



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : CHI/29UH/HIN/2022/0004

Property : Flat 2A, 2-3 Beach Rise, Westgate-on-Sea,
Kent CT8 8AB

Applicant : Kinara Homes Ltd

Representative : Tomes Homes Group

Respondent : Thanet District Council (Private Sector
Housing)

Representative :

Type of Application : Appeal against an Improvement Notice

Tribunal Members : D Banfield FRICS (Chair)
Ms A Clist MRICS
Mrs J Herrington

Date of Decision : 31 August 2022

DECISION

The Tribunal dismisses the Appeal and confirms the making of an improvement notice subject to a modification to the timescale for completion which shall be three months from the date of this decision.

The Tribunal further determines that the provision of high retention storage heaters throughout the property is both reasonable and practicable.

The Application

1. The Applicant seeks to appeal an Improvement Notice issued by Thanet Borough Council on 28 January 2022. The application was received on 18 February 2022.
2. The appeal relates to the Category 1 Hazard “Excess Cold”. The Applicant stated that “Whilst we are in agreement that some improvements are to be made, we do not agree that we are legally obligated to provide storage heaters in every room of the property. We are currently working with a government funded scheme for tenants who are living in fuel poverty. Under their guidelines, they base the number of storage heaters they provide according to the measurements of the property. In most cases, only one storage heater is required to be in line with EPC guidelines. We have been advised by TDC that they require storage heaters in every room based on their own guidance and calculations. We have not been provided with any evidence of legal legislation around this”
3. The application describes the property as a 2 bed lower ground floor flat within a converted block.
4. The Tribunal made Directions on 15 June 2022 for the conduct of the application leading to the preparation of a hearing bundle for use at the subsequent oral hearing on 16 August 2022.
5. References to page numbers in this Decision are shown as[x].
6. The Applicant holds the freehold to the building which is registered with title absolute since 24 May 2021 under title number K416883. [25]

The Respondent’s statement of case

7. In the Respondent’s statement of case[15] it was explained that a Service Request Form from the occupier referred to detailed housing conditions including “ *damp and mould growth, cold and cost a lot of money to maintain*”
8. The property was inspected on 12 January 2022 using the Housing Health and safety Rating System (HHSRS). The premises were described as having 4 bedrooms of which 2 were ensuite, a living room, kitchen, bathroom, utility room, rear garden and use of rear communal garden situated in a pre-1919 four-storey building converted into flats.
9. It was noted that the building is of solid wall construction with external render, uPVC double glazed windows. There were uPVC double glazed doors to a living room and two rear bedrooms. There was a flat roof over the rear left and middle left bedrooms which may or may not have been insulated. Some indeterminate works to the internal walls.

10. There was no fixed space heating in the front and middle right bedrooms. The rear right bedroom has a working Rointe Series K electric heater and a similar but unfixed heater in the rear left bedroom. There were two Blyss Madison wall hung electric fireplaces in the living room and a towel rail in the main bathroom. Water is heated by a Santon Premier Plus Unvented Hot Water System. The EPC rating is F [32]
11. A full HHSRS assessment was carried [66] out on 12 January 2022 with reference to the Operating Guidance issued by the Office of the Deputy Prime Minister particularly the Excess cold hazard profile [38]
12. The narrative on the inspection details [67] referred to “The likelihood of the premises becoming unhealthily cold is significantly increased due to the absence of heating provision in two bedrooms, the provision of unaffordable heating in the living room and two bedrooms and the defective bathroom towel rail which does not adequately heat the room. Room temperatures below 16 degrees Celsius are associated with increased health risks, particularly those relating to respiratory and cardiovascular conditions” The resultant score was shown as 10,234.00 Band A.
13. The Upper Tribunal case of Liverpool City Council vs Hadi Kassim [2012]UKUT169 (LC) HA/3/2011[43] it was determined that the running cost of heating is relevant to the HHSRS assessment.
14. Table 1 [17] showed the estimated fuel costs compiled by the Energy Saving Trust of Gas, Electricity (off peak economy 7) On peak economy 7 and standard rate. The table showed that off peak economy 7 was significantly lower than standard rate.
15. Following the assessment the Respondent issued an Improvement Notice dated 28 January 2022 identifying the Category 1 hazard of Excess Cold together with other Category 2 Hazards not challenged in this application.
16. The Improvement Notice indicates that the property currently has “an unfixed electric panel heater in the rear left bedroom making it unsuitable for use. There is a fixed electric panel heater in the rear right bedroom and there are two fixed electric fireplaces in the living room.”
17. The Officer’s assessment was that;
 - “There is an absence of heating provision in the front right and centre left bedrooms. There are panel heaters in the rear left bedroom, living room and centre right bedroom which are powered using a standard rate electricity which is significantly more expensive than solid fuel and off-peak economy 7 electricity therefore the inability to afford to use the heating system could further lead to unhealthy cold temperatures during cold weather. The bathroom towel rail felt lukewarm.

