FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/45UH/HIN/2021/0015
Property	**:**	17 Brisbane Close, Worthing, BN13 3HJ
Applicant	**:**	Mr Glenn Julian Elkins Miss Carol Linda O'Connor
Representative	**:**	Mr Quelch, Solicitor
Respondent	**:**	Adur and Worthing Councils
Representative	**:**	Ms Rayner
Type of Application	**:**	Appeal against an Improvement Notice, Section 11 Housing Act 2004
Tribunal Member	**:**	Judge J Dobson Mr M J F Donaldson FRICS Ms T Wong
Date of Hearing	**:**	20th December 2021
Date of Decision	**:**	31st March 2022

DECISION

Summary of Decision

1. **The Tribunal confirms the Improvement Notice served on the applicant by the Respondent subject to variations to the works set out in Schedule 3 of the Notice to reflect the findings made by the Tribunal. The works are to be completed in six weeks in respect of obtaining reports, six months for works required by such reports and three months for other works.**

Application and History of Case

2. The Applicant submitted an appeal against an Improvement Notice served by the Respondent and dated 31 August 2021, in respect of both Category 1 and Category 2 hazards (see below regarding such hazards) and requiring remedial works to remove those. That was received by the Applicant on or just after 2nd September 2021. Thirty-three hazards were included in the Improvement Notice. Twenty- four items of works were identified. The Tribunal received the appeal on 21 September 2021, in time.

3. The Applicant's grounds for appeal were set out in the application and elaborated on in the Statement of Case. Those concentrated on the works. Twelve of the items of work were stated to be agreed. Three more were not stated to be agreed in such short terms but it was indicated they could or would be dealt with (item 6 not clearly to the full extent sought) and no arguments were made in support of any appeal against such items. Items 1, 4, 5, and 24 (see below) were stated to be "fully contested". The other five items- 15, 17, 18 (part), 22 and 23 were said to be "unnecessary" and/ or to relate to a garage (15 and 18(part)) and not the house. It should be noted that the later witness statement of Mr Glenn Elkin, one of the Applicants, referred to work item 16 as also being disputed but made no mention of items 22 and 24 still being.

4. The essence of the Respondent's response, aside from summarising the relevant legislation and powers, was that hazards were assessed using the likelihood and spread of health outcomes and based in the risk posed to the vulnerable group and utilising the Respondent's Tascomi complaint management system. The software calculates the likelihood against the harm outcomes- see below. Comments were particularly made as to escape in the event of fire but also about the other items disputed by the Applicant. It was said that there was a duty to take action and that an Improvement Notice was decided on as the most appropriate action.

5. Directions were given on 8th November 2021, setting out the steps to be taken to prepare the case for determination and providing for a determination to be made at a hearing.

6. The Applicant sought to rely on a written Fire Safety Report from a Mr Sam Townsend. Reference was made to a statement in an email: it was

noted by the Tribunal that there was no permission to rely on expert evidence. An application was then made on behalf of the Applicant by an email dated 14th December 2021 to vary the date for provision of the bundle and also for permission to rely on the report of a fire contractor, Mr Townsend. The Applicant was permitted to rely on the written report but was not permitted to call oral evidence from Mr Townsend. The Respondent was permitted to file and serve a reply from Mr Elliot. The date for the bundle was varied.

7. For completeness, there was also an application for the hearing to be conducted fully or partially remotely. Whilst that was late, in the circumstances existing in late December 2021, the application was granted and any who wished to attend remotely were permitted to do so. In the event both sides' advocates and witnesses did so.

The Applicable Law

8. Given the nature of the matters to be considered, it is appropriate to provide some detail as to the legal background.

9. The relevant law is contained in the Housing Act 2004 ("the Act") and the particular law in respect of appeals is more particularly set out in Schedule 1 to the Act. The relevant parts of the Act are annexed to this Decision.

10. The Act introduced a new system for assessing the condition of residential premises operating by reference to the existence of Category 1 and Category 2 hazards Section 2 of the Act defines Category 1 and 2 hazards and provides for regulations for calculating the seriousness of such hazards. Those are to be applied by local Councils to the properties in their area.

11. A hazard is defined in section 2(1) as:

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

12. Category 1 hazard is defined in section 2(1) as follows:

> "(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 of calculating the seriousness of hazard of that description, a numerical score of or above a prescribed amount;"

13. Category 2 hazards are similarly defined.

14. Section 2(3) provides that regulations made may prescribe a method of calculation of the seriousness of hazards. The relevant regulations are the

Housing, Health and Safety Rating System (England) Regulations 2005 ("HHSRS").

15. If the local housing authority considers that a Category 1 hazard exists, section 5 imposes a duty to take the appropriate enforcement action- action is mandatory.

16. Section 5(2) sets out the various courses of action available to the authority, including as one option the service of an Improvement 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. Where more than one course is available, the local authority must take the most appropriate: where only one course is available, the authority must take that course.

17. If on such an inspection the local housing authority considers that a Category 2 hazard exists, section 7 confers a power to take the appropriate enforcement action but does not impose a duty to do so. Section 8 provides that the local authority must give reasons for taking enforcement action.

18. The HHSRS set out a method for calculating the seriousness of hazards by way of a numerical score. That is achieved by applying the prescribed methodology in regulation 6, taking in to account the likelihood of the harm occurring and the severity of the harm if it were to occur. There are a number of steps and variables.

19. There are 10 bands of hazard prescribed, A to J. Band A is the band for hazards scoring 5000 or more. Band B includes hazards with a score of 2000 to 4999 and Band C includes hazards scored at 1000 to 1999. More serious hazards are classed as Category 1 hazards, where a hazard falls into Category 1 if the numerical score is 1000 or above and so into Band A, B or C. Lesser hazards, those within the other 7 bands, are in Category 2.

20. In order to arrive at the relevant Band, the local authority must first assess the likelihood of a relevant occupier suffering any harm during the 12 months beginning with the date of the assessment as a result of the particular hazard. There are 16 ratios of likelihood. For each, there is what is described as a representative scale point. It is that which needs to be applied subsequently.

21. An assessment must then be made of which of the four classes of harm a relevant occupier is most likely to suffer. Those are named as Classes I to IV. Class I harm is "such extreme harm as is reasonably foreseeable as a result of the hazard in question, including….a) death from any cause…….regular severe pneumonia……." and also a number of other severe conditions. Class II is "severe harm", Class III "serious harm" and Class IV "moderate harm". The last of those includes regular serious coughs and colds.

22. A hazard is of a prescribed description where the risk of harm is associated with any of the matters that are listed in Schedule 1. By way of example, that included "Exposure to low temperatures". The "relevant occupier" varies according to the nature of the hazard and depends on the matters in Schedule 1.

23. In addition to assessing which class of harm is most likely, an assessment must also be made of the possibility of each of the other three classes of harm occurring, within a range of percentages of possibility. For each range of percentages of possibility there is set out a further representative scale point, this time of the percentage range" ("RSPPR").

24. Having determined the percentage possibility of each of the three less likely classes of harm, the local authority must then bring the total of RSPPRs for the four classes up to 100%, by assigning the percentage left to the most likely class of harm.

25. After that, a numerical score is produced of the hazard for each of the four classes or harm. The likelihood of each class of harm is multiplied by the RSPPR and then by a further factor which weights the seriousness of the classes of harm. The factor is 10,000 for Class 1, 1000 for Class II, 300 for Class III and 10 for Class IV.

26. The last step is the add the four individual numerical scores to produce a single numerical score that can be related to the ten prescribed Bands.

27. Section 11 of the Act sets out the statutory provisions regarding Improvement Notices relating to Category 1 hazards. Section 13 requires an Improvement Notice to comply with the provisions of that section. Section 12 of the Act sets out the statutory provisions regarding Improvement Notices relating to Category 2 hazards.

