UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2012] UKUT 169 (LC)
LT Case Number: HA/3/2011

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – enforcement action – category 1 hazard – prohibition order – excess cold – RPT quashing order – whether RPT right to hold that cost of heating irrelevant to assessment of hazard and enforcement action – held that it was not right – appeal allowed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE RESIDENTIAL PROPERTY TRIBUNAL FOR THE NORTHERN RENT ASSESSMENT PANEL

BETWEEN **LIVERPOOL CITY COUNCIL** **Appellant**

and

ANWAR HADI KASSIM **Respondent**

Re: Flat 1
31 Botanic Road
Liverpool L7 5PY

Before: The President

Sitting at Cunard Building, Pier Head, Liverpool L3 1TS
on 22 May 2012

Hugh Derbyshire instructed by Head of Legal Services, Liverpool City Council, for the appellant
Mr Tom McVeigh for the respondent

Cases referred to:

Bristol City Council v Aldford Two LLP [2011] UKUT 130 (LC), HA/5/2010
Bolton Metropolitan Borough Council v Patel [2010] UKUT 334 (LC) HA/6/2009

DECISION

Introduction

1. This is an appeal against a decision of a Residential Property Tribunal given on 1 March 2011 quashing a prohibition order made by the appellant council under section 20 of the Housing Act 2004. The notice, which was dated 30 September 2010, related to Flat 1, Botanic Road, Liverpool L7 5PX, a one-bedroom ground floor flat in a pre-1920 terrace house owned by the respondent Mr Anwar Kassim. The notice ordered that the flat must not be used, or be permitted to be used, by any person or persons for human habitation other than the owner of the premises, Mr Kassim. It stated the hazard to be a category 1 hazard, excess cold, and it gave as the reasons giving rise to the hazard:

> "There is no programmable, permanent, fixed and affordable heating in the dwelling. The level of thermal insulation to the dwelling is low."

The notice specified as "Remedial Action in relation to Category 1 Hazards":

> "Provide a fixed, permanent whole flat heating system. This system must be programmable and capable of being controlled by the occupants, efficient and affordable to run. The system must be capable of heating living rooms and bedrooms to 21˚C and to 18˚C in all other rooms and common parts."

2. Mr Kassim appealed against the notice under paragraph 7(1) of Part 3 of Schedule 2 to the Act. His case was that since the service of the notice all the windows of the flat had been double glazed and an adequate heating system had been installed. The heating system consisted of two 2 kW wall mounted heaters in the front living room; a 1.5 kW wall mounted heater in the bedroom and another such in the kitchen; and an electric towel rail in the bathroom. All the wall heaters were thermostatically controlled and had timer switches that enabled them to be turned on and off at particular times of the day. The case for the council was that the heating system did not meet the requirements of the notice because it was not capable of being affordable to run, and they relied on the Operating Guidance issued by the Office of the Deputy Prime Minister in February 2006.

3. The Tribunal expressed its conclusions as follows:

> "20. The tribunal considered the Guidance and concluded that, whilst it is a laudable objective, nowhere is there any requirement in paragraphs 2.19 to 2.23 of the Guidance, headed 'Preventative Measures and the Ideal', that any space heating system should be affordable. There is a requirement that it be efficient. The Tribunal noted from the letter from Latham Consulting, dated 16th September 2010, produced by Mr Kassim, that heating by electricity '*is considered to be 100% efficient as all electricity is converted to heat*'. This was not challenged by the Council, nor was any evidence produced to contradict it. The Tribunal therefore accepted heating by electricity as being an efficient means of space heating. Whether it is affordable will depend on circumstances, some of which are unconnected with its efficiency or the condition of the Property, not least, for example, an occupant's financial circumstances

and the cost of electricity compared to other forms of energy. Neither of these factors is relevant to considering the health and safety aspects of the Property.

21. The Tribunal then considered whether the heating system was adequate. Ms Griffiths agreed that, but for the question of affordability, there was no longer any category 1 hazard at the Property, following the installation of space heaters and upvc double glazing by Mr Kassim. The Tribunal, having inspected the Property, agreed with her. That being the case, and having regard to the findings at paragraph 20 above, it would be perverse for the Prohibition Order to continue in force."

