FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AY/HIN/2021/0021**
Estate	:	**Dorchester Court (including Flats 1-96), Herne Hill, London SE24 9QY and SE24 9QX**
Applicant	:	**Manaquel Company Limited**
Representative	:	**Nik Isaac KC of Counsel, assisted by Richard Miller also of Counsel, instructed by Comptons Solicitors LLP**
Respondent	:	**The London Borough of Lambeth**
Representative	:	**Nick Ham of Counsel, instructed by Lambeth Legal Services**
Type of Application	:	**Appeal against an improvement notice under paragraphs 10-12 of Schedule 1 to the Housing Act 2004**
Tribunal Members	:	**Judge P Korn** **Mr A Fonka MSc FCIEH CenvH**
Date of hearing	:	**2 and 3 October 2023**
Date of Decision	:	**17 November 2023**

DECISION

<u>Description of hearing</u>

The hearing was a face-to-face hearing.

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<u>Decision of the tribunal</u>

The improvement notice which is the subject matter of this appeal is quashed in its entirety.

<u>Introduction</u>

1. The Applicant has appealed against the terms of an improvement notice ("**the Improvement Notice**") dated 20 October 2021 served on it in relation to the Estate, the appeal being made pursuant to paragraphs 10-12 of Schedule 1 to the Housing Act 2004 ("**the 2004 Act**"). The Improvement Notice required the Applicant to carry out certain specified works within various deadlines ranging from between 1 and 15 months from the operative date of 14 November 2021.

2. The Improvement Notice identifies, or purports to identify, hazards relating to (1) excess cold, (2) excess heat and (3) hot surfaces and materials, and it required the Applicant to undertake works to the Estate to address the same.

3. The Applicant is the freehold owner of the Estate, which comprises 8 separate blocks containing 96 flats in total. Of the 96 flats on the Estate, 73 are let on assured shorthold tenancies, and the remaining 23 are let on long leases. The Respondent is the local authority.

4. The tribunal members inspected the Estate on the morning of 2 October 2023. The hearing itself began in the afternoon of that day and continued on the following day.

<u>Applicant's case</u>

5. The Applicant states that well before the Improvement Notice was served it had already applied for planning permission for various works to the Estate. These included window replacement and repairs to existing fabric, alterations to services, engineering works and the installation of biomass boilers. The planning application was originally due to be determined in December 2021, but the Applicant states that the Respondent has delayed matters well beyond the original eight-week target date.

6. From March to June 2021, the Respondent (in its role as local housing authority) undertook inspections of the common parts and the flats within the Estate. Then on 20 October 2021, the Respondent served the Improvement Notice on the Applicant. The hazards were said to be in the flats and common parts of the Estate and required wholesale

replacement of the windows and intensive works to the heating system, including boilers and radiators. The Applicant appealed against the Improvement Notice on 5 November 2021.

7. The Applicant has produced a series of update trackers which set out the works which it says have been completed since service of the Improvement Notice, and it states that almost all the items mentioned in the Improvement Notice which are not part of the proposed comprehensive refurbishment works have been remedied or improved.

8. The Applicant notes that there is a statutory system aimed at the elimination of housing "hazards" and that the 2004 Act refers to two categories of hazards: category 1 and category 2. Whether a particular hazard is a category 1 or category 2 hazard depends on what numerical score they are assigned under a prescribed method. That method is contained in regulation 6 of the Housing Health and Safety Rating System (England) Regulations 2005 ("**the HHSRS Regulations**"). A category 1 hazard is one which receives a score placing it in Bands A, B, or C, whilst a hazard in a lower band is a category 2 hazard. A hazard's band is calculated by the relevant inspector assessing the likelihood, during the period of 12 months beginning with the date of the assessment, of a relevant occupier suffering any harm as a result of that hazard. That likelihood is then assigned a value using a table. The inspector assesses which of the four classes of harm in Schedule 2 to the HHSRS Regulations the relevant occupier is most likely to suffer. The likelihood of the other three occurring is then assessed according to prescribed representative percentages and a formula is applied to the values.

9. Various provisions of the 2004 Act and the HHSRS Regulations refer to the local authority having regard to guidance given pursuant to section 9 of the 2004 Act, and three guidance documents have been issued. One is specific to fire safety, whilst the other two are the HHSRS Operating Guidance and the HHSRS Enforcement Guidance, both of which were issued in February 2006.

10. Under section 5 of the 2004 Act, if the local housing authority is satisfied that a category 1 hazard exists it is under a duty to take action, whereas under section 7, if the hazard is only a category 2 hazard the local authority merely has a power (not a duty) to act. On the identification of a hazard and after deciding to take action, the local authority has a choice of notices or orders, including a hazard awareness notice, an improvement notice and a prohibition order. Where more than one course of action is available, the local authority must take the most appropriate.