28. The information which must be specified in relation to a hazard includes, by s. 13(2)(b) and (d), "the nature of the hazard and the residential premises on which it exists" and "the premises in relation to which remedial action is to be taken in respect of the hazard and the nature of that remedial action". By s. 13(5) the premises in relation to which the remedial action is to be taken are referred to in Part 1 of the Act as the "specified premises".

29. Section 9 of the Act provides for the appropriate national authority to give guidance to local housing authorities about exercising their functions under the Act. In particular, their functions under chapter 2 of Part 1 of the Act relating to Improvement Notices. Section 9(2) provides that a local housing authority must have regard to any such guidance.

30. The office of the Deputy Prime Minister issued guidance under section 9 relating to Operating Guidance (reference 05HMD0385/A) and Enforcement Guidance (reference 05HMD0385/B).

31. The Operating Guidance explains that a "deficiency" is to be treated as the failure to meet the "Ideal". The "Ideal" is the optimum standard at the time to prevent, avoid or minimise the hazard.

32. The Guidance further says that the assessment is to be made based on assessment of the potential effects on a member of the relevant vulnerable group. That group is defined as being the age group for whom the risk from the hazard is greater than for other age groups

33. Part 3 of Schedule 1 to the Act provides for appeals against Improvement Notices. Paragraph 10 provides that a person on whom an Improvement Notice is served may appeal against the notice to the Tribunal Of particular importance in respect of such appeals is that the is to be by way of a re-hearing- paragraph 15(2)- and therefore the Tribunal shall reach its own decision as to the correct approach to take.

34. The appeal may be determined having regard to matters of which the Respondent was unaware. The Tribunal has the power to confirm, quash or vary the Improvement Notice- paragraph 15(3).

35. The Tribunal is required in light of the above to consider housing standards and must make findings as to the alleged deficiencies and must evaluate the scores. The Tribunal must then consider the appropriate enforcement.

36. The Tribunal did so mindful of the limitations of the HHSRS scheme as articulated by the President of the *Upper Tribunal (Lands Chamber) in Bolton Metropolitan Council v Amratlal Patel* [2010] UKUT 334 (LC). The President stated as follows:

> "….. 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 with a numerical score produced in this way is that it creates the impression of methodological accuracy, whereas the truth may be that it is the product of no more than series of value judgements based on little understood statistics of questionable validity."

37. As the President observed, the end result is necessarily dependent upon the inputs and so is dependent upon the appropriateness of the assessments made by the Respondent's officers and cogency of the evidence on which those were made. The complex nature of the process of producing the score can render the assessment difficult for other to understand and to assess the merits of challenge to it.

The Background Facts

38. The Property is agreed to be an end terrace house constructed in the 1970s, comprising a L- shaped living room/ dining area and a kitchen (accessed from the living room) to the ground floor and with three bedrooms and a bathroom to the first floor. The Property was built with a warm air heating system. The living area is open plan, into which the stairs to and from the first- floor lead. It was an accepted fact that there was no physical separation between the stairs and the living area. There is a garage attached to the front of the Property with separate access (and not accessible from the living accommodation).

39. The Tribunal was not requested to inspect the Property and did not do so. The Tribunal had the benefit of the documents provided by the parties and no suggestion was made as to that information being insufficient. The documents included both several photographs taken by Ms Froome and a plan drawn by Mr Elliot, the contents of all of which were not disputed.

40. Following a report made by the Applicants' tenant, the Respondent's officers- Mr Elliot and Ms Katie Froome- inspected the Property on 19th July 2021 and identified various matters considered by the Respondent to amount to hazards.

41. In this case the action which the Respondent took was to serve an Improvement Notice in relation to the asserted hazards under the Housing Health and Safety Rating System

42. The Improvement Notice included, at Schedule 1, a detailed description of the hazards existing, and for which remedial work was required. Schedule 2 of the Improvement Notice provided the reasons for the Notice. Schedule 3 gave details of the works required. The Notice contained advice regarding the date by which any appeal should be made, being 21 days from the date the notice was served. All that was compliant with requirements.

43. Of the thirty- three hazards identified in the Improvement Notice were three Category 1 hazards- all relating to *Excess Cold*- and thirty Category 2 hazards, including ones relating to *Damp and Mould*, to *Falls* and to *Personal hygiene, sanitation and drainage* and *Fire*. Those resulted in the twenty- four items of work identified to be required, of which items 5 and 6 comprised the works to remedy the Category 1 hazards. Dates for compliance were given of 12th October 2021 (three items), 1st December 2021 (thirteen items) and 28th February 2022 (eight items).

The Hearing

44. The Tribunal heard in person from the parties' representatives, Mr Quelch and Ms Rayner respectively, and heard oral evidence from Mr James Elliot, a Senior Environmental Health Officer of the Respondent, and Mr Elkin. The Applicants supplied the Tribunal with a hearing bundle. That included a written statement from Ms Froome, which included a schedule of the nature of the hazards identified and the rating

score given to each as a result of the calculation carried out, including the band into which each hazard was considered to fall.

45. It was accepted on behalf of the Applicant that action was appropriate on behalf of the Respondent save in relation to the disputed items identified above. In closing, the Applicant's representative also accepted the need for repointing in relation to items 1 and 17, albeit not work beyond that, and 18. He further indicated that items 22 and 24 were accepted. Whilst it is identified above that it was not clear that the Applicant accepted all of window defects asserted by the Respondent, the fact of defects was accepted and no issue was taken in respect of the action required, namely the obtaining of a report from a specialist and undertaking the work identified by that and no element of appeal was pursued in respect of work item 6, being part of the deficiencies on which the Category 1 hazard was based.

46. The Tribunal dealt with matters by taking the evidence of the witnesses about each individual disputed work item in turn, then moving on to the next item. The Tribunal dealt with the matter by looking at those disputed works, as opposed to disputed hazards, given that is the way in which the Applicant advanced his case. For the avoidance of doubt, that included items 22 and 24, in respect of which it had not been apparent until closing submissions that the items were definitely accepted. However, in light of that acceptance, no obvious purpose would be served by setting out the evidence presented or making any findings and so the Tribunal does not do so.

47. Therefore, the Tribunal was required to determine whether the bases for dispute in respect of the seven work items contained in the appeal impacted on the identified hazards and/ or the action appropriate from the Respondent in light of the findings made, in combination with the other hazards and remedial works accepted by the Applicant. The Tribunal regarded 16 as being closely linked to 4 and so was prepared to consider it as the eighth item albeit not specifically referred to in the appeal. The Tribunal bore in mind that the Respondent was able to address that item.

48. It was clarified that in relation to any finding of a requirement for the instruction of a surveyor- item 1- the Applicant asserted a timescale of six weeks would be appropriate, whereas a period of six months was asserted to be appropriate for other items. It was said on behalf of the Applicant that the tenant had cancelled appointments in respect of internal items, preventing access and delaying works.

49. Mr Elliot explained about the Respondent's software system and the thirteen different hazard profiles, twelve of which fell into Category 2 and one into Category 1. The evidence presented by the Respondent gave commentary on the deficiencies identified by Ms Frome and Mr Elliot. There was a schedule of scores. There were no calculations shown nor were there details of the variables which resulted in those scores.

50. The Tribunal concluded when reaching its decision that such absences were not a significant issue where the scores were low, the Bands were low, there was a deficiency and any score would, in the Tribunal's judgment, have resulted in a Category 2 hazard and the same remedial works being appropriate. It was necessarily a rather greater issue in the other instances.

51. It is usual for the Tribunal to consider the HHSRS (Housing Health & Safety Rating System) scores, to be able to consider the variables and any calculations. The Tribunal did so insofar as the Tribunal was able to but not comprehensively. The Tribunal had asked for an explanation as to how the Respondent arrived at the score for *Excess Cold*.

