UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – emergency remedial action – excess cold – whether imminent risk of serious harm – RPT holding no imminent risk – whether RPT applied too stringent a test of imminent harm – appeal dismissed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE NORTHERN RENT ASSESSMENT PANEL

BETWEEN BOLTON METROPOLITAN BOROUGH COUNCIL Appellant

and

AMRATLAL PATEL Respondent

Re: 4 Mere Walk
Bolton
BL1 2RW

Before: The President

Sitting at Manchester Civil Justice Centre, 1 Bridge Street West, Manchester M60 9DJ
on 25 August 2010

Andrew Clark instructed by Bolton MBC Legal Department for the appellant
The respondent in person

No cases referred to

DECISION

Introduction

1. This is an appeal against a decision of a residential property tribunal for the Northern Rent Assessment Panel dated 26 March 2009 varying a notice of emergency remedial action served on the respondent by the appellant under section 41 of the Housing Act 2004. The appellant, Bolton Borough Council, is a local housing authority and the respondent, Mr Patel, is the landlord of tenanted premises, the appeal property, 4 Mere Walk, Bolton.

2. The notice identified four "Category 1 hazards" as being present within the property, arising from the fact that the central heating and hot water boiler was defective and not working (giving rise, it was said, to hazards of excess cold and food safety) and that there were exposed electric wires in two locations. On Mr Patel's appeal under section 45 of the Act against the council's decision to take emergency remedial action the RPT determined that the council's decision in relation to the electrical hazards was justified. It concluded, however, that emergency remedial action was not a course that was open to the council under the Act in respect of the hazards of excess cold and food safety.

3. On 1 May 2009 the RPT gave the appellant permission to appeal on the ground advanced by the appellant that it had wrongly interpreted or wrongly applied the relevant law. Permission to appeal on other grounds was refused by the RPT and by this Tribunal.

The facts

4. The property is a mid-terrace house built around 1970 and constructed of brick under a tiled roof. On the ground floor there is a hall, living room and kitchen. Upstairs there are three bedrooms and a bathroom/wc. At the time the notice was served the house was occupied by a tenant, Ms Kara Brooks, and her six children, and Ms Brooks was expecting her seventh child. On 14 October 2008 in the course of seeking advice on another matter from the council's housing advisory service Ms Brooks mentioned that the boiler was not working and that she had been without hot water since May 2008. The council's housing adviser telephoned Mr Patel the same day to discuss the possession proceedings, and she advised him of his repairing obligations; but it was not until four weeks later, on 11 November 2008, that she and another housing officer visited Ms Brooks at the property.

5. On that visit to the property it was noted that the boiler was not working and that Ms Brooks was using halogen heaters. The heaters appeared to have defective guards and the officers were concerned that they might pose a fire risk. It was also noted that there was disrepair to an electric socket. In view of this the matter was referred to the council's Housing and Public Health team, and an environmental health officer and a technical officer visited the property on the afternoon of the same day. In addition to the defective boiler and light switch it was noted that the thermostat in the living room had exposed wiring, and the lack of hot

water meant that dishes and utensils were left unwashed. The technical officer, Mr Curren, later scored the hazards under the Housing Health and Safety System (England) Regulations 2005. Using an automated scorecard to generate the scores by reference to variable data, the values of which were decided by him, Mr Curren produced the following scores:

Excess cold	– Score 32747	(category 1 hazard, band A)
Food safety	– Score 1569	(category 1 hazard, band C)
Electrical hazards	– Score 2839	(category 1 hazard, band B)

I will refer to the Regulations and the scoring system later.

6. Following a telephone conversation with Mr Patel, who was abroad at the time, the officers decided that the appropriate course was for the council to take emergency remedial action. On the next day, 12 November 2008, they returned to the property with a gas engineer, who said that the boiler was beyond repair and needed replacement. He also examined the light switch and the thermostat and said that they both required repair. On the council's instructions he replaced the boiler with a new Worcester condensing boiler and dealt with the faulty electrical fittings. Notice of emergency remedial action was served on Mr Patel, and he appealed to the RPT against the council's decision to take the action.

