FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/00CN/HIN/2020/0014**
Property	**:**	**Flat 6 Compton Court, Walsall Road, Four Oakes, Sutton Coldfield, West Midlands B74 4QY**
Applicant	**:**	**Ms Jatinder Kaur Mattu**
Respondent	**:**	**Birmingham City Council**
Type of Application	**:**	**Appeal under Housing Act 2004 Schedule 1 paragraph 10(1) against an Improvement Notice and under Schedule 3 paragraph 11(1) against a demand for recovery of the Respondent's expenses**
Tribunal Members	**:**	**Judge Anthony Verduyn** **Mr Peter Wilson BSc (Hons) LLB MRICS MCIEH CEnvH**
Date of Decision	**:**	**13th May 2021**

DECISION

The appeal against the Improvement Notice dated 27th August 2020 is allowed in part: Part A Category 1 Hazards Item 1 Electrical Hazards is confirmed; but, Part B Category 2 Hazards Item 2 Damp and Mould Growth is quashed.

REASONS

1. On 27th August 2020, Birmingham City Council ("the Respondent") issued an Improvement Notice ("the Notice") under the Housing Act 2004 to Ms Jatinder Kaur Mattu ("the Applicant") in respect of Flat 6 Compton Court, Walsall Road, Sutton Coldfield, West Midlands B74 4QY ("the Property"). The Notice comprised two items.

   - Item 1 was a Category 1 Hazard. It related to electrical hazards and five matters were identified, namely: "The current electrical installation report (EICR) highlighted the overall assessment of the installation in terms of its suitability for continued use is unsatisfactory"; "due to cross connection of circuits that is fed from a different circuit breaker, a danger of shock is present"; "circuits to the shower has no additional protection from the RCD"; "earth continuity reading was high and does not comply with BS7671"; and, "conductors are found to be incorrectly located in the within the consumer unit". Remediation was specified as to be by way of obtaining a further report and rectification of defects identified as urgent or dangerous in nature.

   - Item 2 related to damp and mound growth and seven matters were identified, namely: "there is mould growth affecting the walls, particularly in the localised area under the windowsill in the rear middle bedroom"; "there is mould growth affecting the window reveals in the rear middle bedroom"; "there is mould growth affecting inside the fitted wardrobes in the rear middle bedroom"; "there is minor mould growth affecting the walls in the rear left bedroom"; "there is no mechanical extractor fan to prevent re-occurrence of condensation and mould growth in the front left of bathroom"; "there is no mechanical extractor fan to prevent re-occurrence of condensation mould growth in the front middle kitchen"; and, "there is mould growth to the rear internal wall in the right living room under the

window sill". Remediation was specified as treatment of mould to living room and bedrooms, with redecoration thereafter; and the fitting of extractor fans to the bathroom and kitchen.

2. Because of current COVID-19 restrictions no inspection was carried out. However, from the documentation and photographs submitted and access to publicly available online street view information it may be said that that the Property is a self-contained top (first) floor flat in a block comprising eight such flats constructed most probably in the 1970s. The lease is dated 11th July 1974 and probably represents first occupation of the Property. Six of the flats are in a three storey part of the block with the Property in a two storey section to the end of the block. Both sections of the block have flat roofs with what appear to be cavity walls with fair faced brick finish. The accommodation comprises an entrance hall, kitchen, two bedrooms, bathroom, living room and kitchen.

3. The Applicant appealed the Improvement Notice, exercising her rights under Schedule 1 Paragraph 10(1) of the Housing Act 2004 ("the 2004 Act"). An appeal is by way of rehearing in accordance with Schedule 1 paragraph 15(2) of the 2004 Act. The Applicant stated that she received the Notice on 5th September 2020 and her Application form is dated 2nd October 2020, but was received by the Tribunal on 5th October 2020. The Applicant states that submissions are made dated 25th September 2020, but the Application Form was not then completed. Copy of the Notice and the Local Housing Authority Reasons, which was required to be included in the application, were not received until 14th October 2020. Directions were given on 14th October 2020 identifying that the appeal was late (the 2004 Act providing for a period of 21 days beginning with the date on which the Notice was served). Representations from the Respondent were invited and duly made objecting to the Tribunal exercising its jurisdiction to extend time. By a decision dated 12th November 2020, Judge D. Barlow did so extend time and that decision was not appealed.