52. However, whilst the Applicant did not accept all of the deficiencies asserted by the Respondent, or the remedial works, there was no reference in the paper case to challenging the degree of harm or likelihood. There were no questions asked by the Applicant's representatives about those matters. No submissions were made as to what the degree of harm and/ or the likelihoods ought to be.

53. Given that both parties were represented by lawyers, the Tribunal did not consider it appropriate to question Mr Elliot hazard by hazard as to those matters. Still less would it have been appropriate for the Tribunal to advance any position ahead of this decision as to what the variables ought to have been and so what score ought to have resulted.

54. Where the Applicant did not raise any point about the variables and did not challenge the hazard score but only the remedial works, the Tribunal has adopted the scores arising from the Respondent's calculation as the unchallenged basis on which to consider the appropriate remedial works.

55. Nevertheless, the uncertainty as to the approach of the Respondent which then produced the scores rendered the assessment of the hazard a difficult exercise in respect of the minority of items where the Applicant challenged the factual basis for the assessment and the Tribunal markedly disagreed with the factual basis on which the Respondent had approach any given hazard.

56. Mr Quelch also challenged the variables in respect of *Excess Cold*- see below- albeit without advancing any alternatives for the likely level of harm percentage chance of any given level.

57. In deciding the outcome of the appeal, the Tribunal considered whether it accepted the hazard to exist and to the extent asserted by the Respondent, collectively whether an Improvement Notice or other action was appropriate and then considered the remedial work, if any, which ought to undertaken.

Consideration

58. The Tribunal takes each of the items or immediately linked work items- and any matters related to the hazards which those seek to address- in turn, considering the factual matrix and the score reached by the Respondent.

Item 1 (and 17)- Arrange for a suitably qualified surveyor to investigate cracking to exterior and provide a report (and complete identified works)
Item 18 Rake out all mortar joints or brickwork to a depth of 15mm and repoint, finish with joint struck to match original. This includes the garage.

Evidence and finding of Facts

59. The Applicant accepted there to be a stepped mortar crack (the Applicants referred to rendering cracking but the Tribunal perceives a clerical error as it was apparent that no render was applied to the wall) and the need for repointing of the wall but not that the cracking was indicative of any greater issue and certainly not that there was any risk of *structural collapse* such that the instruction of a surveyor was required (or that such surveyor would require additional work to be undertaken). Mr Elliot said in evidence that the Respondent would not be satisfied with that if movement of the wall then continued. He said that in addition to the stepped cracking, one brick had cracked, and he thought it had moved slightly out, although he said it was at high level near the eaves. Mr Elliot's evidence was far from clear as to movement of the brick. Mr Elliot accepted that there may have been previous movement of the wall which had contributed to the cracking and which had ended.

60. Mr Elliot stated in response to questions from the Tribunal that there was no evidence of movement from inside the Property, there was no brick dust on the ground and there was no moss growth. Mr Elkin said that in his recollection the cracking had existed in 2016 when he purchased the Property. He was equivocal as to whether the crack had been smaller. He said that no work had been undertaken earlier as no issue had been identified.

61. The Tribunal noted that cracking to the mortar was accepted and also found that there was some evidence that the extent of the cracking had increased but not that such increase was indicative of any wider issues. The Tribunal considered that old mortar was likely to crack to an increasing extent over time but that nothing significant arose from that unless the mortar came to be in such a poor state that there was an identifiable risk of brickwork falling. Similarly, a degree of historic movement was entirely plausible but created only a very little concern. Whilst the Tribunal accepted that one single brick was cracked, it found that no more than a negligible risk of that falling was identifiable.

62. The Tribunal found on the evidence and applying its expertise that the prospect of structural collapse or falling elements was therefore minimal.

63. The Tribunal found in relation to the Applicant having originally referred to the garage not being accessed from the remainder of the Property, that it was.

64. The Respondent referred to the Operating Guidance as to a dwelling including any outbuildings used with it, which definition the Respondent said the garage met. The Tribunal agreed that the garage forms part of the Property, applying that Guidance, and so is part to which the provisions apply.

65. The Applicant did not otherwise argue with the need for some pointing to the garage and hence the Tribunal found that pointing work to the garage is required.

Application of the Facts found

66. The hazard to which this items relates is a category 2 hazard of *Structural Collapse and Falling Elements*. The Tribunal accepts that the hazard encompasses part of the fabric of the Property being displaced, albeit whole dwelling collapse also at the most serious end of the spectrum.

67. Given that any risk of harm gives rise to a Category 2 hazard, the Tribunal accepted that the hazard had been properly categorised as such. The Tribunal accepts that cracking to the mortar is such that the bricks are not as secure as ideally and so there is an extent, albeit a very low one, to which a part of the brickwork could be displaced. Hence the Tribunal accepts that a hazard exists.

68. The assessment by the Respondent had produced a score of only 20, and so band H. That was very much to the lower end of the spectrum. The findings made by the Tribunal necessarily fed into an assessment of the harm likely, in respect of which the Tribunal found the risk of levels of any harm above moderate harm were low and so the score ought to be low accordingly. As the Applicant's challenge had not been expressed as related to the score but rather the remedial work, the Tribunal did not find it necessary to recalculate the score.

69. The Tribunal accepted that in principle- and if merited by the hazard- the Respondent was entitled to request a report to be obtained. However, given the low score even on the Respondent's assessment, the Tribunal was not persuaded that a report from a surveyor was required as the appropriate remedial action in the event of the Improvement Notice remaining. Any reduced score added weight to that.

70. The Tribunal considers that the Applicant is correct that attending to the mortar pointing is sufficient. That includes mortar pointing in respect of all of work item 18 and so includes that required to the garage.

Item 4- Carry out works to internal layout such that there is a protected escape route from the first floor by creating a lobby at the bottom of the stairs-

Item 16- Remove the boarding over the hallway windows, ensure glass replaced with safety glass

Evidence and finding of Facts

71. The Tribunal regarded item 4 and item 16 as closely connected, finding that item 16 would need to be dealt with as part of the work required in respect of item 4. It is therefore sensible to address both together for the avoidance of duplication.

72. Mr Elliot did not accept the assessment made by Mr Townsend as to fire safety of the Property. Mr Townsend had, he said, implied that the first-floor windows would be satisfactory as escape windows- from which the Property could be exited- for able-bodied persons. Mr Elliot emphasised that it cannot be guaranteed that the relevant persons will be able-bodied. He reminded the Tribunal that the escape from fire must be suitable for the most vulnerable group, in this instance being those over 60 or young children, for whom the ground outside the window must be level and soft. Mr Elliot said that the ground outside is not level or soft, there being the garage, the front steps and plant pots at the front and two steps from the patio doors to the rear. Hence the Respondent's position is that the first- floor windows are not acceptable escape window.

73. Mr Quelch put questions about compliance with Building Regulations and asserted conflict with the HHSRS and the Act, which Mr Elliot dealt with, maintaining the Respondent's case. Whilst he also accepted that a fire was most likely in the kitchen, neither that nor an alarm system prevented the hazard being as identified, he said. Mr Elkins accepted that Mr Townsend's report made no reference to the HHRS or the Act and also that the report was wrong to make reference to a conservatory at the Property, there being none.

74. There were a number of questions posed about how to achieve natural light if the layout of the Property were altered. Mr Elliot contended that the door and any windows could be upgraded and fire resisting. He accepted that subject to how item 4 was dealt with, item 16 may not be relevant.

75. Ms Rayner reminded the Tribunal in closing that the risk arose not just from flames but from gas and smoke. She added, having made reference to Building Regulations, that HHSRS is a new system for assessing risk. Mr Quelch argued more widely that the issue was not straightforward and that taking matters as far as the Respondent had was not necessary. He submitted that the work sought could result in a dark room.

