FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BE/HIN/2015/0006**
Property	**:**	**Flats 1 to 8, 32 Havil Street, London SE5 7RS**
Applicant	**:**	**Mrs S Ansari**
Representative	**:**	**Mr A Madden, Counsel**
First Respondent	**:**	**London Borough of Southwark**
Representative	**:**	**Mr W Beglan, Counsel**
Type of Application	**:**	**Appeal against (a) improvement notices and (b) refusal to revoke prohibition orders under the Housing Act 2004**
Tribunal Members	**:**	**Judge P Korn (Chairman)** **Mr T Sennett FCIEH**
Date and venue of Hearing	**:**	**11th and 12th November (and reconvene for decision on 27th November) 2015 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**14th December 2015**

DECISION

Decisions of the tribunal

(1) The improvement notices for Flats 1, 2 and 6 are hereby varied as set out in the Appendix to this decision.

(2) The improvement notice for Flat 3 is confirmed.

(3) The Respondent's refusals to revoke the prohibition orders in respect of Flats 4, 5, 7 and 8 are confirmed, although the parties should also note the comments contained in paragraphs 82 and 84 below in relation to possible ways forward in relation to these Flats. The points contained in paragraph 66 below should also be noted.

(4) No cost applications have been made.

The application

1. The Applicant has appealed to the Tribunal, pursuant to paragraph 10(1) of Schedule 1 to the Housing Act 2004 ("**the 2004 Act**"), against four improvement notices issued by the Respondent in relation to parts of the Property. It has also appealed, pursuant to paragraph 9(1) of Schedule 2 to the 2004 Act, against the refusal by the Respondent to revoke four prohibition orders in force in respect of other parts of the Property.

2. All of the notices relate to parts of 32 Havil Street, London SE5 7RS ("**the Property**"). The improvement notices relate respectively to Flats 1, 2, 3 and 6. The prohibition orders which the Respondent refuses to revoke relate respectively to Flats 4, 5, 7 and 8.

The background

3. The Property is a terraced house on three floors divided into eight self-contained flats. The appeals were lodged on 20th February 2015 but, for various reasons, the hearing did not take place until November 2015.

4. The Respondent originally served prohibition orders on the Applicant in relation to all of the flats within the Property on 30th March 2011. At that time the Property was divided into nine flats, but this was subsequently reduced to eight by combining two units. On 29th December 2014, after an inspection of the Property, the Respondent wrote to the Applicant stating that it would be revoking the prohibition orders relating to Flats 1, 2, 3 and 6 but replacing them with improvement notices. In that same letter it stated that it was unable to revoke the other prohibition orders. The Respondent then wrote to the Applicant on 29th January 2015 confirming that the prohibition orders for Flats 1, 2, 3 and 6 had been revoked (although there was some

confusion in relation to the numbering) and enclosing improvement notices in respect of each of those same flats, as well as reminding the Applicant that the other prohibition orders remained in force.

5. Then on 30th March 2015, after the date on which the Applicant lodged her appeals against the 29th December 2014 and 29th January 2015 decisions, the Respondent served more formal notices on the Applicant revoking the prohibition orders for Flats 1, 2, 3 and 6 and more formal notices refusing to revoke the prohibition orders for the other flats.

6. On 22nd May 2015 the Upper Tribunal gave its decision in a case involving the same parties and the same property on the issue of whether the Applicant was entitled to appeal the original prohibition orders three years after they were made.

Inspection

7. The Tribunal members inspected the Property prior to the hearing in the presence of the parties and/or representatives of the parties.

Applicant's case

8. In relation to the Respondent's refusal to revoke the prohibition orders, the Applicant notes in written submissions that the Respondent relies on its HMO (houses in multiple occupation) licensing room sizes in support of its refusal and submits that (a) this assumes the Property to be a Section 257 HMO but that (b) it fails the test for a Section 257 HMO, in particular because there is no evidence that the Property is not compliant with building regulations.

