FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00MW/HIN/2023/00017
Property	**:**	2 Rosemary Court Palmerston Road Shanklin Isle of Wight PO37 6FD
Applicant	**:**	Miss Caroline Gladwin
Representative	**:**	Mr Michael Darby
Respondent	**:**	Isle of Wight Council
Representative	**:**	Counsel Mr Oliver Capildeo
Type of Application	**:**	Appeal against an Improvement Notice, an Hazard Awareness Notice and an Emergency Remedial Notice – Housing Act 2004
Tribunal Members	**:**	Judge N Jutton, Mr Michael Donaldson FRICS, Ms Jayam Dalal
Date and Venue of Hearing		26 September 2023, The Law Courts 1 Quay Street Newport PO30 5YT
Date of Decision	**:**	4 October 2023

DECISION

Background

1. This is an appeal by the Applicant Ms Caroline Gladwin in respect of the service upon her by the Respondent of three notices pursuant to the provisions of the Housing Act 2004 (the Act). They are a Notice of Emergency Remedial Action dated 1 February 2023 served pursuant to section 40 of the Act (the ERA Notice), an Hazard Awareness Notice dated 24 March 2023 served pursuant to section 28 of the Act (the HA Notice) and an Improvement Notice dated 24th March 2023 served pursuant to sections 11 and 12 of the Act (the Improvement Notice).

2. The Applicant is the owner of a residential flat known as 2 Rosemary Court, Palmerston Road, Shanklin, Isle of Wight (the Property). The Property is a ground floor two bedroomed flat forming part of a building dating (in part) from around 1890 which was converted into flats in 2009. The Applicant let the Property to a Mr and Mrs Benger in August 2020 and they remained the tenants of the Property at all material times.

3. On 18 November 2022 the Respondent, the Isle of Wight Council, were asked to investigate the condition of the Property by a Community Development Worker on behalf of the tenants. Mr Alan Barnes who is employed by the Respondent as a Commissioner for Housing Renewal together with a colleague Mrs Joanne Higginson, an Housing Renewal Officer, inspected the Property on 28 November 2022. Following that inspection Mr Barnes produced a document described as a 'Schedule of Housing Health and Safety Rating System (HHSRS) deficiencies' which he sent to the Respondent and to the tenant Mr Benger.

4. In his letter to the applicant Mr Barnes, by reference to the Housing Act 2004 (the Act) asked that the Applicant provide him with her proposals to remedy the deficiencies set out in the schedule. He also invited the Applicant to make such comments as she wished if she disputed the deficiencies set out in the schedule or her responsibilities in that regard. The letter asked for a response within 14 days to avoid any further intervention.

5. Mr Barnes and Mrs Higginson inspected the Property again on 19 January 2023. They were unable to gain access and therefore just inspected the external areas.

6. It is understood that by this time Mrs Benger had moved out of the Property but Mr Benger remained in residence. The Respondent was concerned for Mr Benger's safety. It is understood that Mr Benger had been the victim of antisocial behaviour by third parties against him. The Respondent was concerned as to the condition of the front door to the Property. It felt that the condition of the door was such that Mr Benger's safety was at risk by reason of the possibility of entry by intruders.

7. On 27 January 2023 the Respondent undertook remedial action to the front door by fitting a timber panel and replacing a door lock. The Respondent subsequently served on the Applicant The ERA Notice.

8. Mrs Higginson inspected the Property again on 7 February 2023 and Mr Barnes and Mrs Higginson together carried out a further inspection on 23 February 2023. The Respondent subsequently served the HA Notice and the Improvement Notice on the Applicant. Whether any of the Notices were valid and/or properly served is disputed by the Applicant. The Applicant appeals to the Tribunal against all three notices.

9. The Applicant's appeal was heard by the Tribunal on 26 September 2023. The Tribunal had before it two bundles of documents. The first bundle (the documents bundle) which ran to 144 pages contained copies of the Notices, the statements case of both parties, witness statements made by the Applicant, Mr Barnes and Mrs Higginson, various correspondence including emails and other documents. References to page numbers in this Decision are references to page numbers in the documents bundle. The second bundle (the photographic bundle) contained some 70 or so photographs of both the inside and outside the Property and other documents all of which were exhibited to the witness statements.

10. **The Law**

11. Part 1 of the Act provides for a system of assessing the condition of residential premises, and the way in which this is to be used in enforcing housing standards. It provides for a Housing Health and Safety Rating System (HHSRS) which evaluates the potential risk to harm and safety from any deficiencies identified in dwellings using objective criteria.

12. Local Authorities apply HHSRS to assess the condition of residential property in their areas. HHSRS enables the identification of specified hazards by calculating their seriousness as a numerical score by prescribed method. Hazards that score 1000 or above are classed as Category 1 hazards, whilst hazards with a score below 1000 are classed as Category 2 hazards.

13. Section 2(1) of the Act defines hazard as '*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 (whether the deficiency arises as a result of the construction of any building, an absence of maintenance or repair, or otherwise)*'.

14. Section 2(3) provides '*regulations under this Section may, in particular, prescribe a method for calculating the seriousness of hazards which takes into account both the likelihood of the harm occurring and the severity of the harm if it were to occur*'.

15. Those regulations are the Housing Health and Safety Rating System (England) Regulations 2005.

16. Under Section 5 of the Act, if a Local Authority considers that a Category 1 hazard exists on any residential premises, it must take appropriate enforcement action. Section 5(2) sets out seven types of enforcement action which are appropriate for a Category 1 hazard. The types of enforcement action that a Local Authority may take following identification of a Category 1 hazard include Emergency Remedial Action (under section 40) and service of an Improvement Notice (under section 11 to 19).

17. Section 7 of the Act contains similar provisions in relation to Category 2 hazards. Power is conferred on a Local Authority to take enforcement action in cases where it considers that a Category 2 hazard exists on residential premises and those courses of action include in Section 7(2) service of an Improvement Notice.