76. The Tribunal determined that the Property suffers from the identified hazard in relation to the fire escape route. The Tribunal found that egress from the first- floor windows was not compliant with fire safety requirements, given that the staircase leads down into the living room and where there was no corridor from the stairs to the front door.

77. The Tribunal found that not to be an uncommon design and quite prevalent in properties of the general age of this one and small properties of other ages. However, the Tribunal did not find that to be a sufficient answer in itself.

78. The Tribunal accepted that safe egress must be considered in relation to the most vulnerable groups and that those groups are persons aged over 60 years old or under 4 years old. The Tribunal accepted that the ground outside the windows was neither level nor soft. The Tribunal noted potential for egress onto the garage roof from a front window but with no evidence of the condition of that. More significantly, the Tribunal noted that neither party had advanced that matter as relevant and considered that it was not appropriate to reach any determination with regard to a matter not raised.

79. The Tribunal found that leaving the Property through the first- floor windows was not an acceptable solution and would not meet safety requirement for the most vulnerable groups and hence those who were required to be considered.

80. The Tribunal considered the extent to which weight should be given to the report of Mr Townsend. The Tribunal had previously noted that it does not meet the requirements for an expert report addressed to the Tribunal and that it should be considered but not treated as expert evidence.

81. The Tribunal derived little assistance from the document. The lack of any reference to the Act and the HHSRS indicated that Mr Townsend did not understand the relevance of those or at least had not addressed his mind to them. Mr Townsend had referred to Building Regulations but the Tribunal considers it well established that different considerations apply under the Act and HHSRS.

82. It should come as no surprise that a report which did not engage with the relevant regulations did not carry much weight. The obvious discrepancy as to the Property having a conservatory where it was clear that it did not, was also troubling and cast considerable doubt on the care taken by the author.

Application of the Facts found

83. The hazard to which item 4 related was *fire*. Item 16 was the basis for finding the hazard of *lighting* and part of the hazard of *falling on level surfaces*.

84. The Tribunal did not disagree with any element of the Respondent's case in respect of work item 4. The Applicant had argued that the Respondent's approach was wrong in respect of escape windows, which argument the Tribunal had rejected. The Applicant had not argued that the variables were any different if the Respondent's position was found to be correct and had not challenged the score resulting.

85. The Tribunal noted the score produced of 176, as against a national average of 2, placing the score in Band F. As noted above, any risk of harm would have led to the same Category 2 categorisation.

86. The Tribunal also agreed as to the works required to address the hazard of fire. Whilst those are not insignificant, they involved suitable partitioning, doors and glazing, rather than any structural work or other work substantially altering the Property. In any event, the Tribunal did not regard any lower level of work to be sufficient to address the hazard, having considered whether there could be such works and what those could be.

87. The Tribunal considered that there were a number of ways in which a protected exit could be created, the exact one of which chosen being a matter for the Applicant, and that the existing hallway door and internal windows would more likely than not be removed or altered in that process. The Tribunal did not accept that would necessarily result in inadequate natural light into the living room, much as the design of the Property did not enhance the scope for natural light. The Tribunal noted that the long limb of the L reaches to the, as described, rear large patio doors and also that the short limb is very short. However, the Tribunal did not consider the details of any specific solution to a safe route and to ensuring natural light as far as practicable fell within its consideration.

88. The Tribunal accepted that the glass in the lobby/ hallway internal windows is not safety glass, that there is risk arising from inadequate lighting and with falls, accepting those Category 2 hazards to exist, and that the area needs to be dealt with. However, the Tribunal found that as the area would very likely need to be dealt with in conjunction with item 4, and that may well involve removal of the windows in the course of reconfiguring the area around the bottom of the stairs and towards the front door, a specific requirement to replace the particular windows currently in situ may be contrary to wider action or serve little if any purpose.

89. The Tribunal determined that as the current hallway door and internal window arrangement is not sufficiently fire resistant and that an appropriately protected escape route would necessarily require work to them, irrespective of exactly how that were achieved, any relevant work was part and parcel of item 4, such that a separate item 16 was of doubtful purpose.

90. The Tribunal varies the Notice to require the removal of the boarding such that there shall only be works to replace the current glass if the current hallway windows and door can be and are retained.

<u>Item 5- Provide an effective, efficient and economical fixed heating system suitable and sufficient</u>

91. This was the item to which the most time was devoted of any of the hazards and remedial works contended by the Respondent. That was perhaps unsurprising where it related to a Category 1 hazard, albeit also a separate Category 2 hazard. Questions of a mix of fact and law arose.

92. The deficiency contributing to the Category 1 hazard was said to that the system is "ineffective to heat the property and is not cost effective to maintain" and also said, using slightly different wording, but without discernible distinction in practice, to be "not effective, efficient or economical to run". In respect of the Category 2 hazard was added "ineffective….to allow proper control of condensation".

Evidence and finding of Facts

93. The Respondent's position as explained in the evidence of Mr Elliot was the heating system is overly expensive and not cost effective and is not sufficient. The system was accepted to work and be safe. He did not consider that the issues as to the heating system would alter if works to the windows were undertaken, much as the rating as to cold would be improved, saying that the weighting giving to the blown window, for example, had been very small. As mentioned above, the Applicant had accepted that any deficiencies with windows identified by an expert should be dealt with (item 6) (without accepting the window defects explicitly any other than blown glass but having raised no challenge).

94. Mr Elliot said in response to cross- examination that where Schedule 1 of the Improvement Notice referred in relation to Category 1 hazards to "ineffective to heat the property and is not cost effective to maintain", the Notice referred to the cost- effectiveness of the tenant maintaining a suitable temperature and not to the maintenance of the system.

95. Mr Elliot stated in relation to the first part of the wording in the Notice that the system "requires" supplemental heating and cannot keep the tenant warm in isolation. In relation to the second part, he expressed the opinion that the tenant would not be able to afford to use the warm air system and so would not use it, rather than there being use and a high bill.

96. Mr Elliot said that his decision that the heating system was not suitable was based on experience as to wider effectiveness of such systems and that the tenant has "had to provide supplemental" direct heating. It was put to him that methods of assessing were available such as the Sutherland tables, but Mr Elliot said that he had not relied on those but rather on having carried out a BRE Energy Saving Trust calculation. No calculation applying that approach was produced. The Tribunal was inevitably unable to make any finding that the outcome of such calculation was appropriate and that the result of it could properly be relied on by Mr Elliot in assessing the heating system.

97. It was established that during the inspection by the Respondent's officers in summer 2021, the heating had not been in use. Mr Elliot said that Ms

Froome and he had not sought to put it on. He had no first-hand knowledge of its operation.

98. Mr Donaldson questioned Mr Elliot as to whether the rooms had been measured and a heat-loss calculation undertaken. Mr Elliot said that it had not. He was not aware of the make or capacity of the boiler. Mr Elliot accepted that he did not try to operate the system and that he had not seen any energy bills for the Property but said that warm air heating systems were more expensive than gas central heating and deficient against that optimum. That was a general comment.

99. Mr Elliot did not accept the Energy Performance Certificate ("EPC") rating of D- neither the best nor the worst- to be relevant, given the nature of the assessment undertaken. Mr Elkin stated that no issues with the heating had been raised by the contractor who had provided gas safety certificates.

100. The Tribunal was surprised by the rejection by Mr Elliot of the relevance of the EPC, noting that local authorities have sought to derive support in other cases from the energy ratings in EPCs, albeit where those were lower than in this instance. The Tribunal was also mindful that the Operating Guidance makes specific reference assessing the energy rating of a dwelling.

101. In contrast to Mr Elliot, the Tribunal considered the mid-range rating of D to be of some relevance to assessment of a hazard of excess cold and not too unusual for a property of the age and nature of this Property.