9. The Applicant also submits that there are procedural issues regarding the validity of the decisions not to revoke the prohibition orders contained in the Respondent's letter dated 29th January 2015 and the status of the subsequent notices dated 30th March 2015. In the Applicant's submission, the letter dated 29th January 2015 was defective as it failed to give reasons for the refusal. As regards the notices dated 30th March 2015, the Applicant makes a number of comments on these based on the premise that it would be unattractive for a housing authority to be able to serve a fresh notice refusing to revoke an order if an appeal against an earlier notice refusing to revoke the same order has already fallen to be dealt with by a tribunal.

10. The Applicant also challenges some of the Respondent's findings in relation to the existence of hazards in those flats in respect of which it has decided not to revoke the relevant prohibition order.

11. In relation to the improvement notices, the main challenge is to the existence of the alleged hazards and to the necessity for the specified works.

12. On the substantive factual issues regarding the existence or otherwise of hazards the Applicant relies on the evidence of her expert, Mr Paul Fitzgerald.

13. At the hearing Mr Madden submitted that the Respondent should not have adopted its borough standards for room sizes in assessing hazards as the purpose of these standards was for licensing properties under Part 2 of the 2004 Act.

14. In relation to Flats 7 and 8 Mr Madden said at the hearing that the Applicant now accepted that the mezzanine levels should not be used for sleeping purposes.

Respondent's case

15. In written submissions the Respondent questions the basis of Mr Fitzgerald's evidence, noting that his first inspection was significantly later than the Respondent's own inspection on which its findings were based. The Respondent also defends its factual findings.

16. The Respondent submits that the Property is a Section 257 HMO, contrary to the position of the Applicant, and that the Respondent's HMO standards are the most appropriate ones to apply.

17. The Respondent also submits that the Applicant's appeal against the refusal to revoke the prohibition orders is defective as it refers to paragraphs 8 and 9 of Schedule 1 to the 2004 Act which relate to improvement notices. In relation to the other procedural issues, the Respondent states that clear reasons were supplied in its letter of 29th December 2014. At the hearing Mr Beglan for the Respondent said that the March notices were intended to supersede the January letter.

18. At the hearing Mr Beglan submitted that the borough standards for room sizes were entirely applicable here. Regarding the mezzanines, whilst the Applicant's partial concession was appreciated there would still be a practical issue of enforceability if the prohibition order was revoked and simply replaced by an obligation not to use the mezzanine for sleeping purposes, as the Respondent had a limited budget and could not simply keep inspecting the Property to ensure continuing compliance.

Mr Fitzgerald's evidence

19. Mr Fitzgerald is a consultant environmental health officer with Southern Environmental Services Limited. His qualifications and experience are set out in his witness statement.

20. In his witness statement he states that he inspected all eight flats on 12th June 2015, then he carried out hazard risk assessments in respect of the alleged hazards forming the basis of the prohibition orders and improvement notices, and then he reviewed the hazard risk assessments carried out by Ms Wilkinson on behalf of the Respondent.

21. He notes that notice of the Respondent's intended visit to inspect the Property was served by Ms Wilkinson herself on the Applicant and on the occupiers and was signed by her. By reference to section 243 of the 2004 Act he expresses the view that the Respondent did not have the power to delegate this function to someone below the level of Deputy Chief Officer. Therefore the notice of entry and subsequent service of the improvement notices were invalid.

22. As regards hazard assessment, in none of the flats did his assessments for 'Crowding and Space' or for 'Fire, Noise and Collision and Entrapment, etc' reveal a Category 1 hazard. In coming to his hazard rating score he states that he has referred to the appropriate National Worked Examples, whereas Ms Wilkinson has made no reference to the National Worked Examples, which in his view accounts for what he describes as her exaggerated and inconsistent approach.

