FIRST-TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/00KF/HIN/2019/0013**
Property		**: FLAT 3 35 First Avenue, Westcliff On Sea, Essex, SS0 8HP**
Applicant		**: Zena Keizer**
Representative		**: Paul Robinson Solicitors /In person rep by daughter**
Respondent		**: Southend on Sea Borough Council**
Representative		**: Matthew McDermott of Counsel**
Type of Hearing		**:Appeal against an Improvement Notice**
Tribunal Members	**:**	**Judge Jim Shepherd** **Stephen Moll FRICS**
Date of Decision	**:**	**26 January 2021**

DECISION

The appeal against the Improvement Notice is dismissed. There shall be no order as to costs.

The application

1. The applicant seeks to appeal an Improvement Notice Dated 14th of October 2019. The notice was served on her by the Respondent council and relates to her property at 35 First Avenue , Westcliffe on Sea, Essex, SSO8HP ("The premises"). Her application is dated the 5th of November 2019. She is appealing the improvement notice on several bases; first she appeals the fire safety provisions - she states that there is no necessity to ensure that the cellar is fire safe in the premises because the cellar had been filled in. Secondly she states that the building was wrongly being treated as a House in Multiple Occupation (HMO) because the premises consist of 3 self contained flats which are occupied separately. She further states that as a result of this incorrect designation further fire safety requirements are made which would not be required in premises which were not an HMO. Finally she challenges the time for compliance stating that most of the requisite work concerned Flat 3 which was occupied by assured shorthold tenants who they were unable to rehouse in time due to the tenants' unreasonable requirements.

Background

2. The Applicant is the freeholder of the premises which are converted into three self - contained flats. The Applicant is elderly. Her property is managed by her family. This decision is written on the basis that the Applicant herself coordinated actions taken at the premises. It may be the case that her family took decisions on her behalf but this was not made clear during the proceedings. There was no evidence of the Applicant formally signing over responsibility to her family.

3. Following complaints made by the tenants of Flat 3 the Respondents informally inspected the premises in the summer of 2019. The principal concern at that stage was a collapsed ceiling in Flat 3. It was acknowledged that the tenants needed to move out of the flat for works to be carried out. They did not have a functional kitchen. A list of deficiencies were sent to the Applicant. A formal assessment of hazards under the HHSRS was made on 8th October 2019 after no works were carried out. Deficiencies were identified such that it was decided that category 2 Hazards existed. On 14th October 2019 the Respondents served the Appellant with an Improvement notice. The notice cited hazards, namely damp, mould growth, falling between levels, structural collapse and fire. The damp referred to was water ingress on the landing and ground floor hall. The *falling between levels* was an unstable guard rail to the balcony. The *structural collapse* was the fact that the kitchen ceiling in Flat 3 had collapsed. In relation to fire , fire safety provisions were required in the kitchen including installing 30 minutes resistance plasterboard and an FD30S door. In addition a fire detection system was needed in the building, fire doors in the communal lobby were also required.

4. The Respondents designation of the premises as an HMO relied on s.257 of the Housing Act 2004. The relevant parts of this section state the following:

257 HMOs: certain converted blocks of flats

(1) For the purposes of this section a "converted block of flats" means a building or part of a building which–

(a) has been converted into, and

(b) consists of,

self-contained flats.

(2) This section applies to a converted block of flats if–

(a) building work undertaken in connection with the conversion did not comply with the appropriate building standards and still does not comply with them; and

(b) less than two-thirds of the self-contained flats are owner-occupied.

(3) In subsection (2) "appropriate building standards" means–

(a) in the case of a converted block of flats–

(i) on which building work was completed before 1st June 1992 or which is dealt with by regulation 20 of the Building Regulations 1991 (S.I. 1991/2768), and

(ii) which would not have been exempt under those Regulations,

building standards equivalent to those imposed, in relation to a building or part of a building to which those Regulations applied, by those Regulations as they had effect on 1st June 1992; and

(b) in the case of any other converted block of flats, the requirements imposed at the time in relation to it by regulations under section 1 of the Building Act 1984 (c. 55).