102. Mr Elliot stated that the most vulnerable group to be looked at was the over- 65s in respect of this element, which is that identified in the Operating Guidance, and stated that where the heating system is deficient, the likelihood of illness to members of that group increases, reflected in the hazard rating score, band and category. In response to questions by Judge Dobson, Mr Elliot described the average likelihood of illness as a whole 1 in 530- which the Tribunal notes is the national average likelihood for post- 1979 dwellings- and the assessed likelihood in the Property as 1 in 100.

103. Mr Quelch argued in closing that the resulting score of 3275 was not broken down to explain how it was reached, although he had not sought to establish how it was in cross- examination or otherwise. He contended that part of the score must relate to the deficiencies in the double-glazing, which was to be dealt with.

104. The Tribunal found that to be correct i.e. that the Respondent had assigned some of the harm as arising from the window elements of the Category 1 hazard assessed. The Tribunal found that the Respondent regarded the main contributor to *Excess cold* as being the heating system

105. A number of questions by Mr Quelch and replies of Mr Elliot referred to insulation. There was nothing which the Tribunal found of immediate

assistance. Although the Tribunal noted Mr Elliot's opinion that the insulation provision could be better, he was unclear of the insulation fitted, he had not accessed the loft for example, and there had been no destructive tests. So, on that point Mr Elliot was content to treat the EPC as correct. That aside, he indicated an assumption is made based on the average for the age of the given property. Mr Quelch contended in closing that Mr Elliot had relied on a level of insulation and then rowed back from that. Mr Elkin stated that the Property has loft insulation, but he could not provide a measurement either.

106. The Tribunal considered that the level of insulation to the Property was very relevant to the assessment of the hazard and the potential impact of a given heating system- indeed the Guidance makes specific reference to thermal insulation as part of thermal efficiency and energy efficiency. The lack of information was found by the Tribunal to be significant.

107. The net effect of the parties' cases was a lack of good evidence of the level of insulation and the consequent effect on heat loss and need for heat/ cost of heating. The fact of some insulation was clear enough but nothing more than that. That did not provide immediate assistance to either party – as not demonstrating there to be either more or less than the average property of the same type- but more particularly did not assist the Respondent in helping to prove that there was insufficient to contribute to greater need for use and greater cost and to make the heating system a contributor to excess cold.

108. Mr Elliot accepted that he did not know what temperature the tenant sought to achieve in any given room. He appeared to accept that the system could achieve 19c which was generally acceptable but said a system was deficient if it could not achieve 22c. The Tribunal could identify no evidence from the Respondent as to whether this system could achieve 22c or could not. No-one had attempted to test that in any given outside temperature or at all.

109. Mr Elkin rather generally stated in evidence that he had used the heating when redecorating the Property and working on fitting a new kitchen. Ms Rayner in closing asserted that undertaking building work in a property and living in were somewhat different. She also submitted that a healthy temperature according to HHSRS was 21c, although people tended not to feel cold unless the temperature dropped below 18c. Those were not the same temperatures as referred to by Mr Elliot.

110. It was queried with Mr Elliot that no report in respect of the operation of the heating system had been obtained. He accepted that one could have been sought and to his credit, he was candid that with hindsight that may have been an appropriate approach to take.

111. The Tribunal applied its knowledge and expertise, noting that warm air heating can remain a realistic option for heating homes at the smaller end of the scale. Heating warm air directly can be very effective and ducting the air can ensure rooms heat up quickly. There is no question

that warm air heating has fallen out of favour since perhaps the early 1980s. It can move allergens around a house and the ducting can be inconvenient- and unlikely to be realistic to fit to a house not constructed with it. It is far from impossible that warm air heating will find some favour again, although with improved controls from earlier versions. From its experience, the Tribunal found that warm air heating systems in general work well when they are running, although a property may become cold fairly quickly once the system is switched off, although that is not unique to warm air systems.

112. Those comments are not intended to provide an invitation for property owners to provide inefficient and expensive heating systems, but merely to make general comments about warm air systems, the efficiency and cost- effectiveness of which- as with any other system- will need to be assessed property by property and on the available evidence.

113. The Tribunal was satisfied from its experience and in the absence of evidence demonstrating the contrary, that the heating system was likely to be capable of achieving an appropriate level of heat. The Tribunal considered there to be a lack of evidence as to the operation of this system, but the consequence of that was that there was nothing to demonstrate the heating system not to be effective to heat the Property as the Respondent alleged.

114. Whilst the Tribunal found that the tenant had purchased a fixed wall heater and that there was one more electric heater in the Property (the oral evidence of Mr Elkins being that the Applicants had not purchased them), the Tribunal also found that did not provide sufficient evidence of any issue with the existing system, still less the nature of that.

115. There was no evidence as to the temperature the tenant sought to achieve in the living room or any other room and so whether that was 19c, 22c or any other level, a query raised by Mr Elkins. There was no evidence that the tenant was unable to, other than the existence of the two additional heaters themselves.

116. The Tribunal was mindful that the tenant may choose to heat one or more rooms using electrical heaters rather than heating the whole house by the warm air system. The Tribunal considered it quite possible, although made no finding where there was no evidence one way or the other which enabled any finding to properly be made, that the tenant used the fixed heater in the living room where she only wished to heat that room only and used the other portable heater when she wished to heat another room only. There was no evidence at all as to whether the tenant did or did not adopt that approach for all or some of the time or did not adopt it at all. It may be that better evidence on that point would have altered the findings made by the Tribunal, but the Tribunal does not seek to engage in speculation where a proper finding was not possible.

117. The Tribunal therefore found that there was evidence that a wall heater and another heater had been purchased at some stage by the tenant but no more than that. There was particularly no evidence that purchase "had" to be done in order to maintain an appropriate level of heat.

118. The Tribunal found it had not been demonstrated that the system "requires" the other heaters, not only because of lack of effectiveness but also because of cost of operation of the warm air system.

119. The Tribunal agreed with the Respondent that in general terms direct electrical heating is at least one of the more expensive of heating systems, although where the Tribunal had found a need- as opposed to a choice- to use the wall heaters had not been demonstrated. The Tribunal also agreed that in general terms warm air heating is less cost effective than the optimum- see further below- but the Tribunal was not asked to make a finding about heating systems in general but rather about the system in this Property.

120. There was not only no evidence of the cost of heating this property with this system, such as heating bills, or evidence of comparable cost of another system but also no evidence was provided of the extent of use by the tenant for that cost. Insofar as it was asserted that the tenant required the wall heater, there was no evidence that reflected the cost of use of the warm air system, the cost of operation of which was unknown. There was no evidence of the cost of whatever the extent was of the wall heater use. There was no financial information on which Mr Elliot's opinion that the tenant could not afford to use the system was based.

121. The Tribunal did not find it proved on balance on evidence presented that the occupier would be deterred from using the warm air system because of the cost of it, determining that there was inadequate evidence on which to reach such a conclusion.

122. The Tribunal found that Mr Elliot had surmised as to the use of the system by the tenant, or lack of it, and the reason for the wall heater, without, in the Tribunal's judgment, sufficient basis for such surmise. The assessment by Mr Elliot of the likelihood and nature of illness, which fed into the remainder of the scoring, was necessarily his opinion based on the conclusion he reached, which the Tribunal found to be flawed.

123. There was, quite surprisingly the Tribunal considered where much was premised on the approach taken by the tenant and the reason for that, no written or oral evidence from the tenant. There was no ability to clarify or challenge. The Tribunal noted that the tenant had not contacted the Respondent stating any defect with the heating system or other issue as to heating. There was therefore not even a brief comment from the tenant which could be seen.

124. Mr Elliot said in evidence that the Respondent had not taken the tenant's comments as gospel. However, the Tribunal found that in practice the Respondent's position in relation to the heating system relied very

heavily on the tenant's apparent comments to the Respondent's officers, where even that information from the tenant was limited and lacking in detail and which additionally could not be tested.