11. An improvement notice is defined in section 11(2) of the 2004 Act as *"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 subsections (3) to (5) and section 13". Remedial action means *"action (whether in the form of carrying out works or otherwise) which, in the opinion of the local housing authority, will remove or reduce the hazard"*.

12. Regulation 5 of the HHSRS Regulations obliges a local housing authority inspector to prepare and keep a written record of the state and condition of the inspected premises, but the Applicant states that the Respondent does not appear to have produced such a record in this case, meaning that the evaluative basis for its decision is unknown. The Applicant submits that it is difficult to see how the Respondent can make out any case for an improvement notice in the absence of such record.

13. The Respondent's HHSRS calculation for Excess Cold shows a likelihood of 1 in 56 that a relevant occupier would suffer harm. The score is 5848, Band A, category 1, and the vast majority of that score comes from 'Class 1' harm, being death or extreme harm. The Respondent's HHSRS calculation for Excess Heat shows a likelihood of 1 in 180 that a relevant occupier would suffer harm. The score is 622, Band D, category 2, and again the vast majority of the score again comes from 'Class 1' harm. The Respondent has not provided an HHSRS calculation in respect of Hot Surfaces and Materials.

14. In the Applicant's submission, the works undertaken following service of the Improvement Notice will have reduced both the likelihood and severity of any harm and caused the score to decrease substantially. Although the Respondent has stated in its statement of case that it reserves its position "until a further re-inspection of the Property can be carried out", the Applicant is not aware of any re-inspection having been undertaken or sought to be undertaken by the Respondent in the intervening 18 months.

15. In relation to the hazard of Excess Cold, the Applicant contends that the Improvement Notice requires it to replace all of the windows in all 96 flats on the Estate with double-glazed modern reproductions of the Crittal-style windows which have served the flats over the last century.

16. The Respondent's case for the existence of a category 1 hazard in relation to Excess Cold depends almost entirely on its assessment of the likelihood of Class 1 harm, which it gives as 31.6%, meaning that the Respondent considers there is a one in 177 chance (1/56 multiplied by 31.6/100) of a relevant occupier dying or suffering extreme harm within 12 months. However, were the chances of death or extreme harm truly that high, one would expect the contents of the Improvement Notice to be alarming, yet that is not the case. The Improvement Notice mentions illnesses, discomfort and inefficiency, but not death or extreme harm, and it explains that a prohibition notice was considered inappropriate because "*there is not an imminent risk of serious harm to the health*

and safety of the occupants". Therefore, in the Applicant's submission other aspects of the Improvement Notice are irreconcilable with the Respondent's assessment of the extent of the hazard.

17. Given the failure by the Respondent to keep or produce the written record of the state and condition of the inspected premises as required by Regulation 5 of the HHSRS Regulations, the Applicant contends that it and the tribunal are left only with the information provided in the Improvement Notice itself and (to the extent admissible) the evidence contained in the witness statement of Charlotte Ward. In respect of the requirement for the windows in all 96 flats to be replaced with modern double-glazed units, neither the Improvement Notice nor the Respondent's evidence identifies which flats suffered from which faults. Instead, the reference is to "most flats" and "many windows".

18. Included in the "deficiencies" identified in relation to Excess Cold is the fact that many windows are single glazed. However, given that single glazed windows were the norm at the date the Estate was built and that the Estate was designed to have such windows – which remain common in many residential buildings today, particularly older buildings – in the Applicant's submission this cannot properly be characterised as a "deficiency" requiring remedy. It is, though, accepted by the Applicant that "corroded frames", "broken or missing stays and handles" and "cracked and/or broken glazing" are deficiencies, albeit they would more generally be described as minor items of disrepair. The Applicant also accepts that such minor items of disrepair might cause an increase in draughts within a particular room or flat affected by them. However, the Applicant states that the Respondent has not produced any objective evidence which would enable the tribunal to assess (a) which flat(s) might be affected or (b) what impact any particular deficiencies might have on any particular flat, i.e. in terms of the impact on temperature that those deficiencies might have against the background of the Estate's heating system.

19. Even if, a particular flat on the Estate did have a sufficient combination of defects to its windows to have a measurably significant impact on the temperature of that flat (despite the heating system) so as to create a hazard within the meaning of the 2004 Act, the Applicant submits that no reasonable local authority could extrapolate from such deficiencies in one flat a requirement to replace all of the windows in all of the flats on the Estate. The Applicant therefore contends that the Respondent's "assessment" of an Estate-wide category 1 hazard for Excess Cold is without objective evidential foundation and is in any event grossly exaggerated. Any reasonable assessment of the windows on the Estate would not have identified any hazard of Excess Cold.

