9421

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	: **CHI/29UE/HIN/2013/0009**
Property	: **147-149 Folkestone Road** **Dover** **Kent** **CT17 9SG**
Applicant	: **Mr. W. Hankin**
Representative	: **Unrepresented**
Respondent	: **Dover District Council**
Representative	: **Ms Z. Whittington of Counsel**
Interested Party	: **Mr. V. Plachetka**
Representative	: **Unrepresented**
Type of Application	: **Application relating to an Improvement Notice Housing Act 2004**
Tribunal Members	: **Judge R. Norman (Chairman)** **Mr. R. Athow FRICS MIRPM**
Date and venue of Hearing	: **21ST August 2013** **Dover**
Date of Decision	: **28th August 2013**

DECISION

Decision

1. The Improvement Notice issued to Mr. W. Hankin ("the Applicant") in respect of 147-149 Folkestone Road, Dover, Kent CT17 9SG ("the subject property") is varied as follows:
(a) In respect of the Category 1 Hazards, the date on which remedial action is to be started is 1st October 2013 and the date on which remedial action is to be completed is 1st December 2013.
(b) In respect of the Category 2 Hazards, the date on which remedial action is to be started is 1st October 2013 and the date on which remedial action is to be completed is 1st January 2014.

Background

2. The Applicant holds the freehold in respect of the subject property.

3. Under the provisions of Sections 11 and 12 of the Housing Act 2004 ("the 2004 Act") Dover District Council ("the Council") served on the Applicant an Improvement Notice dated 22nd March 2013 requiring work to be carried out at the subject property.

4. An appeal against the Improvement Notice was made by the Applicant.

5. Directions were issued and, in response to those Directions, the Tribunal received documents from the parties.

Inspection

6. On 21st August 2013 the Tribunal inspected the exterior and parts of the interior of the subject property. Present at the inspection were the Applicant, Ms Z. Whittington of Counsel representing the Council, Mr. G. Cordes Solicitor with the Council, Mr. T. Lovell Case Officer with the Council and Mr. R. Kennedy Private Sector Housing Manager with the Council. There was no appearance by the Interested Party Mr. Plachetka.

7. The subject property was in a very poor condition. At the inspection, the Applicant stated that he did not dispute the hazards and remedial action detailed in the Improvement Notice. We were not able to be given access to all the rooms at the subject property but from the parts of the subject property which we were able to see we had no doubt that the hazards listed in the Improvement Notice were present and that the remedial action set out in the improvement Notice was required.

8. There is also some form of occupancy of one part of the ground floor of 147 Folkestone Road by a taxi firm and this is accessed from within the common hallway at 147.

Hearing

9. In addition to those who were present at the inspection, the hearing was attended by Ms J. Perry from the Council.

The Applicant's Case

10. The Applicant confirmed that he did not dispute that the hazards listed in the Improvement Notice were present at the subject property or that the remedial action set out in the Improvement Notice was required.

11. The Applicant stated that his appeal was on the basis that he was not the most appropriate person to be served with the Improvement Notice.

12. He also stated that he was selling the subject property, that contracts had been signed and that he was hoping to have completion within a couple of months.

13. Under the 2004 Act, several persons could be served with the Improvement Notice but the most appropriate person should be served.

14. The whole of the subject property is leased in two business leases. The whole of the first floor to Mr. Plachetka and the ground floor to Mrs. Da Silva who, with her son, occupies one flat and rents out the other flat. The leases clearly specify that the leaseholders are free to use the property but that they are fully responsible for compliance with all Regulations and all Acts of Parliament which relate to the use to which they are putting the property. When Mr. Plachetka took on the lease the first floor was empty and needed some repair. He fixed the property, made necessary improvements, found his own tenants and he collects rent from them. He does all the repairs. The Applicant's only interaction is when Mr. Plachetka pays the Applicant the rent for the business lease. The Applicant has no dealing with Mr. Plachetka's tenants and never receives any money from them. The Applicant suggests that the most appropriate person to be served with the Improvement Notice is the leaseholder.

15. The document at A3 of the Council's bundle of documents is a Notice to produce documents under Section 235 of the 2004 Act. It is addressed to Mr. Plachetka at his home address and describes him as a person who is managing or having control of the premises and under those circumstances he would be the most appropriate person to receive the Improvement Notice.

16. The Applicant stated that he has no access to the subject property. Legally he cannot enter the premises to carry out improvement works under, he thinks, the Landlord & Tenant Act 1985. He grants the lease and does not have the right to go in. The lessee has the right to quiet enjoyment. If the Applicant attempted to enter he would be disturbing that right which the lessee pays for. The Applicant has no involvement with the property. He is aware of general issues but is not involved with the upkeep of the properties in the two leases which is a matter for the two leaseholders.

