FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/00MR/HIN/2023/0042**
Property	**:**	**38 Hudson Road, Southsea, Hampshire, PO5 1HD**
Applicant	**:**	**Simon Fletcher** **Iva Fletcher**
Representative	**:**	**Simon Fletcher**
Respondent	**:**	**Portsmouth City Council**
Representative	**:**	**Elizabeth Bowden**
Type of Application	**:**	**Appeal against an Improvement Notice, paragraph 10(1) Schedule 1 Housing Act 2004**
Tribunal Members	**:**	**Judge RE Cooper** **Mr B Bourne MRICS**
Date and venue of Consideration	**:**	**Havant Justice Centre** **11/07/2024**
Date of Decision	**:**	**03/09/2024**

DECISION

Summary decision

1. **The Improvement Notice dated 2/11/2023 is varied (as more particularly set out in paragraph 47)**

2. **The Applicant shall pay £653 to the Respondent in respect of their administration and other expenses incurred in connection with preparation and service of the improvement notice (s49(7) of the Housing Act 2004)**.

Background

3. On 21/11/2023 the Tribunal received an application from Mr and Mrs Fletcher ('the Applicants'). They appealed against the Improvement Notice dated 7/11/2023 which was served by the Respondent under paragraph 10(1) of Schedule 1 to the Housing Act 2004, ("the Act") in respect of Category 2 hazards which they said existed at 38 Hudson Road, Southsea PO5 1HD ('the Property').

4. On 5/04/2024 Directions were sent to the parties, requiring them amongst other things to provide information, with which they have complied. The Directions also confirmed that expert evidence was not considered necessary, but the parties were given until 15/04/2024 to apply for permission if they wished to rely on such evidence. No such application was made.

5. Further Directions were given on 6/04/2024 changing the date and time estimate for the hearing.

The Legal Framework

6. Part 1 of the Housing Act 2004 Act sets out the scheme for assessing the condition of residential premises (the Housing Health and Safety Rating System (HHSRS)) and for the enforcement of housing standards. The system entails identifying specified hazards and calculating their seriousness as a numerical score by a prescribed method.

7. In summary, sections 1 – 4 set out a framework for identifying housing hazards as either Category 1 or Category 2 hazards.

8. Sections 4 to 44 set out the enforcement powers available to a local authority and the procedures to be adopted in doing so. These include a requirement for the local authority to have regard to any statutory guidance given under section 9 of the Act.

9. Section 5 of the Act confirms that in a case where a Category 1 hazard exists, there is a general duty on the local authority to take enforcement action. In relation to a Category 2 hazard, the local authority has the power to take enforcement action (in other words a discretion whether or not to do so).

10. Section 7(2) of the Act sets out the five types of enforcement action which a local authority may take in respect of a Category 2 hazard, and these include an improvement notice, a prohibition order or a hazard awareness notice. If two or more courses of action are available, the

local authority must take the course which they consider to be the most appropriate, and they must provide reasons for taking the relevant action (section 8 of the Act).

11. 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 12(2)).

12. Section 30 of the Act provides that once an improvement notice becomes operative, it is an offence for the person on whom the notice was served to fail to comply with it. The general rule laid down by section 15(2) is that an improvement notice becomes operative at the end of the period of 21 days beginning with the day on which it is served. In the event of an appeal, section 15(5) of the Act applies, and the notice does not become operative until the appeal process is completed and the notice is finally confirmed.

13. The person on whom an improvement notice is served may appeal to the Tribunal against it (paragraph 10(1) of Schedule 1 to the Act). The appeal is by way of a re-hearing (paragraph 15(2)(a) of Schedule 1) but the Tribunal in determining the appeal may have regard to matters of which the authority were unaware (paragraph 15(2)(b)). The Tribunal may confirm, quash or vary the improvement notice (paragraph 15(3) of Schedule 1).

