RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL for the

LONDON RENT ASSESSMENT PANEL

HOUSING ACT 2004 SCHEDULE2 PARAGRAPH 7

LON/00AL/HPO/2006/0001

Property: **Flat H, 301 to 305 Plumstead High Street, London SE18**

Appellant: **Bellcourt Estate Ltd**

Represented by: Ms E Palser (counsel)
Blackett Hart & Pratt (solicitors)

Respondents: **The London Borough of Greenwich**

Represented by: Ms R Foulkes
Miss M Amaso (Legal Services)

Date of Hearing: October 30, 2006

Tribunal Siobhan McGrath (Chairman)
Mr J Sharma FRICS JP
Mrs J Clark JP

Flat H, 305 Plumstead High St, London SE18

LON/00AL/HPO/2006/0001

Decision and Reasons

Decision

The Prohibition Order made by the London Borough of Greenwich on July 31, 2006 in respect of Flat H Plumstead High St is confirmed. The appeal by Bellcourt Estates Limited is accordingly dismissed.

Reasons

Introduction

1. Bellcourt Estates Limited appeal against the making of a Prohibition order under section 20 of the Housing Act 2004, by the London Borough of Greenwich, in respect of a property known as Flat H, 305 Plumstead High Street, London SE18.

2. The Prohibition order was made on July 31, 2006 and was served on Bellcourt Estates Ltd, on August 7, 2006. The landlord lodged its appeal against the order on September 1, 2006. In its discretion, the Tribunal accepted the appeal out of time. Directions were issued on September 11, 2006, and the matter was heard on October 30, 2006. The Tribunal inspected the property prior to the hearing.

3. At the hearing the appellant was represented by Ms E Palser of counsel and evidence heard from Mr M Eckstein; the respondents were represented by Ms R Foulkes of counsel and evidence heard from Mr G Portch, Mr M Pledger and Mr G Reece.

The respondent's application to dismiss

4. The directions had required the appellant to provide a bundle of documents for use at the hearing on or before October 2, 2006 and had required the respondents to provide their bundle on or before October 9, 2006. The appellant's representatives wrote to the Tribunal on October 2, 2006 seeking an extension of time to file its bundle. This application was refused as was a similar application made on October 10, 2006. On October 26, 2006 the Tribunal received the appellant's bundle and on October 27, 2006, the bundle was delivered to the respondent council.

5. At the outset of the hearing Ms Foulkes on behalf of the respondents, made alternate applications:
(a) That the application be dismissed under regulation 17 of the Residential Property Tribunal Procedure (England) Regulations 2006 (the procedural regulations) for failure to comply with an order to supply information and documents; or
(b) That the Tribunal exclude the appellant's bundle; or
(c) That the Tribunal exclude the expert report included the bundle since it failed to comply with the requirements of regulation 22 of the procedural regulations.

6. The Tribunal decided not to dismiss the appeal, nor to exclude the whole of the appellant's bundle. However it did decide to exclude the appellant's expert evidence. So far as dismissal and the bundle were concerned, the Tribunal considered that the appellant's case had been clearly set out at the time the appeal was made and nothing in the bundle indicated a departure from that case. The material in the bundle, apart from the expert report, would be of assistance in considering the matter and receiving it at a late stage would not cause undue prejudice to the respondents.

7. The situation in respect of the expert's report was somewhat different. The report is described as a statement from Mr R R Paice, a building surveyor and member of the Institute of Architects and Surveyors. This statement was included in the appellant's bundle but was undated and unsigned. In breach of regulation 22 neither the statement or any written summary of the evidence was served on the respondents at lest 7 days before the hearing. In further breach it did not contain the statement recognising the expert's overriding duty to the Tribunal as required by regulation 22(3). The body of the statement also makes several references to a "brief initial report" and states "If

asked for my opinion I would stand by my initial report..." When asked about this initial report, the Tribunal was informed that it was an expert report, that it was a draft that had been submitted to solicitors and that it was the same as the report before the Tribunal which had not been changed since the solicitors had not wanted to add anything or to ask Mr Paice to address other areas of expertise.

8. The Tribunal considered that the breaches of regulation 22 were serious and that to allow the evidence in would be extremely prejudicial to the respondents. Furthermore given the failure of Mr Paice to recognise his overriding duty to the Tribunal, the weight that could have been attributed to that evidence would have been severely diminished. The Tribunal were also extremely concerned about the reference to the "initial" undisclosed report. Accordingly, the appellant's expert evidence was excluded pursuant to the Tribunal's power under section 230(2) of the Housing Act 2004.

