FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AX/HIN/2020/0008 & LON/00AX/HIN/2020/0009**
Property	**:**	**66 Motspur Park, New Malden KT3 6PJ**
Applicants	**:**	**Saad Hindosh and Tara Gabriel**
Representative	**:**	**None**
Respondent	**:**	**The Royal Borough of Kingston Upon Thames**
Representative	**:**	**Kingston and Sutton Shared Environment Service**
Type of Application	**:**	**Appeal against an improvement notice under paragraphs 10-12 of Schedule 1 to the Housing Act 2004**
Tribunal Member	**:**	**Judge P Korn**
Date of Decision	**:**	**11th May 2020**

DECISION

Description of hearing

This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was **P**. A face to face hearing was not held because it was not practicable and the issues could be determined on paper. The documents to which I have been referred are in a series of electronic bundles, the contents of which I have noted. The order made is described at the end of these reasons.

Introduction

1. The Applicants are appealing against the terms of an improvement notice ("**the Improvement Notice**") served on them in relation to the Property, the appeal being made pursuant to paragraphs 10-12 of Schedule 1 to the Housing Act 2004 ("**the 2004 Act**").

2. The Improvement Notice requires the Applicants to carry out certain works by a certain date. The Applicants essentially argue that they cannot carry out those works by the specified date as the works cannot be carried out without first obtaining vacant possession, which they have been trying to do but have not yet succeeded in doing.

Applicants' case

3. The Applicants granted a tenancy of the Property to a third party under an Assured Shorthold Tenancy Agreement for a fixed term of 24 months from 1st July 2018 to 30th June 2020.

4. On 10th May 2019 the tenant reported a possible water leak from the cloakroom basin which is sunk into the wall, and the Applicants then arranged for a British Gas Engineer to attend the Property on 13th May 2019 to inspect and repair if necessary. The British Gas Engineer inspected but could find no leak and advised the tenant to monitor the position.

5. On 3rd July 2019 the Property suffered from a more serious water leak. The tenant reported the incident and the Applicants immediately instructed British Gas to investigate and to fix the leak. The leak was fixed on 8th July 2019, the source having been traced to an area below the floorboards in the utility room which is used by the tenant and his family as a study. This leak had caused damage and dry rot in the Property as certified by EDT Surrey Ltd, whose report is included in the bundle of documents.

6. The Applicants also reported the matter to their insurer who then instructed a loss adjustor to facilitate the necessary repair works. The loss adjustor visited the Property and, following a survey by a specialist flooding restoration company, he advised that the Property must be vacant to allow the works to be carried out safely. The Applicants tried temporarily to relocate the tenant to allow the works to be completed, and a total of 18 properties were offered to the tenant by the relocation company appointed by the insurer.

7. The tenant was not prepared to vacate and the Applicants already had other concerns about unauthorised works carried out by the tenant. The Applicants therefore felt that they had no option but to bring possession proceedings, which they commenced by serving a notice on the tenant on 26th July 2019 pursuant to section 21 of the Housing Act 1988. This was followed by the issuing

of a formal claim on 3rd October 2019 at the Kingston Upon Thames County Court under claim reference number F01KT855. There have so far been two hearings and the third hearing has been postponed due to COVID-19.

8. The Applicants argue that their actions show that they are clearly committed to repairing the damage and that therefore there was no need for the Improvement Notice, which was served on them on 20th February 2020. The insurers, the loss adjustor and Mr Hindosh himself (who is an experienced architect) are all of the opinion that works cannot be carried out while people are in occupation of the Property. Furthermore, in an attempt to deal with the matter without fully depriving the tenant of the right to occupy, the Applicants served a notice on the tenant to gain access to the Property to start the repair works on 22nd February 2020, but the tenant refused to allow access. They then issued a second notice requiring access on 29th February 2020 but again this was refused.

9. In addition, from the date of the water leak incident onwards the Applicants have been in continuous contact with Kingston and Sutton Shared Environmental Services.

10. The Applicants question the validity of the Improvement Notice which they state should only have been issued if the Applicants had failed to take any action and/or had not shown any commitment to repair the Property. In addition, the Respondent should not have issued the Improvement Notice when it was aware that the Applicants were actively trying to obtain vacant possession through the court.