(4) For the purposes of subsection (2) a flat is "owner-occupied" if it is occupied–

(a) by a person who has a lease of the flat which has been granted for a term of more than 21 years,

(b) by a person who has the freehold estate in the converted block of flats, or

(c) by a member of the household of a person within paragraph (a) or (b).

(5) The fact that this section applies to a converted block of flats (with the result that it is a house in multiple occupation under section 254(1)(e)), does not affect the status of any flat in the block as a house in multiple occupation.

(6) In this section "self-contained flat" has the same meaning as in section 254.

5. This section is relevant in the present case because the premises we're converted into flats some time ago. The way in which both parties dealt with the "HMO issue" was regrettable. In future the tribunal would suggest that the local authority fully ascertain relevant details about conversion into self - contained

units before making a making a declaration that a property is an HMO. Whilst it is clear that in the present case the premises were an HMO the original designation as such by the local authority did not seem to be based on building regulations at all. In any event it is considered that the HMO issue is a red herring. A lot of time and effort has been spent in dealing with this issue by the parties and therefore by the Tribunal. If the parties had properly prepared their cases they would have realised that the HMO issue was ultimately irrelevant to the present case. The local authority quite rightly wanted the Applicant to upgrade fire safety in the premises in order to meet proper criteria. Instead of just requiring this they sort to justify their designation of the premises as an HMO and instead of just carrying out the fire safety works the Applicant sought to oppose the designation as an HMO. Both parties we're guilty of leading the tribunal into a cul-de sac it did not need to go down.

6. The tenants in Flat 3 alerted the local authority to the condition of the premises principally because the ceiling in their flat was collapsing and they had no proper place to cook. The Applicant through her relatives sought to arrange rehousing of them in alternative accommodation while works were carried out. The problem was that the Applicant was not initially willing to pay up front for the accommodation needed by the tenants. It has to be remembered that the tenants had security of tenure and they were entitled to remain in their home. They agreed however to assist the Applicant by moving out temporarily. The Applicant chose to adopt a position which was unreasonable by initially at least requiring the tenants to pay for their decant accommodation up front. The Tribunal relies particularly on an exchange of emails between the Applicant's daughter and the tenants.

7. The chain of communications starts with an email dated the 13th of September 2019 from the Applicants daughter in which she stated the following:

Thank you for your email on Wednesday I am replying to the last paragraph of the email where you write we will accept to move out into temporary accommodation should it be necessary. From all the discussions I had with the contractors who visited flat 3 to assess the ceilings I believe them when they said there will be large disruption by ceiling removal, and the rooms involved would have to be cleared of furniture and belongings so that the contractors could work freely. There may be a way of working around with the furniture and belongings from room to room, but this could quickly conflict with your day to day living. In terms of temporary accommodation, I did not recommend a specific property on Airbnb, but was indicating that there were properties available not too far from flat 3. I would suggest that you research alternative short stay accommodation yourselves on Airbnb or similar since you stated clearly in earlier correspondence that you would not be content with any property that I sourced. Without prejudice, I have indicated a budget of up to £2750 for a month.

8. The tenants replied to that email later on the same day saying the following;

Dear Madam Many thanks for your email. Without prejudice. Regarding accommodation: because of landladies breach of repairing obligations and your failure to organise and carry out repairs following the incident on the 17th of August, our family is being going through considerable hardship and now face temporary homelessness. Therefore we want to see a very detailed proposal that would guarantee that our temporary homelessness will not become a permanent one. I believe you have received a letter from Southend council's PSH where they are asking you to commission full structural building survey. So far, that survey has not been carried out, and we do not have any indication on the state of your

property and no indicators on the start, length, and end of works needed to bring your property back into a state fit for human habitation. We accepted the council's advice to wait for the results of the survey, which is the starting point for the agreement which must include: 1. results of the full building structural survey, as requested by Southend council's PSH enforcement officer. 2. A detailed description of the work that, hopefully, will be done on the basis of the findings of the survey. 3. Exact start date and end date of the work that will be carried out. 4. The guarantee that we will be allowed to return to the property one day after the completion of the works which will be signed off by a professional surveyor, and that the property will be decorated and cleaned professionally. 5. The guarantee that you will pay for the cost of our emergency accommodation and removal, storage and return of our belongings so the full duration of the work, regardless of the length and scope of the works. 6. The guarantee that you will not be seeking to repossess the property on the 4th of January 2020. 7. The guarantee of extension of our tenancy agreement for 12 months from the 4th of January 2020 keeping the rent at £950 per calendar month