18. Section 9 of the Act requires the Local Authority to have regard to the HHSRS operating guidance and the HHSRS enforcement guidance.

19. Sections 11 to 19 of the Act specify the requirements of an Improvement Notice for Categories 1 and 2 hazards. Section 11(2) defines an Improvement Notice as a notice requiring the person on whom it is served to take such remedial action in respect of the hazard as specified in the Notice.

20. Section 11(8) defines remedial action as action (whether in the form of carrying out works or otherwise) which in the opinion of the Local Authority will remove or reduce the hazard. Section 11(5) states that the remedial action to be taken by the Notice must as a minimum be such as to ensure that the hazard ceases to be a Category 1 hazard but may extend beyond such action. Section 12 of the Act deals with an Improvement Notice for a Category 2 hazard, and contains similar provisions to that in Section 11.

21. An Appeal may be made to the Tribunal against an Improvement Notice under Paragraph 10, Part 3, Schedule 1 of the Act.

    Section 14 of Schedule 1 provides that an appeal '*...must be made within the period of 21 days beginning with the date on which the improvement notice was served in accordance with Part 1 of this Schedule*'.

    Section 14 (3) provides: '*The appropriate tribunal may allow an appeal to be made to it after the end of the period mentioned in subparagraph (1) or (2) if it is satisfied that there is a good reason for the failure to appeal before the end of that period (and for any delays since then in applying for permission to appeal out of time)*'.

22. Part 1 of Schedule 1 provides that the improvement notice must be served on the owner of the property and on every other person who to

the knowledge of the local authority has a relevant interest in the premises or is an occupier thereof.

23. The Appeal is by way of a rehearing and may be determined by the Tribunal having regard to matters of which the Local Authority is unaware. The Tribunal may confirm, quash or vary the Improvement Notice. The function of the Tribunal on an Appeal against an Improvement Notice is not restricted to a review of the Authority's decision. The Tribunal's jurisdiction involves a rehearing of the matter and making up its own mind about what it would do.

24. Section 45 of the Act addresses appeals in relation to Emergency Remedial Action. Subsection 3 provides that an appeal must be made '*… within the period of 28 days beginning with - (a) the date specified in the notice under section 41 as the date when the emergency remedial action was (or was to be) started…'*.

25. Subsection 4 provides that the tribunal '*….may allow an appeal to be made to it after the end of that period if it is satisfied that there is a good reason for the failure to appeal before the end of that period (and for any delay since then in applying for permission to appeal out of time)*'.

26. Subsection 5 provides that the appeal is to be by way of rehearing but may be determined having regard to matters of which the local authority were unaware. The Tribunal may confirm reverse or vary the decision of the authority.

27. Section 28 of the Act gives power to a Local Housing Authority to serve on the owner of residential properties a Hazard Awareness Notice relating to Category 1 hazards. The notice advises the recipient of the existence of the hazard(s), the deficiency giving rise to it, the reason for serving the notice and details of remedial action if any which the local authority considers would be practical and appropriate to take in relation to the hazard. Section 29 contains like provisions for the service of a Hazard Awareness Notice in relation to Category 2 hazards. The Act does not provide for a right to appeal against the service of a Hazard Awareness Notice.

28. **The Hazard Awareness Notice**

29. The HA Notice is at page 45 of the bundle. It is dated 24th of March 2023. The notice makes reference to category 2 hazards that the Respondent says exist at the Property. They are set out in four schedules to the notice. The first relates to damp and mould growth, the second to food safety, the third to personal hygiene sanitation and drainage and the fourth to falling on level surfaces et cetera.

30. At paragraph 9 of its Directions dated 2 August 2023 the Tribunal noted that there was no right of appeal against a Hazard Awareness Notice. The Tribunal indicated that accordingly it was minded to strike out the

Applicant's appeal against the HA Notice in accordance with Rule 9 of the Tribunal Procedure (first-tier Tribunal) (Property Chamber) Rules 2013 on the ground that the Tribunal had no jurisdiction to deal with the appeal.

31. Rule 9 (2) provides that the Tribunal must (emphasis added) strike out that part of the proceedings in respect of which the Tribunal does not have jurisdiction.

32. The Act does not contain a right to appeal against the service of a Hazard Awareness Notice to this Tribunal. It follows that the Tribunal does not have jurisdiction to hear an appeal against the service of such a notice. Accordingly pursuant to Rule 9(2) of the said procedure rules the Tribunal strikes out the Applicant's application to appeal against the Hazard Awareness Notice dated 24 March 2023.

33. **The Notice of Emergency Remedial Action**

34. The ERA Notice (pages 24-26) provides that the Respondent was satisfied that a category 1 Hazard existed at the Property and that further that the hazard involved imminent risk of serious harm to the health and safety of the occupiers of the Property. The schedule to the notice identifies the hazard as: '*Entry by Intruders This covers difficulties in keeping a dwelling secure against unauthorised entry and the maintenance of defensible space*'.

35. The particular deficiency giving rise to the hazard was defined as: '*The front door to the flat has no working lock and the lower door panel is missing and covered by a "for sale sign*"'. The remedial action taken by the Respondent on 27 January 2023 is stated to be: ' *Fitting of timber panel to defective front door to improve security, and replacement of door lock'*.

36. The notes served with the notice set out section 45 of the Act which provides, as set out above, that an appeal to this Tribunal against the decision of the Respondent to take the action set out in the notice must be made within the period of 28 days beginning with the date specified in the notice as the date when the emergency remedial action was (or was to be) started. In this case that date is 27 January 2023 and therefore an appeal to this Tribunal was required by section 45 of the Act to be made no later than 24th of February 2023. The Applicants application by way of appeal to this Tribunal is dated 14 April 2023 some seven weeks after 24 February 2023.

