



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

**Case Reference** : **BIR/OOFK/HIN/2020/0019**

**Property** : **232 Boulton Lane, Alvaston, Derby, DE24 0BB**

**Applicant** : **Ms Pauline O'Connor**

**Respondent** : **Derby City Council**

**Type of Application** : **Improvement Notice. Schedule 1, Paragraph 10, The Housing Act 2004.**

**Tribunal Members** : **Judge C. P. Tonge, LLB, BA.  
Mr A. McMurdo, MSc, MCIEH**

**Date of Decision** : **6<sup>th</sup> April 2021**

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**DECISION**

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## **Application and Background**

1. The Applicant Ms Pauline O'Connor is the owner of 232 Boulton Lane, Alvaston, Derby, DE24 088, "the property", having purchased the property in 2006. The tenant of the property is Kelly Wall who occupies the property along with three other members of her family. The property has been subject to two tenancies, with the present tenant being in occupation for between 9 to 10 years.
2. The Respondent, Derby City Council, served an improvement notice, dated 1 December 2020, upon the Applicant. The notice indicated that the Respondent had ascertained that there were seven category 2 hazards at the property, the nature of these hazards were, Falling On Level Surfaces, Excess Cold, Electrical Hazards, Damp And Mould, Structural Collapse, Collision And Entrapment and Personal Hygiene, Sanitation And Drainage. The notice was sent by first class post to the Applicant on 1 December 2020.
3. By an application, received by the Tribunal's administration office on 23 December 2020, the Applicant seeks to appeal to this Tribunal under paragraph 10 of Schedule 1 of the Housing Act 2004, "the Act", for a determination as to whether or not the Tribunal will quash, vary or confirm the improvement notice. The Applicant agrees that there were 6 areas in which hazards did exist but submits that it was not necessary to issue an improvement notice as she was willing to remedy the hazards, given sufficient time.
4. The application was copied to the Respondent by the Tribunal. In reply the Respondent gave notice to the Tribunal stating that it intended to oppose the Applicants appeal.
5. The Tribunal issued Directions on 6 January 2021, Direction 5 stating that due to the Covid 19 pandemic the Tribunal would not inspect the property, but would rely upon plans/colour photographs submitted by the parties.
6. Both parties have submitted evidential bundles that contain colour photographs of the matters that the parties wish to bring to the attention of the Tribunal.

## **Improvement Notice**

7. The improvement notice and the accompanying statement of reasons for the decision to serve that notice is a substantial document, but it is not necessary to go through the majority of the notice in detail because the Applicant has caused a quantity of remedial action to be completed at the property following service of the improvement notice. Due to this the Respondent is now willing to consent to the improvement notice being varied to delete the majority of the hazards and remedial action requirements.
8. As such, with the consent of the Respondent, the Tribunal will vary the improvement notice by deleting the hazards in the notice as follows:

- Falling On Level Surfaces, the first and third bullet points are deleted so that the only hazard that remains is an allegation that the flooring adjacent to the rear doors is unstable. It should be noted that the word "French" that appears in the remaining hazard as detailed on the improvement notice is also deleted because the door is not a French door.
  - Excess Cold is deleted in its entirety.
  - Electrical Hazards is deleted in its entirety.
  - Damp and Mould, the first two bullet points are deleted so that the only hazard that remains is an allegation that there is no mechanical extract ventilation in the bathroom.
  - Structural Collapse is deleted in its entirety.
  - Collision And Entrapment is deleted in its entirety.
  - Personal Hygiene, Sanitation And Drainage remains as alleged on the improvement notice. This alleged hazard contains three bullet points that in summary allege that the enamel on the bath is degraded and cannot be adequately cleaned. That the shower and enclosure are damaged beyond repair and require renewal and that there is a lack of adequate ventilation in the bathroom.
9. The notice requires that all remedial action is to be started by 4 January 2021 and be completed by 31 March 2021. Summarising the remedial action still required by the notice it is:
- Falling On Level Surfaces (an allegation that the flooring adjacent to the rear doors is unstable), remedial action, investigate the cause of the unsound flooring adjacent to the rear door and carry out repairs to ensure the floor is left in a sound condition.
  - Damp and Mould (an allegation that there is no mechanical extract ventilation in the bathroom), remedial action, to fit a dual speed extract fan ducted to external air and terminating in a louvered wall cowl and providing detailed particulars of the type of extractor to be utilised.
  - Personal Hygiene, Sanitation And Drainage (alleging that the enamel on the bath is degraded and cannot be adequately cleaned. That the shower and enclosure are damaged beyond repair and require renewal and that there is a lack of adequate ventilation in the bathroom). Remedial action, to renew the defective bath, shower and shower screen, leaving the bathroom in good order, sealing joints as required.