125. Nevertheless, the Tribunal found that on balance the heating system is not as efficient as a modern central heating system with individual thermostats for each radiator, enabling an appropriate level of heat to be achieved at a given time for the particular room. The Tribunal found that there was no thermostatic control in any given room or any other individual programming for any room. The Tribunal noted that the Operating Guidance, understandably, recognises controls on the heating system to be relevant.

126. The Tribunal can accept that lack of controllable heating room by room produced a risk that the tenant might pay to heat rooms to a level not required by the given room and thereby reduce the cost-effectiveness of the system, but the Tribunal could make no more precise finding than that.

127. Hence, this warm air system is less than the optimum due to the lack of controls room by room but to an unknown precise extent.

128. The Tribunal made no finding in respect of the heating failing to allow proper control of condensation. Neither party mentioned that in the hearing. The Tribunal considered that it lacked sufficient evidence on which a finding could be made either way.

Application of the Facts Found

129. It is of note that the disputed work item formed only part of the Category 1 hazard of *Excess cold* and only a smaller part of a Category 2 hazard of *Damp and Mould*.

130. Give the other remedial works to windows accepted to deal with the hazard, and implicitly the existence of that hazard, the hazard of *Excess cold* would remain whatever conclusion were reached about the heating dispute. The Category of the hazard and the appropriate works may not.

131. Reference was made by the parties to a case authority, *Liverpool City Council v Anwar Hadi Kassim* [2011] UKUT 169 (LC), a decision of the President of the Upper Tribunal, Lands Chamber. That case related to a different means of enforcement action under the Act, a Prohibition Order. However, the same principles as to hazards applied, both Prohibition Orders and Improvement Notices being means of enforcement from which the local authority selects the most appropriate one- if there is more than one- once hazards have been identified.

132. The case related to an asserted Category 1 hazard of *Excess cold* where the First Tier Tribunal had determined at first instance that the cost of heating was irrelevant to assessment of hazard and enforcement action. The President went through the Act, the HHSRS and the process to be

undertaken in assessing hazards in some detail before turning to the specific circumstances of the case. The outcome was that he held that the First Tier Tribunal was not right to determine as it had.

133. In doing so, the issues in relation to heating and heating cost as they arose in that case were carefully considered. The President then held that the costs of running a heating system is of potential relevance and the Tribunal (and before that the local authority) must consider whether the relevant vulnerable group of occupiers- the over 65s- would be deterred from using the system for that reason. Actual and potential occupiers' means were also relevant to the appropriate remedial action.

134. The President quoted witness evidence received in which it was stated:

> "If heating systems are prohibitively expensive to use, I consider that the occupants of the property will not use them or restrict their use…."

135. The President then held:

> "This in my view properly identifies the potential relevance of the cost of running a heating system."

136. He subsequently added of the cost of electricity:

> "It is capable of being relevant, although only in the ways that I have identified."

137. Ms Rayner argued in closing that the effect of the case is that heating costs can be relevant. Mr Quelch submitted that the Tribunal in that case had received quite a lot of evidence, including as to the cost. He observed that the Judge had made reference to the heating being "prohibitively expensive to use". Mr Quelch drew a contrast with this case, where he argued that there was no evidence of a defect with the heating and no evidence that it was prohibitively expensive, where consideration should be of this system in this Property and not to systems generically. Further, there was no evidence of the ambient temperature of any room or where heat travelled and no evidence of what the tenant did or why. Mr Quelch observed that costs of heating were rising generally but he returned to the lack of evidence of cost in this instance.

138. Ms Rayner accepted that an effect of the case is that whether the occupier may be deterred from using the heating because of the cost is a matter for the Tribunal to determine. It will be appreciated that the Tribunal has found no evidence of a defect with the heating system and it will come as no surprise from the findings made that the Tribunal agrees that there is no evidence that the system is prohibitively expensive.

139. There is no need to repeat the findings made above but for the avoidance of doubt, the Tribunal makes clear that it has not found the occupier to be deterred from using the heating because of cost or would otherwise use the heating less, on the evidence the Tribunal received.

140. Given that the cost is only relevant, applying the above case authority, where that cost is found to be prohibitively expensive and no such finding has been made, it follows that the cost is not relevant to the exercise to be undertaken in this case.

141. The Tribunal accepted that the Respondent properly looked at the optimum and any deficiency from that, as provided for in the Operating Guidance. The Tribunal accepted that this 1970s warm air system is not the optimum because of the lack of thermostatic controls room by room and so necessarily is deficient pursuant to the Guidance, although the Tribunal reminds itself that the Guidance is there to assist with applying the statutory provisions and has no independent force.

142. The Tribunal accepted that, applying the HHSRS, any increase in the risk of harm arising from the system being less than the optimum produced a Category 2 hazard, and so the heating in isolation would give rise to such a Category 2 hazard.

143. The more significant question was whether the extent of the deficiency and the other elements of the hazard of excess cold to the occupiers relevant- so aged over 65 years old- for these purposes were such as in combination to constitute a Category 1 hazard in light of the findings made and the application of the case authority to the heating element.

144. Those other elements were one blown window to the kitchen with interstitial condensation, defects with seals- described as broken and blown- to other windows but where the Notice did not identify the particular windows in question, and an approximately 5mm gap where the front bedroom window is not fully fitted into the frame, said to allow uncontrollable drafts. Under the separate hazard of *Damp and Mould,* reference was made to "dampened seals" to the upstairs windows.

145. The Tribunal understands therefore that, save for the blown kitchen window, the deficiencies were with first floor windows, albeit that it was not clear what "dampened seals" was intended to convey, if anything beyond them being damaged. The condition of the windows was apparently one of the two reasons why the tenant originally contacted the Respondent. It is reiterated that the Applicant did not dispute the works required in respect of the windows and nothing was said by the Applicant that the deficiencies did not exist.

146. Whilst, as referred to above, Mr Quelch correctly submitted in closing that the score for Excess Cold was a combination of the asserted deficiencies with the heating system and with the windows in combination, the score for the windows alone was not explored with witnesses or the subject of specific submissions. Neither was the question of what the score for the heating part alone was as assessed by the Respondent. There was no submission as to the appropriate variables, whether on the basis of the Applicant's case or otherwise, nor as to the appropriate score. Nevertheless, this hazard was not solely disputed about the nature of the remedial works and was not an item

where the Tribunal accepted the Respondent's case and saw no reason to depart from the unchallenged score.

147. The average HHSRS score for dwellings of the same type as the Property- taking that as post 1979 as the Respondent had- and for the relevant occupiers was 664, a Category 2 score within band D. The score awarded by the Respondent for this Property was 3275, a score within band but having significantly increased the likelihood of risk from 1 in 530 to 100 as mentioned above.

148. The lack of knowledge on the part of the level of insulation to the Property and the lack of knowledge of the cost of operating the heating system, combined with a lack of satisfactory evidence of the reason for the tenant buying and using the heaters were substantial failings in the Respondent's assessment, the Tribunal considered and as identified, the end result is reliant on the accuracy of the assessments which feed into it.

149. The Tribunal considered, doing its best on the evidence available to it, that the appropriate level of the average likelihood of harm arising from the level of deficiency found with the heating system in combination with the windows was 1 in 300 The Tribunal calculated that the hazard score therefore exceeded 1000, being approximately 1175.

150. The Tribunal consequently found there to be a Category 1 hazard in respect of *Excess cold*, albeit in Band C and with a much lower score than assessed by the Respondent.

151. The Tribunal considered that if the contribution from the windows were removed, the average likelihood would have been in the region of 1 in 400, such that the score from the heating system alone would have been less than 1000.

152. The Category 2 hazard of *Damp and Mould* was not challenged in relation to any of the other deficiencies listed as causing that hazard, which the Tribunal considered remained irrespective of the absence of sufficient information on which to find the heating system to have contributed.