23. In his main witness statement Mr Fitzgerald states that in his opinion the Respondent has adopted a particularly bullish approach, clearly disregarding the Hampton Principles of Government, the HHSRS Enforcement Guidance and their own Enforcement Policy, proceeding prematurely to enforce with little or no consultation with an owner who clearly wants to co-operate and reach a reasonable compromise. He also states that in his opinion the assessments have been manipulated by the Council Officer to exaggerate the hazards in order to justify the service of improvement notices (presumably this is a reference to the alleged hazards identified in Flats 1, 2, 3 and 6).

24. Mr Fitzgerald criticises what he perceives as the Respondent's failure to elicit the views of tenants and to consider the actual age of the tenants in occupation. He states that the Respondent has provided no evidence of managerial procedures or peer review. The assessments for 'Crowding and Space' have not followed the requisite two-stage process. The Respondent's minimum room sizes are stricter than most other London boroughs. He also makes some detailed points on Ms Wilkinson's factual evidence, on the assessment of individual alleged hazards and on the practicality of certain of the remedies specified by the Respondent to relieve alleged hazards.

25. At the hearing Mr Fitzgerald said that it was an error to assume that a flat will always be occupied by a member of the most vulnerable age group.

26. In relation to Flat 1 he said that the damp problem was more serious on the day of the Tribunal's inspection than he had found on the day of his own original inspection in June 2015, and he accepted that on the basis of the later inspection Ms Wilkinson's scoring for the likelihood of harm was reasonable. However, there was a big difference between his own Rating Score and Hazard Band and those of Ms Wilkinson. He disagreed with Ms Wilkinson's scoring of the likelihood of harm in relation to 'Position and Operability of Amenities etc', where she had reduced it very considerably from 1 in 9,074 to 1 in 100 and his view was that Ms Wilkinson's score was at odds with relevant National Worked Examples. In any event, he considered this the wrong hazard to have chosen.

27. In relation to Flat 2 Mr Fitzgerald disagreed with the scoring for 'Excess Cold' due to the existence of a large radiator and the fact that the flat was part of a building and therefore heat was more likely to be retained. The same points applied to 'Position and Operability of Amenities etc' as with Flat 1.

28. In relation to Flat 3, Mr Fitzgerald noted that Ms Wilkinson's analysis in respect of 'Position and Operability of Amenities etc' led to a Rating Score which put the hazard in Hazard Band F, and he commented that Hazard Band F does not normally justify formal enforcement action.

29. In relation to Flat 6, Mr Fitzgerald noted that Ms Wilkinson had put the 'Damp and Mould Growth' hazard into Hazard Band I, and again he commented that this would not normally justify formal enforcement action. He noted the absence of a reference to a National Worked Example.

<u>Cross-examination of Mr Fitzgerald</u>

30. In cross-examination by Mr Beglan, Mr Fitzgerald accepted that he had not asked the Applicant for a list of occupiers and he conceded that this would have been useful in order to help to work out the appropriate remedial steps to take.

31. As regards whether the Property complied with building regulations in the context of whether it was a Section 257 HMO, Mr Beglan enquired of Mr Fitzgerald whether he had asked the Applicant for evidence of compliance and if not why not. He said that he had not asked for such evidence as it was not part of his remit. He had also not seen any relevant drawings, specifications of works or invoices and conceded

that he had no evidence that the works carried out did comply with building regulations.

32. Regarding Mr Fitzgerald's criticism of Ms Wilkinson for not consulting tenants, Mr Fitzgerald accepted that Ms Wilkinson had now dealt with this point in her third witness statement and that she had in fact consulted tenants. By contrast, he accepted that he had only spoken to one occupier himself.

33. Mr Beglan put it to Mr Fitzgerald that he should have exercised more caution in questioning Ms Wilkinson's report on what she actually saw on inspection, given that he was not present (his own inspection taking place much later), and Mr Fitzgerald accepted this point. As regards the statement in his main witness statement that the owner clearly wanted to co-operate, Mr Beglan put it to him that he had no evidence for this assertion. As regards his statement that the Respondent had disregarded its own enforcement policy, on being invited to do so Mr Fitzgerald retracted this statement. His view remained, though, that the risks were minor and the Respondent's response was disproportionate.