The Application

14. Mr and Mrs Fletcher's grounds of appealing against the improvement notice are set out in some considerable detail in the application, the Applicant's statement of case and in response to the witness statement of Ms Ryle [3] to [16], [37] to [46] and [67] to [71]. The grounds can be summarised as follows:

    (i) The HHSRS assessment is wrong – the finding of a Band D Category 2 Hazard is at odds with the Council's two previous assessments in 2014 and 2018 when no hazard of fire was found. It is also at odds with the worked examples for comparable properties.

    (ii) The current arrangements with bedroom windows acting as a secondary means of escape is not inconsistent with advice from the Hampshire and Isle of Wight Fire and Rescue Service (HIWFRS) and is also consistent with the Applicants' own Fire Risk Assessment.

    (iii) The improvement notice should not have been served without there being a proper informal process. The Respondents failed to respond to his representations and refused to discuss matters at the second inspection.

(iv) The works proposed and the time limits are not reasonable – the works are not necessary or are excessive, have not been properly thought out and will have unintended negative consequences. They would unreasonably interfere with the occupants' academic studies.

The Response

15. The Respondent's response is set out in the statement of Ms Ryle [52] to [65], and can be summarised as follows:

(i) The HHSRS assessment was correctly calculated.

(ii) In the light of the risk to the occupants the works proposed were reasonable.

(iii) The correct process was followed. Mr Fletcher made it clear in his initial letter that he did not want a response and he was hostile in his approach. In the circumstances it was reasonable and proportionate to take enforcement action.

The Documents

16. The documents considered by the Tribunal are in the appeal bundle (719 pages) which included the application, the improvement notice, Directions of the Tribunal dated 5/04/2024, the applicant's statement of case and evidence, witness statements of Stacey Ryle for the Respondents and Alice Ibbotson for the Applicants (and the evidence exhibited to those statements), statutory and non-statutory guidance. All of the documents were considered even if not directly referred to in the decision. Pages, where referred to are marked [ ].

17. In addition to the appeal bundle, Ms Bowden provided a skeleton argument shortly before the hearing.

Inspection

18. The Property was inspected on the morning of the hearing. Mr Fletcher attended for the Applicants and Ms Ryle (a Housing Regulation Officer or HRO) for Portsmouth City Council ('the Council'). Mr Michael Conway (a Senior HRO from the Council), Mr Matthew Richardson (another HRO) and Ms Elizabeth Bowden (the Respondent's representative) also attended the inspection. There were two students present at the house on the day of the inspection.

The hearing

<u>Preliminary issues</u>

19. Ms Bowden applied for Ms Ibbotson's witness evidence to be excluded as no permission had been given for expert evidence. Mr Fletcher

confirmed he had not made an application as he did not perceive her to be an expert. She had been involved in inspecting the property before the improvement notice was issued and had provided a fire risk assessment in August 2023 as well as being involved in inspecting the property in 2014 when she was employed by the Council.

20. Ms Bowden confirmed she had no objection to Ms Ibbotson being called as a witness of fact in relation to her fire risk assessment but would object to evidence being heard regarding her involvement in 2014 as this was not referred to in her statement.

21. Having heard these submissions the Tribunal confirmed that Ms Ibbotson could be called as a witness of fact in relation to her involvement with the property and the fire risk assessment in 2023 but the Tribunal would disregard the opinion element of her statement from paragraph 9 onwards regarding the actions taken by the Council.

Evidence

22. Mr Fletcher gave evidence and made submissions. He was not represented. Alice Ibbotson attended and gave evidence.

23. The Respondents were represented by Ms Bowden, and Ms Ryle gave evidence.

24. The recording of the hearing stands as the record of proceedings.

Decision

The property

25. 38 Hudson Road is a two storey pre-1920 house of standard brick construction with a tiled roof. There are five bedrooms, three on the first floor and two on the ground floor (one in the front room and one to the rear of the kitchen). The Tribunal is satisfied that the floor plan at [72] is an accurate representation of the layout of the property.

