Y TRIBIWNLYS EIDDO PRESWYL (CYMRU)

THE RESIDENTIAL PROPERTY TRIBUNAL (WALES)

Reference: RPT/0003/04/17

Tribunal: Dr Christopher McNall (Lawyer – Chairperson)
Mr Mark Taylor MRICS (Surveyor Member)
Mrs Carole Calvin-Thomas (Lay Member)

Appellants: Mr Richard Morrison
Ms Jacqueline Anne Kendall
(Represented by Mr Roy Carroll (Day 1) and by Mr Simon Stephenson, Counsel (instructed by David W Harris & Co, Solicitors) (Days 2-4)

Respondent: Neath Port Talbot County Borough Council /
Castell-Nedd Port Talbot Cyngor Bwrdeistref Sirol
(Represented by Mr Stephen Cottle, Counsel)

Hearing: Heard in public in Cardiff on 18 December 2017; 1 March 2018; 17 April 2018; 20 April 2018

Property: 86 Cyfyng Road, Ystalyfera, Swansea SA9 2BT

Decision

The Appeal is dismissed.

We confirm the Emergency Prohibition Order dated 15 August 2017 made in relation to 86 Cyfyng Road Ystalyfera, Swansea SA9 2BT.

That order remains in force without amendment.

Reasons for the Decision

Introduction and background

1. These are the reasons for our unanimous decision to confirm an Emergency Prohibition Order ('**the Order'**) which was issued on 15 August 2017 by Neath Port Talbot CBC ('**NPTC**') in relation to 86 Cyfyng Road, Ystalyfera, Swansea SA9 2BT ('**the Property'**).

2. 86 Cyfyng Road is a large 4 bedroom mid-terrace lying to the east side of Cyfyng Road. It was built in the mid to late nineteenth century on a fairly steep hillside running from front to rear. So, although it has a two-storey front elevation (onto Cyfyng Road) it has a three-storey rear elevation, which includes a 'lower ground floor' level giving onto the rear patio. On the far side of the patio, a long rear garden slopes steeply down to the (now filled-in) Swansea canal at the bottom. At some point in the past, some – but not all - of the sloping garden was terraced through the addition of extra earth ('made ground') and the construction of stone retaining walls and other retaining features.

3. On the night of 26/27 February 2017, there was a large landslip at the rear, and directly behind, the house.

4. On 2 March 2017, NPTC issued a Hazard Awareness Notice in relation to the rear garden (but not in relation to the house).

5. On 17 March 2017, NPTC withdrew the Hazard Awareness Notice and issued an Emergency Prohibition Notice in its place. Again, this was only in relation to the rear garden, and was not in relation to the house.

6. On 4 April 2017, there was a further - second - landslip at the rear of the house.

7. The two slips were centred on number 86. The area which has moved has a curved edge, with the visible apex or top of that curve directly behind number 86.

8. Although we did not visit the Property (for reasons which were explained in the Tribunal's procedural decisions in September 2017) the photographs, drone footage, and other documents which we have seen combine to give a very clear picture of what had happened. The landslips have carried away a substantial part of the back garden. Earth, vegetation, stone terracing and other reinforcing materials have all moved downhill. It was a mass movement over a large area of the slope. The British Geological Survey reported the movement as 10 metres. Doing the best that we can from the photographs which we have seen, we estimate that the landslips affected an area approximately 100 or so feet long and 60 or so feet wide. It is hard to estimate accurately the overall volume of earth which moved, but it appears to have been something of in the order of several hundred cubic metres, which will therefore have weighed something of in the order of several hundred tonnes.

9. One effect of the landslips was that a slope which was already very steep became even steeper. Its angle in places is now about 33 degrees (or approximately 1.5 to 2 in 1). Another effect was that a combined sewer pipe (effluent and surface water) running through the area had been broken at either side of the landslips. Water was cascading down the slope from another broken pipe, forming "gullies". A third effect is that land which was terraced and covered with vegetation is now no longer terraced and the earth is exposed to the elements.

10. The drone footage taken by NPTC on 26 October 2017 was shown on the first day of the hearing. Whilst we must be careful to remind ourselves that a visual impression from drone footage is just that – an impression – it is nonetheless part of the evidence, to be set alongside and tested against the other evidence placed before us. It is dramatic, showing a long and precipitous slope, and the rear wall of number 86 very close to the edge of the landslips. The visible top of the backscarp of the landslides is about 8 – 10 feet from the back door of number 86, separated only from it by a patio.

11. The rear patio moved, and, when it did, it opened up a tension crack of 1-2 inches between it and the rear wall of the Property. This is because the patio has 'rotated'. It is no longer level, but tilts down towards the slope. This can be seen from the stone side wall of the patio, which is now leaning forwards, and away from the rear wall of the house. A wedge-shaped gap has opened up between it and the house. That wedge-shaped gap corresponds to the tilt of the patio.

Some general comments

12. In the circumstances of this appeal, it is important that we make clear some of the factors which have, and which have not, played a part in our reasoning, and that we set out some of the principles which have guided how we have arrived at our decision.

13. We readily acknowledge the strength of feeling which the Appellants - facing the loss of their home – express. It is completely understandable. It was said on behalf of Mr Morrison that he had not come to the Tribunal to try to hoodwink it. Having heard him give evidence, we accept that he was not trying to hoodwink anyone.

14. But we are bound to apply the law, which means that we must look at the matter objectively. This law, set down by Parliament, places clear limits on our jurisdiction and our decision-making powers. That law

does not allow us to take strength of feeling or sincerity into account in considering our decision. Nor can we take into account the length of time that someone has lived in a particular property, or factors such as the availability of alternative accommodation.

15. The Tribunal is an adversarial jurisdiction. We are not a board of inquiry, and so do not have the power to conduct any wider-reaching inquiry as to whether any person or body has been at fault for the landslides. Likewise - and whilst this may be frustrating to the Appellants - we do not have the power to compel NPTC, or Welsh Water/Dŵr Cymru, or indeed any other public body, to perform any particular work or works alleged to be capable of remediating the penetration or flow of water into or onto the garden or the slope.