34. On being asked where it is stated in the Operational Guidance or the Enforcement Guidance that in assessing the risks the housing authority should consider the ages of the actual tenants in occupation – as asserted in his witness statement – he said that he did not know but would check. In relation to his criticism that there was no evidence of managerial procedures or peer review, he accepted that he had no reason to assume that managerial procedures and peer review had not taken place other than the existence of what he considered to be errors in the assessments. He now accepted, based on Ms Wilkinson's third witness statement, that peer review had taken place.

35. Mr Beglan noted Mr Fitzgerald's insistence that it was important to use National Worked Examples and asked him where this was stated in the Operating Guidance. Mr Fitzgerald replied that it was in a footnote to paragraph 18 and that it had also been accepted by a previous tribunal that it was good practice. Mr Beglan put it to him that neither of these points demonstrated that there was any requirement to use them. Mr Beglan also put it to Mr Fitzgerald that no relevant Worked Example existed in relation to the hazard of 'Position and Operability of Amenities etc', and Mr Fitzgerald accepted this.

36. As regards the minimum standard required by the Respondent, Mr Beglan noted that in relation to the hazard 'Position and Operability of Amenities etc' this was simply the minimum British Standard expressly referred to in paragraph 28.09 of the Housing Health and Safety Rating System guidance for that hazard. He put it to Mr Fitzgerald that the minimum British Standard was surely achievable and realistic and Mr Fitzgerald accepted this point.

37. As regards Mr Fitzgerald's stated opinion that the assessments had been manipulated by Ms Wilkinson to exaggerate the hazards, on being invited by Mr Beglan to do so Mr Fitzgerald retracted this statement and said instead that Ms Wilkinson was maybe misguided as a result of inexperience. Mr Beglan then referred Mr Fitzgerald to the 2013 tribunal case relating to 1-12 & 14-19 Patina Walk (Reference: LON/00BE/HPO/2013/0021), in which Mr Fitzgerald appeared as an expert witness, and in particular to that tribunal's statement that *"assessments did not always communicate the necessary impartiality of view"*. Mr Fitzgerald accepted that this was a reference to his own assessments in that case.

38. On being asked by Mr Beglan which particular National Worked Examples showed that the Respondent had come to the wrong conclusions, Mr Fitzgerald was unable to say. Mr Beglan put it to Mr Fitzgerald that, despite his criticisms of Ms Wilkinson for failing to do so, he had not had his own opinion peer reviewed and nor had he based it on National Worked Examples. Mr Fitzgerald accepted this but said that the difference was that he was very experienced. Mr Beglan also put it to him that his view that hazards in Hazard Bands F and G constituted an insignificant risk could not be correct, but Mr Fitzgerald disagreed.

39. As regards Ms Wilkinson's opinion on the state of disrepair of the French doors in Flat 2, Mr Beglan referred Mr Fitzgerald to a photograph of those French doors and Mr Fitzgerald confirmed that the photograph justified Ms Wilkinson's opinion. He added that Ms Wilkinson had not described the level of disrepair in her assessment but he conceded that he had not asked the Applicant about the point.

40. In response to a question from the Tribunal Mr Fitzgerald said that he had not seen any gas or electrical certificates and that his instructions were limited to visiting the Property, reading through the documents provided by the Applicant and then giving a critique of the Respondent's case. Specifically in relation to the mezzanines, he said that he would prefer these to be used for storage. Regarding Flat 5, for the safe use of the kitchen he thought that four square metres of clear space would be needed. His view that the Property was not a Section 257 HMO was partly based on seeing the drainage and fire doors but otherwise based on information supplied by the Applicant.

Mr Asif Ansari's evidence

41. Mr Ansari is the Applicant's son and he has given a witness statement. His witness statement summarises his understanding of the circumstances leading up to the appeal.

42. At the hearing Mr Ansari was asked about the cause of the damp in Flat 1's bedroom and he said that it was caused by the electricity board

puncturing the tanking system, although he did not have any documentary evidence confirming this.

