FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**BIR/00FN/HIN/2021/0002**
Property	**:**	**225a Narborough Road, Leicester, LE3 2QR**
Applicant	**:**	**Mr Amarjit Singh Kullar**
Representative	**:**	**Mr Jasbal Kullar**
Respondent	**:**	**Leicester City Council**
Representative	**:**	**Mr Andrew Dymond of counsel**
Type of application	**:**	**Appeal against the service of an Improvement Notice**
Tribunal member	**:**	**Judge C Goodall** **Mr V Ward FRICS** **Mr A McMurdo MCIEH**
Date and place of hearing	**:**	**29 September 2021 by video platform**
Date of decision	**:**	**28 October 2021**

DECISION

Background

1. 225a Narborough Road, Leicester ("the Property") is a first floor flat above a commercial shop on Narborough Road. Mr Kullar ("the Appellant") owns the freehold. On 14 April 2021, Leicester City Council ("the Council") served an Improvement Notice ("the Notice") on the Appellant in relation to protection against the risk of fire at the Property.

2. On 28 April 2021, the Appellant appealed against the Notice.

3. Directions were issued on 6 May 2021 in pursuance of which the Respondent has provided a written statement of case and a witness statement from Mr Matthew Elliot dated 19 May 2021, and the Appellant has provided a statement of case and a witness statement. In compliance with a further direction, the Appellant has also provided an electrical certificate in relation to emergency lighting and fire protection.

4. Two members of the Tribunal (Mr Ward and Mr McMurdo) carried out an inspection of the Property on 28 July 2021 in the presence of the parties.

5. The Tribunal considered the appeal at an oral hearing, held remotely, on 29 September 2021. The Appellant attended by voice only. He asked his son, Mr Jasbal Kullar to speak on his behalf. The Council were represented by Mr Andrew Dymond. The Tribunal heard oral submissions from the Appellant and the Council and oral evidence from the Council's environmental health officer who dealt with the Improvement Notice. This document sets out our decision and the reasons for it.

Decision

6. **The Tribunal's decision on the Appellant's appeal against service of the Improvement Notice dated 14 April 2021 in relation to 225a Narborough Road, Leicester, is to confirm the Notice.** Our reasons for this decision are given in the following paragraphs.

Facts

7. From the witness statements provided by the Appellant and by Mr Matthew Elliott for the Council, we found the following facts.

8. The freehold interest in the Property is vested in the Appellant.

9. On 8 October 2020 the Appellant granted a three-year lease of the Property to Max Energy Savings & EPC Consultants Ltd ("Max Energy") at a rent of £750.00 a year.

10. On 1 April 2021 Max Energy granted a shorthold tenancy of the Property to Mr Leonide Alexandrescu and Mrs Mariana-Alina Alexandrescu for a fixed term of 6 months at a rent of £900.00 per month.

11. The Property is a first floor flat with external staircase. Internally, the entrance door leads directly into a kitchen with corridor beyond. There are two habitable room on the first floor and a bathroom. There is a set of steep stairs which provide access to the second floor on which there are two more habitable rooms.

12. On 7 April 2021, Mr Elliott visited the Property at about 4pm to carry out a proactive inspection into the investigation of unlicensed houses in multiple occupation in the Narborough Road area of Leicester. The door was answered by an adult female who did not speak English. Another occupant, who was male, was called to be interpreter. Mr Elliott was given access to the Property, and he observed that two adults occupied the front first floor bedroom, two adults with a child occupied the first floor rear bedroom, and the second floor rear bedroom was occupied by two adults.

13. Mr Elliott did not inspect the fourth bedroom (second floor front bedroom) but he was advised that it was occupied by a single adult who was asleep. Mr Elliott established that the male interpreter occupied the first-floor front bedroom with his partner. The first-floor rear bedroom was occupied by the two people named on the tenancy agreement, Mr Leonide Alexandrescu and Mrs Mariana-Alina Alexandrescu. The interpreter and his partner were said to be friends of the Alexandrescus and they paid them rent for their occupation. Mr Elliott was told that the occupants of the two second floor bedrooms also paid rent for their occupancy to the Alexandrescus. He was also told that one of the two people who occupied the second-floor rear bedroom was the mother-in-law of the interpreter or his partner.