Background

9. Flat H is a basement flat in a four storey end of terrace building constructed on a slope. The ground floor comprises commercial shop premises which are currently empty. The first and second floor are residential flats. Access to flat H is from the rear of the building and through a side entrance. The accommodation consists of a bedroom, a sitting room, a kitchen and a bathroom. Part of the flat is situated under the shop.

10. In January 2006, the property was occupied by a Mr Gashi who had been the tenant of the flat for almost two years. On his complaint the property was inspected on January 11, 2006, by Mr Portch an Environmental Health Officer (EHO) employed by the respondent council. On inspection Mr Portch had three main areas of concern: dampness, insufficient natural or artificial light and insufficient heating. It also appeared that the flat was used for residential accommodation without appropriate planning consents having been obtained.

11. On January 17, 2006, Mr Portch wrote to the appellant company setting out his concerns and indicating that he intended to serve a closing order on the flat under section 264 of the Housing Act 1985 (then in force). The appellant spoke with Mr

Portch on the telephone and wrote on February 15, 2006, that: "We have now taken advice on these issues from our architect who has advised us that all these areas can be rectified at reasonable expense and we therefore would like to arrange a meeting so that we can take the necessary steps forward...."

12. On May 3, 2006, Mr Portch met with Bellcourt's representative Mr Joseph Teitelbaum (referred to in some correspondence as Mr Joseph). The meeting was not at Flat H itself. It was Mr Portch's understanding that by that stage, no works had been carried out to the flat nor was any scheme to repair and improve the flat put forward by the respondent. Following the meeting Mr Portch wrote to the respondent on May 17, 2006 stating his intention to serve a prohibition order under section 20 of the Housing Act 2004. Reference was also made in that letter to two other basement flats in the same complex where enforcement action was being contemplated. In the letter Mr Portch stated:
"I understand that you have employed an architect to produce plans for a new scheme for the three flats. If the plans are acceptable and the work carried out satisfactorily, then the prohibition orders can be withdrawn."

13. Towards the end of May, Mr Portch left the employment of the London Borough of Greenwich and his work was taken over by another EHO, Mr Mark Pledger. Mr Pledger inspected flat H on June 14, 2006 and again on June 22, 2006 in the company of Mr Reece (also an EHO) who took photographs of the property.

14. Having considered the matter the respondents decided to serve the prohibition order which is the subject of this appeal. The order in terms prohibits the use of the dwelling for the occupation of the premises by any persons and annexes three schedules as follows:
(a) Schedule 1 identifies excess cold assessed under the Housing Health and Rating System (HHSRS) as a category 1 hazard as a result of inoperative and faulty heaters, penetrating damp, rising damp and solid uninsulated external walls;
(b) Schedule 2 identifies lack of natural lighting and inadequate artificial lighting also as an HHSRS category 1 hazard as a result of insufficient natural lighting due to inadequately sized windows and overshadowing and blocking of view and poor artificial lighting in kitchen, lounge and bedroom;

(c) Schedule 3 identifies damp and mould growth as a category 1 hazard as a result of rising and penetrating damp, lack of ventilation and non operative heating appliances.

15. There is no dispute in this appeal about the assessment of the severity of the hazards at the property and no challenge is made to their categorisation under the HHSRS. The photographs of the flat give an impression of a property severely affected by damp. At the time of the Tribunal hearing no remedial action had been taken to address the matters identified in the prohibition order.

16. However on the day the Tribunal inspected the property, work had just been completed to emulsion all of the internal walls. Paint pots were standing in the flat. Mr Eckstein, for the respondents, stated that he understood the repainting had been carried out to freshen up the property before starting work on it, and could not comment on counsel's suggestion that the flat had been painted in anticipation of the Tribunal's inspection. He had not personally asked for the painting to be done.

17. Whether Mr Gashi, the tenant, was in occupation of the flat after February 2006, was a little unclear. The appellants belief was that he had left around that date, the respondents however said that Mr Gashi was still in occupation of the flat in June and that he had given the EHOs access to the property. There was no question however but that Mr Gashi had left the property by the time of the hearing and that the flat is now unoccupied.

The law

18. Part 1 of the Housing Act 2004 (the Act) sets out a new regime for the assessment of housing conditions and a suite of new powers for local authorities to enforce housing standards. Housing conditions are assessed by the application of the Housing Health and Safety Rating System (HHSRS).

19. Where hazard or several hazards in a property are rated as HHSRS category 1 hazards, the options for enforcement include, by section 5, the power to serve an improvement notice under section 11 or the making of a prohibition order under section 20.

20. By section 8 of the Act, the authority must prepare a statement of the reasons for their decision to take the relevant action.