- The absence of heating provision and lack of affordable heating throughout the premises as well as the defective heater in the bathroom make it difficult to maintain a healthy indoor temperature of 21C, and it increases the risk of temperatures dropping below 16C within the premises during cold weather. Room temperatures below 16C are associated with increased health risks, particularly those relating to respiratory and cardiovascular conditions.
18. Ms Adlam said that the current heating system in the property was both inadequate and uneconomic. Ms Adlam referred to the poor EPC rating of F [33] and that the EPC inspector had recommended high heat retention storage heaters at a cost of £2,000-£3,000.
 19. The remedial works specified in Schedule 2 [85] were to remove the two panel heaters and install “a suitable and sufficient fixed space heating installation capable of economically heating all rooms to a temperature of 21 degreesC throughout the year. The installation provided must be fit for purpose, available at all times, and be affordable for and controllable by, the occupier of the premises.” The guidance provided indicated that a gas-fired central heating system was the preferred option or, if gas was not available, appropriately sized electric storage heaters. The installation was specified to be completed by 24 May 2022.
 20. Following a re-visit the Respondent revoked the Notice dated 28 January and issued a revised Improvement Notice on 23 February 2022. There was no change to the Excess Cold requirements, but the completion date was amended to 15 June 2022.

The Applicant’s Reply

21. In the Applicant’s reply [109] it is acknowledged that there is a requirement for heating upgrades and they have been trying unsuccessfully to liaise with the tenant to start the process. Whilst some level of storage heating will be required the Applicant is not satisfied that it is required in every room.
22. The hearing of the Upper Tribunal case Liverpool City Council vs Anwar Hadi Kassim [43] stated in paragraph 3 of the decision, “20. The tribunal considered the Guidance and concluded that, whilst it is a laudable objective, nowhere is there any requirement in paragraphs 2.19 to 2.23 of the Guidance headed ‘Preventative measures and the Ideal’, that any space heating system should be affordable. There is a requirement that it be efficient.” Whilst it states on Paragraph 4 of the decision permission to appeal was approved on the basis that “the proposed appeal raised an important issue as to whether, in considering enforcement action under the relevant sections of the Housing Act 2004, the Tribunal “must take into account the economic

effects of the parties' proposals, or the action taken, or to be taken to mitigate the relevant hazard”

23. We do not know whether the appeal took place and if it did, what the outcome was, therefore the only evidence we have from this tribunal is that in fact affordability does not need to be taken into account.
24. We always take advice on how many high retention storage heaters to install at a property from our EPC surveyor to ensure we are in line with government regulation as part of the Housing Act 2004, his advice in this instance is that we only require one high retention storage heater
25. We do not believe installation of gas heating is viable in this instance whilst the property is tenanted and as per regulations, we do not believe this required and is also not an affordable solution for to us as the Landlord.

The Hearing

26. The hearing was attended by Lucinda Brassey an employee of the Applicant and Stephen O'Shea for the Respondent. Witnesses were Lauren Adlam an Environmental Health Officer and Eve Lockton-Goddard a Home Energy Adviser both employed by the Respondent.
27. An agreed bundle of documents including the statements referred to above was admitted into evidence including the Respondent's statement of case prepared by Lauren Adlam [15], a witness statement by Eve Lockton-Goddard [108] and the Applicant's reply signed by David Wigram-Jones as a Director of Kinara Homes.[109].
28. Mr O'Shea called Ms Adlam who confirmed her statement of case.
29. In answer to the Tribunal's question Ms Adlam explained that the assessment of Excess Cold was derived from the average likelihood of a vulnerable person suffering harm as a result of cold homes. The national average as shown in a table at [39] indicated 1 in 330 as an average whereas her assessment of the likelihood for the subject property was 1 in 32. Applying this average to the other standard multipliers gave a total score of 10,234 meaning that it fell within Band A and was a Category 1 hazard which placed a duty on the Council to take enforcement action.
30. Ms Adlam explained that although the tables referred to the over 65s they are also relevant to other vulnerabilities such as economic deprivation.
31. Ms Adlam referred to the Liverpool City case which confirmed that affordability was a relevant factor in making an assessment and as such a heating system with the most affordable running costs was specified.