37. The directions made by the Tribunal on 2 August 2023 noted at paragraphs 6 and 7 that the Applicant's application to the Tribunal to appeal against the service on her of the ERA Notice was out of time and that accordingly it was minded to strike out the application in accordance with Rule 9 of the procedural rules. The directions referred to section 45 (4) of the Act (which are set out in part above) which provides that the Tribunal may allow an appeal to be made to it after the

expiry of the said 28 day period if the Tribunal is satisfied that there is a good reason for the failure to appeal before the end of that period.

38. At paragraph 10 of the said directions the Tribunal directed the Applicant to provide reasons for making her application to the Tribunal out of time by 9 August 2023. Those reasons (pages 69 – 70) are dated 12 September 2023. Mr Darby told the Tribunal that the date was an error. That a copy of the document had been sent to the Respondent on 9 August 2023.

39. The Applicant says that she was shocked and confused by the ERA notice. That she had been unaware that the lock on the door was broken. That the tenant was responsible for rectifying the damage to the door. That a temporary repair had been carried out without her knowledge or permission. That to avoid the expense of taking up the Tribunals time she sought to resolve the matter directly with the Respondent. That she requested that the notice be withdrawn as part of an official complaint that she filed against the Respondent. That she only received a response to her complaint from the Respondent after the deadline to appeal against the service of the ERA Notice had passed. That she was told that the notice would not be withdrawn and that she should follow the appeal procedure. On that basis the Applicant assumed that the Respondent had no objection to an appeal against the ERA Notice being made out of time.

40. The Applicant told the Tribunal that when she received the Improvement Notice she felt that it would be appropriate to appeal against the ERA Notice at the same time as she appealed against the Improvement Notice. That her complaint against the Respondent was 'escalated' to the Respondent's 'Neighbourhood Director' who said on 19 April 2023 that her request that the notice be withdrawn should be referred to the Tribunal thereby confirming her understanding that the Respondent had no objection to an appeal being heard out of time. The Applicant says that the service of the ERA Notice should be a matter of last resort. That she had no knowledge of the issues set out in the notice and wasn't allowed the opportunity to resolve them. That in the circumstances the Applicant says that it would only be fair and equitable and in the interests of justice for her appeal against the service of the ERA Notice to be allowed to proceed.

41. Mr Capildeo for the Respondent said that when the ERA Notice was served on the Applicant it included information advising the Applicant of her right to appeal to the Tribunal and made clear that such appeal should be made within 28 days of the date when the emergency remedial action was carried out. That the Applicants communication with the Respondent focused not on the proposed work to the Property but upon the way that the Respondent had conducted itself. At no time Mr Capildeo said did the Respondent suggest that consequently the 28 day time limit was a 'soft deadline'. That ultimately the Applicant's complaint to the Respondent was an entirely separate matter to her right to appeal and that the Applicant was wrong to seek to conflate the

two matters. Clearly, he suggested, the Applicant had hoped to persuade the Respondent to revoke the notice and avoid the need to come to the Tribunal. Therefore it was not reasonable to suggest that it was acceptable to delay submitting an appeal until the Improvement Notice was received, they were separate matters.

42. **The Tribunal's Decision**

43. The notes served with the ERA Notice (page 26) clearly set out the Applicant's right to appeal (by setting out section 45 of the Act). The 28 day period by which an appeal should have been filed with the Tribunal expired on 24 February 2023. The Applicants appeal to this Tribunal was made on 14 April 2023 some seven weeks later. The directions made by the Tribunal on 2 August 2023 directed that the Applicant provide her reasons for making her application out of time to the Respondent by 9 August 2023. The application to the Tribunal to appeal does not, as Mr Darby suggested at the hearing, contain a separate application for permission to appeal out of time. The Applicant's written explanation as to why she did not appeal within the 28 day period is the document at pages 69 – 70 headed '*Appeal regarding the notices for 2 Rosemary Court Palmerston Rd, Shanklin Isle of Wight*'. The Applicant says that was served (albeit apparently without a statement of truth) on the Respondent on 9 August. The copy in the bundle which contains a statement of truth is dated 12 September 2023 some five weeks later. There was no formal written application for permission to appeal out of time. The Tribunal nonetheless was prepared to entertain that application at the hearing.

44. Applying the test in section 45 (4) of the Act the Tribunal must decide whether there is a good reason for the failure by the Applicant to lodge an appeal within the 28 days allowed. That means first identifying the reason for the failure and secondly considering whether that reason was a good reason. The Tribunal then asks the same questions in relation to the period of delay between the expiry of the permitted time for appealing and the date upon which the appeal was actually brought. The Tribunal must also consider any delay in making the application for permission to appeal out of time.

45. The Applicant says that the reason for her failure to appeal within the allowed period and the delay in filing her appeal after the expiry of that period was that she did not wish to waste the Tribunals time. Further, that she believed that the manner in which her complaint to the Respondent had been addressed, in particular the advice that she should follow the appeal procedure in relation to the ERA Notice indicated that the Respondent had no objection to her appealing to the tribunal out of time.

46. While the Tribunal acknowledges the Applicants wish not to waste the Tribunals time it does not accept that the reason given for failing to appeal within the allowed period is a good reason. The Applicant made a complaint as regards what she perceived to be unacceptable behaviour

and conduct of the part of the Respondent's officers towards her. There was no reason why, if she were so minded, that she couldn't have filed her appeal concurrently with her complaint within the allowed period.

47. The fact that the Applicant filed a complaint and the fact that the Respondent may or may not have been slow in replying to that complaint is in the view of the Tribunal an entirely separate matter to her statutory right to file an appeal against the service of the ERA Notice upon her. The Applicant's complaint and the Respondents response to it is not a good reason to delay making an application to appeal against the ERA Notice. The disconnect between the appeal process and Respondent's complaints process is made clear from the Respondents response to the complaint which the Applicant sets out at paragraph 33 of her witness statement (page 79) which states: '*This policy covers complaints about the council, its services, or officers it does not however replace any legal appeal process for enforcement notices. If you wish to appeal the notice you will need to do this through the proper legal channel*'.