We accept to move into emergency accommodation for the duration of the work, the beginning and the end of it is subject to the full survey and schedule work you must produce. However we fear that the budget you have proposed will not be enough and ask you to reconsider it and bring into line with market conditions. The cheapest 2 bedroom flat costs £3500 per month according to the search we conducted a few minutes ago on booking.com. We also accept your offer to source and pay for the services of a removal company to remove and bring back our belongings. We would like them to bring the boxes etc and pack it for us, once the beginning

and the end of the work is confirmed . As a gesture of goodwill and to help you mitigate the cost, we accept your offer of £60.00 per day from the 17th of August 2019 until we move into emergency accommodation. Please transfer £1860.00 for the period 17th of August 2019 to 17th of September 2019 into our account: ….

9. That email was copied to the Respondent local authority who were kept fully up to date of negotiations between the Applicant and her tenants. In passing the Tribunal notes that some of the demands of the tenant may be regarded as unreasonable however the reality of the situation was that the tenants were in effect doing the Applicant a favour by moving out and they were a family who needed suitable accommodation whilst the work was carried out. It was also reasonable for the tenants to be told about what works were going to be carried out when they could expect to return to their home and that the move would be financed by the Applicant.

10. There followed an email from Joy Ofremu of the council to the Applicant's daughter stating the following:

Dear Sharon thanks for your email. As a precautionary measure, I agree with the earlier request from yourselves (via your contractors and workmen) that the living room and kitchen should not be used by the tenant until further notice. As such, please provide alternative means of cooking and laundry to the tenant as requested in my letter. Although I have not served an improvement notice due to your cooperation with the council in getting the works resolved, be reminded that a lack of cooking facilities is a category one hazard. Please act on this request forthwith. If the tenant continued to use the prohibited areas, they would be doing so at their own risk.

11. There was then a further email from Joy Ofremu to both the landlord and the tenants stating:

> *Dear both, I need to know that an agreement has been reached in terms of my request for alternative cooking and laundry facilities following the prohibition of the above flat living room and kitchen I need a response by the end of today*

12. On the 17th of September 2019 the council sent a more formal letter to the Applicant stating the following:

> *Dear Mrs Keizer, Housing Act 2004 re: flat 335 1st Ave Westcliff on Sea Essex SSOHP. I'm writing to advise further to my letter dated the 11th of September 2019. The tenants have been prohibited from using the dangerous kitchen and living room which has the risk of collapse and subsequently cause injury to occupiers and visitors. We have not yet received the structural engineers report requested to prove the safety of the affected rooms and continue habitation in the property. The council opinion is that the tenant should not use the kitchen and living room as earlier agreed in my letter dated the 11th of September 2019. As such you are required to provide alternative means to cooking and laundry facilities to the tenants forthwith. A continuous failure to provide the tenants with the above would lead to formal action being taken against you. You should take action to address the above deficiencies forthwith*
> .

13. The Applicant's daughter then wrote an email to the tenants on Friday the 20th of September 2019:

> *Thank you for your email today. The points you raised are covered below*

It seems to me that compromise is required in order to settle this and be able to make progress on the repairs. I would therefore like to propose the following without prejudice offer :

Both parties to agree:

1. *That the landlord pays up to £2750 for the month away from the property, and pro rata if more time is required. This would be bookable and payable by you initially and the money is refunded by me to your bank on receipt of details of a valid booking and payment having been made. This is in order that you can be satisfied that the accommodation booked meets with your approval.*

2. that the question of compensation for the alleged lack of cooking facilities etc will be on the basis of receipts produced for takeaway meals in the period 17th of August to the 4th of September inclusive, and that will be the full extent of compensation in that regard.

3 That you advise a removal today (your furniture and belongings being packed and stored by the removals company) such that I can give the removals company at least one weeks notice of the date of removal and I will also pay for extra storage time if required.