## **The Law**

### **The Housing Act 2004**

#### **CHAPTER 2 IMPROVEMENT NOTICES, PROHIBITION ORDERS AND HAZARD AWARENESS NOTICES *Improvement notices***

#### **Section 12 Improvement notices relating to category 2 hazards: power of authority to serve notice**

- (1) If—
  - (a) the local housing authority are satisfied that a category 2 hazard exists on any residential premises, and
  - (b) no management order is in force in relation to the premises under Chapter 1 or 2 of Part 4,the authority may serve an improvement notice under this section in respect of the hazard.
- (2) An improvement notice under this section is a notice requiring the person on whom it is served to take such remedial action in respect of the hazard concerned as is specified in the notice in accordance with subsection (3) and section 13.
- (3) Subsections (3) and (4) of section 11 apply to an improvement notice under this section as they apply to one under that section.
- (4) An improvement notice under this section may relate to more than one category 2 hazard on the same premises or in the same building containing one or more flats.
- (5) An improvement notice under this section may be combined in one document with a notice under section 11 where they require remedial action to be taken in relation to the same premises.
- (6) The operation of an improvement notice under this section may be suspended in accordance with section 14.

#### **PART 3 APPEALS RELATING TO IMPROVEMENT NOTICES**

##### **Appeal against improvement notice**

##### **Para 10**

- (1) The person on whom an improvement notice is served may appeal to a residential property tribunal against the notice.
- (2) Paragraphs 11 and 12 set out two specific grounds on which an appeal may be made under this paragraph, but they do not affect the generality of sub-paragraph (1).

##### **Para 14**

- (1) Any appeal under paragraph 10 must be made within the period of 21 days beginning with the date on which the improvement notice was served in accordance with Part 1 of this Schedule.

- (2) Any appeal under paragraph 13 must be made within the period of 28 days beginning with the date specified in the notice under paragraph 6 or 8 as the date on which the decision concerned was made.
- (3) A residential property tribunal may allow an appeal to be made to it after the end of the period mentioned in sub-paragraph (1) or (2) if it is satisfied that there is a good reason for the failure to appeal before the end of that period (and for any delay since then in applying for permission to appeal out of time).

### **Para 15**

- (1) This paragraph applies to an appeal to a residential property 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.
- (4) Paragraphs 16 and 17 make special provision in connection with the grounds of appeal set out in paragraphs 11 and 12.

### **Written Submissions**

10. Both parties have submitted extensive hearing bundles and additional bundles of such length that it is not convenient at this stage in the Decision to refer to them in any detail. The Tribunal will refer to them as and when it is convenient to do so in the remainder of this Decision.

### **The Hearing**

11. The remote video hearing commenced at 10.30 am on Wednesday 24 March 2021 and concluded at 3.20pm, the Tribunal then sitting in private to decide the issues in the case. The Applicant attended, accompanied by her sister. The Respondent was represented by Mr Darren Gelsthorpe, Senior Environmental Health Officer for the Respondent Council and their Solicitor Mrs Lucie Keeler.
12. The property is described in the Respondent's bundle as a semi-detached house with a living room, kitchen- dining room, three bedrooms and bathroom.
13. Having established the areas of the improvement notice that remain at issue the Tribunal heard evidence as to the whether or not it had been appropriate to issue an improvement notice at all.
14. The Applicant explained that she was unemployed and herself living in rented accommodation. The Applicant had received a rent for the property for approximately 10 years, receiving now £550 per month. However, The Applicant considered this to be a rent at lower than the average rent for a property of this type in Alveston, herself estimating that a proper market rent would be £675 to £695 per

month. The Applicant stated that she was of limited financial means such that completing the remedial action required was very difficult for her.