48. The manner in which the Respondent dealt with the Applicants complaint to include any alleged delay in doing so does not in the view of the Tribunal support the Applicant's contention that the Respondent would have no objection to her appealing to the Tribunal out of time. Indeed, the extract from the Respondent's response to the complaint set out above suggests quite to the contrary. It certainly doesn't, in the view of the Tribunal, indicate to the recipient that it would be acceptable (even if that were within the Respondent's remit – which it isn't) to appeal out of time.

49. Nor does the Tribunal accept the submission made by Mr Darby at the hearing that it was a good reason to delay submitting the appeal against the ERA Notice until the Improvement Notice was received so that the two appeals could be dealt with in the same application. The Tribunal agrees with Mr Capildeo that they are separate matters, separate notices with different prescribed times for appeal.

50. Further the Tribunal is of the view that no good reason has been given by the Applicant for the delay between the expiry of the period allowed for an appeal and her application for permission to appeal out of time.

51. For those reasons the Tribunal dismisses the Applicants application for permission to appeal the ERA Notice out of time. The appeal is made out of time and accordingly the Tribunal strikes out the Applicant's appeal against the service of the ERA Notice upon her.

52. **The Improvement Notice**

53. The Improvement Notice (pages 32–40) is dated 24 March 2023. Schedule 1 to the notice sets out hazards identified as Category 1 hazards and the proposed remedial action. Schedule 2 sets out hazards identified as Category 2 hazards and the proposed remedial action.

The Category 1 hazard identified is described as '***Excess Cold*** - *This category covers the threats to health from sub-optimal indoor temperatures'*. The deficiencies giving rise to the hazard are stated to be: –

'a) defective and rotten timbers, decor in poor condition to front door.
b) there are single glazed windows to habitable rooms.
c) considerable masonry cracks in hall.
d) masonry cracks and gaps in the floor with daylight visible in bathroom.
e) lounge heater not working'.

The proposed remedial action which the Respondent considers that it will be practicable and appropriate to take in relation to the hazards is stated to be: –

'a) replace door with suitable external door and window, with improved energy efficiency rating.
b) replace windows with suitable double glazed windows and better energy efficiency rating. Ensure adequate ventilation openings and satisfactory means of escape from fire from the bedrooms.
c) infill any cracks using suitable materials and method. Decorate any surfaces as appropriate. Investigate the cause of cracking undertake any necessary work stop any further structural movement.
d) infill any cracks using suitable materials and method. Decorate any surfaces as appropriate. Investigate the cause of cracking undertake any necessary work to stop any further structural movement.
e) investigate and undertake all necessary repairs or renewals as necessary to ensure the heater is in good working order. Heaters to be able to heat a room to 19 *degrees centigrade when external temperature is -1 degree. They must be fixed, efficient, and controllable'.*

The schedule provides that the date on which the remedial action was to be started was 24 July 2023 and be completed by 24 August 2023.

The Category 2 hazards, deficiencies giving rise to the hazards and proposed remedial action set out in schedule 2 are as follows: –

*'**Falling on Stairs etc**.....*
a) external steps at entrance damaged and with slippery surface.
b) defective guttering leaking onto external steps.

Remedial action:-
c) repair steps to leave in good condition and with a nonslip surface.

d) repair guttering so that it does not leak.

'***Electrical Hazards***.....

- *Broken electrical socket and exposed wiring in lounge.*
- *Broken light switch in hall'.*

Remedial action:-

- *'Replace broken socket.*
- *Replace light switch'.*

'***Fire***....

- *Considerable masonry cracks in hall.*
- *Broken light switch in hall.*
- *No fire blanket in kitchen.*
- *Means of escape through higher risk outer room without a self- closing fire door between kitchen and lounge'.*

Remedial action:-

- *'Infill any cracks using suitable materials and method. Decorate any surfaces as appropriate. Investigate the cause of cracking and undertake any necessary work to stop any further structural movement*
- *Replace light switch.*
- *Install a new fire blanket to the kitchen area.*
- *Ensure the door and frame between the kitchen/lounge and the inner hall is FD30(s) standard with smoke seal/intumescent strips. Ensure no gaps around the frame'.*

In each case date upon which the notice requires the remedial action to start is 24 July 2023 to be completed by 24 August 2023.

The Applicant's case

54. The Applicant opposes the Improvement Notice on two grounds. Firstly she contends that the notice is invalid. Secondly she disputes certain of the deficiencies giving rise to the hazards identified in the notice and the proposed remedial action.

55. **The Validity Arguments**

56. The Applicant raises a number of arguments both in her written submissions and orally at the hearing.

57. In her statement of case the Applicant contended that the notice had not been served on her. That it was not sufficient for the notice to be served by ordinary post. She contended that a precedent had been sent when the ERA Notice was emailed to her, delivered by hand and a copy sent by

post. However in her written response to the Respondents written submissions she accepted that service by first class post was a permissible means of service (page 71).

58. The Applicant confirmed that the notice was received by her on Saturday, 25 March 2023. That it was posted by the Respondent on 24 March 2023. That was a Friday. She contends that the deemed date of service was the following Monday, 27 March 2023.

59. The notice states (page 32) that the 'operative date' is 13 April 2023. That is a reference to section 15 of the Act. Section 15(2) provides that the general rule is that an improvement notice becomes operative at the end of the period 21 days beginning with the day on which it is served. Whether the notice was served on the 25th or 27 March 2023 makes no difference the Applicant says because the date of 13 April 2023 is less than 21 days thereafter. As such the Applicant says the notice is defective and therefore invalid. In the circumstances Mr Darby suggested the Tribunal should not look to vary the notice but instead the Respondent as he put it should 'really go back and start again' by which he meant that it should serve a fresh notice.

60. The Applicant also contends that there is an error in the notice. It states that it is served pursuant to section 11 of the Act. Section 11 relates to Category 1 hazards. However because the notice also contains details of Category 2 hazards it should also state that it is served pursuant to section 12 of the Act (as regards the Category 2 hazards). The heading to the notice just refers to section 11 and schedule 2 (which sets out the Category 2 hazards) wrongly refers to section 11 when correctly it should refer to section 12. The effect, the Applicant says is to invalidate the Improvement Notice.