20. In addition to the windows, the Improvement Notice purports to suggest that *"deficiencies with the heating and hot water system… impact the hazards of… excess cold"*. Subsequent details of the alleged

deficiencies do not explicitly identify which of them are said to contribute to excess cold, so one is left to attempt to infer this from context.

21. More specifically, the Improvement Notice refers to the use of manual controls rather than a computer-controlled management system for the boilers as potentially increasing wear and tear on the boilers *"which may lead to premature failure and inability to deliver heat to residents"*. But no comparison between the life expectancy of the boilers with or without such a system is posited, nor in the Applicant's submission, given that the boilers on the Estate are relatively new, is it obvious why this would give rise to any increase in risk of failure over the next 12 months. The Improvement Notice also refers to no safety valve having been observed on secondary pipework, the point being that this would increase the risk of pipework/equipment failure, but the Applicant's evidence indicates that this has been dealt with (and suggests that the safety valve was already in place in any event).

22. The Improvement Notice also refers to the absence of magnetic filters on the boiler circuit potentially leading to *"increased likelihood of interruptions in supply"*. In fact, states the Applicant, such filters are in place and therefore there is no basis for this allegation. In addition, the Improvement Notice refers to the side stream filtration unit not being installed in line with manufacturer's requirements and industry best practice which *"will reduce the flow to the PHE's and reduce heat transfer from the primary… [and] may also reduce the flow temperature to the network which could cause residents to receive insufficient heat"*, but the Applicant's investigations with the manufacturer have confirmed that the side stream filtration unit has been installed correctly.

23. The Improvement Notice also states *"Pumps are operating at 100% speeds… This will cause increased wear on pumps due to increased run hours, and this may lead to premature failure and inability to deliver heat to residents"*. However, investigation by the Applicant has established that *"The heating system is designed as a constant volume system on the delivery side to the Calorifier Rooms so will continue to run at 100% design flow rate on the district main distribution circuits"* and that *"pump speed control is only required when changing from Winter to Summer setting"*. In other words, the pumps are operating at the correct speed. In addition, the Improvement Notice refers to commissioning sets being used for balancing at substations and asserts that *"This could lead to … undersupply of heat to residents". Although there is no explanation for this conclusion, nor timescale in which this alleged risk is said to occur, the Appellant's investigations have established the use of commissioning sets for balancing "was standard practice at the time of installation"*. The Applicant intends to replace the commissioning valves with pressure independent control valves during the main refurbishment.

24. The Improvement Notice also asserts that *"There are limited radiator controls within dwellings"* which means that *"resident comfort can be impacted by… undersupply of heating within dwellings or in communal areas"*. This issue, states the Applicant, has been addressed by the replacement of three faulty external temperature sensors forming part of the weather compensating control in the calorifier rooms. Further, the Applicant's heating contractor has been installing thermostatic valves on radiators in flats, so there are now more extensive radiator controls within the dwellings. There is also reference to a radiator in flat 22 not heating up, but this has been investigated and repaired by the Applicant's heating contractor.

25. In relation to the hazard of Excess Heat, the Improvement Notice refers to insulation within the plant room being non-compliant with BS5422 and being insufficient to mitigate heat losses within the plant room. This is alleged to give rise to *"greater heat loss within the network risers, corridors and dwellings resulting in overheating for residents"*. However, the insulation thickness observed by the Respondent compared to that required to comply with current standards is only 5mm less than the required thickness in two instances and is the required thickness in the third case. Secondly, the insulation used was compliant with standards at the date of its installation. Thirdly, the observations only relate to the plant room and the insulation therein. Consequently, argues the Applicant, it simply does not follow that greater heat loss will occur from pipework within *"network risers, corridors and dwellings"* which are geographically distant from the plant room.

26. The Improvement Notice also refers to weather compensation not being implemented properly which can cause unnecessarily high flow temperatures. Whilst the Applicant accepts that the weather compensating controls in the calorifier rooms were not operating correctly at the date of the Respondent's inspection, these have now been adjusted and replaced where faulty (in three instances) by the Applicant. In addition, the Improvement Notice refers to inadequate insulation in the calorifier rooms/sub-stations within each of the blocks on the Estate and assert that this will have the effect of *"increasing ambient temperatures in communal areas impacting resident comfort"*. However, says the Applicant, the insulation used was compliant with standards at the date of its installation. Secondly, the communal areas are geographically distant from the calorifier rooms, and the Applicant submits that the impact on temperature elsewhere in the blocks will be minimal, if measurable at all. Thirdly, an "impact on comfort" is not the same as a hazard.