153. The Tribunal considers that a complete replacement of the heating system would not be the appropriate remedial action in the event of an Improvement Notice. Given that the Tribunal has determined that absent the window defects, there would have been a Category 2 hazard- and hence once any window repairs are undertaken there will be a hazard of that level- the complete replacement of the heating system is excessive.

154. The Tribunal considers that the correct approach for the Respondent to have taken on considering the most appropriate course of action to be an Improvement Notice- was to require is that the Applicant shall obtain a report from an accredited energy assessor in respect of the operation of

the heating system and the level of insulation and to require the Applicant to undertake works if and to the required extent necessary to provide an appropriate level of insulation and to remedy any defects with the heating system insofar as any are identified in the report. That is in addition to the remedial works to the windows.

Item 15- Repair or renew the garage door

Evidence and finding of Facts

155. No oral evidence was given in relation to this item. It was less than completely clear the Tribunal considered, when discussing the case following the hearing, as to whether the Applicant continued to dispute the item. In his witness statement dated 13th December 2021, Mr Elkin had said that he was unable to comment on the item due to lack of access. The Tribunal considered how to deal with that uncertainty. On balance, the Tribunal decided that it ought to consider such evidence as available and make a determination on the item where agreement has not been explicitly stated.

156. The Tribunal has explained above why it found the garage to form part of the Property. The Tribunal found on the, limited, evidence presented that the garage door did not open and close as it should.

Application of the Fact found

157. The hazard in question was *Position and Operability of Amenities*.

158. The Tribunal found on such evidence as was available that the operation was a deficiency and hazard, though of a minor nature, and that repair work was required to ensure proper operation. The Tribunal considered that repair was unlikely to be complex or expensive.

159. As the Tribunal found the item to be minor- and that band J, the lowest band of hazard, was the appropriate one- and capable of relatively simple resolution, the Tribunal concluded that seeking additional evidence and/or submission was unnecessary and that the appropriate and proportionate course was to proceed on the evidence and comments available. If the Applicant does not in fact dispute the item, no issue arises in any event: if the Applicant does, that could have been made plain and addressed more fully had the Applicant chosen to do so.

160. Whilst it is not clear exactly how the Respondent reached the score of 3, it could not have been much lower and in any event with no different effect. Consequently, the Tribunal agreed with the Category 2 hazard and with the remedial action to address it.

Item 23 – Extend steps front of property so cover full width of doorway and provide handrail

Evidence and finding of Facts

161. The Tribunal found that the steps to the front of the Property are very shallow and that the drop from the front door to the ground below is not especially high. The Tribunal was doubtful whether steps were required in light of the apparent height difference. Mr Elliot explained that the bottom of the door down to the ground is more than 30 centimetres, although for the neighbouring properties it is much less.

162. The Tribunal accepted that evidence. The Tribunal also accepted that there are steps and that the steps do not extend across the full door area. The Tribunal found that in itself creates an increased risk of falls. The Tribunal agreed that there is a risk of missing the steps or inadvertently stepping off the step. Mr Elkin accepted in his December 2021 witness statement the undertaking of work to extend the width of the step.

163. Mr Elliot gave evidence that the absence of a handrail doubles the likelihood of falls on steps even where there is a wall on either side, hence the provision of one being required. A handrail being fixed to the garage wall was said to be acceptable. The parties agreed that there remains a bracket, for a handrail subsequently removed, on the other side of the steps. It was the need for a handrail with which the Applicant stated disagreement.

164. The photographs show what appear to be fixing for two posts or similar, rather than a single bracket. There is some hint that there may have been earlier and slightly wider steps up to the former position of the handrail, whereas now there is gap between the steps and the brackets. Nothing turns on those matters.

165. The Tribunal found that the lack of a handrail to these steps does increase the risk of falls at the Property. Aside from reducing the risk of a fall in the event of stepping off the edge of the steps when going to or from the front door, the Tribunal found that by holding the rail, the risk of a fall using the steps would be reduced more generally.

166. The Tribunal noted that Mr Quelch stated in closing that the Applicant's instructions to him were that the tenant had asked for that handrail to be removed. In the normal course some caution ought to be applied where the Applicant had not addressed that in evidence and where both evidence and the Respondent's closing submissions had been completed. However, nothing turned on the accuracy of the statement, no finding being required as to the reason for the lack of a handrail.

Application of the Fact found

167. The relevant hazard was *falls on stairs and steps*, placed in Category 2.

168. The hazard included not only this item but also a deficiency with the guarding on the stairs. The Tribunal agreed that the relevant most vulnerable group ins persons aged over 60 years. The average hazard is

1 in 410. The score was 218 as against an average of 112 and therefore in band E.

169. As before, the Applicant did not challenge the score or query any of the variables on the basis of which the score was reached. If the Tribunal had found no handrail to have been appropriate, that may have suggested a lower risk than the Respondent assessed but the Tribunal did not so find.

170. The Tribunal therefore accepts the score relied on by the Respondent and finds there to be a Category 2 hazard of the nature set out by the Respondent. The Tribunal agrees that the remedial action provided for in the Notice is that appropriate.

Conclusion and appropriate action

171. The Tribunal considers against the background of the above, the enforcement action taken and other potential actions.

172. The Tribunal has found that the Property suffered from Category 2 hazards in respect of the matters producing work items numbered 4 (and potentially 16 dependent on the works to address 4), 18 (and 1 and 17 given that was the same hazard albeit the additional remedial work was not considered necessary) and 23. That is in addition to the several other work items accepted by the Applicant, being seventeen such items, relating as they did to several other Category 2 hazards.

173. In addition, and significantly, the Tribunal has found there to be a Category 1 hazard of excess cold, although significantly less of a hazard than assessed by the Respondent.

174. As such, the Respondent was under a duty to take action, rather than simply having the power to take action. That action is to be the method of enforcement appropriate. However, it did not necessarily follow that such action should be the service of an Improvement Notice.

175. Other options are available and in re- hearing the matter, the Tribunal needed to weigh up whether an Improvement Notice is an appropriate course to adopt.

176. The Tribunal considered the fact of numerous Category 2 hazards also been found to exist, not least the fire hazard and the damp and mould related matters. Taken in combination, a significant amount of deficiency and hazard exists at the Property.

177. The Tribunal concluded that taking the category 1 hazard and the numerous category 2 hazards, both those agreed by the Applicant and those found by the Tribunal, altogether the issue of the Improvement Notice was a course of action that was both properly available to the Respondent to consider under Section 11 of the Act and was the most appropriate course of action to follow.

178. The Tribunal considered that a Hazard Awareness Notice was not an adequate step in light of the hazards agreed and those disputed but found to exist. It advises the owner of the existence of a hazard but requires no action to be taken. None of the other options for enforcement action were considered by the Tribunal to be appropriate. No need for an emergency order had been identified; there was nothing remotely supportive of demolition or clearance; feasible remedial action could be taken to reduce the risks such that a prohibition order was not appropriate.

179. The Tribunal does not therefore quash the Improvement Notice. The Tribunal does not suspend the Notice, for the reasons set out above as to the number and nature of hazards.

180. However, the Tribunal has not accepted all of the actions which were required of the Applicants by the Respondent and so does not fully confirm the Notice as it was first issued.

Variation and remedial works

181. The Tribunal varies the Improvement Notice to remove remedial work item 1 and item 17, such that the Applicant is not required to obtain a report from a surveyor in relation to the cracking to the mortar. Similarly, to remove the requirement to undertake works identified by such a report, which cannot happen where there is no such report.

182. The Tribunal determined that the hazard could amply be attended to by re- pointing being undertaken of the affected area and any surrounding parts for which the contractor considered that to be required and hence that was the appropriate remedial work to be provided for in the Notice. The remedial action is varied to that.