4. Time having thus been extended, directions took effect. It was recited in the directions that the Tribunal would treat the appeal as a rehearing in which evidence unavailable to the Council could be considered. The Tribunal may confirm, quash or vary the Improvement Notice. The typical issues to be

considered were outlined, namely: whether the Council had gone through the necessary procedural steps; the existence of hazards and (if established, their category), should the council have taken enforcement action; if so, what enforcement action is appropriate; and, if the Improvement Notice were appropriate enforcement, should its terms be varied. By reason of the Covid-19 pandemic, a site view would be impossible and so the parties were allowed to produce photographic evidence as they deemed appropriate.

5. The Applicant applied to join her tenant of the Property as a party, but this was declined by the Tribunal on 7th December 2020 on the grounds that that the tenant was not served with the Notice nor was she an owner of the Property and so she could not be a party to the appeal.

6. A decision on the papers had also been directed. The Applicant and the Respondent provided extensive bundles of documents and submissions. When the Tribunal came to make that decision, further directions were issued for the disclosure by the Applicant of the lease of the Property and details of heating and insulation, and from the Respondent relating to the investigation of the heating and insulation of the Property, since the Tribunal was concerned about the issue of thermal performance. Further submissions were made in response to these directions.

7. The position of the Respondent can be shortly stated:

8. In respect of electrical issues, a condition report was present to the Applicant dated 17th April 2020 , which identified the issues and she had failed to action their remediation by August 2020.

9. In respect of mould growth, black mould was visible to external walls and there were no mechanical extractor fans to kitchen and bathroom. Whereas the tenant stored a large volume of personal possessions at the Property, these were not causative of the problems, nor was (admitted) ivy growth at the front of the Property to blame.

10. Both hazards were internal to the Property and not the result of any leak through the roof or otherwise, therefore the Applicant was required to remedy

them. An advisory letter was sent to the Applicant on 23rd July 2020 detailing the issues, but no remedial works had been done by the time of reinspection on 20th August 2020 and so the Notice was issued one week later. A Hazard Awareness Notice was discounted as an option by reason of the Applicant's apparent unwillingness to carry out the necessary works in the intervening time.

11. The Respondent's Environmental Health Officer, Ms Wai-Tung Ng, provided a statement setting out the lead role in the decision-making since 18th March 2020 and providing copious copy documents. The engagement of the Respondent had been prompted by the tenant, Ms Clare Caudery, who complained at a ceiling collapsing by reason of a leak and of the state of the electrical services. She stated that the Applicant and the management company, HLM Property, were in dispute over responsibility for the condition of the Property. The tenant was then and is understood to still be now temporarily accommodated elsewhere. Mould growth had been an issue in 2019 and was taken up as a matter of concern by the Respondent. HLM Property denied that mould growth was by reason of any issue with the fabric of the Property. It was HLM property that provided the electrical report of 7th April 2020 and circulated this to the parties. The state of the wiring was not associated with a leak from the roof, although that had prompted the obtaining of the electrical report. The electrical report was assessed by the Respondent who then raised the matter directly with the Applicant on 11th June 2020, but she responded with a denial of responsibility. The parties were now in dispute over liability. The Respondent rejected all denials and inspection was arranged taking place on 20th July 2020 with the parties in attendance, along with the tenant and others.

12. At inspection the electrical consumer unit was found to be located in the rear left bedroom and not near the roof leak. Mould growth was found to the bedrooms and living room, but there were no elevated moisture meter readings and there was no other evidence of penetrating or traumatic damp. Damp and mould was unconnected with ivy growth. The Property had been vacant for months and so not subject to household activities which generate moisture, and the cause was identified by the Respondent as condensation. As such, heating,

thermal insulation, ventilation and moisture vapour were all considered. The Property had cavity walls with vents beneath bedroom windows (one closed). There were electric storage heaters to living room and bedrooms. The only forms of ventilation to bathroom and kitchen were openable windows. The kitchen had a self-circulating fan, not one ducted to outside. The bathroom opening window was at a high level behind the shower. The lack of safe and accessible means for extraction of moisture laden air during cooking, bathing and showering was of particular concern to the Respondent and informed the assessment made under the Regulations. Documentation relating to Hazard Scoring were presented with the witness statement.

13. At the inspection, the Applicant disagreed with the proposed measures for remediation. These were detailed to her by letter of 23rd July 2020 with a deadline for works to be done by reinspection on 20th August 2020. The Applicant disputed the content of the advisory letter and stated that clutter in the Property prevented works. Ivy growth was raised as a source of obstruction to wall vents . For her part, the tenant complained that mould growth had been present for one or two years . She stated she had used a drier in the living room vented to outside (although the manner of the venting was not given), but this had been removed at the instance of the Applicant, and mould had been worsened by drying clothes indoors thereafter. The Respondent then determined on the issue of the Notice to resolve matters, with moving of furniture and other items to be arranged in liaison with any contractor.