61. Nor is it acceptable the Applicant says for the Category 1 and Category 2 hazards to be contained in schedules rather than in the notice itself. That the notice itself (page 32) just refers to the hazards as set out in the schedules when properly details of the alleged hazards should be set out or at least properly referred to in the body of the notice.

62. Further the Applicant contends that the schedules to the notice were not attached to it but were loose in the paperwork sent to the Applicant so that they were separate from the notice itself. That (described an 'obvious error') the Applicant contends renders the notice invalid.

63. The Applicant also contends that the gap between the inspection of the Property by the Respondent on the 23rd of February 2023 and the date of the notice which is the 24 March 2023 falls foul of the requirement of section 4 of the Act that such matters should be dealt with as a matter of urgency. The Applicant contends that delay in itself is sufficient to render the notice invalid.

64. The Applicant says that the Respondent has failed to produce the documentation that she says should have been created in order properly

to produce the Improvement Notice. Those being documents such as detailed reports following the inspection of the Property and a proper explanation as to how the calculations that gave rise to the categorisation of the hazards identified in the Improvement Notice had been arrived at.

65. Finally, the Applicant contends that the inspection of the Property on 23 February 2023 was not properly authorised as required by section 243 of the Act. That section provides that where a local housing authority wishes to inspect a property in order to determine whether to exercise any of its functions under inter alia section 4 of the Act (an inspection of a property to see whether category 1 or 2 hazards exist) it should first obtain authorisation for the inspection from an '*appropriate officer*'. 'Appropriate officer' is defined at section 243 (3) as a deputy chief officer of the authority (within the meaning of section 2 of the Local Government and Housing Act 1989). Where the proper authorisation for an inspection is not obtained any subsequent notice served by the authority is, the Applicant says, invalid.

66. There are copies of two authorisation notices in the bundle. The first at page 136 is dated 9 February 2023 and is signed by Samuel Draper who is described as 'Senior Housing Renewal Officer Regulatory Services'. The second at page 137 is dated 23 February 2023 and is signed by Amanda Gregory who is described as 'Strategic Manager Regulatory Services'. Mr Draper, the Applicant says, is not an appropriate officer therefore was not able to authorise the inspection that took place on 23 February 2023. At the hearing Mr Darby accepted that for the purposes of the Act Amanda Gregory was an appropriate officer and that the notice signed by her was sufficient authorisation for the inspection. However, the Applicant says that it was unlawful for the Respondent to send a letter to the Applicant notifying her of the intention to inspect the Property prior to the Respondent obtaining proper authorisation for the inspection. As such the Applicant says the inspection was unlawful and that it follows that the Improvement Notice was unlawful.

67. **The Respondents Case**

68. Mr Capildeo said that the Applicants contention that the Improvement Notice was invalid because of the incorrect 'operative date' being given on the notice is to take a very narrow and technical point insufficient to invalidate the entire notice. That even if the Applicant was correct (which was not accepted) the Tribunal could effectively rectify the notice pursuant to its powers under section 15 (3) of Schedule 1 to the Act by varying the Improvement Notice.

69. As to the Applicants contention that the Improvement Notice was invalid because schedule 2 to the notice which sets out the Category 2 hazards states that the notice is served under section 11 of the Act when that should be a reference to section 12, the Respondent refers to section 12 (5) of the Act. That provides that an improvement notice served under section 12 may be combined in one document with a notice served

under section 11. At worse Mr Capildeo contended the reference to section 11 was a clerical oversight. That the Category 1 and Category 2 hazards were separately categorised in the notice. That it was clear which hazards were Category 1 and which were Category 2. The legislation required the notice to be clear and it was. The Applicants argument didn't he suggested strike at the heart of the case. That such an alleged technical error should not lead to the quashing of the notice not least bearing in mind the underlying factors namely the condition of the Property that gave rise to the need to serve the notice. That it would be disproportionate in such circumstances and wrong he said to quash the notice. Further that in any event if it felt fit, the Tribunal had the power to vary the notice to put right the alleged error.

70. The Improvement notice includes the schedules to it and is, the R**e**spondent says, together one document. That the document along with a covering letter and notes to accompany the notice (setting out the right to appeal) together with the statement of reasons were all included in the same envelope.

71. The Respondent had, Mr Capildeo said done all that was required by the legislation in terms of preparing and serving the Improvement Notice. As regards the Applicants contention that a detailed report of the condition of the Property should have been produced by the Respondent he made reference to the detailed schedule of deficiencies prepared by the Respondent and supplied to the Applicant following the inspection on 28 November 2022 (pages 119 – 124) together with the letter from the Respondent to the Applicant dated 15 December 2022 (page 125). That also illustrated he said the Respondent's initial informal approach to the Applicant to address the hazards identified at the Property prior to the service of the Improvement Notice. The reality was he said that the Applicant had failed to address the schedule of deficiencies and that had she wished to challenge that schedule and the HHSRS calculations carried out by the Respondent then she should have produced expert evidence to the Tribunal, which she had failed to do. That the witness statements of Mr Barnes (pages 88-95) and Mrs Higginson (pages 96-100) were the statements of professional witnesses qualified to address the matters contained therein to include the process that led to the preparation drafting and service of the Improvement Notice.

72. **The Hazards and Proposed Remedial Actions**

73. <u>Category 1 Hazard Excess Cold.</u>

74. The Applicant disputes that 'Excess Cold' can be a Category 1 hazard. She also disputes that the deficiencies set out in the notice are sufficient to support a finding of excess cold. The Property has she says a valid Energy Performance Certificate that meets the requirements of a rental property. The only suggested change to improve the heat insulation at the Property that had been suggested by reason of the EPC was cavity wall insulation. That the EPC had made no recommendation regarding the windows.