26. At all material times the Property has been let to groups of five students under a joint tenancy agreement. It is common ground that the property is a House in Multiple Occupation (HMO) as defined by sections 254 to 259 of the 2004 Act, and is, therefore, required to be licenced by the local authority. At the material time, the Applicants held a licence issued by PCC on 6/12/2018 valid until 5/12/2023 [716].

27. It is also not in dispute that the structure of property has been altered at some point prior to Mr and Mrs Fletcher's ownership with the removal of a wall between the stairs/hall and the living room providing for an open plan communal living space. It would appear also that the extension containing the fifth bedroom at the rear of the house was also added at a later point, but again prior to the Applicants' purchase. The fifth bedroom (on the ground floor) is accessed through the kitchen.

28. At the time of the Tribunal's inspection the two doors between the kitchen and the lounge and the fifth bedroom were FD30S doors with self-closures, seals and intumescent strips. The Respondent accepts the bedroom doors are FD30 fire doors, but they did not have self-closures, brush seals or intumescent strips. Each of the bedrooms had a lock which could be opened from the inside without a key. A key was required to unlock it from the outside. None of the bedroom doors had a self closer, save for bedroom 5 which opens directly from the back of the kitchen.

29. The property has the benefit of UPVC double glazing throughout. The windows of the two back upstairs bedrooms were bottom opening casement windows. The left-hand side of the front bedroom casement window opened to 430cm and gave access onto the top of the front bay window. The rear bedroom gave access onto the flat roof of the extension, and the third (middle bedroom) opened over the double-glazed door leading from the living room to the garden. These were said by Mr Fletcher provide an adequate means of escape in the event the staircase to the ground floor was unusable due to fire.

30. It is not disputed by Mr Fletcher that the open plan arrangement would allow a fire to travel more easily from the living room upstairs than if the living room were enclosed. However, he says the alternative means of escape available to occupiers upstairs is a sufficiently safe arrangement in the context of a shared house. He relies on the LACORS guidance and Alice Ibbotson's fire risk assessment.

The HHSRS assessment

31. Whilst Ms Bowden submits that the HHSRS assessment carried out by Ms Ryle was correct, the Tribunal, having considered the totality of the evidence in the round finds that it was not for the following reasons.

32. The Tribunal agrees with Ms Ryle's assessment that the open plan design of the living room amounts to a deficiency that is capable of contributing to the hazard of fire. Ms Ibbotson in her fire risk assessment accepts that if a fire were to break out in the living room it would compromise the front door as a means of escape [115]. This is not disputed by Mr Fletcher. However, the Tribunal finds that Ms Ryle's assessment both of the likelihood and outcome to be flawed for the reasons set out below.

33. Ms Ryle's assessment that the likelihood of a vulnerable person suffering a harmful occurrence within the next 12 months was in the range 1:240 to 1:420 (giving a scaled score of 1:320) could not be adequately explained by her to the Tribunal, and it is not supported by other documentation before us. Nor is it consistent with the HHSRS operational guidance.

34. It was clear from Ms Ryle's answers to the Tribunal that the only real focus in her consideration of the likelihood of harm was the lack of a protected escape route to the front door due to the open plan arrangement. The Tribunal found she was not properly assessing the likelihood of a hazard event (i.e. a fire) in the property in the following 12 months or the likelihood of a fire starting in the living room. By way of example, in her witness statement rather than referencing the statistics contained in the HHSRS Operational Guidance that only 10% of fires start in living rooms, in comparison with 65% in kitchens, she cited the significance of harm (namely that 40% of fire fatalities occur when fires start in the living room [520]). Although she rightly confirms that the assessment required her to identify both the likelihood of a fire starting and, once started how likely it was to go undetected and spread [56], the only apparent factors Ms Ryle appeared to have identified as increasing the risk of a fire starting were the presence of clothes drying on an airer in the living room and a number of extension cables [54]. She accepts that the condition of the property was "good", and also accepts that the property had the benefit of FD30 fire doors for each bedroom and a mains-wired fire detection system in place [54].