4. *That the right rent payments are brought up to date prior to me booking that removals company.*

14. The tenants responded to the Applicant on the same day:

1. *We do not have funds to pay upfront for emergency accommodation. We have made additional inquiries and the provider will accept the payment from you via BACS We also asked about the eventual extension of the accommodation beyond the 1st of November, and the provider asked for payment of another month upfront, which will be refunded if the accommodation is not needed after the 1st of November. Alternatively, transfer the funds to our account. The provider accepted £2750 per month after a considerable amount of haggling. The payment should therefore be 5500 pounds.*

2 We have answered this question yesterday and three times before yesterday already. The enforcement officer wrote to you three times regarding this matter. We accepted the council's recommendation and your offer of £60.00 per day. The answer is still the same. Including today, the amount we are claiming is £2040 pounds

3. We answered this question yesterday and three times before yesterday. We will move once the work schedule is approved by the council and accommodation secured. See number one above. The date has never been for us to decide. We cannot move out without knowing the accommodation and storage of our belongings are secured and that the repairs that will be undertaken are carried out by a professional company in a professional manner. This was our line since 19th of August when we realised that you are doing everything you can to avoid repairing obligations.

4. *Your repairing obligations do not have anything to do with the rent. We've already written to you: you are free to take action as you see fit.*

15. There was then a further email from the tenants dated the 23rd of September 2019:

> *Dear landlady further to our emails hereunder, The accommodation provider was in touch today to ask whether we are going ahead with the reservations from the 1st of October. Unless we confirm it today, they will not be able to keep the provisional booking they made. Therefore please let us know will you pay for this accommodation, or will you source our emergency accommodation yourself. In anticipation of the reservation your moving company is welcome to contact us directly to arrange a quote for you. Our number is 07739776265 or they can email us to make the appointment.*

16. The applicant's daughter replied stating the following:

> *Thank you for your email today. I can only refer you mine of last Friday setting out or without prejudice compromise. I cannot enter into further correspondence until I have consulted with my mother solicitors on Wednesday this week.*

17. The following day the council notified the Applicant's daughter that further cracks had appeared in the ceiling in living room following rain on the previous Saturday and Sunday and they were visiting to gather more evidence.

18. On the 1st of October 2019 the applicant's solicitors Paul Robinson solicitors wrote to the tenants making a further attempt to arrange the decanting of the property. Amongst other things the letter stated the following:

> *The final issue to be considered then relates to alternative accommodation during the course of works to be undertaken. Our client has previously offered to you hotel accommodation but you have indicated that for health reasons you are unable to accept their accommodation. Please can you confirm the health reasons that would prevent you from being able to use hotel accommodation during the course of any works, So that this can be appropriately taken into account by our client .*
>
> *Whilst you have also sourced alternative accommodation, the cost of which are high, amounting to approximately £2750 per month; and whilst our client is not adverse to you being housed in such accommodation ; Our client is concerned that if the payment is made in advance of approximately £5500 to cover the period during the course of which the works would be undertaken, that you may not leave leaving our client substantially out of pocket.*
>
> *Our client therefore would like some agreement to be entered into in writing in advance, whereby you agree that you will vacate the premises to enable the works to be undertaken, following which our client will happily make the payment in respect of the alternative accommodation. This is of course subject to you providing your*

indication as to why your health issues would prevent you from being able to reside within a hotel.

Finally , we would ask you to note , that whilst there would be an entitlement to compensation in respect of your requirement to be rehoused, and indeed in relation to the alternative catering requirements which are being provided; Equally, you have not been requested to pay rent at this time, and indeed you have not paid rent; and if you are not able to take the step of utilising the kitchen, equally you will not have been required to purchase any food, which leaves you with financial benefit.

In respect of any claim to be advanced therefore , there would be a requirement to pay some rent for the rooms that you continue to use, albeit our client acknowledges that this will be reduced for the full value of the rent, and indeed any reduction could well be substantial. Whilst our client is not therefore asking you make payment of any rent in connection with the property at this time, as some rent would be due and payable, any rent that would be due and payable can be deducted from any overall settlement that may be achieved, in respect of your losses during the course of works undertaken. Equally the fact that you are not able to carry out a normal food shop leaves you with a financial benefit, which would also be deducted. We ask you to note that we are not considering that these would necessarily have a significant impact, but equally there will be an impact, and therefore details of your average weekly shop must be provided, together with evidence that this sum is no longer being incurred.