75. At the hearing Mr Darby agreed that there were defective and rotten timbers to the front door and its decor was in poor condition. He agreed that there were single glazed windows to habitable rooms but did not agree that amounted to a deficiency. He agreed that there were masonry cracks in the hall but did not agree that that contributed excess cold in the property. He agreed that there were masonry cracks and gaps in the floor in the bathroom but didn't agree that would contribute to or cause excess cold. He did not agree that the lounge heater was not working. Indeed he says that it was working at the time of the inspection but was just turned off.

76. Mr Darby said that the Applicant accepted that the Property required a new front door and that she was in the process of speaking to the conservation officer in that regard (the Applicant's understanding being that the Property was grade 2 listed and in a conservation area).

77. It was not accepted Mr Darby said by the Applicant that replacing single glazed windows with double glazed windows was reasonable or necessary. Further that there might well be difficulties in obtaining consent to such works by reason of the Property's listed status.

78. That whilst the Applicant may well fill in the cracks to the masonry at the Property such work was just cosmetic in nature and not necessary to prevent excess cold. He accepted that the hole in the bathroom floor did cause a draft. He said that the heater in the lounge was working properly. That none of the alleged deficiencies taken together or singularly supported a finding that a Category 1 hazard existed at the Property by reason of excess cold or otherwise.

79. The Respondent's evidence is primarily set out in the documents contained in the bundle in particular the witness statements of Mr Alan Barnes and Mrs Joanne Higginson, the schedule of deficiencies (page 119) and the extensive photographs contained in the photograph bundle.

80. Mr Capildeo said that as regards the lounge heater to the best of Mr Barnes recollection it had been switched on during the inspection and was not working. He would have reviewed the point had it been raised with him by Applicant. The Respondent, Mr Capildeo said, could find no evidence that the Property had listed status but was happy to be corrected. If it was not listed then the potential hurdle in the way of the installation of double glazing was removed. All of the deficiencies taken together Mr Capildeo said supported the finding of the hazard of excess cold. He submitted that there was no evidence to challenge the Respondent's calculations that led it to conclude that a Category 1 hazard existed. That the deficiencies at the Property were clearly set out in the schedule of deficiencies.

81. <u>The Category 2 Hazards</u>

82. <u>Falling on Stairs etc.</u>

83. Mr Darby said that the Applicant didn't accept that the external entrance steps required repair. That any damage to the steps, the Applicant says in her statement of case, was caused by the tenant. Mr Darby said that the Applicant did accept that the guttering was leaking and did require repairing but did not accept that the leak affected the surface of the steps.

84. Electrical hazards.

85. Mr Darby said that the Applicant accepted that the electric socket in the lounge is broken and required repairing. He also accepted that the broken light switch in the hall require repairing. He said that both have been damaged by the tenant Mr Benger. Mr Darby said that he couldn't say whether or not these items constituted a Category 2 hazard.

86. Fire.

87. In answer to a question from the Tribunal Mr Capildeo said that the cracks in the masonry were a deficiency giving rise to a fire hazard because they allowed smoke to permeate through the walls together with noxious fumes. Mr Darby said that the cracks were just to the plasterwork not to the structural masonry. The cracks would not allow smoke or noxious fumes to pass through the wall. That whilst the Applicant may well repair the cracks they did not amount to a deficiency which could be categorised as a Category 2 hazard.

88. Mr Darby said that it was accepted that the light switch in the hall was broken and required replacing. It was not accepted that the absence of a fire blanket to the kitchen area was a deficiency.

89. When questioned by the Tribunal Mr Barnes accepted that there was an error in the description of the deficiency relating to the lack of a self-closing fire door. The deficiency set out in the Improvement Notice refers to a door between the kitchen and the lounge whilst the proposed remedial action refers to door between the kitchen/ lounge and the inner hall. Mr Barnes explained that the door referred to was that between the kitchen/lounge and the inner hall, the kitchen and lounge effectively being one open room. The reference in the proposed remedial action to FD30(s) was to a fire door which should be self-closing. The Tribunal suggested that the wording could perhaps be clearer.

90. **The Tribunals Decision**

91. The Validity of the improvement Notice

92. Section 15(2) of the Act provides that the general rule is that an improvement notice becomes operative at the end of the period 21 days beginning with the day on which it is served. The Improvement Notice states that the operative date is 13 April 2023. That is wrong. Whether the notice is said to be served on 25 of March 2023 or 27 March 2023

makes no difference. Either way the period between the date of service and 13 April is less than 21 days. The Tribunal notes that the notes that accompanied the improvement notice made reference to the operative time for the notice following an appeal. They refer to section 19(2) of Part 1 Schedule 1 of the Act which effectively extends the operative time until the appeal is dealt with (taking into account the time for filing any further appeal).

93. At the hearing the Tribunal made the point to the parties that reference to the operative time was not something which it was mandatory to include in an improvement notice (section 13 of the Act sets out those matters which must be specified in the notice). Further that the appeal to the Tribunal was by way of a re-hearing and it was put to the parties that the Tribunal had power (pursuant to section 15(3) of schedule 1 of the Act) to vary the notice to correct the reference to the operative date.

94. In all the circumstances the Tribunal does not accept that the reference in the Improvement Notice to the operative date being 13 April 2023 invalidates the notice. The operative date coincides with the date by which the recipient of the notice may appeal. The effect of the appeal is to suspend the operative date. The Applicant did appeal and the operative date was thereby suspended. As such therefore the reference to 13 April 2023 became of no effect. In any event the Tribunal in dealing with this appeal by way of a re-hearing amends the Improvement Notice by deleting the words: '*The Authority therefore serve this Improvement Notice under Section 11 of the Act the operative date being 13 April 2023 and require you to take the remedial action specified*' and replace that wording with the following:

'*The Authority therefore serve this Improvement Notice under Sections 11 and 12 of the Act the operative date being the end of the period of 21 days beginning with the date on which this notice is served on you*'.