35. The Tribunal found that Ms Ryle's assessment was at odds with the worked examples it had in the evidence before it. Although Ms Ryle claimed to have taken such worked examples into account when making her assessment, the Tribunal found the Respondent had produced no worked examples that were supportive of Ms Ryle's assessment.

36. In the light of the fire safety measures present at the Property, and the lack of factors that would significantly increase the likelihood of a fire starting (such as open fires, portable heaters etc) the Tribunal found Ms Ryle was unable to adequately explain how she calculated the likelihood of risk for 38 Hudson Road as being equivalent to the worked example in the HHSRS guidance at [251]. The property in that example is a two-storey house with an open coal fired boiler, portable radiants and paraffin heaters, top opening casement windows and no smoke/heat alarms. Ms Ryle's response to the Tribunal solely focussed on the layout of the property and the lack of a protected escape route - *'if a fire started in the property the likelihood of getting out was massively impacted, much higher than if there was a protected escape route'*. In the Tribunal's view this indicated a misunderstanding of the assessment process. The Tribunal found Ms Ryle failed to give proper weight in her assessment to the windows on the first floor being used as a means of escape, the presence of smoke and heat alarms and fire-doors, or the absence of factors increasing the risk of a fire actually starting in the living room.

37. In relation to the outcome range for classes of harm, the Tribunal found Ms Ryle unable to adequately provide a clear justification for her determination that the outcome range for Class I and II harms should changed from the national average of 8.7% and 3.2% respectively to

being in the range of 15 – 26% (giving a scaled score of 21.5%). The justification she gave was that the 15 – 26% box was the next Category along in the range from the national average scaled score of 10%.

38. The Tribunal finds that as presently configured, 38 Hudson Road is a shared house which is of lower risk that an HMO consisting of bedsit type accommodation. The Tribunal did not accept that Ms Ryle has a sound basis for her assertion that the occupants of the Property were not a group of students living in the house (as Mr Fletcher says) but in a manner more akin to a family. At the time of her inspection, on her own admission only one occupier was present. We accepted Mr Fletcher's evidence in this regard. He visits the property regularly and would have a greater knowledge of the occupants. The Tribunal gave weight to the LACORS guidance which indicates that a two-storey house occupied by a group of sharers is more akin to a family home, and the risk of fire would be less than say three storey HMO containing bedsits.

39. The Tribunal also found the windows in the first-floor bedrooms and the fifth bedroom at the rear to all be adequate alternative means of escape were a fire to have started in the living room, hallway or landing. Subject to having an appropriate standard of fire doors, and the removal of locks they meet the requirements of the LACORS guidance [172]. Although these windows are not their most favoured option, clearly the HIWFRS considered the windows to be an adequate means of escape solution, particularly if the occupants of the property were able-bodied. As Mr Fletcher made clear, he only let to groups of students we were satisfied they were more likely than not to be fitter and more able bodied that the population as a whole.

40. Having considered the totality of the evidence, the Tribunal accepts that the fact the property was occupied by students did increase the likelihood of fire to a slight degree, in particularly they might be more careless when cooking due to inexperience and might disregard house rules, for instance in relation to use of candles. The Respondents provided evidence of extension cables being used, but the Tribunal was not satisfied this was evidence of overloading of plugs which is a risk that can be easily mitigated in any event by the provision of additional wall sockets. The Tribunal concluded a likelihood score of 1:3,200 was appropriate in all the circumstances.

41. In relation to harm, the Tribunal accepted in relation to this Property that the outcome scores would differ from the national average. The Tribunal considered the risk of death or serious injury of burns was higher than the national average given the bedroom doors at the date of the decision did not have intumescent strips, brushes or door closers, and the risks of fumes and of fire spreading more quickly due to the open plan arrangement. However, the Tribunal was satisfied that the presence of alternative means of escape did not increase the risk of death and serious injury to levels assumed by Ms Ryle. The Tribunal considered the risk of Class II and III injury harm (such as fractures or

serious sprains) would be increased if the first-floor windows were used as a means of escape.