11. As regards the timescale for the works, the Applicants do not accept that the works can be carried out within 2 months. In addition, the presence of the COVID-19 virus makes it hard to ascertain when work could start.

12. The Applicants believe that the Respondent's hazard calculations are inaccurate as they do not take into account the fact that the damage is limited to non-habitable areas. The Applicants go on to state that other areas may have been affected but that full exposure would be required to ascertain this. They add that the calculations also do not take into account the fact that all the habitable ground floor rooms are covered with high quality underlay and thick timber flooring preventing any dampness (if present) to pass through. The calculations also refer to excess cold at the Property when the rooms affected by the damage are non-habitable.

Respondent's case

13. On 5th August 2019, the Respondent wrote to the Applicants informing them that it had been notified of defects at the Property. The Respondent stated that if the works were not completed within a reasonable period of time a further

letter would be sent detailing a proposed inspection date and time under the provisions of section 239 of the 2004 Act. Following any such inspection enforcement action might be taken if considered appropriate. Therefore, the Respondent made it very clear to the Applicants from the start that formal action could be taken if the works were not completed within a reasonable period of time.

14. In response, the Applicants informed the Respondent that they were aware of the water leak, had already inspected the Property and were ready to appoint a specialist company to carry out the restoration works. They added that the tenant and his family could not remain at the Property while the work was being undertaken, due to health and safety reasons. They also stated that they were offering the tenant suitable alternative temporary accommodation options but that the tenant was insisting on remaining at the Property during the repair work.

15. On 16th August 2019, the Respondent's officer made an informal visit to the Property in order to assess its condition. During this visit, the tenant stated that he would be happy to vacate the Property if alternative accommodation was provided. As both the Applicants and the tenant were showing interest in resolving this matter by working together, the Respondent decided not to take any formal action at that time.

16. On 4th November 2019, following an email from the tenant, Mr Nasser Ahmad of Kingston and Sutton Shared Environment Service spoke to the tenant over the telephone, and the tenant asserted that the Applicants were not serious about providing alternative accommodation. According to the tenant, when he accepted one of the offers of accommodation the Applicants simply did not go through with the process, although Mr Ahmad notes that the Applicants' version of events is that there was no response from the tenant to the offer of accommodation. Then, on 29th December 2019, the Applicants offered the tenant and his family hotel accommodation for the period 6th January 2020 up to the court hearing date on 28th January 2020, but the tenant rejected this offer on the basis that he had been told that it would take 6 months to complete the repairs and he was unclear where he and his family were meant to stay after 28th January.

17. As no progress had been made through the informal approach, and the condition of the Property was reported to be getting worse, the Respondent decided to carry out a formal inspection of the Property on 11th February 2020 under Section 239 of the Housing Act 2004. The Property was assessed as having category 1 hazards; Damp and mould (No.1) and Excess cold (No.2). Under the 2004 Act, if on such an inspection the local housing authority considers that a category 1 hazard exists, section 5 imposes on it a duty to take the appropriate enforcement action. Section 5(2) sets out the various courses of action available to the authority including the service of an Improvement Notice. On 20th February 2020, the Respondent served an Improvement Notice on the Applicants.

18. In the absence of any progress, the Respondent felt that it had no alternative but to serve an Improvement Notice as it believed that a formal Improvement Notice was the best course of action to ensure the works were undertaken within a specified time frame. Indeed, on 20th February 2020, following the service of the Improvement Notice, Mr Hindosh stated in an email to the case officer that he agreed with the Respondent that there was a category 1 hazard at the Property.

19. The Respondent agrees with the Applicants that the damage from the underfloor water leak is limited to the ground floor area only, but the tenant's family uses the ground floor reception room as a bedroom. This is also confirmed by the Applicants' contractors' report. The most vulnerable age group affected by Damp and mould (No.1) hazard are persons aged 14 years or under who normally spend a large proportion of the day in their bedrooms, both because that group typically requires 9 to 14 hours sleep per day and because bedrooms are often also used for homework (see Housing Health and Safety Rating System Operating Guidance 2005), and the tenant has a 13 year old child who falls into this category. The kitchen and dining room are also located on the ground floor where the tenant and family are likely to spend a considerable part of their day.