4. The council sought permission to appeal from the RPT, and the Tribunal said, granting permission, that it considered that the proposed appeal raised an important issue as to whether, in considering enforcement action under the relevant sections of the Housing Act 2004, the Tribunal "must take into account the economic effects of the parties' proposals, or the action taken, or to be taken to mitigate the relevant hazard".

Housing Act 2004: hazards and enforcement action

5. Part I of the Housing Act 2004 deals with housing conditions, and Chapter 1 contains a system for assessing housing conditions and enforcing housing standards. Section 2(1) defines "category 1 hazard" and "category 2 hazard":

"(1) In this Act –

'category 1 hazard' means a hazard of a prescribed description which falls within a prescribed band as a result of achieving, under a prescribed method for calculating the seriousness of hazard of that description, a numerical score of or above a prescribed amount;"

"Category 2 hazard" is similarly defined, and "hazard" is defined as

"any risk of harm to the health or safety of an actual or potential occupier of a dwelling or HMO which arises from a deficiency in the dwelling or HMO or in any building or land in the vicinity (whether the deficiency arises as a result of the construction of any building, an absence of maintenance or repair, or otherwise)."

(HMO is a house in multiple occupation.)

6. Section 2(3) provides:

"(3) Regulations under this section may, in particular, prescribe a method for calculating the seriousness of hazards which takes into account both the likelihood of the harm occurring and the severity of the harm if it were to occur."

7. It is the Housing Health and Safety Rating System (England) Regulations 2005 that contain the prescriptions provided for in section 2(1), and they also define what "harm" is. I will refer to the Regulations later.

8. Section 5 of the Act contains the general duty to take enforcement action in respect of category 1 hazards. As far as material it provides:

> "5 Category 1 hazards: general duty to take enforcement action
>
> (1) If a local housing authority consider that a category 1 hazard exists on any residential premises, they must take the appropriate enforcement action in relation to the hazard.
>
> (2) In subsection (1) 'the appropriate enforcement action' means whichever of the following courses of action is indicated by subsection (3) or (4) –
>
> (a) serving an improvement notice under section 11;
>
> (b) making a prohibition order under section 20;
>
> (c) serving a hazard awareness notice under section 28;
>
> (d) taking emergency remedial action under section 40;
>
> (e) making an emergency prohibition order under section 43; …
>
> (3) If only one course of action within subsection (2) is available to the authority in relation to the hazard, they must take that course of action.
>
> (4) If two or more courses of action within subsection (2) are available to the authority in relation to the hazard, they must take the course of action which they consider to be the most appropriate of those available to them..."

9. If the hazard is a category 2 hazard the authority are not obliged to take enforcement action, but under section 7 they have the power to do so. The kinds of enforcement action they are empowered to take include serving an improvement notice, making a prohibition order and serving a hazard awareness notice. Under section 8 the authority are required to give reasons for taking enforcement action. Section 9 provides for the giving of guidance to authorities in the exercise of their functions, and such guidance has been given in the Housing Health and Rating System Operating Guidance and the Housing Health and Safety Rating System Enforcement Guidance, both issued by the Office of the Deputy Prime Minister in February 2006. Under section 9(2) a local housing authority are required to have regard to any guidance given under the section.

10. Prohibition orders are dealt with in sections 20 to 22. Under section 20(3)(b), in the case of a building containing flats, the order may prohibit the use of any part of the building. Section 22 provides as follows:

"22 Contents of prohibition orders

(1) A prohibition order under section 20 or 21 must comply with the following provisions of this section.

(2) The order must specify, in relation to the hazard (or each of the hazards) to which it relates—

(a) whether the order is made under section 20 or 21,

(b) the nature of the hazard concerned and the residential premises on which it exists,

(c) the deficiency giving rise to the hazard,

(d) the premises in relation to which prohibitions are imposed by the order (see subsections (3) and (4)), and

(e) any remedial action which the authority consider would, if taken in relation to the hazard, result in their revoking the order under section 25.