95. The Applicant says that where the Improvement Notice makes reference to the Category 2 hazards it should refer to section 12 of the Act not section 11. The Respondent says it matters not because section 12(5) provides that an improvement notice served under section 12 may be combined in one document with a notice under section 11.

96. In the view of the Tribunal section 12(5) does not help the Respondent. It simply allows improvement notices in respect of both Category 1 and Category 2 hazards to be combined in one document and thus avoid the need to serve separate notices. The contents that must be contained in the notice are set out in section 13 of the Act. Section 13(2)(a) states that the notice must say whether it is served under section 11 or 12. The Improvement Notice states that it is served under section 11 (in respect of both categories of hazard). It arguably complies with that requirement by at least referring to one of the two sections. In the view of the Tribunal the reference to section 11 of the Act as the section under which notice of the Category 2 hazards are served is not fatal to the validity of the notice. It does not make the notice invalid. Further as with the

operative date and as this appeal is by way of a re-hearing it is an error that the Tribunal may correct by way of variation of the Improvement Notice and it does so.

97. The Tribunal varies Schedule 2 of the Improvement Notice so that where it is stated in that schedule that the notice is served under section 11 of the Housing act 2004 that shall read: '*This notice is served under section 12 of the Housing Act 2004*'.

98. Similarly in the heading of the Improvement Notice (page 32) the reference to '*Housing Act 2004 Section 11*' is varied to read: *Housing Act 2004 Section 11 and Section 12*.

99. The Tribunal does not accept the Applicant arguments that it was wrong to set out details of the hazards deficiencies and remedial action proposed in schedules to the Improvement Notice. It is in the view of the Tribunal standard practice to set out details of Category 1 and Category 2 hazards together with remedial action required in schedules to the notice. The fact that such details are set out in the schedules is clearly stated on the front page of the notice and the Applicant is not in any way misled thereby. It is a reasonable and convenient way of addressing the details of the hazards identified and the suggested remedial action.

100. Nor does the Tribunal accept the rather torturous suggestion on the part of the Applicant that the Improvement Notice is invalid because the schedules were not physically attached to the front page of the notice albeit they were included together in one envelope. Upon opening the envelope the Applicant would have been able to read the front page of the Improvement Notice, read the reference to the schedules and then readily find the schedules without any uncertainty.

101. The Tribunal does not agree with the Applicant's contention that there was such delay between the inspection of the Property and the service of the Improvement Notice to amount to a lack of urgency which would in some way invalidate the notice. Section 4 of the Act provides that where following an inspection of a property it is reported that a Category 1 or Category 2 hazard exists then the authority must consider that report '*as soon as possible*'. There is nothing to suggest that wasn't the case here. Nor has the Applicant put forward any legal authority to address what is meant by the expression 'as soon as possible' or any coherent argument to support her contention that a delay or alleged delay in the service of an improvement notice would invalidate such notice.

102. The Tribunal does not accept the Applicant's contention that there was a failure on the part of Respondent to produce documents to which she was entitled and which failure might in itself invalidate the Improvement Notice. The Applicant has produced no legal authority to support her contention that certain documents should be produced to her. In any event the Tribunal is satisfied from the papers before it that sufficient information, not least in the form of the schedule of deficiencies (page 119-124) and the Improvement Notice itself that the

Applicant had sufficient information to properly consider the contents of the Improvement Notice and as to whether or not she wished to appeal against the notice.

103. Finally the Tribunal is satisfied that the inspection of the Property on 23 February 23 was properly authorised, on behalf of the Respondent by Amanda Gregory a Strategic Manager Regulatory Services with the Respondent (page 137). Mr Darby quite fairly and reasonably accepted that authorisation was properly made. There was no evidence adduced before the Tribunal to suggest that the authorisation was made after the inspection was carried out albeit that inspection was carried out on the same day as the authorisation.

104. For those reasons and in all the circumstances the Tribunal is satisfied that the Improvement Notice is valid and was properly served.

105. **The Hazards and Proposed Remedial Action**

106. Category 1 Hazard

107. On the basis of the evidence before it to include the photographs contained in the photograph bundle and the submissions made by the parties both in writing and at the hearing the Tribunal is satisfied that as at the date the decision was made by the Respondent to serve the improvement notice that the front door to the Property was defective as set out in the notice. The Applicant accepted at the hearing that the door required repairing/replacing. The Applicant said that she was speaking to the conservation officer in that regard.

108. There was some question at the hearing as to whether or not the Property was grade 2 listed. That was the Applicant's understanding but the Respondent said it had no record to that effect albeit it was happy to be corrected. There was no evidence before the Tribunal to show the Property was grade 2 listed.

109. The Tribunal does not accept that it is reasonable to require the windows at the Property which are single glazed to be replaced with double glazed windows. That no doubt would be an expensive exercise. In the view of the Tribunal if the remainder of the remedial work in relation to the Category 1 hazard of 'excess cold' set out in the Improvement Notice is properly carried out that would address the issue of excess cold. However if the single glazed windows allow drafts into the Property the Applicant should take such reasonable action as may be necessary to draught proof those windows.

110. The Tribunal therefore varies the following remedial action:

> '*Replace windows with suitable double glazed windows and better energy efficiency rating. Ensure adequate ventilation openings and satisfactory means of escape from fire from the bedrooms'*.

To read: ' *Take such reasonable action as may be necessary to draught proof the single glazed windows at the Property. Ensure adequate ventilation openings and satisfactory means of escape from fire from the bedrooms'.*

111. The Tribunal is satisfied on the evidence before it that the balance of the proposed remedial action set out in the Improvement Notice to remedy the Category 1 hazard of excess cold is reasonable. If it is the case, as the Applicant contends that the heater in the lounge is working in accordance with the remedial action demanded then she has effectively complied with that requirement. If the heater is not working or does not meet the parameters/conditions set out in the Improvement Notice then she must take the necessary remedial action.