16. Nor is this appeal an inquiry into the manner in which NPTC has dealt with the people affected by the Order. Various arguments have been put forward about NPTC's actions in issuing earlier notices, and its apparent inconsistency in deciding to withdraw those earlier notices and to issue the notices which are the subject matter of this appeal. The earlier notices are part of the background, and we do not exclude them entirely from consideration. But, and as explained in the Tribunal's decision in this appeal of 18 September 2017, NPTC was entitled under section 25 of the Housing Act 2004 to revoke its earlier order. The only order which we are empowered to decide upon in this appeal is the Order of 15 August 2017. That is the order which we must concentrate on.

17. In this appeal, the question of whether Mr Morrison may have committed, or may still be committing, criminal offences in relation to his continuing occupation of the Property is simply not relevant to the decision which we have to make.

18. Although this appeal was heard together with two other appeals, we have considered each appeal individually, and on its own merits, doing the best that we can wherever there has (inevitably) happened to be overlap between the evidence and materials presented in relation to the three appeals. But, inevitably, some of our findings and reasons are common to all three appeals.

19. This appeal is by way of a re-hearing, and may be determined having regard to matters of which the authority were unaware: section 45 of the Housing Act 2004. Since our jurisdiction is by way of a re-hearing and not by way of review, we do not need to decide whether the Order was imposed reasonably in a public law sense.

20. We must simply look at all the information available to decide whether the statutory conditions for the issue of a valid Emergency Prohibition Order are met or not. We can properly take account of all evidence available to us at the date of hearing, even if that evidence was produced late. For various reasons this was an appeal in which fresh evidence was produced throughout the course of the hearing. We have not had regard to anything sent to the Tribunal by any party after the formal closing of the evidence in this appeal on the afternoon of Friday April 20 2018.

21. In this appeal, NPTC bears the legal and evidential burdens of establishing that the Order should be confirmed.

22. Decisions are made on the basis of evidence. The standard of proof is the ordinary civil standard of proof. That is the balance of probabilities, or whether something is 'likelier than not'. So, NPTC must prove on the evidence that the conditions in Housing Act 2004 section 43 are met. That is to say, NPTC must establish:

    22.1 That it is likelier than not that a Category 1 hazard exists; and

    22.2 That it is likelier than not that any such hazard causes an imminent risk of serious harm to the health or safety of any of the occupiers of those or any other residential premises.

23. It is important to remember that even where – as here - the matter is one of the gravest importance to the affected parties, the Supreme Court has made it clear that there is no enhanced or greater burden of proof than the ordinary balance of probabilities: see the decision of the Judicial Committee of the House of Lords in Re B (Children) (Care Proceedings: Standard of Proof) [2008] UKHL 35 and the comments of Lord Hoffmann at Paras [2] and [13].

24. We remind ourselves that an Emergency Prohibition Order of the kind under appeal in this case is one of the most powerful tools available to a local authority. The effect of such an Order – if it is complied with – is to prevent any occupation of the property. Therefore, and recognising the practical impact of this Order – which is enormous - we have given the most careful and anxious scrutiny to all the evidence which has been placed before us during the course of the appeal, whether or not it is expressly referred to in this Decision or not. We have also considered all the submissions and arguments made, both orally and in writing, whether or not referred to in this Decision.

The Order

25. On 15 August 2017, NPTC revoked the April 2017 Emergency Prohibition Order and issued the Emergency Prohibition Order which is the subject matter of this appeal ('**the Order'**).

26. NPTC issued the Order under section 43 of the Housing Act 2004, which, so far as material, reads as follows:

> **"Emergency prohibition orders**
>
> (1) If
>
> (a) the local housing authority are satisfied that a category 1 hazard exists on any residential premises, and
>
> (b) they are further satisfied that the hazard involves an imminent risk of serious harm to the health or safety of any of the occupiers of those or any other residential premises, and
>
> (c) [not relevant]
>
> making an emergency prohibition order 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)."

The Identified Hazards

27. On 14 August 2017, Mr Celvin Davies of NPTC 'scored' the hazards using the system set down in The Housing Health and Safety Rating System (Wales) Regulations 2006: Statutory Instrument 2006/1702 ('**HHSRS**')

28. We had written evidence in the form of witness statements from Mr Davies, and we heard him give oral evidence. He qualified as an Environmental Health Officer in 2000. He is a Team Leader at NPTC. The main part of his work involves HHSRS assessments.

29. We were impressed with his demeanour and evidence, which was given clearly and consistently. It is plain that an extremely heavy responsibility came to rest on his shoulders when it came to making the

HHSRS scorings in August 2017. In our view, he took that responsibility seriously and professionally.

30. We find that when he made his HHSRS scoring on 14 August 2017 he had carefully considered the materials and information which were before him, including from experts in disciplines in which he himself is not an expert. He is not a geologist and he is not a structural engineer, but NPTC had sought out advice from those who were, and made it available to Mr Davies.

31. Mr Davies fairly acknowledged that the assessment of risk for the purposes of HHSRS was sometimes difficult, especially where – as in this case – the examples in the operational guidance do not deal with the situation. The operational guidance given in relation to structural collapse is more concerned with falling elements such as ceilings, fixtures and fittings rather than with complete structural collapse, which is a relatively rare occurrence.

32. Mr Davies' oral evidence of the HHSRS scoring exercise in general, and how he had approached the scoring in this case, showed him not only to be conversant with the relevant principles, but also to be thoughtful and reflective as to how those principles could most appropriately be applied.

33. He subsequently had his HHSRS scoring externally reviewed by Mr Andrew Arthur, who is a chartered environmental health practitioner. Whilst Mr Davies scoring was not effectively challenged in cross-examination of him, it was subsequently demonstrated – through some skilful cross-examination of Mr Arthur in connection with another of the appeals – that Mr Davies had made some small errors in calculation. We are satisfied that those errors were inadvertent, and were not done to deceive or mislead anyone. Nor were they done to make the situation seem more hazardous than Mr Davies genuinely thought it was. More importantly, we are also satisfied that the errors in the HHSRS did not ultimately affect the categorisation of the hazard in relation to this Property.