15. The Applicant stated that she had for some period of time intended to sell the property, but did not wish to do so with a sitting tenant. This had been delayed due to fact that she had agreed to delay action for possession of the property when asked to do so by a different department of the local authority. This request was made due to difficulties in the tenant and her family being re housed. The Applicant stated that she had discussed her financial difficulties with Mr Gelsthorpe who had indicated that it might be possible for the Respondent to complete the remedial action with the Respondent being refunded the cost of those works upon sale of the property. The Applicant thought that this discussion had been left with Mr Gelsthorpe indicating that he would get back to her on the point, but he had not done so. The Applicant thought that this way of dealing with the remedial action might cause her further problems with regard to the sale of the property.
16. The Applicant stated that she had always intended to complete the remedial action that the Respondent required, but needed more time than had been allowed. There had been additional complications in that the Applicant had been caused to wait for contractors to be available. Further, there had been a period when she had been required to wait whilst the tenant had been forced to self isolate because of Covid-19. In the opinion of the Applicant an improvement notice was not necessary. The Applicant has completed much of the work required.
17. The Respondent pointed out that the initial complaint to them had been made on 23 March 2020, from Ms Wall. This had resulted in a remedial action notice being issued on 26 March 2020 relating to smoke alarms at the property, issued under the Smoke and Carbon Monoxide Alarm (England) Regulations 2015. This had been complied with by fitting battery powered alarms.
18. The property had been inspected on 16 June 2020 and amongst other things the rear door aperture had been found to be unsafe. The Applicant arranged for the door area to be shored up and fitted insulation to the loft area, but did not otherwise appear to be dealing with the matters that had been identified to the Applicant as needing attention in a schedule of works. Extensions were granted for the work to be done, expiring in October 2020.
19. The property was again inspected on 23 October 2020. It was at the end of this inspection that Mr Gelsthorpe remembered there had been an informal discussion in which the possibility of the Respondent completing the remedial action had been mentioned. However, his evidence was that he had said that he would serve an improvement notice and that if the notice were not complied with the Respondent would complete the work required in default and then recover the cost of the works from the Applicant. Mr Gelsthorpe explained that it was much easier for the Respondent to recover the cost of itself dealing with remedial action if the landlord had first failed to complete the remedial action as required by the improvement notice. There is a second course of action that could involve the local authority

dealing with the remedial action without waiting for default of the improvement notice. This is via "action taken by agreement". Mr Gelsthorpe made it clear that this, "action taken by agreement" was not what he had in his mind and was not discussed. The Tribunal notes that the sequence of events as envisioned by Mr Gelsthorpe in waiting for default of the improvement notice did not take place, an appeal being raised against the improvement notice.