112. Finally, at paragraph 26 of her statement of case the Applicant questions whether 'excess cold' can constitute a category 1 hazard. The Tribunal notes that the Housing Health and Safety Rating System is based on 29 hazard profiles which are set out in schedule 1 to the Housing Health and Safety Rating System (England) Regulations 2005, one of which is 'excess cold'.

113. <u>Category 2 Hazards</u>

114. Falling on Stairs etc.

115. The Tribunal is satisfied from the evidence before it including the photographs contained in the photograph bundle that the deficiencies identified in the Improvement Notice are properly made out and that the proposed remedial action in set out in the notice is reasonable.

116. Electrical hazards.

117. The Applicant accepted at the hearing the deficiencies identified in the Improvement Notice and the required remedial action. The fact that the damage to the electric socket and the light switch may have or may not have been caused by the Applicant's tenant is not relevant.

118. Fire.

119. The Tribunal is satisfied from the evidence before it that the deficiencies identified in the Improvement Notice are made out and the proposed remedial action is reasonable. The Applicant indicated in any event that she was minded to fill in the masonry cracks. The Tribunal however varies the description of the deficiency in relation to the self-closing fire door from:

'*Means of escape through higher risk outer room without a self-closing fire door between kitchen and lounge'* to read:

'*Means of escape through higher risk outer room without a self-closing fire door between kitchen/lounge and the inner hall'.*

120. **Type of Enforcement Action**

121. The Tribunal has given careful consideration in relation to all of the hazards identified in the Improvement Notice as to whether in the circumstances an improvement notice is the most appropriate enforcement action to take. Sections 5(2) and 7(2) of the Act identify the different types of possible enforcement action. None of the hazards which are set out in the Improvement Notice in the view of the Tribunal represent imminent danger to the health and safety of any occupants of the Property and that rules out the options of Emergency Remedial Action (as regards the hazards identified in the Improvement Notice) an Emergency Prohibition Order or a Prohibition Order. Patiently, the condition of the Property and the nature of the deficiencies rule out the radical options of demolition or clearance. The choice is therefore between an Improvement Notice (with the possibility of suspending the improvement notice) and a Hazard Awareness Notice.

122. The Tribunal does not consider that a Hazard Awareness Notice would have been appropriate in respect of the hazards covered by the Improvement Notice. A Hazard Awareness Notice advises the owner of a property of the existence of a hazard and the deficiency causing it. It requires no action to remedy the deficiency on the part of the owner. In the view of the Tribunal not least given the risk of harm and health represented by the hazards identified, a Hazard Awareness Notice would not be appropriate. The hazards require remedying. There is no suggestion by either party that the Improvement Notice be suspended nor does the Tribunal think it would be appropriate to do so.

123. **Timing**

124. The Improvement Notice provided that the remedial works be started no later than 24 July 2023 and to be completed by 24 August 2023. The Tribunal varies the Improvement Notice in respect of the timescale for the works to be carried out so that it will read as follows:

> '*The date on which the remedial action is to be started is: 24 January 2024.*
> *The period within which the remedial action is to be completed or the period within which each part of it is to be completed: 24 February 2024*'.

125. **General Observation**

In the submissions made by both parties both in writing and orally at the hearing various accusations were made about the behaviour and alleged motives of the other. Those included a contention by the Applicant that the Respondent was 'weaponizing' the Housing Act 2004 against her (which the Respondent denies). Whilst the Tribunal recognises the strength of feeling on the part of the Applicant in particular the allegations made by both parties were not helpful in

determining the issues which fall to the Tribunal to address. For that reason the submissions made in respect of the motives and interactions or alleged lack thereof between the parties are not set out or addressed in this decision.

126. **Summary of Decision**

127. **The Hazard Awareness Notice.**

128. The Tribunal strikes out the application to appeal the Hazard Awareness Notice dated 24 March 2023 on the grounds that it has no jurisdiction to determine the application.

129. **The Notice of Emergency Remedial Action.**

130. The Tribunal dismisses the Applicant's application to appeal the Notice of Emergency Remedial Action dated 1 February 2023 out of time. The appeal is made out of time and is struck out.

131. **The Improvement Notice**

132. The Tribunal confirms the Improvement Notice dated 24 March 2023 subject to the following variations:

i. The heading to the Improvement Notice is varied to read: '*Housing Act 2004 Sections 11 and 12*'.

ii. The words:
'*The Authority therefore serve this Improvement Notice under Section 11 of the Act the operative date being 13 April 2023 and require you to take the remedial action specified*' be deleted and replaced with:
'*The Authority therefore serve this Improvement Notice under sections 11 and 12 of the Act the operative date being the end of the period of 21 days beginning with the date on which this notice is served on you*'.

iii. In respect of each hazard identified in schedule 2 to the Improvement Notice the wording:
'*This notice is served under section 11 of the Housing Act 2004*' be varied to read:
'*This notice is served under section 12 of the Housing Act 2004*'.

iv. In respect of the category 1 hazard of 'Excess Cold' the remedial action to be taken in respect of the single glazed windows to habitable rooms be changed from:
'*Replace windows with suitable double glazed windows and better energy efficiency rating. Ensure adequate ventilation openings and satisfactory means of escape from fire from the bedrooms*'.
To read: ' *Take such reasonable action as may be necessary to draught proof the single glazed windows at the Property. Ensure*

adequate ventilation openings and satisfactory means of escape from fire from the bedrooms'.

v. In respect of the category 2 hazard of 'Fire' that part of the description of the deficiency that reads:
'*Means of escape through higher risk outer room without a self-closing fire door between kitchen and lounge*'
be changed to read: '*Means of escape through higher risk outer room without a self-closing fire door between kitchen/lounge and the inner hall*'

vi. The timescale for the works set out in the improvement notice be varied to read:
'*The date on which the remedial action is to be started is: 24 January 2024'.*
'The period within which the remedial action is to be completed or the period within which each part of it is to be completed: 24 February 2024'.

Judge N Jutton

4 October 2023

Appeals

1. 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.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.