14. The Applicant has produced copious documentation in support of her own case. The Tribunal is required to focus on the issues or potential issues in hand which broadly relate to the existence, cause and remediation of issues relating to wiring and mould growth. A significant part of the Applicant's commentary does not go to these issues, in part perhaps because the core of her submissions were made before the directions were given. Irrelevant matters will not be addressed in this decision, but the Applicant should appreciate that her documents have been read by the Tribunal in their entirety. In response to the further directions issued by the Tribunal, the Applicant also raised the matter of possession proceedings, but this Tribunal is not the correct venue for such matters.

15. The Property was let unfurnished by the Applicant to the tenant with occupation being taken on 11th October 2015. The tenant occupied the Property with her two children. The history of the current issues being taken up followed a roof leak. The Applicant details a number of complaints that followed. Of the ten listed, some may be relevant: the tenant complained of mould to the bathroom, though the Applicant was dismissive that this was discoloured sealant, which was replaced; the fan to the bathroom did not work, but it transpired there was no fan, it was the heater that did not work and this was removed; the heater to the living room did not work as a fuse had blown, but the tenant stated that the heater was too expensive to operate anyway; crackling was audible from light fittings during an incident of heavy snow; and there was mould, but the Applicant suggests that this was new and observed clutter in the Property and possible external causes. The Applicant had advised that air vents be kept open by the tenant.

16. The management company were contacted about mould. It also commented about clutter and denied any exterior matter could be contributing to damp and mould.

17. The Applicant took issue with the presence of a dryer in the Property and advised the tenant in 2019 to buy proper cleaning products to remove mould, effectively blaming the tenant for the problem.

18. In February 2020 complaints were made once more following a roof leak during a storm. An electrician was instructed by the Management Company and the Applicant, identifying the issue as related to the roof, pressed the Management Company to act. The latter rejected liability for the internal electrical arrangement of the Property. The Respondent then took up the issue of the wiring with the Applicant, which the Applicant describes (correctly it seems) as a new issue relating to installation and wiring, rather than relating to the roof leak. Email correspondence in April 2020 from the electrician explains the inter-relationships of the issues: "In my opinion the minor flood damage to the electrical installation served to highlight the poor workmanship/installation." He observed that the consumer unit had been wired incorrectly and from that point alone the installation was unsafe. The Applicant details her response, but

it is puzzling: whilst naturally dissatisfied with the work of the electrician who installed the consumer unit, she investigated matters with her mortgagee, since she could not understand how she obtained a mortgage with an unsatisfactory electrical installation. This point was apparently pursued by the Applicant at the inspection of 20th July 2020. In other submissions, though, the Applicant suggests that the consumer unit was installed during the currency of the tenancy and that it may have been sabotaged or deliberately damaged.

19. The Applicant says that it was on 25th March 2020 that the Respondent then took up the issue of mould growth. The Applicant recounts the inspection of 20th July 2020 and says she disputed then that the former tumble dryer had been vented outside the Property, and she identified it as a cause of the mould problem. The tenant complained at that meeting that she could not remove the mould growth. The Applicant again refers to vents being closed that should have been opened and the extent of clutter. Windows should also have been opened to ventilate the Property, although the Applicant states that Ms Ng observed that there was no obligation on a tenant to do this.

20. The Applicant does not dispute that no work was done before the next inspection on 20th August. She considered the investigations to be inadequate and the problems of clutter to have been unaddressed. She wanted a further meeting. The inspection on 20th August 2002 was similarly unsatisfactory for the Applicant. The Applicant summarises her concerns as the Respondent ignoring the state of the Property for which the tenant is responsible, especially in terms of affording safe access for works, and the tenant being unwilling to address the need to ventilate the Property properly. The Respondent is characterised as taking the tenant's part and refusing to respond to the Applicant's complaints. Her electrician is ready to examine the evidence and comment on the consumer unit, but a risk assessment would be required before works could be completed, with attendance problems of clutter.