34. We accept Mr Davies' evidence that, when he made his assessment in August, this was a genuine reassessment, relying (for example) on material from Mr Bodycombe which had not been available sooner, and was not simply a recapitulation of the earlier scoring.

35. In short, we are satisfied that the hazard scoring exercise which Mr Davies conducted was a sound one, competently conducted, and

which can be relied upon. Mr Morrison has not placed before us any alternative HHSRS scoring by some other competent and appropriately qualified professional to seek to demonstrate that a different scoring could or should have been arrived at.

36. Based on Mr Davies' work, NPTC was satisfied that certain Category 1 hazards existed on the premises (HA 2004 s 45(1)(a)) and was satisfied that those presented an imminent risk of harm to the health and safety of the occupiers (HA 2004 s 45(1)(b)).

37. The three identified Category 1 hazards were:

Hazard	**Deficiencies which contributes (sic) to the hazard**
Personal hygiene, sanitation and drainage (Hazard 17) (meaning '*An inadequate provision of (a) facilities for maintaining good personal hygiene; (b) sanitation and drainage'*)	Following a landslide of the land behind the dwelling, the public sewer serving the dwelling is now disconnected from the sewerage network
Falls between levels (Hazard 22) (meaning '*Falling between levels where the difference in levels is 300 mm or more'*)	Landslip has cause (sic) rear garden levels to change significantly, and area to the rear of the house have broken up or fallen away
Structural collapse and falling elements (Hazard 29) (meaning '*The collapse of the whole or part of the dwelling or HMO'*)	Movement of ground to rear of the house has potentially affected the stability of the land on which the building is situated.

38. 'Structural collapse and 'falling elements' is summarised in the HHSRS Operating Guidance issued by the Office of the Deputy Prime Minister of UK Government in February 2006) as follows:

> *"this category covers the threat of whole dwelling collapse, or of an element or part of the fabric being displaced or falling because of inadequate fixing, disrepair, or as a result of adverse weather conditions. Structural failure may occur internally or externally within the curtilage threatening occupants, or externally outside the curtilage putting at risk members of the public".*

39. Following the cross-examination of Mr Arthur, NPTC reviewed the HHSRS scoring and produced the following outcomes.

40. Significantly, this did not result in any change to the categories.

Hazard	Numerical Score	Band	Category
22 (Falls between levels)	10515	A	1
29 (Structural Collapse and Falling Elements)	4576	B	1
17 (Personal Hygiene, Sanitation, and Drainage)	3138	B	1

The works

41. It is important to note that the Order was made subject to conditions which, as the Notice states, if complied with, would have led NPTC to review the Order. NPTC's opinion was that the works specified in Schedule 2 of that notice would reduce the potential for harm to the occupiers and any visitors to an acceptable level that would allow the Order to be revoked.

42. Schedule 2 reads:

Works
There is evidence of movement to the land to the rear of the property. A structural engineer should be commissioned to investigate the stability of the land and all buildings and structures situated upon it, and all works recommended in the subsequent report undertaken.
Provide and fit a barrier to prevent access to the areas that have suffered collapse or movement of the ground. It should be at least 1,100mm high and designed and constructed to discourage children climbing and strong enough to support the weight of people leaning against it. There should be no openings in the guarding which would allow a 100mm sphere to pass through.
In consultation with the Sewerage Undertaker, disconnect all drainage connected to the sewer at the rear of the property and make arrangements to connect to a functioning public sewer network. Rearrange internal foul

drainage as necessary in order to discharge to the public sewer network.

43. As a matter of law, NPTC was obliged to consider (among other matters) whether an Improvement Notice was the most appropriate action to deal with the Category 1 hazards which it had identified. NPTC considered that an Improvement Notice was not the most appropriate action, '*as immediate action is required to protect the occupiers and deal with the risks encountered*'.

44. In his evidence, Mr Davies specifically addressed the question of why an Improvement Notice had not been issued. He was aware of the requirement of imminent risk to issue an Emergency Prohibition Order, and how this differed from an Improvement Notice. His position was that, as matters stood at the time of the hearing, he was still not satisfied that there was sufficient evidence to allow him to withdraw the Order and issue an Improvement Notice. We agree with his analysis, and we accept his evidence.

The scope of this Appeal

45. Mr Morrison advances his appeal on the basis that he '*fully accepts'* that the identified hazards exist, but that he considers that the hazards are best dealt with by way of an Improvement Notice rather than an Emergency Prohibition Order. As already touched upon, this depends on whether the hazards involve an "imminent" risk of serious harm to the health or safety of any of the occupiers of those or any other residential premises. However, the question of 'imminence' is not straight forward, and involves addressing detailed evidence concerning a number of technical matters.

46. As such, this dispute largely turns on our assessment of expert evidence. Whilst we heard oral evidence from Mr Morrison, his evidence is evidence of fact, and is not expert evidence. Some of Mr Morrison's evidence of fact – for example, as to the location of the trial holes which he dug – is not in dispute and is helpful. Other parts of his evidence are in dispute, but generally in relation to issues which are not centrally relevant to the decision which we have to make.

47. The Order, relying on "evidence of movement to the land to the rear of the property" required Mr Morrison to do the following:

> *"A structural engineer should be commissioned to investigate the stability of the land and all buildings and structures situated*

upon it, and all works recommended in the subsequent report undertaken."

48. That was an entirely reasonable condition to impose. The situation following the landslips was one which self-evidently raised questions of stability and which called for the attention of an appropriately qualified structural engineer. There was nothing perverse or irrational about this requirement. It does not matter that the earlier Hazard Awareness Notice or Emergency Protection Order had not put the remedial condition in this way. We are satisfied that the circumstances which presented themselves to Mr Davies and to NPTC in mid August 2017 justified that condition.

NPTC's evidence

49. NPTC relied on the evidence of Mr David Bodycombe BEng Ceng. He has been a Fellow of the Institute of Civil Engineers since 2007. He is a consultant of CB3 Consult Ltd, who are a firm of engineering consultants. He was engaged by Atkins and Faithful & Gould to visually inspect the Property and assess its structure. He visited number 86 twice - on 29 March 2017 (before the second landslip) and 11 April 2017 (after it).