Although a gas fired central heating system was preferred and considered to be the most economical option for both landlord and tenant the installation of high heat retention storage heaters throughout was an acceptable alternative.

32. Ms Lockton-Goddard then explained the difficulties incurred by mixing storage heaters and panel heaters. The former was run on an off-peak tariff which although cheaper for night time consumption was significantly more expensive for consumption during the day. The occupier would not therefore be able to benefit from the more affordable tariffs available.
33. Ms Brassey asked the difference between high retention and ordinary storage heaters in reply to which Ms Lockton-Goddard said that the latter were being phased out and all new storage heaters were likely to be high retention.
34. In presenting her case Ms Brassey said that she agreed that upgrading was required but that she did not accept that there was a requirement for storage heaters in each room.
35. The EPC surveyor used had advised that one storage radiator was sufficient, and the provision of gas central heating was not affordable to the landlord.
36. In referring to the Liverpool City case Ms Brassey acknowledged that the Tribunal had said that affordability was an issue to be taken into account but that the outcome of the application was unknown and therefore not of relevance to the current application.

The Law

37. Part 1 of the Act provides for a system of assessing the condition of residential premises, and the way in which this is to be used in enforcing housing standards. It provides for a Housing Health and Safety Rating System (HHSRS) which evaluates the potential risk to harm and safety from any deficiencies identified in dwellings using objective criteria.
38. Local Authorities apply HHSRS to assess the condition of residential property in their areas. HHSRS enables the identification of specified hazards by calculating their seriousness as a numerical score by prescribed method. Hazards that score 1000 or above are classed as Category 1 hazards, whilst hazards with a score below 1000 are classed as Category 2 hazards.
39. Section 2(1) of the Act defines hazard as “*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 (whether the deficiency arises as a result of the construction of any building, an absence of maintenance or repair, or otherwise)*”.

40. Section 2(3) provides “*regulations under this Section may, in particular, prescribe a method for calculating the seriousness of hazards which takes into account both the likelihood of the harm occurring and the severity of the harm if it were to occur*”. Those regulations are the Housing Health and Safety Rating System (England) Regulations 2005.
41. Under Section 5 of the Act, if a Local Authority considers that a Category 1 hazard exists on any residential premises, it must take appropriate enforcement action. Section 5(2) sets out seven types of enforcement action which are appropriate for a Category 1 hazard. If two or more courses of action are available, the Local Authority must take the course which it considers to be the most appropriate. An Improvement Notice is included in the type of enforcement action that a Local Authority may take following identification of a Category 1 hazard.
42. Section 7 of the Act contains similar provisions in relation to Category 2 hazards. Power is conferred on a Local Authority to take enforcement action in cases where it considers that a Category 2 hazard exists on residential premises and those courses of action include in Section 7(2) service of an Improvement Notice.
43. Section 9 of the Act requires the Local Authority to have regard to the HHSRS operating guidance and the HHSRS enforcement guidance.
44. Sections 11 to 19 of the Act specify the requirements of an Improvement Notice for Categories 1 and 2 hazards. Section 11(2) defines an Improvement Notice as a notice requiring the person on whom it is served to take such remedial action in respect of the hazard as specified in the Notice.
45. Section 11(8) defines remedial action as action (whether in the form of carrying out works or otherwise) which in the opinion of the Local Authority will remove or reduce the hazard. Section 11(5) states that the remedial action to be taken by the Notice must as a minimum be such as to ensure that the hazard ceases to be a Category 1 hazard but may extend beyond such action. Section 12 of the Act deals with an Improvement Notice for a Category 2 hazard and contains similar provisions to that in Section 11.
46. An Appeal may be made to the Tribunal against an Improvement Notice under Paragraph 10, Part 3, Schedule 1 of the Act.
47. The Appeal is by way of a rehearing and may be determined by the Tribunal having regard to matters of which the Local Authority is unaware. The Tribunal may confirm, quash or vary the Improvement Notice. The function of the Tribunal on an Appeal against an Improvement Notice is not restricted to review of the Authority’s decision. The Tribunal’s jurisdiction involves a rehearing of the matter and making up its own mind about what it would do.