43. In cross-examination Mr Ansari accepted that the works to the Property had required planning permission and that the Applicant had not tried to obtain planning permission. The intention was later to apply for a certificate of lawfulness of use. He accepted that he could produce no evidence of compliance with building regulations. Mr Beglan referred Mr Ansari to the Upper Tribunal decision dated 22nd May 2015 between the Applicant and the Respondent, also relating to the Property, on the issue of whether the Applicant was entitled to appeal the original prohibition orders three years after they were made. In particular he referred to the criticisms of Mr Ansari made by the Upper Tribunal in paragraphs 70 to 72 of that decision, and Mr Ansari conceded that those criticisms were broadly accurate but needed to be seen in context.

44. Mr Ansari now accepted that the mezzanines should not be used for sleeping purposes, but he did not want them to be removed completely. He was also prepared to consider restricting flats to single occupancy.

Ms Wilkinson's evidence

45. Ms Wilkinson is a Principal Enforcement Officer for the Respondent and has prepared three witness statements summarising her actions and her analysis of the issues, including specific points raised by Mr Fitzgerald. Specifically in relation to Mr Fitzgerald's objection to her signing the notice of entry, she states that she has been given delegated power to serve notices of entry herself.

46. At the hearing she said that, when she visited the Property, all but one of the flats had two people living in them, which made 17 people in total. As regards the possibility of single occupancy, this had been the basis of her discussions with Mr Ansari as to minimum standards. As regards the mezzanines, if the staircases were removed she would be prepared to be flexible about whether the mezzanines themselves had to be entirely blocked off, and there might be a case for storage use with the storage area being accessed by ladder.

47. In cross-examination she said that she was not sure whether the Respondent's HMO standards had been adopted specifically to assess hazards. Her understanding was that these standards are enforceable and that they are also a benchmark to help landlords to understand what is appropriate. She accepted that the Operating Guidance did not refer to local HMO standards.

48. Mr Madden put it to her that when deviating from National Worked Examples she should have referenced this and explained her reasons. She did not accept this and said that the Respondent has its own

internal expertise and information. Although she did not specifically use National Worked Examples she did look at other properties.

49. In relation to Flats 4 and 5, Ms Wilkinson accepted that the main issue was size of room, although she said that there were also sub-issues such as ease of food preparation. She accepted that if one ignored the bathroom issue Flat 4 might be suitable for single occupancy.

50. As regards the bathrooms generally, Ms Wilkinson broadly accepted that they were fully equipped but doubted whether one could comfortably bend over the sink with the door closed. In relation to the very large increase from the national average when assessing the risk of harm from 'Position and Operability of Amenities etc' Ms Wilkinson accepted that she had received no reports of people being badly injured through having to use a small bathroom in any of the flats, but she also noted that the Property had been empty for years.

51. Mr Madden put it to Ms Wilkinson that all of her calculations had been adjusted upwards. In response she said that all of the flats were fairly similar and that justified similar treatment.

52. Regarding the damp issue in Flat 6, which Ms Wilkinson placed in Hazard Band I, why was this issue not dealt with informally? In response she said that based on her previous dealings with the Applicant she had reason to believe that the Applicant would simply disregard any informal requests. Specifically as regards the need to serve improvement notices, Ms Wilkinson said that there were serious problems and that the problems were worse when she inspected than when Mr Fitzgerald inspected. In relation to the tripping hazard in Flat 6 she agreed that this was no longer an issue.

53. As regards the notice refusing to revoke the prohibition notices, Ms Wilkinson accepted that it did not fulfil the formal requirements.

54. In response to a question from the Tribunal Ms Wilkinson said that it might be possible for Flats 4 and 5 to be combined into one double flat. She would also be prepared to be flexible in relation to tanking.

The Tribunal's analysis

55. We note the oral evidence and written submissions from the parties and have considered the various copy documents provided.