The Housing Act 2004

7. Part 1 of the Act deals with housing conditions, and in Chapter 1 a new system for assessing housing conditions and enforcing housing standards is established. 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.)

8. 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."

9. 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.

10. 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; …
>
> (d) taking emergency remedial action under section 40; …
>
> (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."

11. 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 (2006).

12. Section 11, dealing with improvement notices relating to category 1 hazards (section 12 deals with improvement notices for category 2 hazards), contains the following provisions:

> 11. Improvement notices relating to category 1 hazards: duty of authority to serve notice
>
> (1) If –
>
> (a) the local housing authority are satisfied that a category 1 hazard exists on any residential premises, and

(b) no management order is in force in relation to the premises under Chapter 1 or 2 or Part 4,

serving an improvement notice under this section in respect of the hazard is a course of action available to the authority in relation to the hazard for the purposes of section 5 category 1 hazards: (general duty to take enforcement action).

(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 subsections (3) to (5) and section 13 …"

13. Section 13 deals with the contents of improvement notices, and subsection (1) provides that an improvement notice under section 11 or 12 must comply with the following provisions:

"(2) The notice must specify, in relation to the hazard (or each of the hazards) to which it relates –

(a) whether the notice is served under section 11 or 12,

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

(c) the deficiency giving rise to the hazard,

(d) the premises in relation to which remedial action is to be taken in respect of the hazard and the nature of the remedial action,

(e) the date when the remedial action is to be started (see subsection (3)), and

(f) the period within which the remedial action is to be completed or the periods within which each part of it is to be completed.

(3) The notice may not require any remedial action to be started earlier than the 28th day after that on which the notice is served."

14. Section 15(2) provides that (unless suspended) an improvement notice becomes operative 21 days after being served, the period for appealing against the notice under Schedule 1. Under section 15(5), if an appeal is made, the notice does not become operative until the notice is confirmed on appeal or the period for further appeal expires.

15. Sections 1 to 10 are contained in Chapter 1 of Part 1 of the Act Part 1 is entitled "Housing conditions". Chapter 1 is entitled "Enforcement of housing standards: general". Chapter 2 deals with "Improvement notices, prohibition orders and hazard awareness notices"; and Chapter 3, containing sections 40 to 45, deals with "Emergency measures". Section 40 includes the following provisions:

"40. Emergency remedial action

(1) If –

(a) the local housing authority are satisfied that a category 1 hazard exists on any residential premises, and

(b) they are further satisfied that the hazard involves an imminent risk of serious harm to the health or safety of any of the occupiers of those or any other residential premises, and

(c) no management order is in force under Chapter 1 or 2 of Part 4 in relation to the premises mentioned in paragraph (a),

the taking by the authority of emergency remedial action under this section in respect of the hazard is a course of action available to the authority in relation to the hazard for the purposes of section 5 (category 1 hazards: general duty to take enforcement action).

(2) 'Emergency remedial action' means such remedial action in respect of the hazard concerned as the authority consider immediately necessary in order to remove the imminent risk of serious harm within subsection (1)(b).

(3) Emergency remedial action under this section may be taken by the authority in relation to any premises in relation to which remedial action could be required to be taken by an improvement notice under section 11 (see subsections (3) and (4) of that section)."

16. Under subsection (6) (read with paragraphs 3 and 4 of Schedule 3) the authority have the right to enter the premises to take the emergency remedial action.

17. Section 41 (read with paragraph 1 of Schedule 1) requires the authority to serve notice of emergency remedial action on the person having control of the dwelling, and section 42 empowers them to recover from that person expenses incurred in taking the action.

18. Under section 45 a person on whom a notice has been served in connection with emergency remedial action may appeal to a residential property tribunal against the decision to take action, and the tribunal has power under subsection (6) to confirm, reverse or vary the decision.