Discussion and decision

48. In this case the Applicant does not challenge the assessment of a Category 1 hazard but challenges the requirement to provide storage heaters to every room.
49. Excess Cold was identified in the Improvement Notice by the Respondent as a Category 1 hazard. Whilst acknowledging that the application of the HHSRS scoring system utilised by the Respondent is far from perfect and that such process has its limitations the Tribunal is satisfied from the evidence before it that the scoring process was reasonably and logically applied by the Respondent (which evidence was not disputed by the Applicant) and that the Respondent was correct to identify the lack of an appropriate heating system at the property as a Category 1 hazard. It is a hazard that could have a detrimental effect on a person from a vulnerable age group or suffering from health issues occupying the Property.
50. The Tribunal is satisfied that the remedial action required by the Respondent set out in the Improvement Notice is reasonable and its inclusion of the requirement for the installation to be affordable to the tenant is appropriate given the decision of the Upper Tribunal in Liverpool City Council vs Anwar Hadi Kassim paragraph 31 of which states;

In her witness statement, Ms Griffiths says this:

“If heating systems are prohibitively expensive to use, I consider that the occupants of the property will not use them or will restrict their use thus resulting in the effects of Excess Cold which the HHSRS is aiming to address”

This in my view properly identifies the potential relevance of the cost of running a heating system. An occupier could be deterred by cost from using a heating system by the cost of running it, just as he might be deterred from using it effectively by the difficulties of operating it. Whether he would be so deterred is a matter for the authority or, on appeal, the RPT. It is clearly a matter of potential relevance, in my judgment. I reach this conclusion independently of any consideration of the Guidance, but the Guidance is consistent with it. I should make clear also that the Guidance itself, contrary to what appeared to be the approach urged on behalf of the council, has no independent force. It is there to assist in the application of the statutory provisions.

51. Turning now to the requirements of the Improvement Notice of 23 February 2022. Given that the Tribunal has determined that affordability to the tenant must be taken into account and accepting Ms Lockton-Goddard’s evidence that a mixture of storage and panel heaters would not permit the tenant to benefit from the lower cost of off peak electricity the Tribunal determines that only a gas fired central heating system or the installation of high efficiency storage heaters throughout and meeting the Housing Authority’s satisfaction is likely to eliminate the hazard of excess cold.

52. It is the Applicant's choice which of the two options to provide but whichever system is chosen it must be capable of providing heat to all rooms within the property.
53. Although the other elements of the Improvement Notice dated 23 February 2022 have not been challenged the Tribunal confirms that the Category 2 Hazard assessments under Fire, Electrical Hazards and Falling on Level Surfaces are confirmed.

Whether an Improvement Notice Should be Issued?

54. The legislation is structured in such a manner that if a category 1 hazard is present on a property appropriate enforcement action must be taken to reduce the hazard. Where there are category two hazards there is discretion to take action to reduce the hazard.
55. The Tribunal finds that this property has one category 1 hazard and three category 2 hazards. The Tribunal considers that the Respondent was justified in taking enforcement action against the category 2 hazards as well as the category 1 hazard, particularly as the two categories of hazard combined to give an overall view of the condition of the property.
56. The question, therefore, is whether the improvement notice was the most appropriate enforcement action to take in respect of the three category 1 hazards and the two category 2 hazards.
57. The Applicant had no comments on which type of enforcement action was appropriate. The Applicant broadly accepted the recommendations of the Respondent.
58. The Tribunal is satisfied that an improvement notice is the only realistic option to remedy the deficiencies in the property.
59. The final step to consider is whether the remedial works proposed by the Respondent in the improvement notice were reasonable and practicable. The Applicant's only objection was the extent and type of heating to be provided.
60. The Tribunal is not satisfied that the Applicant's proposal not to provide high retention storage heaters in every room would enable an acceptable level of heating to be maintained throughout this four-bedroom property.

Decision

61. **The Tribunal dismisses the Appeal and confirms the making of an improvement notice subject to a modification to the timescale for completion which shall be three months from the date of this decision.**

62. **The Tribunal further determines that the provision of high retention storage heaters throughout the property is both reasonable and practicable.**

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.