(3) The order may impose such prohibition or prohibitions on the use of any premises as—

(a) comply with section 20(3) and (4), and

(b) the local housing authority consider appropriate in view of the hazard or hazards in respect of which the order is made.

(4) Any such prohibition may prohibit use of any specified premises, or of any part of those premises, either—

(a) for all purposes, or

(b) for any particular purpose,

except (in either case) to the extent to which any use of the premises or part is approved by the authority.

(5) A prohibition imposed by virtue of subsection (4)(b) may, in particular, relate to—

(a) occupation of the premises or part by more than a particular number of households or persons; or

(b) occupation of the premises or part by particular descriptions of persons.

(6) The order must also contain information about—

(a) the right under Part 3 of Schedule 2 to appeal against the order, and

(b) the period within which an appeal may be made,

and specify the date on which the order is made.

(7) Any approval of the authority for the purposes of subsection (4) must not be unreasonably withheld.

(8) If the authority do refuse to give any such approval, they must notify the person applying for the approval of—

(a) their decision,

(b) the reasons for it and the date on which it was made,

(c) the right to appeal against the decision under subsection (9), and

(d) the period within which an appeal may be made,

within the period of seven days beginning with the day on which the decision was made.

(9) The person applying for the approval may appeal to a residential property tribunal against the decision within the period of 28 days beginning with the date specified in the notice as the date on which it was made.

(10) In this Part of this Act "specified premises", in relation to a prohibition order, means premises specified in the order, in accordance with subsection (2)(d), as premises in relation to which prohibitions are imposed by the order.

11. Under section 25(1) the authority are required to revoke a prohibition order if at any time they are satisfied that the hazard in respect of which the order was made does not then exist on the residential premises specified in the order. Schedule 2 deals with provisions and appeals relating to prohibition notices. Under paragraph 7(1) there is a right of appeal to a residential property tribunal against a prohibition order, and sub-paragraph (2) makes clear that the right of appeal is a general one. Paragraph 9 provides a right of appeal against the refusal of an authority to revoke (or to vary) a prohibition order. Paragraph 11 provides that an appeal to an RPT is by way of re-hearing and may be determined having regard to matters of which the authority were unaware. The tribunal may by order confirm, quash or vary the prohibition order. A prohibition order thus continues in force until it is revoked or is quashed by an RPT. Under section 32 contravention of a prohibition order is an offence triable summarily and punishable by a fine.

The Housing Health and Safety Rating System (England) Regulations 2005

12. The Regulations prescribe the descriptions of category 1 and category 2 hazards, and they also prescribe a method for calculating their seriousness by establishing a numerical score. Regulation 2 defines "harm" as harm within any of Classes 1 to IV as set out in Schedule 2. The Schedule provides that Class 1 harm is "such extreme harm as is reasonably foreseeable as a result of the hazard in question, including -", and then are set out "(a) death from any cause" and, from (b) to (g), lung cancer, malignant tumours, permanent paralysis below the neck, regular severe pneumonia, permanent loss of consciousness and 80% burn injuries. Class II harm is "severe harm" (including, for example, cardio-respiratory disease). Class III harm is

"serious harm" (including, for example, gastro-enteritis). Class IV is "moderate harm" (including, for example, regular serious coughs and colds).

13. Regulation 3(1) provides that a hazard is of a prescribed description for the purposes of the Act where the risk of harm is associated with any of the matters or circumstances listed in Schedule 1. The list includes: "2. Exposure to low temperatures."

14. Regulation 7 prescribes bands of hazards from A to J on the basis of a range of numerical scores. Thus a Band A hazard is one with a numerical score of 5000 or more; a Band B hazard is one with a numerical score of 2000 to 4999; and a Band C hazard is one with a numerical score of 1000 to 1999. Regulation 8 provides that a hazard falling within band A, B or C is a category 1 hazard and that a hazard falling within any other band is a category 2 hazard.