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

19. 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).

20. 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 the three matters on the basis of which the council took emergency remedial action: Excess cold ("2. Exposure to low temperatures"); Food safety ("16. An inadequate provision of facilities for the storage, preparation and cooking of food"); and Electrical hazards ("23. Exposure to electricity").

21. 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.

22. 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.

23. 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. For paragraph 16 (Food safety) it is any occupier. For paragraph 23 (Electrical hazards) it is an occupier under the age of 5 years.

24. 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%.

25. 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.

26. 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.

The assessments

27. The council's technical officer produced his scores for each hazard 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 simply has to select one of the numbers for case likelihood (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).

28. For Excess Cold Mr Curren chose an actual case likelihood (ie of any one case in 12 months for an occupier aged 65 or over: but see below) of 1 in 10 (as against a stated NA of 1 in 320). He 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 scores were these:

Class I	10000	x	1/10	x	31.6	=	31600.00
Class II	1000	x	1/10	x	4.6	=	460.00
Class III	300	x	1/10	x	21.5	=	645.00
Class IV	10	x	1/10	x	42.3	=	42.30

Added together these produced the very high hazard rating score of 32747, putting the hazard firmly into band A. All but 1147 of this was attributable to Class I harm - death or other extreme harm.

29. It is to be noted that what the inspector was required to do was to produce an assessment of the likelihood of any one case occurring in a 12 month period and the percentage possibilities of each class of harm, not in relation to the actual occupiers but in relation to an occupier of 65 or over. It appears from the Guidance that the NA number for Class I harm in relation to Excess Cold is derived from the total excess of winter deaths in the 65+ age group, a bare statistic with no defined relationship to housing or housing conditions.

30. Mr Curren entered on the form as "Justification for actual case likelihood" the following:

> "(a) The tenants have been without heating or hot water for six months. The tenant and her two year old child were at home most of the day and therefore more prone to cold related illnesses.

(b) The temperature in the property was very low even though the tenant had portable halogen heaters on. A five day weather forecast suggested that temperatures were likely to remain low for the foreseeable future."

For the assessment of outcomes, the RSPPRs, Mr Curren adopted the NA figures because, as he noted on the form, "I did not feel justified in changing the harm outcomes."

31. For Electrical Hazards Mr Curren applied the same actual case likelihood of 1 in 10, and he adopted the NA values for each of the RSPPRs. The result was a score of 2839, making it a band B category 1 hazard. For Food Safety he adopted an actual case likelihood of 1 in 6 (against an NA value of 1 in 3200) and he applied the NA values for each of the RSPPRs. The resulting score was 1569, making it a band C category 1 hazard. If an actual case likelihood of 1 in 10 had been adopted the score would have been less than 1000, putting the hazard into band D and category 2, and emergency remedial action would not have been an available course of action. It is not clear from what statistical base these NA values are derived.

The RPT's decision

32. In relation to the Electrical Hazards the RPT concluded that the pre-requisites to emergency remedial action in section 40(1) were established and that the action taken by the council as emergency remedial action was the most appropriate form of action for them to take. In relation to Food Safety, the RPT said that the basis for Mr Curren's assessment of an actual case likelihood of 1 in 6 was not immediately apparent, but it was clear from the comments made on the scoring sheet that the lack of hot water was not the only factor that contributed to this assessment. Bearing in mind the range of contributing factors the action taken – the replacement of the boiler – would not have been sufficient to remove any imminent risk of serious harm. The Tribunal was not satisfied, therefore, that in this respect the action taken was emergency remedial action. There is no appeal against this part of its decision.