14. There were no locks on the bedroom doors at the time of Mr Elliott's inspection. There were "hasp and staple" type latches on the outside, and internal bolts on the inside so the doors could be secured either from the outside or the inside. There was no lounge.

15. Mr Elliott carried out an HHSRS inspection whilst at the Property and concluded that there was a category 2 hazard of fire. The score attributed to this hazard was 814 points, and it was a Band D hazard. As a result, on 14 April 2021 he issued the Improvement Notice to the Appellant and to Max Energy. He believed that the Property was being used as a house in multiple occupation.

16. On 15 April 2021, A S Properties (which is a trading name of either the Appellant or Max Energy – it is not clear which) emailed a copy letter from Mr & Mrs Alexandrescu dated 14 April 2021 stating:

> "We Mr & Mrs Alexandrescu are the tenants of [the Property]. We can confirm we are the only tenants that live at the property. We are one family only. When the Council visited the other people was just visiting us and they are allowed because there in the same support bubble. I am sorry for the problem caused and can assure you we are the only family staying here."

17. The Property was vacated by the residential tenants by 19 June 2021. No details of how or why have been provided.

18. At some point (we have not been provided with a copy), the Council invoiced the Appellant for the sum of £135.00 being expenses relating to the service of the Improvement Notice which are claimed pursuant to section 49 of the Housing Act 2004 ("the Act").

19. Irrespective of the appeal, the Appellant says he has now done the work required by the Notice. The Council saw the work undertaken during the Tribunal's inspection on 28 July 2021, but have not otherwise re-inspected. They agree that work has been undertaken but Mr Elliott's position is that there are still "some minor bits and pieces outstanding".

20. Neither party has suggested that the Property is licensed under either Part 2 or Part 3 of the Act and we so find.

The Improvement Notice

21. The Notice is dated 14 April 2021. The operative date is 5 May 2021. Work is required to start by 12 May 2021 and to be complete by 19 May 2021.

22. The hazard identified is Fire. The deficiency identified is the lack of a safe means of escape from the rooms on the first and second floors as the only access was through the kitchen. The bedroom doors were said to be ill-fitting lightweight doors. The fire detection system did not provide adequate warning in the event of fire.

23. Remedial action required was (summarising):

    a. Extend the fire detection system by installing four more interlinked smoke alarms – one in each bedroom – and a heat alarm in the commercial premises downstairs;

    b. Provide certificates for the additional works complying with BS5839: Part 6:2019;

    c. Install an openable window (as a secondary fire escape) in the first floor front bedroom; the window is to openable without a key and with a restrictor to prevent falls, but with a child-proof release mechanism to allow full opening when required;

    d. Provide and fit SD30S standard fire doors at six points in the flat.

The Inspection

24. At the inspection on 28 July 2021, the Tribunal members observed that the fire detection system requirements in paragraph 23.a above appeared to have been met. The Tribunal was unable to determine if there was a detector in the ground floor takeaway premises, as it was unable to access those premises.

25. The requirement to provide an openable window in the first floor front bedroom had not been met, though there is an escape window in the first floor

rear bedroom that could provide safe egress as a secondary exit point. It was not possible to ascertain whether that window had been installed recently.

26. New doors had been provided as required in paragraph 23.d above. The Tribunal members were unable to verify that these were FD30S fire doors.

27. The Tribunal observed that the Property appeared to be occupied, but it was not possible to determine from observation whether it was being operated as an HMO or as a self-contained flat.

28. For completeness, we record that certificates were provided to us after the inspection as required by paragraph 23.b above. It is for the Council to determine whether these satisfy their requirements.

The law

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

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

    a. Section 1 (1) provides for a system of assessing the condition of residential dwellings and for that system to be used in the enforcement of housing standards in relation to such premises. The system (which is the HHSRS system) operates by reference to the existence of Category 1 or Category 2 hazards on residential premises.