50. Mr Bodycombe impressed us as a knowledgeable and experienced individual, who had approached the task set for him in an appropriately objective and professional way. We have no hesitation in accepting his evidence.

51. His main conclusions were set out in his letter of 9 August 2017. His analysis was to some degree necessarily theoretical, in that he did not at that time know for sure what the rear wall was resting on; how deep the concrete strip foundation was; or the depth of any underlying bedrock. His diagram and reasoning were therefore to some degree – at least, at that time – conjectural. But latterly, and as we find, his conjectures have been vindicated.

52. In his oral evidence, he was clear that this was an appropriate matter for a structural engineer. He put it in this way: "*If you haven't understood how it has gone wrong, then you will have a great deal of trouble to find an engineering solution*." We accept this evidence. It articulates a robust and conventional scientific and empirical approach.

53. Whilst Mr Bodycombe had not formulated any remedial measures, he spoke in his oral evidence of the need for extensive piling works, over a

piling mat, with significant access difficulties, requiring a haul road, to ensure the stability of piling equipment. He thought that it would be a "*major civil engineering exercise*". His view was that you would *"more or less have to demolish the house to install stabilising work*". That evidence was not challenged.

54. NPTC also relied on the written and oral evidence of Mr Matthew Eynon BSc (Hons) MSc. He is a chartered geologist and a Fellow of the Royal Geological Society. He is a specialist and a director of Earth Science Partnership Ltd (ESP) who are consulting engineers, geologists and environmental scientists. He is a registered ground engineering specialist.

55. He has been involved with the area since mid-2016 when he prepared a report on the wider 'Panteg' landslip. He later wrote a specific report about this property, called '*Ground Instability to the rear of 86 Cyfyng Road'*. Although that was not dated, he thought that had been written in the summer or autumn of 2017, and it was revised on 2 November 2017. He wrote a letter on 13 December 2017 with further information.

56. He impressed us a thoughtful and knowledgeable individual, and we accept his evidence. His view was that there were lots of different mechanisms happening on the slope at the same time. Some of his work was theoretical or conjectural: he had used a predictive slope stability model, and had done a sensitivity analysis to determine how the slope would move in the future. However, and even though it was theoretical or conjectural, no significant challenge was made to show that his working assumptions were incorrect. He had assumed that the Property and the slope were likely founded on a thin and variable horizon of made ground underlain by clay and weathered rock, with intact rock below that, and that proved to be correct. That is to say, his theoretical modelling closely reflected the actual conditions as they were eventually discovered to be. We reject the suggestion that the failure to finalise a LiDAR survey undermined his evidence or conclusions.

57. The work and conclusions of Mr Bodycombe and Mr Eynon are each individually compelling. Read together, and in conjunction, the case which they make is irresistible. They consistently demonstrate the condition of the slope, and the implications for the Property. We are entirely satisfied that Mr Davies' and NPTC's reliance on the work of Mr Bodycombe / CB3 and Mr Eynon / ESP was appropriate.

Mr Morrison's evidence

58. Mr Morrison advanced evidence, but none of it is expert evidence of an appropriate character, by appropriately qualified professionals. None of Mr Morrison's evidence – insofar as it is inconsistent with the analysis and findings of NPTC's expert witnesses – adds up to any effective challenge to the methodology or conclusions of NPTC's experts.

59. Mr Morrison has not done what the Notice required him to do. He has not commissioned a structural engineer to investigate the stability of the land and all buildings and structures situated upon it. Since no structural engineer was commissioned by Mr Morrison, then no works have been recommended or done.

60. Mr Morrison places particular reliance on evidence from Mr Riordan and Mr Carroll. None of that evidence – even arguably – satisfies the condition laid down by NPTC, which we have found to be both justified and reasonable. None of it – even arguably – comes close to undermining the methodology or conclusions of NPTC and its expert witnesses.

Mr Riordan

61. Mr Riordan is a surveyor from James and Nicholas his evidence was contained in a 2 page letter dated 31 October 2017; comments in emails in November 2017 (which were extracted in the Scott Schedule); and his amendments/comments to Mr Hasan's witness statement of 19 April 2018, which was written following a site visit on 18 April 2018. Mr Riordan was not called to give oral evidence and so his evidence could not be explored and tested in cross-examination.

62. Mr Riordan's letter of 31 October 2017 is not an investigation of the stability of the land and all buildings and structures situated upon it. Mr Riordan made a visual inspection of some trial pits. But he did not conduct any recognisably scientific or empirical investigation of stability - whether of the land, or of the buildings. He did not take any samples or measurements, or make any calculations. He did not describe the dimensions of the concrete strip footing. Nor did he assess its load-bearing capacity, and whether that was or was not likely to have been affected by the landslide, or by rotational or other forces. He did not assess the propensity of the ground, or the concrete strip, or the rear wall to move.

63. Indeed, it does not seem as if Mr Riordan was asked to comment specifically on the rear wall, and whether it was acting as a retaining wall; which in terms of future stability, hazard, and imminence of risk is an important factor. He did not describe or assess the material characteristics or the load-bearing qualities of the boulder clay material upon which the concrete strip footing was resting. He had not undertaken any geotechnical investigations, whether on the wider slope or at the property itself.

64. Mr Riordan did not recommend any engineering solution. We agree with NPTC that nothing in Mr Riordan's letter can properly be construed as saying there is *no* need for any remedial work to the land downslope of the house.

65. In the circumstances, Mr Riordan's short and summary view that there was no reason to believe that there was "an inherent problem" with the foundations of the Property is not a conclusion to which we can attach any weight at all.

Mr Carroll

66. Mr Carroll is a qualified and practising civil engineer. He is a senior works manager for rail contractors, but was very careful to make it clear that he wrote his report in a personal capacity, not on behalf of those contractors, and as a favour to Mr Morrison. He first became involved on 8 March 2017 when Mr Morrison asked him to attend the property to investigate the *cause* of the landslip. As Mr Carroll explained in his email of 29 March 2017, he wrote a report *'for the mountain, road, and drainage only'* which did not cover 'any structural integrity of the properties'. So, and as it makes clear, his report is not one as to stability of the land and buildings. That affects the weight which we can give to his evidence.