21. The Tribunal finds that the Notice in respect of the electrical hazards was fully warranted and should not be interfered with. The electrical installation report of Mr Paul Pinheiro is dated 14th April 2020 and appears in the Respondent's bundle of documents. The production of his report was prompted by reason of

flood damage, but identifies faults unconnected with penetrating damp. The system is identified as about 25 years old with alteration about 5 years prior to the inspection. Records were not available when he inspected on 6th April 2020, but on the Applicant's evidence some electrical works may have been more recent than Mr Pinheiro thought. The system was found to be unsatisfactory, more particularly that there were both dangerous (Code 1) and potentially dangerous (Code 2) conditions were found. The most important deficiencies are confirmed as dangerous and appear in the Notice. There is no contradictory evidence and the photographs of the consumer unit support Mr Pinheiro's findings. The assessment of a category 1 hazard is fully justified although an investigation into the heating circuitry, which is not referred to explicitly in the report, may also have been appropriate.

22. The Applicant was warned of the state of the electrical services prior to and at the inspection in July 2020 and did not take any action. The fact that April report was the result of a roof leak and may have been mislaid by the Applicant is not an excuse. The faults identified are with the systems and do not relate to water damage. Neither do they relate to the structure and exterior of the Property, for which the freeholder and management company may have responsibilities: the electrical services are a matter for the Applicant as landlord. How the faults arose is not a material consideration in this context, the internal electrical system is plainly the Applicant's responsibility and whom she may pursue once it is made good is a matter for her, and not for the Respondent or this Tribunal. The Property is presently unoccupied on the available evidence to the Tribunal as the tenant is housed elsewhere and clutter did not prevent inspection and testing. It will also not prevent works being undertaken. Complaints by the Applicant about alleged hygiene conditions in the Property are irrelevant. The Applicant complains at the need for a risk assessment, but this can be readily undertaken by any contractor. That the Property be empty of all content is not required. The Respondent was acting reasonably in issuing a Notice when the Applicant had failed to act in respect of electrical services notwithstanding possession of the report since April 2020 and having received a warning and been present at inspection in July 2020. The Improvement Notice was fully warranted accordingly and a Hazard

Awareness Notice would have been inadequate: even now, the Applicant is insistent that work should not be done before the tenancy is ended, or at least the Property is emptied, neither of which is necessary nor appropriate in circumstances of a justified complaint. No procedural fault is properly identified and there is no reason for the works required to be delayed.

23. The issues surrounding damp and mould growth are more complex and the Tribunal is concerned that they have not been fully investigated and that the proposed remedy is simply inadequate to the issues that do arise.

24. There is no evidence before the Tribunal that there is any penetrating or traumatic damp. Whilst there may have been incidents of the roof leaking, there is no connection between this and the presence of the damp and mould growth to the external walls. The damp has been identified as condensation and this is the probable cause, given the locations described. The Respondent has correctly identified the four relevant factors for such an issue: heating, thermal insulation, ventilation and moisture vapour which were all considered, but the analysis of each does not appear to have been adequate.

25. The evidence before the Tribunal discloses two major issues with heating: adequacy and affordability. No heating source has been identified to the kitchen. No current heating source has been identified to the bathroom. The Applicant has recorded that there was a historic heater to the bathroom, probably a radiant heater, but that this was known not to work and was removed, she says at the instance of the tenant. The heaters that are present are elderly, perhaps original, storage heaters to hallway, bedrooms and lounge. There is evidence that the heater to the lounge does not work. Given their age, the heaters are also likely to be inefficient, difficult to manage and (as the tenant has complained) too expensive to operate. No assessment has been made of their adequacy to heat the property or the risk of excess cold. The result is that the Property has a heating system that is likely to be inadequate in terms of capacity and affordable operation, which should have been assessed by the Respondent in its own right and was contributing factor to condensation dampness and resulting mould growth.

26. Thermal insulation has also not been adequately investigated. There is a flat roof to the Property and whilst it does appear that the covering has been renewed there is no direct evidence of the amount of insulation within the roof structure. Given the date of construction, it is likely that the amount of insulation material will be very limited (the thermal insulation requirements of the then prevailing Building Regulations were much less stringent than today) and insulation provided may well have settled. The Respondent does not appear to have considered this issue. The latest CIEH guidance on assessing excess cold states at paragraph 2.4.2 "… where a flat roof is present above a habitable room a lack of insulation may be a major deficiency. Where there is a flat roof, practitioners should try to identify the date of construction and look at Building Regulations for that time, to assess the adequacy of the insulation. If this is not possible, they may assume that the insulation is well below the required standard. Other issues such as condensation and mould on the ceilings may also help officers come to this conclusion."

27. In their response to the further directions, the Respondent states that "Properties inspected under the Housing Health & Safety Rating System (HHSRS) are in the majority done via visual observations with the aid of a protimeter. There is limited scope of the survey to the internal and external (where accessible) fabric of the building and intrusive testing is not included. Limited insulation to the flat roof and no insulation to the cavity walls were assumed based on the age and type of the dwelling." However, there is no reference to this assumption in the Improvement Notice itself nor in the HHSRS assessment carried out by the Respondent. The latter refers only to the existence of mould growth and ventilation issues. The assessment does not address the question of why the mould growth is present, merely indicates that it is present.