15. The numerical score for a hazard is reached in a number of steps prescribed by regulation 6. First the inspector is required to assess the likelihood, during the period of 12 months beginning with the date of assessment, of a relevant occupier suffering any harm as the result of that hazard as falling within one of a range of 16 ratios of likelihood that are set out. For each range there is also set out a representative scale point of range (L, as it is called in a formula that later falls to be applied). Thus, for instance, in the range of ratios of likelihood between 1 in 4200 and 1 in 2400 the representative scale point of range is stated to be 3200.

16. Who is a "relevant occupier" is defined in regulation 6(7) by reference to particular matters contained in Schedule 1. For paragraph 2 (Excess cold) the relevant occupier is an occupier aged 65 years or over.

17. The second step requires the inspector to assess which of the four classes of harm a relevant occupier is most likely to suffer. Thirdly he must assess the possibility of each of the three other classes of harm occurring as a result of that hazard, as falling within a range of percentages of possibility. For each range there is also set out a representative scale point of the percentage range (RSPPR). Thus, for instance, for the range 0.15% to 0.3% the RSPPR is 0.2%.

18. Step four requires the inspector to bring the total of RSPPRs for the four classes up to 100%. To do this he adds the percentages of the three RSPPRs he has reached at step three, takes the total away from 100% and attributes what is left to the class of harm that he assessed to be most likely to occur.

19. Step five is the production of a numerical score for the seriousness of the hazard for each of the four classes of harm. For each of these, L (see paragraph 22 above) is multiplied by the RSPPR and then by a further factor, which weights the seriousness of the classes of harm. This factor is 10000 for Class I, 1000 for Class II, 300 for Class III and 10 for Class IV. The final step is to add the four individual numerical scores to produce the numerical score that can be related to the prescribed bands.

Housing Health and Safety Rating System Operating Guidance

20. This document provides guidance on the HHSRS and the method of making assessments. For present purposes the following provisions are to be noted (I refer later to particular passages relied on by the council). "Hazard" is defined (at paragraph 2.12) as any risk of harm to the health or safety of an actual or potential occupier that arises from a deficiency; "deficiency" is defined (at paragraph 2.02) as the failure of any element to meet the Ideal; and the "Ideal" is defined (at paragraph 2.18) as the perceived optimum standard, at the time of the assessment, intended to prevent, avoid or minimise the hazard. Thus any heating system that falls short of the ideal and by reason of this failure gives rise to any risk of harm to health, however small or remote, constitutes a category 2 hazard at least. An authority, as I have noted above, are not obliged to take enforcement action in relation to a category 2 hazard, and it would no doubt be inappropriate to do so where the risk is very small.

21. At paragraph 2.33 it is stated that the assessment "is of the dwelling disregarding the current occupiers (if any), and based on the potential effects of any hazards on a member of the relevant vulnerable age group." A footnote says that the current occupiers are taken into account after this initial assessment of the dwelling, as one factor in determining the best course of action. "Vulnerable Group" is defined (following a reference to the Regulations) as follows:

> "2.30 A range of people for whom the risk arising from a hazard is greater than for any other age group in the population. Where there is no vulnerable group for a specific hazard, the population is taken as a whole.
>
> 2.31 Vulnerability to particular hazards is restricted to age groups. It does not extend to vulnerability for other reasons."

For the purposes of assessing the hazard of excess cold the vulnerable group, as I have noted above, consists of those aged over 65.

The assessment

22. The assessment that Ms Griffiths carried out following an inspection on 14 July 2010 was produced by taking the steps prescribed by the Regulations. There is an electronic form that is provided for this purpose for each of the Schedule 1 matters. The inspector has to select a property age band (in this case pre-1920), a property type (here a flat/dwelling in HMO), one of the numbers for case likelihood for the hazard under consideration (step 1 above, the L number) from the range 1 in 1 to 1 in 5600 and one of the RSPPRs (step 3 above) from the range 0.% to 46.4% for each of the four classes. He also needs to carry out step 4, unless the percentages already total exactly 100%. The computation is then automatic. The choice of numbers is of course crucial. To assist the inspector each of the ranges from which the selection is made includes a number marked "NA". This is said to represent the national average (for the actual case likelihood and the percentage of possibility of harm for each class).