67. Mr Carroll gave oral evidence. Whatever his motives for becoming involved with Mr Morrison's appeal, it was clear that he had to some degree lost the sense of proper distance and objectivity to be expected of an expert. Indeed, he himself accepted that he had '*probably become involved too much'*. That was a fair and pragmatic concession, but it also inevitably affects the weight which we can give to his evidence.

68. Mr Carroll (who seems to have instructed Mr Riordan) relies heavily on Mr Riordan's findings. That reliance is misplaced, for the reasons which we have set out above as to Mr Riordan's evidence. Mr Carroll argues

that he has identified the cause of the landslips as a defective gully or channel, and, as we understand it, goes on to argue that fixing that gully or channel will remove the risk. We reject that evidence, for the reasons which are set out further below.

Mr Atherton

69. Mr Atherton has a BSc (Hons) in physics. He is not a structural engineer, having recently retired from a career as a house-builder. He is a member of the Cyfyng Road Landslip Group. Although Mr Morrison's solicitors had provided evidence from Mr Atherton, under cover of a letter dated 26 February 2018, it was made clear at the hearing that Mr Morrison did not seek to rely on that evidence in support of his appeal.

70. But, in any event, and for the reasons set out in more detail in our decisions in the appeals which have sought to rely on Mr Atherton's evidence, Mr Atherton's evidence suffers from very serious inadequacies, and we do not accept it.

What is the house built on?

71. The key assertion of fact made by the Appellants is that the Property is built on rock, and, as such, is built on a secure platform which will not move.

72. The parties agree that the factual issue is an important one because, if the property is founded on solid rock or stone, then it would be able to withstand any further movement of the slope. The possibility of the house moving is significantly reduced. That goes to imminence. If there were no imminent risk, then an Emergency Prohibition Order would not be appropriate.

73. Atkins / Faithful & Gould, advising NPTC on 9 August 2017, wrote in a Technical Note:

> *"The movement of garden walls, and the inevitable continued loss of ground, will further expose the rear walls and foundations of the property. In geotechnical terms, how the building reacts will depend on whether the rear wall is:*
>
> - *founded on rock or colluvial deposits (previously failed material); or*
> - *retaining material on the uphill side.*

If the wall is not founded on rock, or acts as a retaining wall, the geotechnical hazard designation would be increased to Category 1: total loss of property likely and injuries are possible….

If the wall is founded on rock, and does not act as a retaining wall, the geotechnical hazard designation may be left at Category 2…."

74. We have no hesitation in finding as a fact that Mr Morrison's property is not founded on rock or stone. Nor is it founded on a rock or stone outcrop. It sits on the superficial geology which is colluvium (previously failed glacial material) and/or boulder clay and/or on made ground (perhaps C19th or C20th building in-fill). None of those kinds of material are rock or stone.

75. The Property does not sit on the solid geology of the rock below. There is obviously rock somewhere under the Property, but this is at considerable depth, because it was detected about 10 metres away from the back wall at about 3.5 metres depth. That rock may well be part of a coal seam called the 'red seam' which is conjectured to sub-crop behind the Cyfyng Road terrace. But the presence of rock strata at more than negligible depth below the Property is just not relevant for the purposes of this appeal.

76. The fact that this Property does not rest directly on rock is entirely clear from the trial pits which were dug in Mr Morrison's basement. They were not excavated into rock or stone. We were shown colour photographs with a good level of detail. They show material described as boulder clay. They were dug by Morrison and his brother, with sides of about 1-1.5m and about 5 feet deep. Mr Morrison had dug a further series of trial pits, including outside the rear wall. There was no rock in any of them.

77. Although it was suggested that boulder clay is a good material upon which properties can be built, and that Building Regulations approval would be given for such properties, no evidence was provided to support this assertion. Moreover, a further difficulty with this approach is that it completely ignores the actual circumstances of *this* property, and the geology at *this* location.

78. The original foundation of the rear wall does not, and never did, bear directly onto rock.

79. The rear elevation of the property is founded on a concrete strip footing. That concrete strip footing is not original. It was perhaps put in place in the 1990s, before Mr Morrison acquired the Property. We accept Mr Bodycombe's view that the foundation strip had been put in because the older foundations had been deemed inadequate.

80. That concrete strip is not founded on rock either, but – as Mr Riordan agreed on 18 April 2018 - is on "wet silty clay".

81. We accept the evidence of CB3 Consult contained in the letter of 9 August 2017. They had conducted a dimensional check and assessment of load bearing walls/span arrangements of 86 on 11 April 2017. Their conclusion was that the rear wall of 86 was acting as a retaining wall, as well as providing vertical support to the floor and roof load it supports.

82. Therefore, and taking the Atkins' analysis in its Technical Note as accurate, there is a Category 1 geotechnical risk. The situation may in fact be worse than CB3 had identified, because the written report did not take account of a factor which Mr Bodycombe explained to us in his evidence regarding the width of the Property (it being significantly wider than the others on the terrace) and the absence of an internal 'party wall' which would have provided some further structural strength.

83. The fact that there is a level of colluvium and/or top soil above an underlying stratum of rock is consistent with the boreholes excavated in November 2017, although it is fair to say that those were at numbers 81 (borehole BH202) and 96 (borehole BH401), and therefore some distance from the Property. Those showed up to 4 metres of soft grey silty clay and gravelly material identified as made ground. We do take account of the fact that it is possible that the bore holes might have passed through in-fill from the collapse of houses which had earlier stood there, thereby increasing the apparent depth of made ground. But nonetheless it is clear that there is no rock near to the surface under this terrace of houses sufficient that it can be said that this property rests on rock. It does not.

The composition of the landslip

84. There is a further argument upon which we must make findings of fact. This relates to the composition of the material which failed and moved in the landslides, and whether this material was superficial only (that is, only made ground, leaving the underlying slope intact) or whether it is composed of the underlying slope.

85. Whilst it is obvious from the photographs that at least some of the ground which moved in the landslips was made ground / topsoil comprising the terracing, we reject the Appellants' case that these were superficial landslips of made-up gardens.