17. The Applicant accepts that probably at least the upstairs of No. 147 is a House in Multiple Occupation ("HMO") but he does not see why that means that the entire building should be considered as one undivided unit. Clearly it is not. There are two separate ground floor flats which are self contained and

although Mrs. Da Silva is working on her own shower she still has a shower exclusively available to her while she is doing the works.

18. There could be two improvement notices and one could be issued to each of the two commercial leaseholders of those two units.

19. The Applicant stated that Mr. Plachetka and Mrs. Da Silva could not be present at the hearing but produced short statements which he said were from them.

20. The Applicant made comments on the points raised in the Council's documents and statements. The points dealt with included:
(a) Alleged confusion as to responsibility for maintenance of the common parts at the subject property.
(b) Whether the whole of the subject property was contained in the two leases.
(c) Whether the whole of the subject property should be considered to be an HMO or, as suggested by the Applicant, four flats of which one is an HMO.
(d) Clause 1.8 in the leases, of which the following is an example, requiring the lessee "To maintain or improve the Property as necessary to comply with the terms of every Act of Parliament, order, regulation, bye-law, rule, licence & registration authorising or regulating how the property is used, and to obtain, renew and continue any licence or registration which is required, even if it alters or improves the Property. All reasonable expenses incurred to this end will be reimbursed by the landlord."
(e) The meaning of a commercial lease under the provisions of the Landlord and Tenant Act 1954 and security of tenure.

21. At that stage, the Applicant summarised his case in the following way. He does not believe that the ground floor flats are an HMO even though upstairs may be, so the ground floor flats would not be subject to improvement notices. Even if the whole subject property is an HMO there is no reason why two improvement notices could not be issued to the two respective leaseholders. There was no legal basis for the contention that even if there are two HMO's in one building the leaseholders could not be subject to improvement notices as previously notices requiring production of documents had been issued to them. Then, suddenly the owner is served with an improvement notice and if he were to carry out work it would impinge on the leaseholders' rights as leaseholders. There was no need for that to be the case. The Improvement notice should have been served on the person controlling the subject property and that is not the Applicant.

22. The Applicant was cross-examined by Ms Whittington on behalf of the Council. The matters dealt with included the following:
(a) The Applicant accepted that some of the works in the Improvement Notice concerned gas and electricity which apply to the whole building and that the meters are in the cellar.
(b) The agreement under which Mrs. Da Silva does not pay any rent to the Applicant because she has taken on the responsibility of the utilities in the building and any repair works on the ground floor. Mr. Plachetka has no access to the cellar.

(c) The right of the Applicant to enter the leased property upon giving reasonable notice, except in an emergency. The Applicant considered that that provision allows him under exceptional circumstances to enter and that if the circumstances were not exceptional he could be prosecuted whether it was a commercial or residential lease.
(d) The Applicant accepted that Mr. Plachetka had never lived at or had an office at the subject property but that his business is renting out accommodation. He is subletting.
(e) Ms Whittington contended that it is necessary for an agreement to be a business lease for the tenant to occupy the property and that subletting is not sufficient for the Landlord and Tenant Act 1954. She provided the Applicant and the Tribunal with a copy of the House of Lords judgement in the case of Graysim Holdings Ltd. Respondent v P. & O. Property Holdings Ltd. as authority for this.

23. In order to avoid any misunderstanding it was explained to the Applicant that it was not only in respect of HMO's that the Council could issue an improvement notice and that if his description of the subject property as comprising four flats of which one is an HMO were correct the Council could issue the Improvement Notice. If, as stated in the Improvement Notice, the Council is satisfied that Category 1 or Category 2 hazards exist on residential premises and that no management order is in force in relation to the premises under Chapter 1 or 2 of Part 4 of the 2004 Act then an improvement notice can be issued. The notice can be issued to the owner and also drawn to the Applicant's attention and read out in full was Section 262(7) of the 2004 Act which provides:
"In this Act "owner", in relation to premises-
(a) means a person (other than a mortgagee not in possession) who is for the time being entitled to dispose of the fee simple of the premises whether in possession or in reversion; and
(b) includes also a person holding or entitled to the rents and profits of the premises under a lease of which the unexpired term exceeds 3 years."

24. The Applicant accepted the following:
(a) That he owns the freehold, which is the fee simple of the subject property.
(b) That he is entitled to dispose of it (he stated that he was in the process of selling it) subject to the leases which he has granted (in reversion).
(c) That although he considers that his lessees have the automatic right to renewal of their leases, the leases are for less than three years so they cannot have an unexpired term exceeding three years.