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

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

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

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

33. Section 12 gives the authority power to serve an improvement notice if the local authority is satisfied that a category 2 hazard exists at the property. The Notice

will require the person on whom it is served to take such remedial action as is specified in the notice.

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

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

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

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

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

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

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

40. The Improvement Notice must, as has been seen, be served. The appropriate person on whom service must be effected is dealt with in Schedule 1 Part 1 paragraph 3 of the Act. Paragraphs 3 provides:

> "3 (1) This paragraph applies where any specified premises in the case of an improvement notice are—
>
> (a) a dwelling which is not licensed under Part 3 of this Act, or

(b) an HMO which is not licensed under Part 2 or 3 of this Act, and which (in either case) is a flat.

(2) In the case of dwelling which is a flat, the local housing authority must serve the notice on a person who—

(a) is an owner of the flat, and

(b) in the authority's opinion ought to take the action specified in the notice.

(3) In the case of an HMO which is a flat, the local housing authority must serve the notice either on a person who—

(a) is an owner of the flat, and

(b) in the authority's opinion ought to take the action specified in the notice,

or on the person managing the flat."

41. Identification of whether a property is an HMO is governed (in so far as is relevant) by the following extract from section 254 of the Act:

"S254 Meaning of "house in multiple occupation

(1) For the purposes of this Act a building or a part of a building is a "house in multiple occupation" if—

(a) it meets the conditions in subsection (2) ("the standard test");

(b) it meets the conditions in subsection (3) ("the self-contained flat test");

(c) it meets the conditions in subsection (4) ("the converted building test");

(d) an HMO declaration is in force in respect of it under section 255; or

(e) it is a converted block of flats to which section 257 applies.

(2) A building or a part of a building meets the standard test if—

(a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;

(b) the living accommodation is occupied by persons who do not form a single household (see section 258);

(c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);

(d) their occupation of the living accommodation constitutes the only use of that accommodation;

(e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and

(f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities.

(3) A part of a building meets the self-contained flat test if—

(a) it consists of a self-contained flat; and

(b) paragraphs (b) to (f) of subsection (2) apply (reading references to the living accommodation concerned as references to the flat)."

42. The definition of a flat is contained in section 1(5) of the Act and is:

""flat" means a separate set of premises (whether or not on the same floor)—

(a) which forms part of a building,

(b) which is constructed or adapted for use for the purposes of a dwelling, and

(c) either the whole or a material part of which lies above or below some other part of the building;"

43. The definition of the "owner" of the Property is contained in section 262(7) of the Act, as follows:

"(7) 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."

44. So far as expenses are concerned, these are governed by section 49 of the Act, the material provisions of which are:

"49 Power to charge for certain enforcement action

(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.

...

(7) Where a tribunal allows an appeal against the underlying notice or order mentioned in subsection (1), it may make such order as it considers appropriate reducing, quashing, or requiring the repayment of, any charge under this section made in respect of the notice or order."

The parties' cases

45. The Appellant's challenge to the Improvement Notice is (a) that it was not served on the correct person, and (b) that the Property is not, and never was, intended to be an HMO, and the works required in the Notice were more extensive than those that would be required in a property that was not an HMO. The Appellant sought an order quashing the Improvement Notice.

46. At the hearing, the Appellant's representative expanded on these two points. On the first, Mr J Kullar pointed out that under paragraph 3(3) of Part 1 of Schedule 1 in the Act, there was an option to serve the Notice on either the owner and the person who ought to take the action specified, **or** the manager, and the Council should have exercised its discretion to serve on Max Energy as they were the person managing the Property.

47. On the question of whether the Property was an HMO, Mr Kullar drew our attention to the tenancy agreement, which only identified one single joint tenant (2 people), and the letter received from Mr & Mrs Alexandrescu explaining that said the Property was only occupied by one single household.

48. Mr Kullar then said that his father had obtained a fire risk assessment which had advised that the work required in the Notice was excessive for a non-HMO property. He asked to be allowed to introduce this evidence to show that the Notice was excessive in its extent. The Tribunal did not agree to admit new material at this stage, but the question of whether the specification set out in the Notice was excessive had been partly conceded by the Council in their statement of case, in which they accepted that smoke detectors would not be required in the two second floor bedrooms or in the first-floor rear bedroom if the Property was not an HMO.

