In recent times there has been one case that has changed the way Local Authorities operate. That case was a case relating to the service of an improvement notice served by London Borough of Camden. This is not a sour grapes story because I was in fact the officer of the council who carried out the inspection and scoring of the hazard concerned. I do, however, want to put a few things straight concerning the decision. The case was Mr. & Mrs Evans versus Camden Council. The improvement notice in this case was quashed on the grounds that section 239(5) of the Housing Act 2004 had not been complied with properly.

The property was a first floor flat fronting a busy road in London. The facade of the building was Georgian and Pre 1920. The rear had been rebuilt in 1947 due to bombing during the war. The flat consisted of 2 bedrooms to the front and a living room, bathroom and kitchen to the rear. The flat had use of the common staircase and a garden to the rear of the building. The ground and basement floor were set as offices save for one room that was a bedsit at basement front. The Fire alarm served only the basement and ground floors. The common parts were in poor condition with poor artificial light and worn carpets to the stairs. The flat was heated by means of four storage heaters two to the living space and one in each bedroom. The occupant (a tenant) had supplied two further electric radiators to supplement the storage heaters. There was secondary glazing to the front windows to cut down the noise from vehicular traffic outside. Hot water was provided by a central boiler serving the whole building.

The ownership of the building was as follows

Freeholder The Bedford Estates, Head lease Mr. Akerman (lease had ended prior to this action and was being renegotiated) Leaseholder Mr & Mrs Evans, occupier Mr Mark Boettcher and Chair of the Tenants Association Mr Christodoulou.

The Council was contacted by Mr Christodoulou who complained that the common parts were in poor condition and lacked fire precautions. It was explained to Mr Christodoulou that access to a dwelling that had use over the common parts would be required. Mr Christodoulou stated that as he was out of the country he would contact Mark Boettcher of Flat 7 who worked near by. Mr Boettcher then made an appointment with the Council for them to enter his flat some days later. At the inspection before any action was taken the process was explained to Mr Boettcher taking about half an hour to answer all his questions. That done Mr Boettcher stated that the heating was somewhat lacking and it would be nice to have it improved. The inspection was then undertaken and the various deficiencies noted. These deficiencies related to excess cold and Fire and they were duly scored using the age of the building as pre 1920.

So let’s set the scene. The RPT panel

Ms. L M Tagliavini, LLM, Dip Law, BA(Hons) (Chair), Mr. T Sennett MA FCIEH, Dr. A Fox PhD, Bsc MCIArb

Representing the Council Mr R.J (John) Pullen and Mr D (David) Durrant

The Appellant Mr and Mrs Evans (lease holder of the Flat concerned)

The hearing started in the usual manner with the parties being introduced. The Chair then asked the Council to put its case first as the appellant acting for him self had little or no experience in such matters. The council put forward the case by saying that the HHSRS system relating to excess cold is a strange one because it is weight toward a category one hazard from the outset. The council naturally would ask for the "ideal" and so required a wet system on central heating with the relevant thermostats and controls. The fire hazard had been referred to the LFEPA who duly served notice to have the alarm extended through the building and the carpets replaced. (this case was heard the day before this RPT case.

The chair of the panel then began to question whether or not we had entered the building in compliance with section 239 of the act relating to powers of entry. After very lengthy argument the chair stated that it appeared that the council were not then trespassing. One has to ask the question here as at what point the council is taking formal action?

Is the taking of formal action the point where the notice is served or the survey of the property and therefore when the entry is made? There is no question in this case the occupant had been given 24 hours notice in accordance with section 239(5). The question therefore remains whether the other part of 239(5) can be material and its state 24 hours notice must be given to the owner (if known). The "if known" would imply here that the Council does not need to make too much effort to find out who the owner is. The leaseholder Mr Evans was not informed of this visit although I doubt that if he was informed he could have given the occupant the 24 hours notice required by him to enter. There is therefore no question that the owner could not have undertaken the remedial works within the 24 hours notice required.

If the panel had made their decision that the entry was indeed flawed then the notice would be quashed by virtue of that fact and any action taken after this would be invalid. There would be no need for the panel to go through the hazard and the requirements of the notice it was after all invalid and the notice quashed. Why then did the panel choose to go on?

Let’s look at the problems

First the age of the building was questioned. The hazard in this case had been scored using the age pre 1920. Those of us who have been trained in HHSRS know that the age of the building is determined in line with the EHCS definition and that looks at the oldest part of a building and use that age hence pre 1920. The panel insisted that the building should be scored using 1946-1979

Using this age for the building, interestingly enough, gives the same result 10233 Band A keeping the likelihood and the outcomes at the same levels. So is there an argument here. I think not. The fact of the matter was that because of the uncontrollable nature of the heating and the fact that is was supplemented taken together with the lack of insulation to the front and rear walls and the lack of double glazing the property was in winter cold. The Council must take a view over 12 months and that would include at least one winter. To then state that the scores were unreliable and that rightly the hazard should have been category 2 hazard is

fundamentally flawed. The weighting placed on this hazard means that if nothing is changed in terms of likelihood or outcomes the score would in fact be a category 1 Band C hazard necessitating service of a notice. Was this property therefore in the opinion of the panel better than average with its poor heating and lack of insulation surely not!

Let's look at what the panel said a paragraph 16 of their decision

16. The Tribunal is also of the opinion that the the hazard described by the Respondent is not a Category 1 Hazard but could more properly have been dealt with by the service of a hazard awareness notice. Any necessary works to address such a hazard could, in the Tribunal's opinion be satisfied with the installation of secondary glazing to the remaining windows and the provision of a more efficient slim line electric heating system rather than the wet central heating system proposed.