27. The Improvement Notice also refers to *"high ambient temperatures within communal areas as there are no thermostatic control valves on any of the communal radiators"*. This issue, states the Applicant, has been dealt with by the adjustment and replacement of weather compensating controls for each block. In addition, the Improvement

Notice refers to a *"high differential between the flow temperature and the return temperature of radiators tested within some dwellings"*. Whilst in the Applicant's submission this is clearly not a hazard, the Applicant's heating contractors' investigations have concluded that this issue should have been addressed by the adjustment and repair of the weather compensating control system.

28. In relation to the hazard of Hot Surfaces and Materials, the Applicant states that the Respondent has not produced any inspection records nor any calculations in respect of its hazard assessment under this head. The Improvement Notice refers to excessively hot water temperature within flats, and it is accepted that this potentially constitutes a hazard. However, the Applicant contends that this has been addressed by its heating contractor adjusting the temperature control set points for each block downwards. The Improvement Notice also asserts that the *"surface of the radiators are also excessively hot and pose a risk of scalding"*, but no evidence has been provided to identify which flats might be affected in this way, and in any event this issue has been addressed by the adjustment and repair of the weather compensating control system.

Respondent's case

29. The Respondent states that it does not appear that the Appellant disputes the existence of category 1 and 2 hazards or the need for them to be remedied. And whilst the Respondent acknowledges that there is a planning application to be determined, it submits that a planning application neither alters the assessment of the hazards identified nor displaces the Respondent's statutory duties under the 2004 Act. Similarly, the Applicant's planning application does not insulate the Applicant from its statutory obligations arising from the 2004 Act. An application for planning permission, if granted, results in no more than a lawful opportunity for an owner/developer to alter land in line with the terms of the permission.

30. The Respondent is of the view that the works required to address the hazards set out in Schedule 2 to the Improvement Notice are necessary to reduce and/or remove the impact of the hazards identified in the Improvement Notice. It also submits that the timeframe set out in the Improvement Notice for the Applicant to remedy the hazards is generous.

31. The Applicant was invited to submit its plans for a programme of works for the Respondent to consider if it was unable to meet the Respondent's suggested timeframe. To date, the Applicant has not provided any such plans to the Respondent, although the Respondent concedes that since service of the Improvement Notice the Applicant has taken some steps to address the hazards relating to excess heat, partly complying with items 7 to 9 to Schedule 2 of the Improvement

Notice. The Respondent has reserved its position on these works until a further re-inspection of the Estate can be carried out to confirm that these works have been done and completed to the required manner.

32. The Respondent submits that the Applicant is aware of the various deficiencies and risks affecting the Estate but to date has failed to take any meaningful remedial action towards reducing or removing these risks. By the Applicant failing to take appropriate remedial action, the Respondent submits that the potential health risks, discomfort and inconvenience for occupants at the Estate all continue.

<u>James Gallimore's witness evidence</u>

33. James Gallimore is a chartered engineer working for FairHeat, a specialist heat networks consultancy, and he has given a witness statement on behalf of the Respondent. He states that FairHeat conducted a site audit of the existing communal heat network to review the current performance of the heat network, the quality of the installation and insulation and the potential root causes of any sub-optimal performance identified. FairHeat then produced a report, which is in the hearing bundle, setting out the findings and some observations and recommendations for improvements against the root causes identified.

34. At the hearing he was asked whether the boilers could fail within the next 12 months and he conceded that this was unlikely on the balance of probabilities. He also accepted that what happens in the plant room has no impact on the comfort of the occupiers of individual flats.

35. Regarding the observation in the FairHeat report that the side stream filtration was not installed in line with the manufacturer's requirement and industry best practice, Mr Gallimore confirmed that there is no actual regulatory requirement in respect of which the Applicant is in breach. As for the observation in the FairHeat report about a high differential pressure set point across pumps, he was unable to say whether this would have an impact within the next 12 months.

36. Regarding the observation about weather compensation not being implemented or removed at substations, Mr Gallimore conceded that he had no reason to suppose that this point had not now been addressed. As for the insulation within blocks not being compliant with current standards, he accepted that he had not measured the effect that this would have had on the common parts. Regarding the problem of high ambient temperatures within communal areas due to lack of radiator controls, he conceded that the Applicant's solution should resolve this problem.