20. The Tribunal notes that Mr Gelsthorpe considered seven hazards with regard to the Housing Health and Safety Rating System Guidance (issued pursuant to section 9 of the Housing Act 2004). All seven hazards were rated at category 2 hazards. (Respondent's bundle, page 33 to 48.)
21. The Respondent referred to its bundle, page 49 to 53 "Most Appropriate Course of Action- Report". In this document Mr Gelsthorpe had considered the history of the case as described above and concluded that an improvement notice was the most appropriate course of action to deal with these seven hazards. The improvement notice was issued 1 December 2020.
22. The Applicant accepted that she had still not fully complied with the remedial action as required by the improvement notice.
23. The Tribunal moved on to hear evidence in relation to the alleged hazards that remain.
24. The first remaining issue, Falling On Level Surfaces (an allegation that the flooring adjacent to the rear doors is unstable), remedial action, investigate the cause of the unsound flooring adjacent to the rear door and carry out repairs to ensure the floor is left in a sound condition.
25. The Applicant described this hazard as being a slight springiness under the vinyl floor covering close to the rear door of the property. The Applicant stated that she had employed a contractor, County Damp, to deal with damp at the property and had asked that contractor to deal with this matter as well. The contractor had dealt with the damp and returned on a later day to deal with the floor. The Applicant had not been present during the visit in which the floor had been dealt with and so did not see what the contractor did, she did not know if any investigation had been made by pulling floor boards up to see what was underneath. The Applicant was told orally, at some point, that the contractor had decided that there was some packing under the floor board that had worn or fallen away and that all that was required was a nail through the board into the joist underneath. She had no written report in relation to this work.
26. Mr Gelsthorpe indicated that when he pressed on the floor next to the rear door with his foot the floor moved by about two inches downwards. He accepted that he miss described the door as French doors and that the floor covering was vinyl and not wood as he had initially believed. Never the less he stated that if an elderly person trod on this area of flooring, the downwards movement could cause a fall out of the

rear door, over the threshold involving a height of two bricks and onto concrete (an additional photograph was admitted during the hearing that shows the rear door to be a single door with windows on either side and a two brick rise at the threshold). Mr Gelsthorpe indicated that such a fall could cause serious injury and the hazard would remain a category two hazard on its own. In his opinion putting a nail into a floor board could not remedy the problem. The floor boards would have to be lifted for a full inspection of the joists.

27. Damp and Mould (an allegation that there is no mechanical extract ventilation in the bathroom), remedial action, to fit a dual speed extract fan ducted to external air and terminating in a louvered wall cowl and providing detailed particulars of the type of extractor to be utilised.
28. The Applicant stated that the electrician (who attended at the property on 19 December 2020, page 68 of the Applicant's bundle) had noted the two windows in the bathroom and had said that they provide sufficient ventilation for the bathroom. No extractor was necessary. The Applicant did not have a written report relating to this and was simply relying upon what had been said to her. The electrician's opinion had not been discussed with Mr Gelsthorpe.
29. The Applicant described the two windows. The larger window is partly shown in a photograph (Respondent's bundle, page 141), it is two to two and a half feet wide and the top part of the window opens. The second is off to the right hand side of the photograph, above the toilet and the top part of that opens and has dimensions of approximately one foot by eight inches.
30. The Respondent seeks to rely upon the Housing Health and Safety Rating System, Operating Guidance, Hygrothermal Conditions, 1 Damp and mould growth, paragraphs 1.21 and 1.22 (page 56 of the guidance, made pursuant to section 9 of the Housing Act 2004).
31. Paragraph 1.21 states, "The dwelling should be able to cope with normal occupant moisture producing activities without persistently high relative humidities. There should be provision for the removal of moisture laden air during peak production. This should include extraction during cooking and bathing, either by mechanical means, or passive stack ventilation....."
32. Paragraph 1.22 states, "There should be sufficient and appropriate means of ventilation to deal with moisture generated by normal domestic activities without the need to open windows....."
33. Mr Gelsthorpe stated that in his opinion an extractor should be fitted to the bathroom.
34. Personal Hygiene, Sanitation And Drainage (alleging that the enamel on the bath is degraded and cannot be adequately cleaned. That the shower and enclosure are damaged beyond repair and require renewal and that there is a lack of adequate



ventilation in the bathroom). Remedial action, to renew the defective bath, shower and shower screen, leaving the bathroom in good order, sealing joints as required. This hazard rating calculation takes into account the fact that Mr Gelsthorpe has concluded that the condition of the bathroom suite is such that it will put the tenant and her family off using it and that failure to bathe may result in harm through infection (Respondent's bundle, page 46).

