category 1 or Category 2 hazards on residential premises.

b. Section 2 (1) defines a Category 1 hazard as one which achieves a numerical score under a prescribed method of calculating the seriousness of a hazard. A Category 2 hazard is one that does not score highly enough to be a Category 1 hazard. The scoring system is explained later.

c. "Hazard" means any risk of harm to the health or safety of an actual or potential occupier of a dwelling which arises from a deficiency in the dwelling.

23. Section 4 of the Act provides the procedure to be followed by a local authority before commencing any enforcement action. If the local authority becomes aware that it would be appropriate for any property to be inspected with a view to determining whether a hazard exists, it must carry out an inspection for that purpose.

24. By section 7 the authority has a power (but not a duty) to take action in respect of a category 2 hazard.

25. Section 12 gives the authority power to serve an improvement notice if the local authority is satisfied that a category 2 hazard exists at the property. The Notice will require the person on whom it is served to take such remedial action as is specified in the notice.

26. Section 13 specifies that an Improvement Notice must specify:

i. Whether the notice is served under section 11 or 12 of the Act
ii. The nature of the hazard and the residential premises on which it exists
iii. The deficiency giving rise to the hazard
iv. The premises in relation to which remedial action is to be taken in respect of the hazard and the nature of that remedial action
v. The date when the remedial action is to be started
vi. The period within which the remedial action is to be completed or within which each part of it is to be completed
vii. The remedial action cannot be required to start earlier than the 28th day after service of the notice.

27. Section 15 states that the general rule is that an Improvement Notice becomes operative at the end of the period of 21 days beginning with the day on which the notice is served.

28. Schedule 1 Part 3 of the Act deals with appeals in relation to Improvement Notices. Paragraph 10 sets out a general right of appeal and that an appeal is to the First-tier Tribunal (Property Chamber).

29. Paragraph 15 states that the appeal is to be by way of a rehearing but may be determined having regard to matters of which the authority were unaware. The Tribunal may confirm, quash or vary the Improvement Notice.

30. The method of determining whether a category 1 or category 2 hazard exists (i.e. the operation of the HHSRS) is set out in the Regulations. An assessor has to assess the likelihood, during the period of 12 months beginning with the date of the assessment, of a relevant occupier suffering any harm as a result of a particular hazard. The second judgement for the assessor is the possible harm outcomes, that could affect a person (who is a member of the most vulnerable group) as a result of the hazard actually occurring.

31. A mathematical formula is then used to convert the judgements the assessor has made into a single integer. That integer identifies the hazard as a category 1 hazard if the integer is 1,000 or more, and a category 2 hazard if the integer is less than 1,000. Each hazard is also prescribed a band, between A and J according to its actual calculated score, as set out in paragraph 7 of the Regulations.

32. The Improvement Notice must, as has been seen, be served. The appropriate person on whom service must be effected is dealt with in Schedule 1 Part 1 paragraph 2 of the Act. Paragraphs 2 provides:

> "2 (1) This paragraph applies where the specified premises in the case of an improvement notice are—
>
> (a) a dwelling which is not licensed under Part 3 of this Act, or …
>
> (2) The local housing authority must serve the notice –
>
> (a) (in the case of a dwelling) on the person having control of the dwelling

33. Section 263(1) of the Act defines the meaning of a "person having control" of premises as:

> "… 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."

Grounds of appeal

34. In his appeal form, the Applicant set out his grounds for appeal as:

> "… the [Notice] has been served to victimise, harass and discriminate [against] the Appellant.
>
> When the notice was served upon him by the council it was fully aware that the Appellant had sought to undertake works in the property and

was obstructed by the tenant. The appellant then issued proceedings against the tenant to do the work and a court hearing was fixed for possession. Knowing all these facts the council issued this notice as revenge for taking proceedings against the tenant in order to victimise, harass and discriminate [against] the Appellant."

35. In his Statement of Case, the Applicant repeated the essence of his complaint that the Council had taken sides in a way that was discriminatory and designed to harass the Applicant.