183. For completeness, the Tribunal considered that in effect the work required was encompassed in item 18, which requires the raking out of all defective mortar pointing to a depth of 15mm and repointing, includes attending to the cracking.

184. In addition, the Tribunal varies the Improvement Notice in respect of item5, the heating system. The Tribunal has determined that the proper action to be take is for a report to be obtained from an accredited energy assessor as in respect of the operation of the heating system and the level of insulation and to require the Applicant to undertake works if and to the required extent necessary to provide an appropriate level of insulation and to remedy any defect with the heating system insofar as any are identified in the report. The report must provide expert opinion in respect of those matters and as to the room sizes and appropriate radiator/ heater sizes and/ or outputs in the event of the warm air heating system being found to be defective and requiring to be replaced by a gas central heating system or equivalent system.

185. The Tribunal further varies item 16 such that the Applicant shall only remove the boarding over the hallway windows and replace glass with

safety glass insofar as, if at all, the hallway windows remain in situ once the protected escape route has been created.

186. The timescale for completion of works shall be six weeks for the obtaining of reports, six months for the completion of works required by those reports and three months for the other remaining works. The Tribunal notes that the Improvement Notice had required such remaining works to be completed within six months rather than three months but did so approximately seven months ago, such that it is not appropriate to provide for six months from this point.

Fees

187. The Tribunal considers that whilst the Improvement Notice has been varied, given that it remains in place, the Respondent ought not to be ordered to pay any of the fees paid by the Applicant to pursue the application.

188. The Tribunal has considered with care the relative success of the parties. The Tribunal has particularly had regard to the variation in respect of the heating system, not least from the perspective of the cost of the work originally required by the Notice. However, the Tribunal has found an Improvement Notice to be appropriate, rather than any other action or indeed no action, and the majority of the works required by the Notice remain required.

189. Having weighed those in the balance, the Tribunal considers that the cost of paying the fees to pursue the application should remain with the Applicant.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case and is to be sent by email to rpsouthern@justice.gov.uk.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

Appendix- relevant legislation Housing Act 2004

1 New system for assessing housing conditions and enforcing housing standards

(1) This Part provides—
(a) for a new system of assessing the condition of residential premises, and
(b) for that system to be used in the enforcement of housing standards in relation to such premises.
(2) The new system—
(a) operates by reference to the existence of category 1 or category 2 hazards on residential premises (see section 2), and
(b) replaces the existing system based on the test of fitness for human habitation contained in section 604 of the Housing Act 1985 (c. 68).
(3) The kinds of enforcement action which are to involve the use of the new system are—
(a) the new kinds of enforcement action contained in Chapter 2 (improvement notices, prohibition orders and hazard awareness notices),
(b) the new emergency measures contained in Chapter 3 (emergency remedial action and emergency prohibition orders), and
(c) the existing kinds of enforcement action dealt with in Chapter 4 (demolition orders and slum clearance declarations).
(4) In this Part "residential premises" means—
(a) a dwelling;
(b) an HMO;
(c) unoccupied HMO accommodation;
(d) any common parts of a building containing one or more flats.
(5) In this Part—
"building containing one or more flats" does not include an HMO;
"common parts", in relation to a building containing one or more flats, includes—
(a) the structure and exterior of the building, and
(b) common facilities provided (whether or not in the building) for persons who include the occupiers of one or more of the flats;
"dwelling" means a building or part of a building occupied or intended to be occupied as a separate dwelling;
"external common parts", in relation to a building containing one or more flats, means common parts of the building which are outside it;
"flat" means a separate set of premises (whether or not on the same floor)—
(a) which forms part of a building,
(b) which is constructed or adapted for use for the purposes of a dwelling, and
(c) either the whole or a material part of which lies above or below some other part of the building;

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;

(f) making a demolition order under subsection (1) or (2) of section 265 of the Housing Act 1985 (c. 68);
(g) declaring the area in which the premises concerned are situated to be a clearance area by virtue of section 289(2) of that Act.
(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.
(5) The taking by the authority of a course of action within subsection (2) does not prevent subsection (1) from requiring them to take in relation to the same hazard—
(a) either the same course of action again or another such course of action, if they consider that the action taken by them so far has not proved satisfactory, or
(b) another such course of action, where the first course of action is that mentioned in subsection (2)(g) and their eventual decision under section 289(2F) of the Housing Act 1985 means that the premises concerned are not to be included in a clearance area.
(6) To determine whether a course of action mentioned in any of paragraphs (a) to (g) of subsection (2) is "available" to the authority in relation to the hazard, see the provision mentioned in that paragraph.
(7) Section 6 applies for the purposes of this section.

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 of 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.
(3) The notice may require remedial action to be taken in relation to the following premises—
(a) if the residential premises on which the hazard exists are a dwelling or HMO which is not a flat, it may require such action to be taken in relation to the dwelling or HMO;
(b) if those premises are one or more flats, it may require such action to be taken in relation to the building containing the flat or flats (or any part of the building) or any external common parts;
(c) if those premises are the common parts of a building containing one or more flats, it may require such action to be taken in relation to the building (or any part of the building) or any external common parts.
Paragraphs (b) and (c) are subject to subsection (4).
(4) The notice may not, by virtue of subsection (3)(b) or (c), require any remedial action to be taken in relation to any part of the building or its external common parts that is not included in any residential premises on which the hazard exists, unless the authority are satisfied—
(a) that the deficiency from which the hazard arises is situated there, and

(b) that it is necessary for the action to be so taken in order to protect the health or safety of any actual or potential occupiers of one or more of the flats.
(5) The remedial action required to be taken by the notice —
(a) must, as a minimum, be such as to ensure that the hazard ceases to be a category 1 hazard; but
(b) may extend beyond such action.
(6) An improvement notice under this section may relate to more than one category 1 hazard on the same premises or in the same building containing one or more flats.
(7) The operation of an improvement notice under this section may be suspended in accordance with section 14.
(8) In this Part "remedial action", in relation to a hazard, 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.

S12 Improvement notices relating to category 2 hazards: power of authority to serve notice

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

Schedule 1- Procedure and Appeals relating to Improvement Notices

Part 3- Appeals relating to Improvement Notices
10 (1) The person on whom an improvement notice is served may appeal to a residential property tribunal against the notice.
(2) Paragraphs 11 and 12 set out two specific grounds on which an appeal may be made under this paragraph, but they do not affect the dsgenerality of sub-paragraph (1).
12 (1) An appeal may be made by a person under paragraph 10 on the ground that one of the courses of action mentioned in sub-paragraph (2) is the best course of action in relation to the hazard in respect of which the notice was served.
(2) The courses of action are—
(a) making a prohibition order under section 20 or 21 of this Act;
(b) serving a hazard awareness notice under section 28 or 29 of this Act; and

(c) making a demolition order under section 265 of the Housing Act 1985 (c. 68).

Powers of ……..tribunal on appeal under paragraph 10

15 (1) This paragraph applies to an appeal to a residential property tribunal under paragraph 10.

(2) The appeal

(a)is to be by way of a re-hearing, but

(b)may be determined having regard to matters of which the authority were unaware.

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

17 (1) This paragraph applies where the grounds of appeal consist of or include that set out in paragraph 12.

(2) When deciding whether one of the courses of action mentioned in paragraph 12(2) is the best course of action in relation to a particular hazard, the tribunal must have regard to any guidance given to the local housing authority under section 9.

(3) Sub-paragraph (4) applies where—

(a) an appeal under paragraph 10 is allowed against an improvement notice in respect of a particular hazard; and

(b) the reason, or one of the reasons, for allowing the appeal is that one of the courses of action mentioned in paragraph 12(2) is the best course of action in relation to that hazard.

(4) The tribunal must, if requested to do so by the appellant or the local housing authority, include in its decision a finding to that effect and identifying the course of action concerned.