25. The hearing was adjourned for lunch and the Applicant was asked to consider the implication of those provisions of the 2004 Act and the House of Lords judgement during the lunchtime adjournment.

26. When the hearing resumed, the Applicant accepted he had had the opportunity to read the judgement and to consider the explanation of the Council's authority to issue improvement notices.

27. The cross-examination continued and included the following:

(a) The Applicant considered that it was unfair to present him with the lengthy judgement at the hearing and that it should have been provided earlier by the Council. Ms Whittington explained that the judgement had been produced to illustrate a point and because the Applicant in response to a proposition put to him had asked for the authority for the proposition. He did not accept that the judgement was authority for the proposition as to subletting not being occupation or that there was a need for occupation. He did not believe that the lessee had to physically live on the premises for the lease to be a business lease and it was explained that it was not a matter of living at the premises but occupying them. In the event nothing turned on the judgement.
(b) That Mrs. Da Silva had stated that the Applicant had organised roof repairs. He said that all he had done was to give her the name of a carpenter.
(c) That in document A11 of the Council's bundle there was an Emergency Lighting Inspection and Test Certificate dated 2nd October 2012 and signed by M Dessouki in which the Applicant was shown as "CLIENT : Mr. W. Hankin Director Amsterdam House Ltd". It was suggested that that indicated that he had control of the subject property. His explanation was that Mr. Dessouki the fire engineer had been dealing with fire alarms for the Applicant for perhaps thirty years so knows all the premises very well so if Mr. Plachetka telephoned and asked for an inspection Mr. Dessouki would use a name he has on file but is fully aware that Mr. Plachetka leases the property upstairs. The Applicant does not accept that this shows he is managing the premises.
(d) The notices for production of documents sent to Mr. Plachetka and Mrs. Da Silva and their provision of documents.
(e) The Applicant agreed that he did not have to be running an HMO to be served with the Improvement Notice but he considered that he was not the most appropriate person to be served with it.

28. The Applicant had no other witnesses to call.

The Council's Case

29. Mr. Lovell gave evidence and was cross-examined by the Applicant. The matters dealt with included the following:
(a) Notices to produce documents had been issued to Mr. Plachetka and to Mrs. Da Silva as part of the investigation to try to find the owner of the subject property before the issue of the Improvement Notice.
(b) That the Applicant spends a lot of time out of the country so asking him to attend could be inappropriate, particularly if it was thought that the information could be obtained from other sources. Correspondence with him was mainly by email.

Submissions

30. Submissions were made by the Applicant.

(a) He accepted that legally several people could have been issued with the Improvement Notice including him but there was a requirement for reasonable action by all parties including the Council.

(b) Reasonable action would mean that notice be served on the appropriate person to deal with that notice. He referred to HMO licence conditions in support of his contention that an HMO licence states that the person managing the property is the appropriate person to carry out works. In this case there is no HMO licence but it makes sense. Referring to Section 263 of the 2004 Act, the "person having control" receives rent. Mr. Plachetka and Mrs. Da Silva receive rent. Further references were made to the holder of an HMO licence on the basis that the situation in this case is similar. The Applicant submitted that it was inappropriate to issue the Improvement Notice to someone not in control of the property, not managing the property and not receiving rent from anybody except commercial leaseholders. He did not have an automatic right of entry to the leaseholders' property. He was not the appropriate person to receive the notice.
(c) A Notice requiring production of documents had been sent to Mr. Plachetka describing him as managing or in control then six months later a notice was sent to the Applicant. The Council had the belief that he was in control.
(d) There was no legal reason why the Council could not issue two improvement notices; one for upstairs and one for downstairs. Mr. Plachetka and Mrs. Da Silva are appropriate and it is rather difficult for the Applicant to carry out works.
(e) Some of the material presented at the hearing had not been fully accurate. In the document from Mr. Kennedy some points were not correct and the Applicant did not understand the reasons given by Mr. Lovell for the service of notices to produce documents. The Applicant suggested that the evidence for the Council might not automatically be right in what was being suggested to the Tribunal.