33. In relation to excess cold the RPT found that, having carried out a Housing Health and Safety Rating System inspection of the property, the council was justified in concluding that there was a category 1 hazard. However, it said, it was not satisfied that the hazard involved an imminent risk of serious harm to the health or safety of any of the occupiers of the property or to occupiers of any other residential premises. It stated its reasons as follows (I have replaced the bullets before each reason in the decision with letters):

"(a) The statutory requirement of 'an imminent risk of serious harm' is an exacting one, which deliberately sets a high threshold for the availability of emergency remedial action as a course of action under section 5(2) of the 2004 Act. This reflects the fact that emergency remedial action is a drastic step for an LHA to take, and is one which should be taken only in extreme circumstances. That this is the intended effect of the requirement is clearly demonstrated by a comparison with the conditions which apply to the (less drastic) step of serving an improvement notice under section 11 of the Act. Although service of an improvement notice does not entitle an LHA to take immediate unilateral action to deal with a hazard, its availability as a course of action under section 5(2) depends only on the existence

of a category 1 hazard (and on the absence of a management order), and not on the presence of a particular degree or severity of risk which is associated with that hazard.

(b) The requirement embodies two discrete conditions: First, the risk that harm will result from the hazard must be 'imminent'. Second, the harm in question must be 'serious harm'. These conditions are cumulative: both must be satisfied in order for the requirement to be met.

(c) The 2004 Act does not offer any guidance as to what sort of harm is 'serious harm', but it is reasonable to assume that it suggests significant injury or illness. It is also reasonable to assume that an assessment of the seriousness of harm should be made by reference to its possible effects on the health or safety of the actual occupiers in question, so that in the present case the fact that the occupiers were a pregnant woman and a number of children is a relevant consideration.

(d) Nor does the Act define 'imminent', but that word clearly conveys a sense of urgency – that there is a good chance that the harm in question may be about to occur unless preventative action is taken.

(e) The Respondent did not present specific evidence about the nature of the risk which the hazard presented to Ms Brooks or to her children. The relevant HHSRS scoring sheet shows that Mr Curren did not adjust any of the variables in the section on 'Assessment of Outcomes (Harm)', which therefore remained at the stated national average. Nevertheless, the Tribunal accepts that serious illnesses, particularly in young children, may result from living in conditions of excess cold. The crucial question, therefore, was whether there was an imminent risk of such illness or illnesses in these particular circumstances.

(f) The relevant HHSRS scoring sheet shows, in the section on 'Likelihood Assessment', that Mr Curren assessed the likelihood of harm at 1 in 10 (adjusted from the stated national average of 1 in 320). In evidence he said that he had made this assessment on the basis of the current (and expected) cold weather at the time, and because young children were present at the Property. It appears that the particularly high hazard rating score for excess cold was mainly attributable to Mr Curren's assessment of this aspect of the case.

(g) The Tribunal was not convinced that the likelihood of serious harm from excess cold was as high as the Respondent claimed. The five day weather forecast (referred to … above) on which the Respondent relied predicted that, although it may be very cold on 12 November 2008 (before emergency remedial action to replace the boiler was taken), with temperatures as low as zero degrees C, the following three days were forecast to be milder: the predicted minimum and maximum temperature for 13 November was 10 degrees C, with temperatures ranging from 9 to 13 degrees C on 14 November, and 8 to 12 degrees C on 15 November. It was not unusually cold for the time of year.

(h) In any event, the occupiers of the Property were not entirely without heating. It was conceded that the tenant had at least two halogen heaters which were providing some (albeit limited) heating. Mr Curren was concerned about the safety of these heaters, and perhaps rightly so. However, it should be noted that any hazards posed by the heaters were not taken into account as part of the HHSRS assessment and therefore cannot form a legitimate basis for the taking of emergency remedial action by the Respondent.

(i) The occupiers of the Property had already been without central heating for several months and, whilst the conditions in which they were living were clearly unsatisfactory, it was not reasonable to conclude that the risks posed by those living conditions were about to suddenly increase."

The appellant council's case

34. The council's case was that in determining that there was no imminent risk of severe harm from excess cold the RPT erred in that it treated "imminent" as imposing a higher threshold than was justified under the statutory provision. In particular, it was said, the RPT was wrong to equate an imminent risk of serious harm with there being "a good chance" of the harm in question occurring.