35. The Applicant first made the point that the electric shower does work, it was checked by the electrician who issued the Domestic Electrical Installation Condition Report on 15 January 2021 (page 68 of the Applicant's bundle).
36. The Applicant agrees that the shower screen is damaged, initially this was to be repaired by the tenant (attachment 1 to the Applicant's second bundle received 3 March 2021). The Applicant has already instructed a workman to remedy this by fitting a new screen or a new shower curtain, whichever is considered to be most appropriate. The workman has already measured the job up, but the Applicant does not know if anything has been fitted yet.
37. The Applicant states that the bathroom suite is old and worn, but that it can be cleaned and can be used. It does not need replacing.
38. The Tribunal notes that there is a statement from the tenant, Kelly Wall (Respondent's bundle, pages 134 to 135.) There is no reference at all to the tenant and her family not wishing to use the bathroom facilities.
39. The Tribunal also notes that a photograph of the bathroom shows a towel on the side of the bath and bottles for use in this area on the window sill next to the bath and on a shelf above the bath (Respondent's bundle, page 46).

### **The Deliberations**

40. The Tribunal takes into consideration all the facts and circumstances in this case as described above. The Tribunal determines that it is satisfied on the balance of probability that it was reasonable, fair and just for the Respondent to issue this improvement notice on 1 December 2020. By that time eight months had elapsed between the initial complaint and issue of the improvement notice. The initial complaint was made on 23 March 2020 and although there had been some remedial work done as this case proceeded, the Tribunal is satisfied that the Applicant's lack of funds were such that the work would not have been completed within a reasonable time frame without an improvement notice. Indeed, some of the remedial work has still not been satisfactorily completed a year after the complaint was made.
41. The Tribunal now determines the issues relating to the three outstanding hazards.
42. Falling On Level Surfaces (an allegation that the flooring adjacent to the rear doors is unstable), remedial action, investigate the cause of the unsound flooring adjacent to the rear door and carry out repairs to ensure the floor is left in a sound condition.

43. Both parties agree that the floor just inside the rear door is unstable. They disagree about the level of that instability. The Tribunal has not been able to inspect and test the level of downward movement and neither party has taken the opportunity provided by Direction 5 to produce photographs demonstrating the level of deflection of the floor when pressure is applied. However, the Tribunal has no reason to doubt the expert evidence of Mr Gelsthorpe on this point. The Tribunal therefore determines that the floor has a flex of up to two inches when pressed with the foot. This could cause a fall in the circumstances as described by Mr Gelsthorpe. The contradictory evidence is in the form of hearsay evidence, not supported by any written report and not even discussed with Mr Gelsthorpe outside the Tribunal hearing.
44. The Tribunal agrees that this is a category two hazard as alleged in the improvement notice and confirms the remedy that is required in the notice.
45. Damp and Mould (an allegation that there is no mechanical extract ventilation in the bathroom), remedial action, to fit a dual speed extract fan ducted to external air and terminating in a louvered wall cowl and providing detailed particulars of the type of extractor to be utilised.
46. The Tribunal considers all the facts and circumstances as described above. The Tribunal accepts the opinion of Mr Gelsthorpe, supported as it is by the Housing Health and Safety Rating System, Operators Guidance, Hygrothermal Conditions, 1 Damp and mould growth, paragraphs 1.21 and 1.22 (page 56 of the guidance, made pursuant to section 9 of the Housing Act 2004). This is an expert opinion, based upon a calculation made under the Housing Health and Safety Rating System Guidance (issued pursuant to section 9 of the Housing Act 2004).
47. The Tribunal confirms the hazard as it appears in the improvement notice. However, the Tribunal notes that the suggested remedial action is such as to involve more cost than is necessary. The Tribunal accepts the Applicant's evidence that she is in financial difficulty and as such the Tribunal varies the remedial action so as to be sufficient to remedy the hazard, but at a reduced cost, removing humidistat and dual speed from the remedial action.
48. The Tribunal varies the remedial action to be: "Supply and fit a mechanical extraction fan capable of achieving an intermittent extraction rate of 15 l/s ducted to external air. If automatic controls are provided, a manual override will be necessary to allow the occupier to turn the extract on. The fan must meet the performance requirements of BS EN 13131-4. The fan should be installed as high as possible on the wall but not within 400mm of the ceiling. To be fitted following manufacturer's instructions. All wiring must comply with the relevant clauses of BS 7671 18th Edition. The works are also to comply with the relevant clauses of Approved Document F of the Building Regulations".