Validity of appeal against refusal to revoke prohibition orders

56. The Respondent argues that the Applicant's appeal against the refusal to revoke the prohibition orders is defective as it refers to paragraphs 8

and 9 of Schedule 1 to the 2004 Act which in fact relate to improvement notices. As stated at the hearing we do not accept this point. Whilst it was indeed an error to refer to those paragraphs, it was a very technical error which cannot possibly have confused or prejudiced the Respondent, it being a local housing authority with considerable in-house expertise on these issues. In addition, the evidence indicates that the Respondent was not remotely confused in practice by the reference to paragraphs 8 and 9 of Schedule 1. No legal authority has been brought by the Respondent to support the proposition that the Tribunal either is obliged to or should reject the appeal on the basis of this sort of small technical error. Therefore, we are satisfied that the appeal should not be dismissed – or declared invalid – on this basis.

Procedural issue relating to the Respondent giving notice of intended entry

57. Mr Fitzgerald states that the notice of intended entry on to the Property served by the Respondent on the Applicant under section 239 of the 2004 Act was invalid as it was signed by Ms Wilkinson and that under section 243 the power cannot be delegated below the level of Deputy Chief Officer. In response Ms Wilkinson states that she does in fact have delegated power to serve notices of entry.

58. Section 243 requires that a person exercising the powers set out in sub-section 243(1), which includes the power of entry under section 239, be authorised by the appropriate officer of the local housing authority. The appropriate officer is defined at sub-section 243(3). In our view there is nothing in section 243 which would prevent the Respondent's appropriate officer authorising Ms Wilkinson by way of delegated power to exercise such powers.

Procedural issues relating to the notice revoking the prohibition orders

59. The Applicant argues that the December 2014 / January 2015 refusal to revoke the prohibition orders relating to Flats 4, 5, 7 and 8 was invalid but that the refusal was never withdrawn and therefore the Respondent was not entitled to replace it with the formal notices dated 30th March 2015.

60. The position in respect of these procedural issues is certainly not ideal. There has been confusion over flat numbers, although a consensus on these was achieved at the hearing. More importantly, whilst the letter dated 29th December 2014 explained the reasons for the decision it did not contain all of the formalities required by paragraph 6 of Schedule 2 to the 2004 Act. The letter dated 29th January 2015 did not really advance matters as it merely stated that the Applicant was being reminded of the Respondent's decision not to revoke.

61. As regards the status of the notices dated 30th March 2015, through arguably no fault of the Applicant (who made her application prior to the service of the March notices) these notices are not the subject of this appeal and therefore it is outside our remit on this appeal to make a formal determination as to their status. This could, though, lead to the unattractive possibility of our allowing an appeal against the refusal on 29th December 2014 and/or on 29th January 2015 to revoke the prohibition orders relating to Flats 4, 5, 7 and 8 whilst being unable to rule on the status of the notices dated 30th March 2015.

62. If the March notices were later to prove to be valid then either the parties would need to come to an agreement between them, which seems unlikely given the history of the dispute, or a further tribunal hearing would be required (a) to determine the validity of the notices and then (b) if they were adjudged to be valid, to make a determination on many of the same issues as have already been aired before this Tribunal. If the March notices were adjudged to be invalid then the Respondent would need to consider its next steps, including whether hazards remained in these flats and what enforcement action should be taken, which itself could lead to a further tribunal hearing.

63. All of the above would be likely to lead to significant extra expense and delay in circumstances where there are serious questions to be decided as to whether these flats contain hazards and – if so – what should be done about those hazards to protect the safety and wellbeing of the occupiers and potential future occupiers. This is all in the context of the Respondent having a statutory duty to take enforcement action in appropriate cases. Much can be said about how this situation has arisen, including possible speculation as to what was in the Respondent's mind when it served the fresh notices, but we do not consider on the basis of the evidence that one party has been shown to be clearly to blame.