35. For the council Mr Andrew Clark submitted that "imminent" bore the meaning in the Oxford English Dictionary of "impending, soon to happen". He said that he accepted that because "imminent" implied that the risk was "soon to happen" it conveyed a sense of urgency. But in saying that there must be "a good chance" that the harm might be about to occur the RPT appeared to ignore the word "risk", which in common English denoted only that there was a possibility or probability of a chance of something occurring.

36. Specifically, Mr Clark said, the RPT was wrong in treating the urgency conveyed by section 40(1)(b) as being limited to the immediate future of three days, as its reference to the 5-day weather forecast implied that it had. Rather, he said, imminence should be determined by reference to the 28-day period before the next alternative course of action, an improvement notice under section 11, could have been implemented.

Conclusions

37. Before I consider Mr Clark's submissions I should say something about the method of hazard assessment provided for by the Act and Regulations and its application by the technical officer in this case. It seems to me important that RPTs when determining cases under Part 1 of the Act should bear in mind the nature of such assessments as these and their limitations. The complicated set of provisions is designed to produce a numerical score for each hazard that is under consideration so that it can be seen to fall within a particular band and in either category 1 or category 2. The great danger of a numerical score produced in this way it that it creates the impression of methodological accuracy, whereas the truth may be that it is the

product of no more than a series of value judgments based on little understood statistics of questionable validity.

38. The factual basis of the score for Excess Cold here was that the house was without central heating, with space heating being provided by halogen heaters. The actual occupants of the house were not relevant to the scoring system, since the score had to be based on the likelihood of a "relevant occupier" suffering harm as the result of the hazard, and the relevant occupier for Excess Cold is a person aged 65 or more (see paragraph 23 above). The NA (national average) case likelihood on the score sheet relates to the relevant occupier. It is not at all clear how useful a guide this is to the risk of harm due to a cold house, since it is simply derived from the total excess of winter deaths in the 65+ age group, a bare statistic, as I have said, that has no defined relationship to housing or housing conditions. In fact the technical officer appears to have based his assessment, not on the risk to the relevant occupier, but on the risk to Ms Brooks and her two year old child (see paragraph 30 above). For this purpose even the NA figure could have been of no assistance, and it appears that no other statistical guidance is provided.

39. The officer's assessment was that there was an actual case likelihood – ie of a single incident of harm of any sort being suffered by one person within the next 12 months – of 1 in 10. Then (step three above – see paragraph 24) he distributed this risk among the four classes of harm on the basis of the national average distribution, which, like the actual case likelihood, relates to the relevant occupier. For Class 1 the attribution was 31.6%. Thus he had concluded that there was a likelihood of 1 in 31.6 that an occupier of the house would within the next 12 months either die or suffer some other form of extreme harm (see paragraph 19 above) as the result of there being no central heating but only halogen heaters in the house. It was this surprising conclusion that produced the remarkably high hazard rating score of 31600.

40. The RPT said that it was not convinced that the likelihood of serious harm from excess cold was as high as the as the council claimed. Its reasons for saying this were that, in contrast to the council's suggestion, the weather forecast showed that it was not unusually cold for the time of year; that in any event the occupiers were not wholly without heating; and that they had already been without heating for several months. Those were matters that led the RPT, essentially as a matter of common sense, to question the very high hazard rating that the council's assessment showed. If it had also had regard to the matters I have referred to in the two immediately preceding paragraphs its doubts would almost certainly have been much greater.