23. For her assessment in relation to excess cold Ms Griffiths chose an actual case likelihood (ie of any one case in 12 months for an occupier aged 65 or over) of 1 in 32 (as against a stated NA of 1 in 320). She gave as the justification for this:

> "With regard to its 9 inch solid brick walls, the single glazed timber windows and the presence of only portable electric heaters as discussed above, the likelihood of the dwelling becoming unhealthily cold is significantly higher than for the average dwelling."

She adopted the NAs for the RSPPRs for each of the four classes (Class I 31.6%; Class II 4.6%; Class III 21.5%; and Class IV 46.4%). The resulting rating score was 10234. Its composition (not shown on the copy of the assessment produced at the hearing) would have been:

Class I	10000	x	1/32	x	31.6	=	9875.00
Class II	1000	x	1/32	x	4.6	=	143.75
Class III	300	x	1/32	x	21.5	=	201.56
Class IV	10	x	1/32	x	42.3	=	13.22
Total							10233.53

The score put the hazard into band A and making it a category 1 hazard. All but 358 of this was attributable to Class I harm – death or other extreme harm. It is to be noted that an assessment using the national average case likelihood (for dwellings of this type and for the over 65 age group) would produce a score of one tenth of this – 1023, making it (just) a Band C hazard and thus still a category 1 hazard, although on the margin of category 2. Also, even if the case likelihood were judged to be one thousandth of the national average, the score (1) would put the hazard into Band J, which (see paragraph 7 of the Regulations) comprises a numerical score range of 9 or less, and thus it would remain a category 2 hazard.

Case for the appellant council

24. The case for the council is a simple one. They say that the RPT's conclusion that neither an occupant's financial circumstances nor the cost of electricity compared to other forms of energy is a relevant consideration was wrong in law because under section 9(2) there is a requirement to have regard to guidance given under the section and the guidance given contains reference to these matters. Mr Hugh Derbyshire for the council, echoing the word used in the prohibition order, says that "affordability" was a matter that should have been taken into account. He places reliance on a witness statement by Llinos Elen Griffiths, a Senior Enforcement Officer with the council.

25. Ms Griffiths says in her statement that she believes that the panel heaters should be removed and replaced with modern storage radiators with a central temperature and time control for the individual heaters utilising a tariff such as Economy 7 or Economy 10. Having said this, she makes clear that the council are pursuing the appeal as a matter of principle. As she puts it:

"25. However, I also feel that the consequences of the RPT's decision is profound and will negatively affect the health of persons living in the private rented sector on a National level. I fear that what the RPT has done is given the private rented sector its' approval to install a form of heating that is detrimental to the health of occupants."

26. Referring to the Sutherland Tables on comparative domestic heating costs, Ms Griffiths says that they show, by way of example, that the annual space and water heating costs for a 2-bedroom house would be £896 using Economy 7 compared to £1,826 for electric radiators

27. Ms Griffiths says that in her view the need to have regard to affordability arises from the requirement that the system should be energy efficient, and she refers in particular to the following passages in the Guidance, which, she says, show this. With the exception of (b) they appear in Annex D "Profiles of potential health and safety hazards in dwellings" in the section dealing with "Excess cold".

(a) Under the heading "Preventive measures and the ideal": "2.20 Heating should be controllable by the occupants, and safely and properly installed and maintained. It should be appropriate to the design, layout and construction, such that the whole of the dwelling can be adequately and efficiently heated."

(b) "Thermal Efficiency. The dwelling should be provided with adequate thermal insulation and a suitable and effective means of space heating so that the dwelling space can be economically maintained at reasonable temperatures." This passage appears as an example in Box 9 on page 42, in a part of the Guidance entitled "Identifying Hazards".

(c) Under the heading "Causes": "2.15 Cold related illness is in part determined by the characteristics of the dwelling and in part by occupation factors. For example, under-occupation can mean either excessive heating costs or low indoor temperatures."