<u>Charlotte Ward's witness evidence</u>

37. Charlotte Ward was (at the relevant time) Team Leader for the Respondent's Private Sector Housing Enforcement Team, and she has given a witness statement in support of the Respondent's position. She states that the Respondent received a number of complaints from residents in the winter months of 2020/21 about problems with heating on the Estate, some residents stating that they had no heat at all for several weeks. The heating and hot water is provided through communal boilers and circulated via substations in the basement of each block. There are risers within each block to radiators and hot water taps located within each dwelling.

38. On 26 March 2021, Ms Ward served a notice of entry on the Applicant to inform it that the Respondent would be inspecting the Estate and required access to the main boiler house, the plant rooms within each block, riser cupboards, maintenance areas, corridors and stairwells to inspect the heating and hot water system. A request was also made for access to 5 flats, namely numbers 3, 16, 62, 29 and 89.

39. On 31 March 2021, Ms Ward visited the Estate accompanied by a senior engineer from 'Fairheat', a heat network consultancy instructed to carry out a site audit of the heating system within the Estate and to produce a report setting out the findings and any recommendations for improvements. She was also accompanied by Lauren Finlay, property manager for Property Partners. The engineer examined the main plant room, all substations, and a sample of flats, observing and inspecting the performance of the heating system to ascertain if there were factors that significantly increased the likelihood of an occurrence that could cause harm due to excess cold or excess heat. During this inspection it was noted that none of the communal radiators had control valves, which meant that they were very hot to the extent that the communal areas were uncomfortably hot contributing to the hazard of 'excess heat'. The engineer also took the temperature of the hot water inside the flats which measured 69.5°C. The Respondent's assessment concluded that this temperature of water was excessively hot and posed a safety risk to residents from scalding. The probability of an occurrence that could cause harm due to the hazard of 'hot surfaces and materials' due to the excessively high temperature of hot water at the point of delivery to the flats was considered to amount to a category 1 hazard.

40. The Respondent intended to carry out further inspections of all the flats and the communal areas at a later date to investigate the presence of other hazards. Therefore, further notices were served on the Applicant on 19 April, 24 May and 18 June 2021 advising that Ms Ward would be entering all the flats and shared areas within the Estate for the purposes of an inspection. Further inspections were carried out between 26 and 29 April 2021, on 25 May 2021 and on 18 June 2021. Category 1 and 2 hazards were found within the Estate in accordance with the Housing Health and Safety Rating System (HHSRS), and Ms Ward's assessment of the hazards identified a considerable number of

deficiencies within the Estate. A copy of some of the photographs from the inspections are exhibited in the hearing bundle.

41. The main deficiencies identified during these inspections were Excess Cold relating to the windows, Excess Cold relating to the plant room, substations, network and individual dwellings and Excess Heat relating to the plant room, substations, network and individual dwellings. The inspections identified that the windows to most of the flats within the Estate are single glazed and that the frames are corroded, resulting in rust bloom forcing components of windows apart, and that many windows have broken or missing stays and handles. In addition, Ms Ward identified many windows which had cracked and/or had broken glazing. Her assessment concluded that these deficiencies were wasting heat and reducing air temperatures within the dwellings and also caused draughts and discomfort and could contribute to detrimental health effects and other cold related illnesses.

42. Ms Ward also identified that in many cases the radiators within the flats and in the common areas were either on and extremely hot or were off entirely, and in most cases there was no reliable way to control the temperature of the radiators. The inspections also identified that radiators do not turn off when a comfortable ambient temperature is achieved due to a lack of thermostatic controls on the radiators. In the communal areas there are also no thermostatic control valves on any of the communal radiators. The ambient temperature within the communal areas was found to be excessive during the inspections, thus creating the deficiencies set out in the Improvement Notice. Within some flats, some of the windows could not be opened so there was an inability to dissipate heat at night which contributed to the Excess Heat hazard.

43. In relation to the hot surfaces and materials deficiencies identified, the inspections found the hot water temperature to be excessively hot. Water temperature above 45°C presents a risk of scalding to residents, especially to young children and particularly where there is whole body immersion, for example, baths and showers. Due to the high water temperature, the surfaces of the radiators are also excessively hot and pose a risk of scalding. The Improvement Notice requires that taps are fitted with anti-scalding thermostatic mixing valves at each human point of use to decrease the water temperature to 49°C or less.

44. On 14 June 2021 Ms Ward received the report from Fairheat in relation to the inspection on 31 March 2021, and the report listed the findings in relation to performance, reliability, operability, resident comfort, and in relation to the cost of delivering heat efficiently. She states that there were some concerning observations regarding the lack of control of the heating and hot water system, the lack of compliance with British Standards, manufacturer's requirements and industry best practice, and there were concerning performance observations. Following the

inspections of the Estate and after assessing the housing conditions in the context of the 2004 Act, the HHSRS, and the Fairheat report, she was satisfied that enforcement action was required to remedy the hazards.