86. The photographs of the ground disturbed by the landslides show a small number (about half a dozen) blue bags in which made ground was said to have been delivered (and which were then buried) at some point in the past. But that would account for only a very small proportion of what actually moved.

87. More fundamentally, there is no evidence at all that the *only* earth which moved in the landslides was made ground, and *only* made ground. Therefore, there is no evidence at all from which we can safely infer that, even if there are further movements on the slope, the only ground which would move is made ground, leaving the underlying – that is to say, the original - slope intact.

The presence of water

88. Having made our findings as to the nature of the material below the house, and the rear wall, then we have to go on to ask whether there is anything about that material, and the material on the slope, which is nonetheless relevant to the question of the likelihood of movement.

89. The trial pits were visited and inspected on 18 April 2018 (that is to say, during the course of the appeal) by Mr Hasan Ibrahim Hasan - a qualified chartered structured engineer employed by the NPTC - and Mr Riordan.

90. The local authority and Mr Riordan agreed that the following was a true and accurate description of the condition of the trial pit in the centre of Mr Morrison's basement:

> *"the pit was dug to a depth of 1400mm below basement level. The trial pit contained wet silty clay"* (we note that Mr Riordan did not agree that it was *'very wet'*, but agreed that it was *'wet'*) "*with water pooling at the bottom of the pit".*

91. That is a very important piece of evidence. It gave a clear, agreed, statement of what was below the foundation on 18 April 2018. It was not rock. It was silty clay, and it was wet.

92. The water in the bottom of the trial pit dug in the basement cannot (for example) have been rainwater because the basement is roofed. Likewise, that water cannot have come into the basement from the 'runnels' outside since those are downhill of, and some distance from, the basement.

93. Water is entering the sub-stratum of this property from somewhere outside. The report by Quantum Geotechnical, on behalf of Welsh Water identified a number of sources of water. The photograph of the inspection chamber at the rear of 84 – next door but one - also shows a continuous flow of clean water coming into it from somewhere. There is water flowing under this terrace.

94. We note that the pit immediately outside the rear wall, and (according to Mr Carroll) directly underneath the back door contained what both Mr Riordan and Mr Hasan agreed to be *"very wet silty clay"*. This is consistent with the findings about the internal trial pit, although we give somewhat less weight to the external pit since (as far as we are aware) it is uncovered.

95. 'Silty clay' is not rock. It is made up of small particles of silica. The presence of water coats each particle, separating and lubricating them, and meaning that they can move against each other. The presence of water therefore both reduces the friction of the soil - making it likelier to move - and, at the same time, makes the ground heavier. The combination of decreased friction and increased weight materially increases the risk of movement, especially when earth – as in this case – is subject to changing lateral forces. We accept Mr Eynon's evidence that regression and/or development of the landslip downslope creates a decrease in the shearing resistance of a slope made of colluvial soils.

Drainage

96. Whilst there is general agreement between the parties that water was a factor in the landslips to the rear of number 86, there is disagreement as to whether this was the only factor.

97. NPTC disagrees with Mr Carroll. It does not accept that any blocked or surcharging culvert was the *sole* cause of the landslips. In his evidence, Mr Davies said that NPTC did not dispute that there were groundwater and drainage issues. NPTC accepts that uncontrolled surface water flows may have *contributed* to instability, but go on to add that there are also topographical conditions (e.g. the slope angle); geological conditions (e.g. strata type and interactions); hydrological

conditions (e.g. rainwater); and hydro-geological conditions (e.g. groundwater) which are also important.

98. We agree with this analysis and we accept it. A number of factors played an operative part in the 2017 landslides. In terms of water, we find that these included the presence of naturally occurring groundwater, the presence of groundwater concentrated along the underlying stratified geology, and the presence of groundwater from any recorded or unrecorded mine entries or surface water ingress.

99. Mr Carroll's evidence (in his 'Land slide investigation' dated 25 March 2017) and orally was that, through neglect and lack of maintenance, a culvert pipe had become blocked, causing water to track across the slope at the rear of the properties, and then to saturate the ground. As we understood it, the basic thrust of this evidence was that if that drain was fixed and/or the gully cleared and/or reinstated, then there would no further water penetration of the slope, and hence no further risk of landslide.

100. Mr Carroll made a further site visit on 23 November 2017, and, consistently with his earlier report, concluded that the reason for the landslip was the uncontrolled escape of water from the mountain into the highway drainage and left to run freely behind residential properties. His view was that this could easily be solved by diverting the flow into the highway system.

101. We reject Mr Carroll's evidence on this point.

102. Firstly, there is no evidence to substantiate the Appellants' position that the *sole* cause of the landslides was water from a blocked gully or broken culvert. Man-made drainage *may* have played a part in the landslips; but it is not the *only* part. In short, there is no cogent evidence that *everything* which has happened has happened *only* due to water from the culvert.

103. Secondly, and in the course of his cross-examination, Mr Carroll did accept – fairly and candidly - that the following four factors (set out in the Technical Note produced by Atkins on or about 9 August 2017), as a matter of principle, all leave the surface prone to further movement:

    (i) Over-steepening of the upper part of the slope;

    (ii) Undermining and loss of support of garden retaining walls;

(iii) Washout, gullying and shallow failures due to ongoing discharge from the combined sewer;

(iv) Washout and gullying due to the bare erodible surface being exposed in severe weather conditions. Mr Carroll's oral evidence was that he especially agreed with this factor.

104. Mr Carroll's position seeks to focus on factor (iii) only. But all of those four features are present, as a matter of fact, in this case:

(i) There has been over-steepening of the upper part of the slope. The slope is locally approximately 30-35 degrees (1.5-2:1) post-failure;

(ii) There has been undermining and loss of support of garden retaining walls;

(iii) There has been washout, gullying, and shallow failures due to ongoing discharge from the combined sewer;

(iv) There has been washout and gullying due to the bare erodible surface being exposed in severe weather conditions.

105. We accept that even small changes to these variables make movement more likely than not.

106. Moreover, we consider that the correct approach is to look at factors in the round, and holistically, and also to recognise that one factor can affect another.