(d) And in the same section: "2.16 The energy efficiency of a dwelling depends on the thermal insulation of the structure, on the fuel type, and the size and design of the means of heating and ventilation. Any disrepair or dampness to the dwelling and any disrepair to the heating system may affect their efficiency. The orientation and exposure of the dwelling are also relevant."

(e) Under the heading "Hazard assessment": "2.25 Indoor temperature is a function both of dwelling characteristics and of the occupying household. For the HHRS assessment it is the dwelling characteristics, energy efficiency and the effectiveness of the heating system, which are considered, assuming occupation by the vulnerable age group."

Case for the respondent owner

28. The respondent, Mr Kassim, was not present at the hearing, but was represented by Mr Tom McVeigh, of the North West Property Owners Association. Mr Kassim's statement of case asserted that the RPT was right to reject affordability as a material consideration. It was not mentioned in the Guidance. The word used was "economically", which in the context meant without waste. The combination of the heating system and the double glazing and the situation of the flat had negated the category 1 hazard of excess cold. The fundamental flaw with Economy 7 was the expensive rate of electricity in the remaining 17 hours of the day. Once all the heat had been emitted from a storage heater it had to be heated up using the more expensive day time tariff. Elderly and vulnerable tenants might not understand this. If they wished to boost the heating or hot water in the evening they would pay a premium. The cost of running any heating system was dependent on the lifestyle of the occupier and the particular utility and tariff that they chose to use.

29. Mr Kassim had filed a report by Latham Miller Consulting Ltd, who describe themselves as mechanical and electrical consulting engineers specialising in building services. It was signed by a director, Tom Metcalfe, but, like Ms Griffiths, he was not called to give evidence. The report said that, whilst it was not disputed that the information provided in the Sutherland Tables was of use in producing a rough assessment of heating costs, it was contended that the figures did not accurately reflect a property of the nature of the subject flat. The actual usage of the system and the building fabric would determine the running costs, and on assumptions that in their experience reflected real world usage in this type of property, the economic costs of the two systems would be generally equivalent. Calculations were produced to show this (£735 per annum compared with £749). The report added that the environmental costs of the storage heating option far outweighed those of the panel heaters because of the very large amount of energy that was wasted by the storage heaters.

Conclusions

30. The issue is whether the RPT was right to reject affordability (embracing the costs of heating and the means of the occupier) as a material consideration. The question of its potential relevance requires consideration in two contexts, which need to be distinguished from each other. The first context is the assessment process. Is affordability potentially relevant to the assessment of the hazard in accordance with the regulations? The second context is in relation to enforcement action. What enforcement action should be taken in relation to the hazard? And, if the hazard is a category 2 hazard, should any enforcement action at all be taken?

31. In her witness statement, Ms Griffiths says this:

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

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

32. In the context of the assessment the question has to be addressed by reference to the vulnerable group, those over 65. Any proclivity to be deterred from using the heating system for reasons of expense must be considered in relation to the group. The Guidance (see paragraphs 2.30 and 2.31, quoted above) says that vulnerability due to factors other than age cannot be taken into account. To the extent that the over 65 population is generally less well-off than the younger working population, that fact is, in my view, relevant, but no more specific assumption as to means can be taken into account.

33. In the context of the enforcement action – if it is a category 2 hazard, is it appropriate to take any such action? and if it is appropriate to take action (or where, in the case of a category 1 hazard, such action must be taken) what should that action be? – regard can be had to the actual and potential occupiers of the property and their circumstances. The means of such persons could be taken into account if was considered that this would affect their proclivity to use the heating system. Other factors might also be relevant. Mr McVeigh said that in the case of student accommodation, the usual practice was for the rent to be inclusive of heating costs. If that is right, in the case of such accommodation the cost of heating would have no apparent relevance. To be noted also is the decision of this Tribunal in *Bristol City Council v Aldford Two LLP* [2011] UKUT 130 (LC), HA/5/2010, which concerned accommodation occupied by a working couple, who expressed satisfaction with a system consisting of wall-mounted convector heaters with timers and thermostatic controls. It was held (at paragraph 43) that their views were manifestly material in determining the appropriate course of action to take.