41. In the event, however, the basis of challenge to the RPT's decision with which this appeal is concerned is not the factual basis of its disagreement with the council's assessment. Indeed the RPT proceeded on the basis that the hazard was a category 1 hazard. The challenge is directed to what is said to be the question that arose under section 40(1)(b) – whether the hazard involved an imminent risk of serious harm to the health or safety of the occupiers, and in particular whether it had misunderstood the meaning of "imminent risk". As far as "serious harm" is concerned, it said that the Act did not offer any guidance as to what sort of harm constitutes "serious harm". That is correct, but the Regulations do identify a hierarchy of harm

– extreme harm (Class I), severe harm (Class II), serious harm (Class III) and moderate harm (Class IV). Thus, for the purposes of the Regulations serious harm excludes moderate harm, and, although there is no express provision requiring the Regulations to identify what harm is serious harm for the purposes of section 40, it is, I think, implicit in section 2 that the Regulations will, or at least may, include this identification. Certainly, it seems to me, an authority could not be criticised if they treated as serious harm any harm falling within Classes I, II and III (excluding, therefore, Class IV), and in my view it would be right for them to do so.

42. Mr Clark's contention that the RPT had erred in law had essentially two inter-related elements to it. The first was it had misunderstood the meaning of "imminent" when it said that there must be a "good chance" that the harm might be about to occur unless preventive action were taken. The second was that it had wrongly treated as the relevant period for this purpose the next three days. I will consider these in turn.

43. As a matter of linguistic analysis "imminent risk" may appear to present something of a problem, since it is clear from the underlying purpose of section 40 that the risk – the chance of serious harm occurring – is, or at least may be, an existing risk. The adjective "imminent" is obviously not there for the purpose of suggesting that the risk must be one that does not at present exist but is likely to arise soon. It is perhaps in the nature of a transferred epithet qualifying "serious harm" – the risk must be one of serious harm being suffered soon. The degree of risk (or the likelihood, or the chance) that a state of affairs may give rise to an incidence of harm is necessarily time-related. That is why the Regulations require an inspector to assess the likelihood of harm being suffered within a specified period. The use of "imminent" implies, in my judgment, a good chance that the harm will be suffered in the near future. I can see nothing wrong, therefore, in the RPT's statement that imminent "conveys a sense of urgency – that there is a good chance that the harm in question may be about to occur." In my view the RPT correctly understood the meaning of the word in its context.

44. There are two things to be said about Mr Clark's submission that the urgency conveyed by section 40(1)(b) should not be limited to the immediate future of 3 days. Such limitation, he said, would appear to be implicit in the RPT's comments about the 5-day weather forecast, whereas urgency should be related to the 28-day period until the next alternative course of action could have been implemented. The first point on this is that the reason that the RPT referred to the 5-day weather forecast was, it is evident, because it was on the expectation of cold weather in the days immediately after the date of the notice that the council's case that there was an imminent risk of serious harm through excessive cold was based. The RPT addressed the council's case on the basis on which it was advanced and found that it was unsubstantiated. It did not purport to say that, in applying section 40(1)(b), attention should be confined to the ensuing few days or to any particular period, nor is this to be implied from what it said.

45. The second point to be made on Mr Clark's submission is that the 28-day period referred to in section 13(3) does not represent the period within which the council could have secured the implementation of remedial action. Under section 13(3) an improvement notice may not

require any remedial action to be started earlier than the 28th day after service of the notice. But the notice has to specify the period within which the remedial action is to be completed. More significantly there is a right of appeal against an improvement notice, and there is no failure to comply with the notice (giving rise to an offence under section 30(1)), if an appeal is brought and not withdrawn, until the notice has been confirmed on appeal and the period for further appeal has expired. It is, in my view clearly wrong to suggest, as Mr Clark did, that the test of the need for emergency remedial action is whether the action is judged to be needed within 28 days, and the contention that the RPT was in error in not approaching the appeal on this basis therefore fails.

46. I do not say that the section 13(3) period is not capable of being relevant when an authority are considering emergency remedial action. But the Act is not drafted so as to create a nexus between the two courses of action, and the 28-day period only has limited significance in view of the need to specify a completion period and the provisions for appeal.

47. The appeal must therefore be dismissed. The RPT's decision discloses no error of law; and I would only add that its conclusions in my view addressed the realities of the situation on a manifestly sensible basis.

Dated 19 October 2010

George Bartlett QC, President