45. Having considered all of the factors, Ms Ward concluded that service of an improvement notice was the most appropriate action to require the Applicant to remedy the relevant hazards, and the Improvement Notice was duly served on 20 October 2021. The Improvement Notice set out the category 1 and 2 hazards identified as existing within the Estate and also the works that should be carried out to remove or reduce the hazards. The Improvement Notice required that the Applicant begin the works no later than 24 November 2021 and complete them within a period of 15 months thereafter.

46. On 21 October 2021, the Applicant's solicitors wrote to her advising that the Applicant had no alternative but to appeal against the Improvement Notice because it was applying for planning permission to construct new penthouse flats and townhouses on the Estate and intended to carry out extensive ancillary works. As regards the works identified to resolve the hazards, the Applicant stated that it could not practically undertake the replacement of the windows without also carrying out brickwork and lintel repairs, and that there was no point overhauling the heating system when they intended to install biomass boilers subject to obtaining planning permission.

47. In response, on 26 October 2021, the Respondent advised that if the Applicant could not replace the windows without carrying out brickwork and lintel repairs it should refer to that inability when providing its programme of works to enable the Respondent to consider the matter further. In relation to the works to the boilers, the Applicant was advised that many of the items listed in the Improvement Notice could be resolved simply, making the system more cost-effective and reliable. The Respondent's letter also invited the Applicant to submit its plans for the Respondent to consider, but to date the Applicant has not provided the Respondent with a programme of works.

48. Ms Ward states that the lintels above the window openings appeared to be sound during her inspections, and her assessment is that it is likely that the windows can be replaced without any changes to the lintels. In her view the Applicant has not demonstrated that the lintels are defective and/or need repairing, nor provided the recommended structural engineer's report confirming the same. Also, to date the Applicant's planning application has not been determined. She remains satisfied that the deficiencies/hazards identified within the Estate pose a significant risk to health and that it was appropriate to serve the Applicant with the Improvement Notice. The timeframes in the notice are generous and leave adequate time to carry out further work if a structural engineer's report evidences concerns about

structural repairs to lintels or brickwork has been accounted for. By failing to take appropriate remedial action towards resolving the hazards and deficiencies identified, the potential health risks, discomfort and inconvenience for occupants on the Estate continues.

49. At the hearing, Mr Isaac put it to her that the relevant assessment date for the hazards for the purposes of the appeal was the day of the hearing, as it was a re-hearing, and yet the last detailed inspection was carried out in 2021. Ms Ward said that she considered that there were still problems with the heating system, but she accepted that there had been no reassessment for the purposes of the hearing.

50. Mr Isaac also put it to her that it was not reasonable for her to take single glazing into account when scoring the Excess Cold hazard if single glazing was normal for properties built at the same time as Dorchester Court, and he also put it to her that the Improvement Notice took no account of the fact that some windows were double-glazed and nor did she know how many were double-glazed. Mr Isaac also commented that there was no detailed record of problems in any specific flat; Ms Ward accepted this point but said that the Respondent had to take a sensible and proportionate approach given the number of windows.

51. Regarding the fact that there was a communal (district) heating system, Ms Ward said that this meant that it was outside the residents' control, but it was put to her that this did not make the heating system unreliable.

52. Mr Isaac then took Ms Ward to the specification of required works in Schedule 2 to the Improvement Notice and asked her how the Applicant could possibly know from this what it actually needed to do and where. Ms Ward said that the starting point was paragraph 6 of Schedule 2 which required the Applicant to produce a programme of work, but Mr Isaac countered that paragraph 6 could not be the starting point as paragraph 1 required the Applicant to carry out works to all flats.

53. Ms Ward conceded that the temperature in the flats was not checked on inspection but she added that the statutory guidance did not require this and that in her view it was unnecessary. She also accepted that as a result of the improvements carried out by the Applicant so far the Excess Heat score could well now have fallen to an average score and therefore it could now be the case that there was no longer an Excess Heat hazard.

54. Mr Isaac noted Ms Ward's statement that the Applicant had not engaged with the Respondent in respect of the Improvement Notice but he put it to her that the Respondent had provided no evidence to support this submission.

Brian Kane's witness evidence

55. Brian Kane is a mechanical services engineer and an associate director od AECOM, a large firm of infrastructure engineers and consultants, and he has given a witness statement on behalf of the Applicant. In his statement Mr Kane summarises the works specified in the Improvement Notice which he believes have already been undertaken, and he also states which issues will be addressed by the proposed refurbishment works to which the planning application relates. He also covers matters such as the need for statutory consultation with leaseholders in respect of certain works and other practical issues which he states has made it harder for the Applicant to address the various repairing issues.