49. Personal Hygiene, Sanitation And Drainage (alleging that the enamel on the bath is degraded and cannot be adequately cleaned. That the shower and enclosure are damaged beyond repair and require renewal and that there is a lack of adequate ventilation in the bathroom). Remedial action, to renew the defective bath, shower and shower screen, leaving the bathroom in good order, sealing joints as required.
50. The Tribunal determines that it is satisfied by the Applicant's evidence as supported by the Domestic Electrical Installation Condition Report on 15 January 2021 (page 68 of the Applicant's bundle). The electric shower in the bathroom is working and is safe to use.
51. Mr Gelsthorpe seeks to rely upon very blurred photographs to establish that the enamel in the bath is pitted (Respondent's bundle, pages 142 to 144). The Tribunal determines that the photographs are so blurred as to be of no help in this regard.
52. The Applicant gives evidence that the bathroom suite, though old and tired is still capable of being cleaned and used. There is no evidence before the Tribunal to properly contradict this evidence. Adequate ventilation will be provided to this room by the remedial action required in paragraph 48 above.
53. Mr Gelsthorpe has assumed that the condition of the bathroom suite is such that it will put the tenant off using it. The Respondent has a statement from the tenant, but the tenant does not say this. In fact a photograph (Respondent's bundle, page 46) shows that on the contrary, the bathroom is in normal use. Mr Gelsthorpe bases his calculation of risk on a premise that is not supported by the evidence and it cannot be sustained. The Tribunal determines that it is fair and just to delete this hazard and its remedial action from the improvement notice.

## **The Decision**

54. For the reasons stated above, the Tribunal varies the improvement notice so that it now has only two category two hazards. These are as follows.
55. Falling On Level Surfaces (an allegation that the flooring adjacent to the rear doors is unstable), remedial action, investigate the cause of the unsound flooring adjacent to the rear door and carry out repairs to ensure the floor is left in a sound condition. The hazard and remedial action to remain as per the improvement notice.
56. Damp and Mould (an allegation that there is no mechanical extract ventilation in the bathroom), remedial action, to fit a dual speed extract fan ducted to external air and terminating in a louvered wall cowl and providing detailed particulars of the type of extractor to be utilised. The hazard to remain as per the improvement notice, but the remedial action to be varied to be "Supply and fit a mechanical extraction fan capable of achieving an intermittent extraction rate of 15 l/s ducted to external air. If automatic controls are provided, a manual override will be necessary to allow the occupier to turn the extract on. The fan must meet the performance requirements of BS EN 13131-4. The fan should be installed as high as possible on the wall but not

within 400mm of the ceiling. To be fitted following manufacturer's instructions. All wiring must comply with the relevant clauses of BS 7671 18th Edition. The works are also to comply with the relevant clauses of Approved Document F of the Building Regulations".

57. The dates upon which the remedial action must commence and be completed are to be calculated from the date that this Decision is sent to the parties.
58. This case has been dealt with under the restrictions imposed upon society by the rules made relating to the Covid-19 pandemic. As such it has not been possible for the Tribunal to inspect the property. The Tribunal is satisfied that the Tribunal has been able to deal with this case in a fair and just manner.
59. Appeal against this Decision is to the Upper Tribunal. Any party wishing to appeal has 28 days from the date that the Decision is sent to the parties to deliver to this First-tier Tribunal an application for permission to appeal. That application must state the grounds of appeal, particulars of those grounds, the paragraphs of the Decision that are appealed against and the result that the appellant seeks by raising the appeal.

Judge Tonge

Date 6<sup>th</sup> April 2021