.....

Our client's ultimate intention in respect of this matter generally is to have the repair works undertaking at an early opportunity. It is clearly to neither party's advantage for the works to be delayed to this extent, particularly as you have indicated that they are causing such substantial disruption to your home. We would therefore be grateful if you could consider the content of this letter with a view to providing information requested at an early opportunity, to enable works to be completed as soon as possible. To that end we would look forward to hearing from you in respect of matters generally.

19. The Tribunal is of the firm view that it was up to the Applicant to take the initiative and ensure that the tenants could be moved so that the work could be carried out. They chose instead initially to make virtually impossible demands on the tenants by requiring them to pay upfront for moving out of accommodation when they'd been told that they could not afford to do this. It was for the landlord to facilitate the temporary rehousing of the tenants. The applicant refused to do this. It is recognised that the tenants we're not easy to manage but it is repeated that this does not justify the landlord failing to comply with their basic responsibilities. The letter from the Applicant's solicitors did not take matters forward. Whilst the expressed intention was to get the repair works done as soon as possible the letter raised a whole raft of issues for the tenants to deal with before they would be moved. This was the wrong approach. The landlord was not in a bargaining position . She had to move the tenants to carry out works required by the Respondent Authority under the threat of an Improvement Notice. The tenants were willing to move and found a property to move to. The responsibility for the delay in addressing the work does not rest with the tenants as alleged it rests with the Applicant herself.

20. Thereafter the notice was served and as already indicated the Applicant opposed the notice and sought this appeal.

Post notice developments

21. There followed an extraordinary amount of "toing and froing" between the Applicant and the Respondent authority .It is not the intention of the tribunal to go through this background because it is largely irrelevant to the question of whether the original improvement notice was valid. Suffice to say that the Respondent authority initially altered their view as to the status of the premises as an HMO and then reverted to their original view that the premises were indeed an HMO. In addition the Applicant carried out works in the premises which to all intents and purposes complied late with the original notice. The local authority most recently served a further draft notice involving fairly substantial works in the premises. This draft notice does not form part of our deliberations because it is not relevant to the question we are considering.

Decision

The appeal against the notice

22. The Tribunal have no doubt that the Improvement Notice was valid and justified. The works identified in the notice we're all reasonable and necessary. There was a question of fire safety in the premises. That plainly is an extremely important issue . Instead of complying with the notice and carrying out the work required the Applicant sought by various means to oppose it . Amongst other things the tribunal was concerned to note that the Applicant adopted a position to the effect that the cellar in the premises had been filled in and therefore there was no

need for fire safety provisions to be carried out. It transpired on inspection that this was not true . There was a void underneath the kitchen and fire safety works were necessary. The Tribunal is concerned that the Applicant did not seek to carry out her own proper inspections before adopting the stance she did.

23. All of the works contained in the notice were genuine and necessary and the notice should have been complied with. Instead of doing this and seeking to facilitate the early decant of the tenants the Applicant adopted a uncooperative stance. This is clear from the detailed recital of events above. She basically failed to distinguish between her responsibilities as a landlord in terms of getting urgent repairs carried out quickly and the ongoing dispute with the tenants. The appeal against the Improvement Notice is dismissed.

Costs

24. The tribunal has already indicated that the works in the Improvement notice were necessary even if the premises were not an HMO. Despite this the parties spent a lot of time arguing over the issue. The matter was not assisted at all by the approach adopted by the Respondent authority . Instead of carrying out investigations at the start of the case which would have allowed them to indicate the reasons why they had arrived at a conclusion that the premises were an HMO, namely evidence concerning the building standards adopted when the premises were converted, they altered their position on the basis of inadequate information on two occasions. This added to the delay and cost of the proceedings.

25. Whilst the Respondent Authority has been successful to the extent that this appeal is dismissed the tribunal is disinclined to award costs on the basis of the Applicant's

unreasonable behaviour because of the Respondents' own conduct in relation to the HMO issue.

Summary

The appeal is dismissed and there is no order as to costs.

Name: Judge Jim Shepherd **Date:** 26 January 2021

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case. The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit. The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking. If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).