49. Finally, Mr J Kullar objected to the imposition of costs for the preparation and service on the Improvement Notice which he said should be quashed or repaid.

50. We record that there was no challenge by the Appellant to Mr Elliott's right to assess the Property under the HHSRS system or to his conclusion that there was a category 2 hazard at the Property. There was no specific challenge to the

necessity for the works listed on the Notice, apart from those that arose because of the Council's allegedly incorrect analysis of the status of the Property.

51. We also record that Mr J Kullar accepted that the Appellant fell within the definition of "owner" under the Act.

52. For the Council, Mr Dymond took the Tribunal to paragraph 3 of Schedule 1 and identified that if the Property were an HMO, under 3(3) the Council had the option of serving either on Max Energy as the person managing the flat or on the Appellant, but they were entitled to choose the Appellant at their discretion. He referred to the option contained in that paragraph to serve **an** owner, but said that Max Energy could not be an owner as their lease was not for an unexpired term exceeding three years, so they were not within the definition of owner under section 262(7).

53. Mr Dymond then said that if, as was contended for by the Appellant, the Property was not an HMO, then paragraph 3(2) of Schedule 1 required service on the Appellant as he was the owner.

54. On the question of whether the Property was an HMO, and therefore that there might be an argument, if not, that the Notice should be varied to remove the elements the Council had conceded should be removed (and possibly further elements that a Tribunal might find were not necessary), Mr Dymond argued that Mr Elliott had correctly identified that at the point of inspection the Property was being used as an HMO, and the Tribunal should so find.

Discussion

55. We start by explaining why we were not willing to allow the Appellant to adduce further evidence from their fire risk assessment ("FRA") to try and establish that excessive works were being required in the Improvement Notice. We were told that advice in the form of a fire risk assessment had been obtained by the Appellant which said that the Council were asking for works suitable for an HMO, whereas a lesser amount of work would be required for a non-HMO flat. The FRA was in a building some hours' drive away and could not be provided to the hearing.

56. The first reason is that this document should have been provided by the Appellant before the hearing. The introduction of late evidence is generally likely to prejudice the other party's case to some extent, and to waste some costs, and the benefit of admitting it needs to be compelling. The second reason was that in our view the point the Appellant was wishing to pursue took him down a blind alley. The Appellant said the additional evidence would establish that the Improvement Notice contained excessive requirements, but the whole thrust of his appeal was to the effect that he wanted the Notice to be quashed, not varied. On his own argument, the new evidence could not take him to the point where the justification for an Improvement Notice entirely disappeared. The new evidence could only establish something that had been conceded anyway by the Council (see paragraph 48 above). To pursue this point would

be disproportionate and would result in delay, in breach of the overriding objective of the Tribunal.

57. Turning now to the merits of the appeal, on the first issue of whether the Notice should have been served on the Appellant, we entirely concur with Mr Dymond's argument in relation to paragraph 3 of Schedule 1 of the Act. The Appellant conceded that he is the "owner" as defined in the Act. If the Property is NOT an HMO (his preferred outcome), paragraph 3(2) requires that he is served. If it is an HMO, the Council CAN serve the Appellant) under paragraph 3(3)) and we cannot see a good reason why they should not. The Appellant's case was that Max Energy should have been the only recipient of the Notice. We heard no evidence to explain the relationship between the Appellant and Max Energy. The Appellant clearly has a continuing interest in the Property and the leasehold interest of Max Energy is only for a short term. We can see a reasonable justification for the Council's decision to serve the Appellant with which we would not wish to interfere.

58. This brings us to consideration of the issue of whether the Property was being operated as an HMO at the time of Mr Elliott's inspection on 7 April 2021. We have recited the relevant facts in paragraphs 12 and 13 above. Mr Elliott's evidence was effectively unchallenged. We accept that he was persuaded that the Property was occupied by three couples and a single person on 7 April 2021. There is a reasonable basis for him to conclude that the Property was being used as a self-contained flat and that elements (b) to (f) of section 254(2) were met on his inspection, meaning that it was an HMO.