31. Submissions were made by Ms Whittington.

(a) The Applicant appears to accept that there is a choice as to who may be served with an improvement notice.
(b) The Applicant submits that the building comprises four flats of which one is an HMO. The Council considers that the entire property is an HMO on the basis of the converted building test. In that case the person having control should be served. In the statements produced by the Council it is explained why it is only the Applicant who can be the person having control or managing. The Applicant is the only person who receives rent for the entirety of the property and it is the whole of the property which is in the Improvement Notice. For example, there are communal areas; the shared utility meters (only one each for electricity and gas for the whole building) are only accessible from the ground floor and the leases do not provide for a division of those services. Therefore it is clear there would be some difficulty in dividing those between the lessees. The building should be considered as a whole.
(c) However, it is not necessary to make a finding that the whole building is an HMO. Even if the building comprises self contained flats, the Council can still serve the Improvement Notice under Schedule 1 part 1 paragraph 3 of the 2004 Act. This is not the Council's preferred argument but in light of what the Applicant says then sub section 2 applies. The Applicant falls within the definition and does not dispute he is an owner and could have the

Improvement Notice served on him. He says he is not the most appropriate person to receive it and he refers to HMO licences. In the relevant parts of the 2004 Act now drawn to attention, there is not a provision concerning the most appropriate person. It provides a choice. It was quite open to the Council to serve the Improvement Notice on the Applicant. The legislation provides for this.
(d) The Council submit that the leases are not genuine business leases. In the agreements, the Applicant has a right of access on giving reasonable notice as in any residential agreement. As to the receiving of rents there is some contradictory evidence from the statement of Mrs. Da Silva, the email from her and what she has told the Council as set out in Mr. Lovell's witness statement. Mrs. Da Silva could not be a business tenant because she does not use the premises for business purposes. She passes to the Applicant rent from the other tenant. She is not operating as a business. Mr. Plachetka could not be a business tenant because he does not occupy the premises. He does not need to live there but there has to be some physical use of the property by the tenant and subletting is not sufficient. The Council having made its investigations and by serving notices under Section 235 of the 2004 Act and not being satisfied that all the information had been received, came to the conclusion that the Applicant was the appropriate person to be served, but that was not necessary. The Applicant comes within the definition in Schedule 1 Part 1 paragraph 3 of the 2004 Act and that is enough. To some extent, whether the leases are genuine business tenancies does not matter. These are short tenancy agreements and do not extend to 3 years to make the leaseholders owners. The leases are a red herring.
(e) The position is simple. Someone needed to be served with the Improvement Notice so that work could be done. The Tribunal has seen the state of the property and urgent work is needed. As to heating we are now going into autumn months. The Applicant retains control of the building and does receive rent. Being an owner he is the person who may be served with the Improvement Notice.

Reasons

32. There was a lack of clarity in some of the provisions in the leases. For example the lease to Mr. Plachetka described the property as "147 First Floor Folkestone Road, Dover, Kent" yet the Applicant treated the lease as being of the whole of the first floor which would include 149 first floor. There was no provision for maintenance of common parts. Also there was a provision for payment for utilities in respect of "the Property" but no separate metering and the lessee had no access to the cellar where we were told that for the whole of the subject property there was just one meter for the electricity and one gas meter.

33. The Applicant stated that the central heating boiler is in the cellar and is serviceable but that when the building next door was demolished about 18 months ago, the gas pipe to the subject property was damaged and the supply was cut off. He stated that it had been agreed that when the doctors' surgery, which had been built in place of the demolished building, was completed the supply would be reconnected. The surgery was completed about 4 months ago but the gas supplier says that the supply cannot be reconnected and there will

have to be a new supply. This means that the central heating has not been working for about 18 months and confirms Mr. Lovell's statement that he has not seen the central hearting working for 18 Months. It also means that the people living in the subject property did not have the benefit of central heating through the last winter.

34. We were particularly concerned that in one of the ground floor rooms, which appeared to be occupied by a family with children, there were live electrical wires partly covered by a plastic bag. It appeared likely that at some time in the past there had been an electric socket in that area. We were pleased to note that the Applicant stated that the day after the hearing he would arrange for an electrician to correct that matter.

35. The Applicant did not accept that:
(a) The whole of the subject property is an HMO.
(b) He was the most appropriate person to be served with the Improvement Notice as he was not managing the property or in control of it.
(c) He had any right to enter the subject property to carry out work.
(d) The leases he had granted were not business leases.

36. However, the Applicant did not dispute the existence of the hazards and the need for the remedial action detailed in the Improvement Notice and accepted that:
(a) He came within the definition of "owner" of the subject property.
(b) He was one of the persons who could legally be served with the Improvement Notice.
(c) The leases he had granted did not have unexpired terms exceeding three years.

37. As a result, there was no need to consider the disputed matters. On the basis of the matters accepted by the Applicant, the Council had the authority to issue the Improvement Notice to the Applicant and the Improvement Notice stands, subject only to a variation in the dates for starting and completing the remedial action as set out in paragraph 1 above.

Appeals

38. 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 which has been dealing with the case.

39. 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.

40. 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.

41. 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.

Judge R. Norman (Chairman)