36. The Applicant explained that on 19 April 2022 he had served a section 8 Housing Act 1988 notice on the tenant seeking possession of the Property on grounds 6 (intent to demolish or reconstruct the whole or a substantial part of the Property, or carry out substantial works on the dwelling-house or a part or is, and the work cannot be carried out without the tenant giving up possession) and ground 13 (deterioration due to neglect or default of the tenant).

37. The Statement provided confirmation that County Court proceedings for possession were issued on 7 July 2022. Copies of the claim form and the section 8 Notice of intention to seek possession had been provided previously to the Council and were contained in the Council's Statement of Case.

38. In the County Court claim, the Applicant alleged that the tenant in the Property had damaged the Property by removing the ceiling plaster boarding in part of the living room, had removed wall-paper and carpets in the Property, and had buried her dog in the garden.

39. In the Statement, the Applicant then stated that repairs could not be carried out whilst the tenant resided at the Property for health and safety reasons. A builder was apparently ready to start work once the tenant moved out. The Applicant would cover the tenant's reasonable expenses of moving, and once the repairs were completed, the tenant would be allowed to return to the Property.

40. It was stated that prior to the service of the Notice, the Applicant had had difficulty obtaining permission to enter the Property.

The hearing

41. Mr Radcliffe opened his case by explaining that it was based on the proposition that the Council's decision to serve the Notice was irrational and unreasonable bearing in mind that at the time of issue, the Council knew that the Applicant was unable to access the Property and that he was bringing possession proceedings against the tenant.

42. The Tribunal raised the question of whether evidence concerning access difficulties to carry out the works required by the Notice could be given bearing in mind that that issue had not been dealt with in the Applicant's Statement of Case, which was intended to be a document that set out all

matters of fact and law relied upon. Ability to access the Property to carry out the works required by the Notice had not been raised at all in the Applicant's Statement. Ms Harper opposed the admission of such evidence.

43. The Tribunal allowed Mr Radcliffe to call the Applicant to give evidence but indicated that it would not allow new evidence on ability to access the Property. Questions on any evidence already in the Applicant's Statement of Case could be asked.

44. The Applicant was called to give evidence. He explained that he and a builder had visited the Property and the builder had advised him that the works required could not be carried out with the tenant in possession.

45. Mr Chowdhury also introduced a new point in the hearing concerning rent payments. He stated that the tenant had ceased paying rent in April 2022. His case on this point was that he therefore ceased to be in control of the Property and therefore was not the appropriate person upon whom the Notice should have been served.

46. Ms Harper's case was that the Notice should be confirmed as the hazards identified in the Notice existed and needed to be resolved. The case had been going on since September 2022 and even something as straightforward as fitting smoke alarms had not been attended to. The Council had also pressed the Applicant to provide a gas safety certificate for some time, but none had been forthcoming.

47. Mr Radcliffe cross-examined Ms Harper on the state of the Council's knowledge of the dispute between the Applicant and the tenant prior to the issue of the Notice. Ms Harper confirmed that she had been aware of the possession proceedings before issue of the Notice.

48. On the question of compliance with the Notice whilst the tenant remained in possession, Ms Harper stated her view that all of the works required in the Notice could be carried out with the tenant in situ.

49. Ms Harper was asked by Mr Satchwell about the feasibility of installing a wash-hand basin in the WC. She thought it would be possible but if the Applicant were to present an argument that it was not practically possible, she would be willing to be flexible on that element of the Notice.

50. Ms Harper also confirmed that she had been unaware of any suggestion that the tenant had not been paying rent.

51. In his final submissions, Mr Radcliffe conceded that the need for the works specified in the Notice to be carried out was not disputed. Instead, he focussed on the suggestion that the issuing of the Notice whilst the Council was aware of the steps the Applicant was taking to obtain vacant possession of the Property was unreasonable in the Wednesbury sense, and the Notice should be quashed. The Applicant had been advised by his builder that he had to obtain possession to carry out repair works, and he was entitled to rely upon that professional advice.