56. At the hearing, Mr Kane accepted that certain planned works had not yet been carried out and that there was no guarantee that they would be carried out if the Improvement Notice was quashed. Regarding the 'fail' status of two of the pumps, Mr Kane agreed that those pumps needed replacing and confirmed that this would be done, although this had only recently been raised as an issue.

57. Mr Kane agreed that the insulation of each plant room should be improved. This work was envisaged by the planning application and his view was that any money spent on this now would be money wasted as it would need to be re-done as part of the more major works planned. Similarly, the hot water set points could be regulated now but again it would be more cost-efficient to do this as part of the works envisaged by the planning application.

Closing submissions

58. At the hearing, Mr Isaac for the Applicant repeated the Applicant's contention that the Improvement Notice extrapolated the general from the specific. It was accepted by the Applicant that the Respondent had generically shown the existence of some deficiencies, but it had not accurately specified where and to what extent specific hazards existed.

59. Mr Isaac said that of the heating deficiencies identified by Mr Gallimore's report some had now been addressed. Many of the issues related to the boiler room itself did not impact resident comfort or safety to any significant degree. The Respondent had also provided insufficient information to enable the tribunal to assess the deficiencies itself, and no calculations have been provided in relation to the hazard of Hot Surfaces and Materials.

60. In relation to the windows, Mr Isaac said that Ms Ward did not know how many windows were single glazed. In relation to the performance of the heating system, Ms Ward's primary basis for concluding that performance was poor was historic complaints during the previous winter, but new boilers had been installed since then and there was no evidence of further complaints.

61. As a general point, Mr Isaac said that there had been no re-assessment on any of the hazards even though it was accepted by the Respondent that relevant impactful changes had been made by the Applicant.

62. Mr Ham accepted that the Improvement Notice should not merely be confirmed as there were reasonable grounds for varying it. The Respondent considered the windows to be the principal issue because of their condition and the resulting heat loss from them, but the Respondent accepted that it had no updated assessment. However, in his submission it was clear that there were deficiencies with some windows, and it was right that these should be addressed pursuant to a varied Improvement Notice; it was enough for the Applicant to argue that it should be allowed instead to carry out its own proposed schedule of works once planning permission has been granted as the grant of planning permission does not trigger any obligation and the Applicant needs to be under an obligation to remedy the relevant hazards.

63. As regards the argument that the Improvement Notice is not sufficiently detailed, Mr Ham said that it imported some flexibility and needed to be read in a common-sense way. For example, it was obvious that there was no need to replace existing double-glazing.

Relevant statutory provisions

64. *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.*

Tribunal's analysis

65. Under paragraph 15(2) of Schedule 1 to the 2004 Act, this appeal is a re-hearing of the Respondent's decision but may be determined having regard to matters of which the Respondent was unaware.

66. We have considered the wording of the Improvement Notice, the parties' written and oral submissions and the witness evidence, as well as the results of our own inspection accompanied by the parties.

67. On the basis of the evidence before us, it is clear – and readily conceded by the Applicant – that there is significant disrepair at the Estate. It is also clear, both from the evidence and from our inspection, that certain items of disrepair such as cracked windows will have had, and are continuing to have, an adverse impact on the relevant occupiers' use and enjoyment of their flat.

68. We also agree with the Respondent that the fact that a property owner has applied for planning permission to carry out works which cover some or even all of the territory covered by an improvement notice served on that property owner does not by itself obviate the need to remedy any hazards identified by that improvement notice within the time limits set by that improvement notice. Planning permission might be refused, and even if it is granted it does not itself oblige the property owner to carry out the works for which permission has been granted. Local housing authorities have a statutory obligation to take appropriate enforcement action in respect of category 1 hazards (and a power to do so in respect of category 2 hazards), and a property owner on whom an improvement notice is served must take the required remedial action unless that property owner successfully appeals against the notice.

69. However, in this case we have major concerns about the contents of the Improvement Notice itself. It is clear that the Applicant has carried out certain works which the Respondent concedes have remedied some deficiencies and reduced the extent of certain other deficiencies, and the Respondent has not reinspected or carried out a recent reassessment of the hazards. The Respondent is therefore in difficulty when it comes to evidencing the current position and the extent to which remedial action still needs to be taken. The Respondent has now conceded that the Excess Heat hazard would appear to have been

adequately dealt with, but it is not able to demonstrate the current position with the Excess Cold hazard (this being its main current focus) or the Hot Surfaces and Materials hazard.