20. The mental and social health effects of dampness and mould should also not be underestimated. Damage to decoration from mould or damp staining and the smells associated with damp and mould can cause depression and anxiety. Feelings of shame and embarrassment can lead to social isolation (Housing Health and Safety Rating System Operating Guidance 2005). It would also be incorrect to assume that just because the structural damage is limited to the ground floor areas the health effects of the hazards are also limited to the ground floor areas. Both the detritus from house dust mites and mould spores are potent airborne allergens. Persistent dampness and microbial growth on interior surfaces of a property can lead to adverse health effects. Similarly, the source of Excess cold (No.2) hazard at the ground floor is likely to be affecting the overall temperature in the Property. The structural thermal insulation in the dwelling has been compromised due to substantive damage to the flooring on the ground floor. The dampness is further exacerbating the conditions and becoming a source of heat loss. Therefore, it is difficult with these current conditions to prevent heat loss and maintain a healthy indoor temperature during winter.

21. The Respondent did take into account all of the variables before finalising its HHSRS calculations, otherwise the score would have been much higher. The HHSRS calculations are included in the bundle and a copy of the HHSRS calculations was sent to the Applicants on 25th March 2020.

22. The Respondent states that it is not suggesting that the works could only be carried out whilst the tenant and his family are in occupation, and in making this statement it quotes Schedule 2 of the Improvement Notice as requiring the following: *"Provide a specialist report from a suitably qualified contractor on the condition of the underfloor water leak, flooring and walls with respect to*

dampness. The report shall identify the faults causing the dampness and make specific recommendations for treatment, a copy of the report shall be forwarded to the Case Officer. The treatment shall be undertaken in accordance with the report findings". The Applicants are claiming that the Respondent advised the tenant to remain at the Property but this is not the case.

Relevant statutory provisions

23. *Housing Act 2004*

Schedule 1, Part 3

10.

(1) The person on whom an improvement notice is served may appeal to the appropriate tribunal against the notice.

15.

(1) This paragraph applies to an appeal to the appropriate tribunal under paragraph 10.

(2) The appeal – (a) is to be by way of a re-hearing, but (b) may be determined having regard to matters of which the authority were unaware.

(3) The tribunal may by order confirm, quash or vary the improvement notice.

Analysis

24. The Applicants accept that there exist category 1 hazards at the Property and they also accept that these hazards need to be remedied. They do, though, question the Respondent's scoring of the hazards, thereby implicitly challenging the degree of seriousness and urgency.

25. Having considered the evidence, I am satisfied that the Respondent has gone through the necessary steps prior to issue of the Improvement Notice and that the Respondent has also been through a proper process in assessing and scoring the hazards in question. Its evidence is detailed and persuasive, and there is no persuasive reason on the basis of the evidence to doubt Mr Ahmad's professionalism or competence in scoring the hazards. The Applicants have raised various objections to the Respondent's analysis and/or methodology, but I am satisfied that these objections are satisfactorily answered by the Respondent's responses.

26. As the Respondent notes, if it considers that a category 1 hazard exists it is under a statutory duty to take the appropriate enforcement action. Section 5 of the 2004 Act envisages the possibility of various forms of enforcement action, one of which is the service of an improvement notice.

27. It was open to the Applicants to argue that a different form of enforcement action would have been more appropriate, but they have not done so. Instead, they have merely argued that an improvement notice should not have been served, seemingly on the basis that the Applicants were already doing all that they reasonably could to remedy the defects. Having considered the factual evidence I am satisfied that, in principle at least, serving an improvement notice on the Applicants was the most appropriate enforcement action in the circumstances. A mere hazard awareness notice, for example, would have been insufficient as – to the extent that remedial works can safely be carried out – they need to be carried out as soon as practicable.

28. This brings me to the question of whether the works can in fact reasonably be carried out within the timescale envisaged by the notice. Whilst the Applicants claim that they were given 2 months within which to carry out the works, they were in fact given 3 months, and the evidence indicates to me that this would have been sufficient time in which to complete the works in circumstances of vacant possession. However, unless the position has changed since the date of the Applicants' last written submissions, the Applicants do not currently have vacant possession.

29. I turn now to the evidence on the vacant possession issue itself. First of all it should be noted that, whilst the tribunal and the parties all satisfied themselves that – in the context of the COVID-19 epidemic – the appropriate and proportionate way of dealing with this case was for it to be decided on the papers alone, it follows that there has been no opportunity to cross-examine the parties on their witness evidence. In addition, there is no witness statement from the tenant, and therefore I am forced to form a view on the actions and the position of the tenant via the respective written submissions on the part of the Applicants and the Respondent.