21. A prohibition order is an order which prevents specified residential premises being used for all or any purposes. By section 22 the contents of prohibition orders are prescribed. By section 22(2)(e) the order must specify, in relation to the hazard (or each of the hazards) any remedial action which the authority consider would, if taken in relation to the hazard, result in their revoking the order under section 25. Section 25 requires an authority to revoke an order if they are satisfied that the hazard in respect of which the order was makes does not then exist.

22. An improvement notice is a notice requiring the person on whom it is served to take remedial action in respect of the hazard, for example by carrying out works.

23. Appeals in respect of prohibition orders are dealt with in Part 3 of Schedule 2 to the Act. Paragraph 7 of that schedule gives a relevant person a general right of appeal against the service of a prohibition order. Paragraph 8 provides:
"8(1) An appeal may be made by a person under paragraph 7 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 order was made.
(2) The courses of action are –
(a) serving an improvement notice under section 11 or 12 of this Act."

The grounds of appeal

24. The appellant's case is that service of an improvement notice would have been the best course of action in respect of the three category 1 hazards identified by the respondents. Alternatively, it was submitted at the hearing, that the prohibition order ought to be suspended.

25. Reasons for the making of the prohibition order are, as required, included in the notice. They are, so far as relevant as follows:
"Pre formal action has not resulted in any conclusive action or significant improvement in the condition of the building; the premises were converted to residential accommodation without appropriate consents; the tenant has been placed

in the property and has no other place of abode; there are three category one hazards in the property.....
It is not considered that remedial action can be taken in this case without considerable expense and it is not reasonable to require work to be carried out. Previous remedial attempts have been unsuccessful and the Authority does not believe that the improved premises would provide a safe dwelling in the long term. Therefore an improvement notice is not considered appropriate in this case"
Additionally, the order sets out the remedial action in respect of each hazard, which if taken would result in the authority revoking the order.

26. It is the appellant's case that these reasons cannot be sustained. Several contentions were advanced. First it was argued that works to remedy the hazards could be carried out for between £7,000 to £10,000 which Mr Eckstein considered to be a reasonable cost given the overall value of the flat. Also it was said that carrying out the suggested works (with certain modifications) could be achieved without great difficulty. This was so in particular since the property is empty and, on the appellant's undertaking, would remain empty until works were carried out to the authority's satisfaction.

27. Secondly, there had been no prior enforcement action which might have supported the need for a prohibition order and there had been a general failure to consult with the appellant before taking action. At all times the appellant had been willing to undertake appropriate remedial works.

28. Thirdly, the hazards at the flat had been either caused or substantially contributed to by the behaviour of Mr Gashi. That despite the respondents' contention that the flat is not capable of providing safe accommodation in the long term, other flats within the block have been refurbished and are neither damp nor unsuitable.

29. Fourthly, the fact that remedial works are specified in the notice militates against the contention that the property is incapable of being brought up to a standard which render it suitable for occupation.

30. Finally, and in particular since the property is presently unoccupied, the service of a prohibition order is a disproportionate response.

The tribunal's reasons for rejecting the appeal

31. It is clear from the evidence that flat H is in a very poor state both because of disrepair and its layout. It presents, as is accepted by the appellant, three category 1 hazards to any potential occupier. Mr Pledger's opinion is that even is substantial work were carried out to the property, the problem of dampness would recur. This is evidenced by the fact that in February 2005, work to treat the dampness were carried out by PLF Preservations on behalf of the appellant but the problem recurred in a very short period of time. Furthermore PLF stated in their recommendation and quotations that "no guarantees will be issued in respect of this work as the walls treated are in such a very poor state of repair".

32. The list of works to bring the property up to standard are included because of the statutory requirement set out in section 22(2)(e) of the Act. Mr Pledger was not confident that even if all of the works set out in the notice were completed, that the property would be capable of safe occupation for any reasonable length of time. The Tribunal accepted this assessment.

33. The issue of reasonable cost is only one element of the respondent's consideration. In this case it was a matter that the council were entitled to take into account given the concern set out in paragraph 25.

34. It is also of relevance that no work had been carried out to the property between Mr Portch's first contact with the appellant in January 2006 and the date of the hearing. Although on several occasions, the appellant had assured the respondents that its architect was putting together a scheme of work, nothing had been done and no final proposals had been put to the council. The respondents were therefore correct to say that pre-formal action had not resulted in any conclusive action or significant improvement in the condition of the building.

35. The appellant has undertaken not to allow occupation of the property until it is in a suitable condition. Works can be carried out to the property and an application made

to revoke the prohibition order. Alternatively, when the appellant has put together a scheme to improve the flat this can be submitted to the respondents. If necessary the prohibition order can be varied.

36. In all the circumstances it is not considered that the decision to serve a prohibition order was disproportionate. The appeal was therefore dismissed.

Chairman .....

Date 13.11.06