59. The argument that the occupiers were all part of one family and that Mr Elliott's conclusion was wrong, are unconvincing. The quality of the Appellant's evidence on this point was poor. There were no witness statements – not even from Max Energy. There is only a letter from two of the occupiers, and no explanation of the relationships between the occupiers apart from an unverified possibility that there was a mother-in-law relationship between one adult and one couple. A friendship between couples does not make them a single household (see definition of single household in section 258 of the Act). No names or addresses have been provided for the other occupiers. No documents (such as, for instance, birth certificates or marriage certificates), have been supplied to corroborate the Appellant's case on this point. The evidence is entirely inadequate for the Tribunal to disturb the evidence from Mr Elliott. We find that as at the 7 April 2021, the Property was being used as an HMO.

60. That leads on to consideration of whether there is any basis for us to determine that the Improvement Notice should not have been issued, and whether, if so, we should now confirm, vary, or quash it. We remind ourselves that we are rehearing the question of whether to issue the Improvement Notice in the light of the Council's legal power to take enforcement action where a category 2 hazard has been identified.

61. Our view is that it was right to issue the Improvement Notice. The primary means of escape from fire in the Property is through the kitchen, which is the room that is likely to generate the greatest risk of fire. We agree with Mr

Elliott's assessment that a hazard was present at the Property, and we agree that the remedial action specified was appropriate, in broad terms. We are clear that at the date of issue of the Notice, as the Property was being used as an HMO, the Notice correctly identified appropriate remedial action.

62. In particular, we consider that due to the poor means of escape and reliance on a fire escape window, a higher specification of automatic fire detection system is appropriate even if the Property were not an HMO. The fire detection specification in the Improvement Notice would give more advance warning in some circumstances (e.g. fire in a bedroom) which could be important if an occupant who wasn't particularly athletic was trying to exit through a window.

63. Our reference to the appropriateness of the remedial action "in broad terms" is because there are two points that we would wish to draw to the Council's attention. Firstly, in the Improvement Notice, it chose to require that the first-floor front bedroom window should be configured so that it could be used as a secondary means of escape. In our view, the first-floor rear bedroom window might be just as good, as the exit point is on to a flat roof as opposed to dropping onto the ground from the front bedroom.

64. Secondly, we have also considered that it might be necessary to require, in addition, that whichever bedroom is so designated should not have a lockable door, to ensure that all occupants are able to access whichever bedroom has the secondary means of escape, from inside the flat (see LACORS Fire safety guidance para 14.2). To us, the wording in the Notice about this is not absolutely clear.

65. Our decision, on the basis of the discussion above, is to confirm the Improvement Notice.

66. So far as the timing for compliance with the Improvement Notice is concerned, we draw the partys' attention to paragraph 19 of Part 3 of Schedule 1 to the Act. If any work is in fact still required in order for the Appellant to comply with the Improvement Notice (and it appears that there may still be a dispute between the parties as to whether there is full compliance with the required remedial works), the Appellant should check those provisions carefully to ascertain the date by which work should be completed, and/or should arrange a re-inspection by the Council so the work can be checked. He might reasonably ask the Council to confirm their understanding of the time limits that now apply to ensure he does not risk breaching the Improvement Notice, as a breach can have significant financial and other consequences.

67. We now turn to the issue of the administrative costs which the Appellant has been charged, which he objects to. Our power to interfere with that invoice is contained in section 49(7) and is limited to the circumstance in which the Appellant has succeeded in the appeal. This appeal has not been allowed; we have confirmed the Improvement Notice, and so we have no power to reduce, quash, or require repayment of the administrative costs.

68. We add one final comment. If the Appellant or Max Energy intend to operate the Property as a flat not falling within the definition of an HMO, they, or one

of them, would be entitled to ask the Council to vary the Notice (see section 16 of the Act) if they wished to argue that the requirements were excessive for a non-HMO self-contained flat.

Appeal

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

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