52. On the entirely new point about non-payment of rent (which was not raised of foreshadowed in the Applicant's Statement of Case), Mr Radcliffe submitted that whilst rent was not being paid, the Notice was unenforceable against the Applicant, as he was not a person in control of the Property as defined in section 263 of the Act.

Discussion

53. The Tribunal does not accept the Applicant's evidence concerning non-payment of rent. It was not raised at all in the Applicant's Statement of Case. If rent did cease to be paid in April 2022 as alleged, it is inconceivable that the possession proceedings commenced in July 2022 would not have raised non-payment as a ground for possession.

54. We do not consider there is any merit in Mr Radcliffe's argument in any event that the Notice is unenforceable because the Applicant is not the person in control of the Property. In our view, Mr Radcliffe's interpretation of section 263 of the Act is misconceived. That section does not equate non-receipt of rent with non-entitlement to rent. Whether it was paid or not, the Applicant, as the (joint) freehold owner was the person entitled to the rent and profits accruing from the Property. He was hardly in a position to deny the existence of the tenancy bearing in mind that he was bringing possession proceedings on the basis that there was an existing tenancy which he was entitled, under the Housing Act 1988, to bring to an end.

55. As conceded by Mr Radcliffe, there is not doubt that the hazards set out in the Notice exist. The process of inspection and the content of the Notice have not been challenged.

56. We do not accept that there was any malign motivation on the part of the Council that resulted in the issue of the Notice. There is no evidence to that effect and it was not put to the Council.

57. We reject the suggestion that the Council acted unreasonably in deciding to issue the Notice. The decision to do so seems to us to have resulted from a property arranged physical inspection of the Property in which hazards potentially injurious to the health and safety of the occupants of the Property were correctly identified.

58. We also regard the issues concerning the Applicant's ability to access the Property prior to the issue of the Notice as something of a red herring. Clearly, as shown by his section 8 notice and the particulars of claim in the County Court action, the Applicant had plans to redevelop the Property well before the issue of the Notice. He did not explain those plans at all in his Statement of Case, and he should have done if they were germane to his case on this appeal. It may well have been the case that those plans would have required possession of the Property to implement, but the Tribunal does not see the relevance of this point. If the Applicant succeeds in his possession action, he may be able to carry out whatever redevelopment or works be

plans, but that is an entirely separate issue from the Council's actions to enforce existing legislation to make the Property safe for the tenant.

59. Our view is that the existence of existing litigation between the Applicant and his tenant is of no significance to the Council in the exercise of their statutory function. It is not uncommon for landlords to be in dispute with their tenants. It cannot be the case that the existence of a dispute can limit or restrict the operation of the HHSRS system so as to enable a landlord to avoid being obliged to take measures to make a property reasonably safe.

60. We also reject any suggestion that the works required in the Notice require the tenant to vacate the Property whilst they are carried out. That proposition, in our view, is patently absurd. We do not see how any reasonable builder could have reached that conclusion. The works require, in our view, an electrician for a few hours to install the fire alarm system, an extractor fan in the bathroom and a light in the WC; and a gas engineer to attend to the boiler and issue a gas safety certificate, again for only a short time. A competent general builder would be required to fix a toilet door, investigate and repair the rook leak, and tile the kitchen splash-back. In our view, the work required would have involved no more than a few days during which tradesmen could undertake the work with minimal inconvenience to the tenant.

61. In our view, the Council were entitled, and indeed obliged, to exercise their proper statutory function under Part I of the Act. Having found hazards to exist, they were entitled and obliged to take statutory action under section 5 of the Act. It seems to the Tribunal that it was entirely appropriate for the Council to elect to deal with their inspection findings by the issue of the Notice. Their rationale for doing so, as set out in their section 8 statement included with the Notice, is entirely reasonable.

62. For these reasons, we dismiss the appeal and confirm the Notice. The parties are referred to section 15(5) and paragraph 19 of Schedule 1 of the Act which set out the rules for determining the new operative date for the Notice.

Appeal

63. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)