107. Not only are those identified risk factors present and operative, but there are, in our view, others. These include the back of the scarp being perilously close to the rear of number 86 (being, as far as we can tell, no more than 8 to 10 feet from the back door) and the shallow depth of the foundation strip. We accept Mr Bodycombe's evidence that, notwithstanding the presence of the patio, the backscarp is already tight against the rear wall.

108. We can add a further factor, which is that the presence of groundwater - over and above any surcharged water from a blocked gully or broken culvert - continues to play an operative role, thereby contributing to an imminent risk of further landslide or movement of the rear wall of the property. We add that there is at least a real possibility that there is a mine roadway and one (and possibly two) adits or mine openings

under 86 and the slope. It cannot be put any higher than a 'real possibility' due to the difficulty of reconciling with a high degree of accuracy the Coal Authority underground plans with the overground Ordnance Survey.

Walton Construction

109. Mr Morrison also seeks to rely on the report from Walton Construction, dated 17 January 2018. We give no weight to it. It is not a report from a structural engineer. There was no oral evidence from the writer of that report. It is a report on drainage. Insofar as it might have any evidential value at all, it simply confirms that there is rock at some depth below the property - for instance, at 10m from the rear, at about 2.5m below the foundations. Insofar as it is inconsistent with our other findings of fact, we reject it.

Drainforce

110. For similar reasons, we given no weight to the Drainforce report. It is not a report from a structural engineer, and there was no oral evidence from the writer of the report. It is a report on drainage, and it does not address the other factors to which we have referred.

Imminence

111. The heart of Mr Morrison's case was that the hazards identified were not "imminent". Whether a hazard is 'imminent' or not is the crucial difference between circumstances justifying the imposition of an Emergency Prohibition Notice of the kind which we are considering in this appeal, and circumstances justifying some different remedial action or order, including an Improvement Notice.

112. The legislation does not define 'imminent'. But as the President of the Lands Chamber of the Upper Tribunal remarked in Bolton MBC v Patel [2010] UKUT 334 (LC):

> *"As a matter of linguistic analysis, 'imminent risk' may appear to present something of a problem, since it is clear from the underlying purpose of section 40 that the risk – the chance of serious harm occurring – is, or at least may be, an existing risk. The adjective 'imminent' is obviously not there for the purpose of suggesting that the risk must be one that does not at present exist but is likely to arise soon. It is perhaps in the nature of a transferred epithet qualifying 'serious harm' – the risk must be*

one of serious harm being suffered soon. The degree of risk (or the likelihood, or the chance) that a state of affairs may give rise to an incidence of harm is necessarily time-related. That is why the Regulations require an inspector to assess the likelihood of harm being suffered within a specified period. The use of 'imminent' implies, in my judgment, a good chance that the harm will be suffered in the near future…."

113. That guidance is useful, although the context was somewhat different (being emergency remedial action under section 40), as were the facts (involving the assessment of excess cold caused by a failed boiler). In that case, the Tribunal at first instance had refused to find that the risk to health posed by excess cold was "imminent" (and therefore did not justify the taking of emergency remedial action). However, that was for a number of reasons, including that there were working portable halogen heaters in the house, and a relatively mild spell of weather.

114. Although in that case the Council's appeal on the point was dismissed, it is important to note that the Upper Tribunal remarked that the Tribunal's conclusions '*address the realities of the situation on a manifestly sensible basis'* (see §47). This serves to emphasise that the assessment of the test of "imminence" by a fact-finding Tribunal of first instance – as we are – is not purely a linguistic or semantic exercise, but must take account of the realities of the situation, and the application of common sense. In turn, that is reflected in the make-up of the panel which heard this appeal – a lawyer, a surveyor, and a lay member.

115. We accept Mr Bodycombe's assessment, in his letter of 12 December 2017, that *'the continuing stability of the rear wall of Nr 86 is very much in doubt and with the onset of winter weather conditions plus the already weakened state of ground within the landslip zone we are of the opinion that a further sudden and large scale collapse of the rear wall at Nr 86 is imminent*'.

116. We accept Mr Eynon's oral evidence the stability of the slope was quite marginal, with a high potential for things to develop and move again.

117. The very nature of the risk here is the fact that it could happen at any time - and not necessarily with any prior warning. There were two slips behind the property in quick succession in early 2017. The first came without any warning.

118. We consider that NPTC has comfortably discharged the burden placed upon it in this regard. We find that the risk of movement is an imminent one. We find that there is a high risk that the harm will be suffered in the near future. The statutory conditions for the issue and confirmation of an Emergency Prohibition Order are met.

119. Mr Morrison argued that we could deal with the question of imminence by looking at whether the Property had actually moved. In support of this, he relied on the Movement Monitoring Report from Quigley Civil Engineering and Lifting Ltd, dated 21 August 2017. This was done by establishing a baseline and then measuring movement from nine 'targets' placed on the UPVC window-frames in the rear wall (which, it was said, are less prone to expansion and contraction than wooden or metal frames).

120. This report was not a report by a structural engineer as to the stability of the land and buildings. Mr Quigley did not come to give evidence and therefore his methodology and conclusions could not be tested in cross-examination. But, as he made clear in his email of 4 September 2017, he had not tried to offer any structural analysis or confirmation of the stability of the founding ground.

121. All that Mr Quigley had confirmed in his report was that the rear wall did not appear to have moved significantly (i.e. outside tolerances of 5mm) over a 13 week period (from 1 May 2017 to 12 August 2017). That report was supplemented by a further set of measurements, presented at the hearing, taken on 12 April 2018, which likewise showed no significant movement.

122. Hence, it was argued, there had been almost a complete year (1 May 2017 to 12 April 2018) without significant movement of the rear wall. But Mr Quigley's report - on its own terms - does not consider (i) the factors identified by CB3 Consult, nor (ii) the factors identified by Atkins, which were accepted as operative factors by Mr Carroll.

123. The report of Mr Quigley therefore fails to take any account that, as a matter of fact, and not as a matter of conjecture or prediction, (i) the rear wall of the property is not founded on rock; (ii) the rear wall of the property is acting as a retaining wall; and (iii) it is above a slope which, given the operative risk factors, is now unstable and prone to further movement.