34. The RPT was in error in my judgment when it said that the cost of electricity was not relevant. It is capable of being relevant, although only in the ways that I have identified. The case must accordingly be remitted to the RPT for reconsideration. Since the council have expressed their satisfaction that if night storage heating of the same capacity as the panels were to be installed the hazard of excess cold (or, as I think it would be more accurately put, any such hazard requiring or meriting enforcement action) would no longer remain, the questions for the RPT are these. The first is whether the generality of occupiers over the age of 65 would be likely to use this panel system less than a night storage system in cold weather. If it does not appear probable that they would, that is the end of the matter. The prohibition order should be quashed.

35. If the answer to the first question is that the over 65 group probably would use this panel system less than a night storage system in cold weather, the second question is whether it is

probable that as result there would be such a risk to the occupier's health that a category 1 hazard would remain. The method of assessment, as I have noted above, is complicated and the apparent precision of a numerical score can be misleading. The result is dependent on judgement, and the national risks quoted as a guide are based on statistics that may be of questionable validity (see *Bolton Metropolitan Borough Council v Patel* [2010] UKUT 334 (LC) HA/6/2009 at paragraph 37). Necessarily the RPT must make a common sense judgement in the light of the evidence as to whether any deterrent effect that it considers that cost might have would be such as to create sufficient risk to give rise to a category 1 hazard.

36. If the conclusion is that a category 1 hazard remains, it would be open to the RPT to consider whether some other enforcement action (in particular a hazard awareness notice) rather than a prohibition order is the appropriate (see on this the *Bristol* case). If the conclusion is that a category 2 hazard, but not a category 1 hazard, remains, the RPT will have to decide whether it merits enforcement action at all and, if it does, whether a prohibition order rather than some other action is appropriate. In considering these questions it would, as I have said, be material to consider the circumstances of the likely occupiers of the flat. Such circumstances could include their probable means, if this was thought to be a factor of any significance, and also whether they might not prefer the present system to a night storage system. If the RPT considers, addressing the matter on this basis, that a prohibition order is not appropriate, it must quash the order.

37. The appeal is allowed and the case is remitted for further determination by the RPT.

38. Mr Derbyshire said that if the appeal were to be allowed the council might wish to apply for costs. A letter on costs accompanies this decision, which will become final when any question of costs has been determined.

Dated 30 May 2012

George Bartlett QC, President

Addendum on costs

39. I have received representations on costs. The council ask for their costs. They say that the respondent is a commercial landlord with a large property portfolio. He chose to appeal against the prohibition order, and the RPT accepted his arguments. This necessitated an appeal by the council, which was contested by the respondent, and they had employed the services of counsel in consequence. The matter was of considerable importance, as it concerned the question whether affordability was a material factor in the assessment of heating in the HHSRS rating system. Costs should, therefore, follow the event.

40. The respondent says that he should not be responsible for costs in circumstances where the RPT had failed to take a factor, affordability, into account. The respondent was blameless in this respect. He did not effectively contest the appeal; his involvement was minimal; and the council's case did not change in the light of the bare documents that he had submitted. He did not enter into the legal argument and made plain that he was willing to comply with any order made in relation to affordability by the Tribunal. His status as landlord of several properties is, he says, irrelevant.

41. The council have made clear that they pursued this appeal as a matter of principle. Ms Griffiths indeed suggested that the effect of the RPT's decision would be to affect the health at a national level of persons living in privately rented accommodation. It does not seem to me in these circumstances that it would be appropriate for the respondent to have to pay the costs that they have incurred in having this point of principle decided, even though he is the landlord of several properties. There is, moreover, a substantial possibility that, when it considers the matter again on remission, the RPT may conclude that a prohibition notice order was not appropriate, and this is in my view an additional reason for making no order as to the costs of the appeal.

Dated 11 July 2012

George Bartlett QC, President