42. On balance, in relation to the outcome scores, the Tribunal concluded that scores of 15% for Class I (giving a representative scale point of 10%) 15% for Class II (10%), 40% for Class III (46.4%), and 33.6% for Class IV are appropriate for the property in all the circumstances.

43. Having made those findings, the Tribunal was satisfied that although a Category 2 hazard still existed at the property, the HHSRS total rating score was 38.84 meaning it was in the Band H Category, rather than the Band D calculated by the Respondent. This was consistent with the worked examples in the evidence before us.

44. The Tribunal considered whether in the light of that revised assessment it was reasonable for an improvement notice to have been served at all. It concluded in the light of the evidence that it was reasonable for the Respondent to have done so. This is because it is clear that the Applicants did not respond to the Council's concerns in a reasonable manner, their correspondence did not indicate a willingness to engage in an informal process or follow advice with a view to improving the safety for the occupiers of 38 Hudson Road. The Tribunal found Mr Fletcher in his letter of 15/08/2023 clearly told the local authority that he did not expect them to respond to his representations criticising the assessment and proposed works [99]. The Tribunal also found that he had failed to implement all the recommended works given by Ms Ibbotson in the action plan attached to her Fire Risk Assessment that he had obtained in July 2023. By the time of our inspection on the date of the hearing, he had still not done so.

45. As to the works proposed in the improvement notice. The Tribunal agreed with Mr Fletcher that the works proposed were excessive. Given the current layout of the living room and stairs, the construction of a wall and door between the staircase and lounge would be less than ideal. Given that the windows provided an adequate alternative means of escape in the event a fire started in the living room, the Tribunal was satisfied that improving the fire and smoke resistance of the bedroom doors as proposed by Ms Ibbotson by fitting of smoke seals, intumescent strips and self-closing devices [126], together with the removal of bedroom door locks (in line with the LACORS guidance) would be adequate.

46. The Tribunal also considered that a testing of the fire alarms should be carried out by the Applicants on a termly basis, and the keeping of a log to demonstrate this should be introduced. Whilst the Tribunal accepted Mr Fletcher might advise the occupiers to test on a monthly basis, which would ordinarily be sufficient, given the occupiers were students, the Tribunal considered this additional safeguard would be reasonable. The Applicants could then, as he suggested, arrange for such testing to be carried out in conjunction with another visit, or if no other visit had

occurred in a term, he could make a pre-arranged visit at a convenient time.

Conclusion

47. For the reasons set out above, the Tribunal orders the Improvement Notice in respect of 38 Hudson Road, Southsea, Hampshire, PO5 1HD issued on 7/11/2023 to Mr and Mrs Fletcher be varied:

(a) The 'works required' section on page one is varied as follows:

"the works specified in Schedule 2 must be completed within 3 months of the date of this notice (i.e. by INSERT/12/2024)

(b) Schedule 2 is varied to read as follows:

"Specification of works to be carried out:

(i) the doors to each of the bedrooms should be fitted with smoke seals, intumescent strips and self-closing devices.

(ii) the locks to the bedroom doors should be removed."

48. Whilst it is not a requirement to be included in the improvement notice as varied, the Tribunal recommends that the Applicants implement the first and third items of Ms Ibbotson's action plan within the same period namely the provision of a fire alarm/equipment testing logbook at the property which should be used to record regular testing by the residents and the competent person, and her associated advice and the over boarding of storage cupboard in the kitchen [126]. For the reasons set out above, the Tribunal considered it reasonable for Mr Fletcher to carry out testing of the equipment on a termly basis.

49. In the light of the Tribunal's conclusion that service of an improvement notice was reasonable, the Tribunal orders the Applicants to pay the Respondent's costs of £653.

Signed: Judge RE Cooper

Date: 03/09/2024

Note: 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 to the First-tier Tribunal at the Regional office that 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, and should be sent by email to rpsouthern@justice.gov.uk.

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.