The panel states that the proper course of action is a hazard awareness notice because in their opinion the hazard is not a category 1 hazard. This implies that the hazard was in fact a category 2 hazard. Was this property therefore so much better than the average that it warranted this course of action? Look at the rest of that paragraph. Any necessary works could be satisfied by the following works

a. Installation of secondary glazing to the rear windows
b. Provision of a more efficient slim line electric heating system rather than a wet system as proposed.

Does this not point to the fact that the heating system was indeed inadequate and that it would not provide the required level of heating in winter months. This surely would make the hazard a Category 1 hazard as in the panels opinion the heating system was not fit for purpose and therefore worse than the average. This would then move the Band C to a Band B or A giving a Category 1 Hazard.

There are a couple of things here that spring to mind
Is at least one member of the panel fully trained in HHSRS methods in line with the Regulations? Councils can only use those officers who are suitably qualified for this purpose. The member to the panel should therefore be at least as qualified.
Do the Panel have the right to play around with the scores given by the fully trained officer? The have the right to vary or quash the notice and to take another course of action. The question here is what does vary mean. Does it mean that they can substitute one set of works for another. Yes I believe it does and they can substitute works with no works thus quashing the notice.

The important part here is that the Act in Schedule 1 makes it clear that the tribunal are bound by the guidance that has been issued under section 9 that is to say the operating guidance and the enforcement guidance.

Had the tribunal taken heed of the guidance in this case I would find it somewhat hard to believe that they would have come to the decision that they did. I can see that some variation in the details of the work required might occur but the substitution of a Hazard awareness notice for the improvement notice was I believe against the spirit of the Act and against that which the Act was designed to achieve.

That all said let us now look at the other half of the case relating to section 239 of The Act

Enforcement

239 Powers of entry

239 (1) Subsection (3) applies where the local housing authority consider that survey or examination of any premises is necessary and any of the following conditions is met –

(a) the authority consider that the survey or examination is necessary in order to carry out and inspection under section 4(1) or otherwise to determine whether any functions under Parts 1 to 4 or this Part should be exercised in relation to the premises;

(b) the premises are (within the meaning of Part 1 specified premises in relation to an improvement notice or prohibition order;

(c) a management order is in force under Chapter 1 0r 2 of Part 4 in respect of the premises.

(2) Subsection 3 also applies where the proper officer of the local housing authority considers that a survey or examination of the premises is in order to carry out an inspection under section 4(2)

"(3) Where this subsection applies –

(a) a person authorised by the local housing authority (in a case within subsection (1), or

(b) the proper officer (in a case within subsection (2).

May enter the premises in question at any reasonable time for the purpose of carrying out a survey or examination of the premises.

(5) Before entering any premises in exercise of the power conferred by subsection (3), the authorized person or proper officer must have given at least 24 hours' notice of intention to do so –

(a) to the owner of the premises (if known), and

(b) to the occupier (if any).

(6) Subsection (7) applies where the local housing authority consider that any premises need to be entered for the purposes of ascertaining whether an offence has been committed under section 72, 95 or 234(3).

(7) A person authorised by the local housing authority may enter the premises for that purpose-

(a) at any reasonable time, but

(b) without giving any prior notice as mention in subsection (5)

The first thing here is that the officer has first to be authorized by the Local Housing Authority in writing. The real question here is does the officer need to be authorised individually for each premises. The answer is Yes Section 243 determines who is to give that authorization (the deputy chief officer or his senior) and he must do this for

each entry. An argument here is whether it is permissible to an authorization for the function rather than the premises thus allowing the issue of a blanket authorization. I think the real problem here is that the Act always refers to premises and the function being carried out on that premises. So it follows that the authorization must be for the premises to carry out a function. There is no question that the officer needs to be authorized to visit and carry out the function.

The second part is the giving of 24 hours notice to the occupier (if any) and the owner (if known). There is a lot of case law on this and it points mainly to an individual being prejudiced in some way. Some case law actually points out that where this notice was not given the individual would not necessarily be prejudiced and therefore the following actions would be deemed as valid.

The presumption in this case was that the leaseholder was prejudiced because he might have been able to carry out the work prior to the visit. That poses two problems.
Could the work have been undertaken in 24 hours?
Would the owner have known what work was required to be carried out?
In this case the nature of the work would take organisation and therefore could not have been carried out in 24 hours. I assume here that the notice is restricted to 24 hours and not more.
Would the owner have known what works were required? The simple answer is no. Indeed the inspecting officer would not have had prior knowledge of this either since he had not at this time entered the premises. Could the owner therefore have been prejudiced? No because there was nothing to be prejudiced by.

Remember the process here the inspecting officer has only one role and that is to produce a report for the Local Housing Authority. No action has been determined by the Authority. The enforcement action comes about at the point where the Local Housing Authority makes its decision based on the report submitted to take a particular course of action. That is the enforcement and it does not occur until this point just prior to the decision being made to take action.

My argument here is that the survey and examination might not lead to an action by the Local Housing Authority and cannot therefore be deemed to be enforcement. It is a gathering of information.

So, assuming, the officer is duly authorised he then has to give notice (of at least 24 hours). The Act makes it clear that he must give this information to both the owner and the occupier trouble is it then qualifies this by saying if known and if any. It does not specify what effort the authority must make to ascertain the names of these persons.

I believe in this case that section 239 (5) was satisfied and the panel should not have based their decision on this part of the case to quash the notice although it is difficult to assess whether or not it was their intention to vary the course of action or just quash the improvement notice.

An appeal against the decision was made to the LVT but this was refused on the grounds that the RPT decision was fair and reasonable. Further appeals are being looked at by Camden Council.