28. The Tribunal acknowledges that the Housing Act 2004 does not appear to give a local housing authority the power to undertake invasive inspection and that consent of the relevant estate holder is required to carry such inspection. However, the Respondent does not appear to have raised the issue of the thermal performance of the roof with the Applicant nor to have attempted any non invasive assessment for example using a simple infrared thermometer to

note temperature differentials. If the issue of insulation within a flat roof is disputed, it is possible to access the void in a flat roof and inspect using a borescope by having a qualified electrician present to remove a ceiling rose and replace it when the inspection is complete. Such a practice would have allowed a determination as to whether the roof had its original thermal quality as built, which is highly unlikely to be considered adequate now, or whether it had been insulated to an acceptable modern standard. Consideration of the terms of the lease could then have determined whether any inadequacy in thermal quality was the responsibility of the Applicant or the freeholder. The Respondent does state that the cavity walls have not been insulated but does not give any evidence for this. Again adequacy of the thermal performance of the walls given the nature of the heating and any responsibility for any remedial work on the part of the Applicant or the freeholder should have been considered. Thermal insulation to the flat roof and the walls was simply not adequately addressed by the Respondent, nor responsibility for it determined and, as emphasised by the CIEH guidance, it is of considerable significance when the heating is of a type which is expensive to run as are electric storage radiators (in particular when they are old).

29. The generation of moisture vapour within the home was considered, but in a fairly perfunctory manner. The tenant accepted that she dried clothing within the Property, after she was required to remove a free-standing tumble dryer. There was an issue whether the latter had been vented inside or outside the Property. Since the Property was not lived in at the time of the inspections, and had not been for some months, it is not clear to what extent the mould growth was the result of historic water vapour or current problems. It does beg the question as to whether there is any provision for clothes drying vented to the external air, an issue which is a relevant factor referred to in the hazard profile for damp and mould growth in the statutory Operating Guidance.

30. Ventilation was properly considered, but the analysis was hardly penetrating. There were some vents and there were opening windows to all rooms save the hallway. It is notable that there was an opening light to the kitchen and to the bathroom, although the latter was not ideally located for easy use. The Applicant contends, not without some justification, that if the tenant could open

a window to release moisture, then it is hardly the Applicant's fault that moisture is trapped in the Property. The statutory Operating Guidance at paragraph 2.34 and Appendix A does differentiate between matters which are properly the responsibility of a property owner and those for which responsibility lies with the occupier.

31. Whilst acknowledging that, given the apparent location of the window to the bathroom, the provision of an extractor fan to the bathroom in particular if equipped with humidistat control may be of benefit, the Tribunal, however, considers that the real issue in this case is likely to be the inadequacy (including the expense) of the heating provision to the Property properly and its poor thermal insulation. These key issues of causation were not investigated appropriately and it is unlikely that the solution proposed by the Respondent (i.e. cleaning down the mould, redecorating and having installed extractor fans) will present anything more than a temporary solution. Mould is not the fault in itself, but the result of a hazard or hazards, which have not been adequately investigated and may have several elements.

32. One option open to the Tribunal would be to vary the Improvement Notice in respect of its provisions relating to damp and mould growth. However, because of pandemic restrictions, the Tribunal has not had an opportunity to inspect the Property. In these circumstances, the Tribunal finds that the Notice in respect of damp and mould growth shall be quashed and the Respondent should consider thorough-going reinspection to address the issues identified in this decision properly and thoroughly, and also in particular the question as to whether there is a significant excess cold hazard

33. The power to charge arises under Section 49 of the 2004 Act:

> "(1) A local housing authority may make such reasonable charge as they consider appropriate as a means of recovering certain administrative and other expenses incurred by them in–
> (a) serving an improvement notice under section 11 or 12; ...
> (2) The expenses are, in the case of the service of an improvement notice or a hazard awareness notice, the expenses incurred in–
> (a) determining whether to serve the notice,
> (b) identifying any action to be specified in the notice, and
> (c) serving the notice."

34. In this case the Respondent has charged £363.96. The Tribunal has given careful consideration to the sum charged and considers it a reasonable sum to charge for the work done as set out Section 49(2) of the 2004 Act. It does not reduce or cancel the charge accordingly.

Judge Dr Anthony Verduyn

Dated 13th May 2021