30. Having considered the available evidence, I am persuaded that there is significant doubt as to whether the works required by the Improvement Notice can safely and properly be carried out whilst the tenant and his family remain in occupation. I also note that, in his witness statement, Mr Ahmad states that he is not suggesting that the works could only be carried out whilst the tenant and his family are in occupation and that, in making this statement, he quotes Schedule 2 of the Improvement Notice as requiring a specialist report from a suitably qualified contractor to identify the faults causing the dampness and to make specific recommendations for treatment, with the treatment to be undertaken in accordance with the report's findings. This is a somewhat ambiguous submission on Mr Ahmad's part, but it appears to constitute a concession that a specialist contractor could well recommend that the works only be carried out on obtaining vacant possession and that – if that were to be the recommendation – the Applicants should follow it. What is unclear, though,

is whether the Respondent is or might be conceding that the advice already obtained by the Applicants could constitute such a specialist recommendation.

31. As regards the steps so far taken by the Applicants to obtain vacant possession, there are competing narratives as to what has happened, including as to whether the Applicants' offers of alternative accommodation have been genuine, and as noted above I do not have any real direct evidence from the tenant. However, on the basis of the evidence that I have seen, I consider on balance that the Applicants have taken reasonable lawful steps to try to obtain vacant possession.

32. The above points lead me to the conclusion that it was right for the Respondent to serve an Improvement Notice on the Applicants but that the wording of the Improvement Notice does not give sufficient credence to the proposition that it may not be practicable to carry out the works whilst the tenant and his family remain in occupation. Therefore, in my view, the Improvement Notice needs to be varied so that if the specialist report required by paragraph 1 of Schedule 2 concludes that the recommended treatment works cannot reasonably be carried out without first obtaining vacant possession, then the obligation to carry out the works will be suspended until vacant possession for the anticipated duration of the works has been obtained. At the same time, though, the Applicants need to be obliged to use all reasonable endeavours lawfully to obtain such vacant possession as soon as reasonably possible.

33. As regards the obtaining of the specialist report itself (if it is not already available), I consider one month to be sufficient time to obtain this, even in the circumstances of COVID-19, as the category 1 hazards do still need to be dealt with as soon as reasonably possible. I consider 3 months to be a sufficient amount of time for the carrying out of the works themselves, subject to the point about vacant possession.

34. Accordingly, the Improvement Notice is hereby varied as set out below.

Order

35. The Improvement Notice is hereby varied so that Schedule 2 now reads as follows:-

	Hazard	**Remedial action required to remove or reduce the hazard**	**Period within which the remedial action must be completed**
1.	Damp and mould	1. Provide a specialist report from a suitably qualified contractor on the condition of the underfloor water leak, flooring and walls with respect to dampness. The report shall identify the faults causing the dampness and make specific recommendations for	By 11/06/2020

		treatment. A copy of the report shall be forwarded to the Case Officer. 2. Undertake treatment in accordance with the findings of the specialist report referred to above and, upon completion, forward a copy of the guarantee to the Case Officer. 3. Appoint a competent contractor to repair / replace the damaged flooring on the ground floor. Leave the whole sound, stable and damp-proof upon completion. Reference should be made to the Building Control Officer. 4. Treat the mould-affected wall and ceiling surfaces on the ground floor. Wash down the mould-affected surfaces using a Health and Safety Executive (HSE) approved fungicidal solution. After the first application allow the wall surfaces to dry before applying a second treatment. Allow to fully dry and redecorate the treated walls with paint containing an HSE approved fungicidal solution. 5. If the specialist report states that the treatment cannot reasonably be carried out without first obtaining vacant possession, to use all reasonable endeavours lawfully to obtain vacant possession for the duration of the works specified in this Schedule as soon as reasonably possible.	By 11/09/2020 or, if the specialist report states that the treatment cannot reasonably be carried out without first obtaining vacant possession, within 3 months after obtaining vacant possession As for 2 above As for 2 above As soon as reasonably possible
2.	Excess cold	As above	As above

Cost applications

37. No cost applications have been made.

Name: Judge P Korn **Date:** 11th May 2020

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. 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.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. 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.