70. In addition, the Improvement Notice is not nearly specific enough. For example, in relation to what the Respondent now says is its key concern of Excess Cold, paragraph 1 of Schedule 2 to the Improvement Notice states as follows (underneath the heading *"Flats within Dorchester Court"*):

"Install replica galvanised steel Crittall Windows, that are similar in section size to the existing window units and as close to exact replicas of the existing as possible. The windows should be double glazed, and constructed of clear toughened glass. These windows should be coloured to match recently replaced large windows with the glass units bedded in silicone sealant to mimic traditional putty in appearance".

71. The Respondent has conceded the obvious point that (particularly on the basis of the evidence before us) the need for the abovementioned works cannot apply to all of the flats, but it is not at all clear from the Improvement Notice which flats are being referred to. The Respondent was unable to tell us to which flats paragraph 1 of Schedule 2 is intended to apply, and in any event it has provided no actual evidence to demonstrate which flats require this remedial work.

72. The Respondent has sought to argue that it would be too difficult to provide a flat by flat analysis and has sought to characterise its failure to do so as "sensible and proportionate", but such an approach is not at all sensible in the context of the service of an improvement notice. The Respondent has served an improvement notice on a property owner requiring it to spend substantial time and money carrying out works, in circumstances where a failure to comply with the improvement notice (if valid) constitutes a criminal offence and is subject to financial sanctions. The recipient of an improvement notice must be able to understand from that notice which specific parts of the property need fixing in order to remedy the hazards specified in the notice. And even where an improvement notice is detailed enough so that one can understand which specific parts of the property are said to need fixing, on an appeal the local housing authority must be able to satisfy the tribunal that the hazard scoring and the list of required works has a proper and sufficient evidential basis. The Respondent has failed on both of these points.

73. In relation to the Excess Heat issue in the common parts, we do not accept that it was correct to multiply the likelihood of occurrence by 500 (as the Respondent has done) when residents merely pass through the common parts. In any event, the Respondent has now conceded that there may not be any continuing Excess Heat hazard.

74. In relation to the Hot Surfaces and Materials issue, the Respondent has not provided an HHSRS calculation and has not provided a reason why its conclusions should be relied on without such a calculation, and therefore it has not made its case. The Applicant has also provided some evidence to indicate that it has addressed the concerns raised in relation to hot surfaces and materials. The Respondent therefore now appears in practice just to be relying on the Excess Cold issue.

75. In relation to the Excess Cold issue, we have already noted the unsatisfactory nature of the contents of the Improvement Notice which by itself makes the Improvement Notice unsafe. In addition, the Respondent has assessed the likelihood of Class 1 harm for Excess Cold as 31.6%, meaning that the Respondent considers there is a one in 177 chance of a relevant occupier dying or suffering extreme harm within 12 months. However, as noted by the Applicant, the Improvement Notice mentions various risks but not death or extreme harm, and the Respondent explains that a prohibition order was considered inappropriate because "*there is not an imminent risk of serious harm to the health and safety of the occupants*". We agree with the Applicant that the Respondent's reasoning for not making a prohibition order does not sit comfortably with its assessment of the extent of the hazard.

76. The Respondent's evidence is also unclear as regards the relationship between the mere fact of single glazing in many of the windows and the starting point for the Respondent's scoring of the hazard, as the Respondent has been unable to articulate whether it took into account the fact that single glazing was the norm at the time that the Estate was constructed.

77. The evidence indicates that some of the Respondent's concerns regarding potential under-supply of heating have now been addressed by the Applicant. The Respondent's expert also accepts that what happens in the plant room (for example the lack of insulation) has no impact on the comfort of the occupiers of individual flats. There is also no evidence before us that the communal heating system is currently unreliable. In addition, Mr Gallimore has conceded that the Applicant's solution should resolve the problem of high ambient temperatures within communal areas due to lack of radiator controls.

78. There is some evidence of a lack of compliance on the part of the Applicant, but the Respondent has failed to demonstrate that this leads to an Excess Cold hazard in all of the individual flats.

79. It is unsatisfactory that there is significant disrepair within the Estate which has not been attended to over a long period of time, and flat occupiers will have suffered as a result. However, we cannot confirm an improvement notice which for a number of reasons is patently flawed, and we do not have sufficient information or evidence before us for it to be possible to vary it so as to turn it into an improvement notice

which fairly and specifically sets out the hazards that exist and the works that need to be carried out in order to alleviate those hazards.

80. In conclusion, the Improvement Notice is much too vague and the evidence before us does not support the Respondent's conclusions as to the extent of any hazards and the works that need to be carried out. Accordingly, the Improvement Notice is hereby quashed in its entirety.

Cost applications

81. No cost applications have been made.

Name: Judge P Korn **Date:** 17 November 2023

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.