124. Mr Quigley does not consider whether there had been any movement of the patio, or of the side wall – both of which are hard landscape

features which could have been measured, but which were not. Mr Quigley was very careful to qualify his report by saying that it offered no confirmation of the property's future structural stability, and that its purpose was only for period movement investigation.

125. We were also invited to consider the earthquake which struck South Wales on 17 February 2018 with an epicentre said to be not far from the Property, and a reported magnitude of 4.4. It was argued that because the Property did not move or collapse during or as a result of this earthquake, then we can properly conclude - as a matter of fact - that it will not do so in the future.

126. We do not accept this argument. Even if there has been no significant movement of the *house* (which, in fairness to Mr Morrison, seems to be borne out by the Quigley measurements on 12 April 2018) the argument fails to engage with whether there has been any movement of the *slope*, or the *patio*. The earthquake has not caused the operative risk factors present to disappear. Those factors are all still present. The rear wall still acts as a retaining wall. The concrete strip on which the rear wall rests is still not founded on rock.

127. We do not consider that these arguments change the overall position as to the *imminence* of harm, which is the matter upon which NPTC has succeeded in persuading us. There will be structural failure. The fact that it has not happened yet does not mean that it is never going to happen; or is never going to be likely to happen.

Risk of serious harm to health and safety

128. There was no real challenge by Mr Morrison to the HHSRS scoring, which involves an assessment of risk. He did not put forward any contrary HHSRS scoring by another appropriately qualified professional.

129. We accept Mr Bodycombe's evidence in his letter of 9 August 2017 that "in the event that the rear wall of the property is 'lost' as a consequence of further ground movement to the rear garden area then end-support for the suspended timber floor joist construction to the upper storeys and the roof rafters will also be lost". This is supported by his diagrams which show the beams running from side to side, and the joists from front to rear.

130. His oral evidence was clear and compelling. It was that '*as far as I am concerned, a loss of support will lead to a catastrophic movement. That*

is what I would expect to see". That evidence was not challenged. Indeed, Mr Carroll seemed to agree with it. He said that "*if the house is built on material likely to move again, then the first thing to go would be the rear elevation, and that could be a catastrophic failure."*

131. We accept the evidence in this Technical Note that the stability of the footing of the rear wall is at risk, and that the movement of the slope during the landslip events has affected the lateral forces at work on the rear wall, the concrete strip upon which it stands, and the non-rock material beneath.

132. We accept the evidence, in that same Technical Note, that the changed pattern of forces means that settlement, sliding and rotation of the footing will be the outcome. We accept the evidence that such settlement, sliding, and rotation will result in the three-storey high rear wall being displaced. If that happens, then there is a high risk that the floor will collapse.

133. NPTC has discharged the burden of proving that there is a risk of serious harm to health and safety arising from structural collapse and falling elements, and that risk is imminent, within the proper meaning and effect of the legislation.

Fencing

134. We are satisfied that the fencing was an appropriate remedial condition for NPTC to have imposed designed to address the falls between levels in the rear garden.

135. We are satisfied that the condition has been complied with. Mr Morrison installed 'HERAS' anti-climb fencing in early September 2017.

136. We do not consider that this requires any variation of the Order.

Hygiene and Drainage

137. We are satisfied that this was an appropriate hazard for NPTC to have identified, and an appropriate remedial condition for NPTC to have imposed.

138. It was not disputed that the landslide had broken a soil pipe to the rear of the property, causing foul waste and sewage to discharge from the Property onto the slope. That 6 inch VC pipe was broken in two places. The best evidence is that it was about 1.6-2 m below ground level

before the landslide, which gives a further indication of the amount of earth which had moved. Red-die put into the toilet at 86 was discharged onto the slope. The property was no longer connected to the foul-water sewage system, leading to an accumulation of effluent.

139. We find that the remedial condition has not been complied with.

140. We were shown photographs of a plastic pipe connected to a vertical stack, running overground along the rear of the property, and eventually feeding into a drainage / inspection chamber behind number 90 from which the manhole cover had been lifted. This work had been done by Mr Morrison, and not by Dwr Cymru. It was 'DIY' by Mr Morrison because he was still living in the Property, and Dwr Cymru had refused to allow any of their employees to come onto the Property whilst there was an Emergency Prohibition Order in force in relation to it, or, following the landslide, onto the slope behind it. Dwr Cymru was not a party to the hearing before us, and in any event it is beyond our jurisdiction to make any findings as to whether Dwr Cymru was right or wrong in the position which it adopted, or in its dealings with Mr Morrison.

141. In mid October 2017, Mr Morrison had stated that he was waiting for Dwr Cymru to give the 'go ahead'. In the course of his oral evidence, Mr Morrison stated that he had, since then, received permission from Dwr Cymru to do the works.

142. Prompted by Mr Morrison's oral evidence, NPTC made inquiries with Dwr Cymru. There was written and unchallenged evidence from Mr Liley, a Senior Public Protection Officer of NPTC, dated 19 April 2018, which exhibited an email from Dwr Cymru saying that Dwr Cymru had neither received nor approved any ‘section 104 adoption’ or ‘section 106 connection application’ from anyone in relation to the property. Those both refer to sections of the Water Industry Act 1991.

143. There was evidence in an email that Mr Richard Davies, Dwr Cymru's Sewerage Manager for Swansea, West, and Hereford, had spoken to '*the customer'* (which we take to mean Mr Morrison) *'and explained that we are not in a position to inspect any works at the rear of the property and any new connections would need authorisation from Developer services'.*

144. We find that the condition had not been complied with, but at the same time we wish to make it clear that we do not consider Mr Morrison to have been dishonest in what he told us. It seems to us that he had

simply – whether through misunderstanding, or wishful thinking – come to believe that he had formal permission to do what he did, when in fact he did not.

Conclusion

145. As a result of the facts and matters which are discussed above, the Order is confirmed, and the Appeal against it must be dismissed.

Dated this 23rd day of May 2018

CHAIRMAN