64. In the highly unusual circumstances of this case, and bearing in mind the overriding objective contained in rule 3 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, we consider that the notice of refusal to revoke the prohibition orders relating to Flats 4, 5, 7 and 8 should be treated as valid. The letter of 29th December 2014 contains reasons, and on the basis of the evidence we do not consider that the Applicant was prejudiced in practice by the notice being technically non-compliant.

65. In this regard we note that the Respondent has made brief reference in written submissions to the decision of the House of Lords (as it then was) in *R v Soneji (2006) 1 AC 340*. Whilst that decision was concerned with confiscation orders, it is worth noting that in the context of compliance with statutory provisions the House of Lords took the view that instead of focusing on whether the relevant statutory provision was a mandatory one it was more appropriate to focus on the

consequences of non-compliance by applying an objective test as to the intention of Parliament. Applying that test, in our view the consequences of non-compliance on the facts of this case were not prejudicial to the Applicant, especially as it did not prevent her lodging a detailed appeal, and on balance we do not consider that Parliament would have intended non-compliance to be fatal to the validity of the notices in this case.

66. If it transpires that we are wrong on the above point as a matter of law, then our comments on the merits of each refusal and on possible alternative remedies may nevertheless aid the parties in future discussions.

Section 257 HMO issue

67. A property is an HMO for the purposes of section 257 of the 2004 Act if it has been converted into, and consists of, self-contained flats, and if less than two-thirds of the flats are owner-occupied and if the building work undertaken in connection with the conversion did not comply with appropriate building standards and still does not do so.

68. It is common ground between the parties, and in any event is clear from the evidence, that the Property was designed and built as a single family dwelling and has subsequently been converted into, and consists of, self-contained flats and that less than two-thirds of the flats are owner-occupied. The issue is therefore whether the relevant building work complied with appropriate building standards when carried out and whether it complies now.

69. We note that by Mr Ansari's own admission the Applicant made no attempt to obtain planning permission for the building work at the time. Specifically as regards compliance with appropriate building standards (or building regulations), the Applicant has provided no evidence of compliance. As regards Mr Fitzgerald's assertion that the work complied with building regulations, he appears to have no basis for making this assertion other than what he has observed in relation to the drainage and the fire doors. He had not asked the Applicant for evidence of compliance and had not seen any relevant drawings, specifications of works or invoices. At the hearing he expressly conceded that he had no evidence that the works carried out did comply with building regulations.

70. The Applicant has known for some time that this point is a live issue and she has had the benefit of legal advice. Therefore, if the work did and does indeed comply with building regulations it would not have been difficult for her to obtain formal confirmation or some other independent evidence of this. On the balance of probabilities, therefore, taking into account the history of deliberate non-compliance

with planning law, we conclude that the Property is an HMO to which section 257 of the 2004 Act applies.

Respondent's HMO standards

71. The Applicant has sought to challenge the applicability of the Respondent's HMO standards. On the basis of our conclusion that the Property is a Section 257 HMO, one aspect of this challenge falls away. As regards the reasonableness of the Respondent's HMO standards, Mr Fitzgerald sought to portray the Respondent's standards as being out of line with other local housing authorities. However, whilst it is true that they are more stringent than that of some local housing authorities it is also the case that they are less stringent than others, and in our view Mr Fitzgerald's anecdotal evidence was not strong enough to support the point that he was trying to make.

72. On the basis of the evidence and the Tribunal's own knowledge, we are satisfied that the Respondent's HMO standards are within the range of reasonable minimum standards, that they are appropriate standards to be used for the purposes of assessing housing conditions under Part 1 of the 2004 Act and that the Applicant knew what the standards were.

Expert evidence

73. In his witness statements Mr Fitzgerald strongly disagrees with many of Ms Wilkinson's conclusions. On seeing Ms Wilkinson's second and third witness statements and on being cross-examined on his evidence he has conceded or retracted a number of significant points and has accepted the validity of certain observations which help to put his evidence in context.

74. Mr Fitzgerald concedes that Ms Wilkinson consulted tenants and that he himself only spoke to one occupier. He also now accepts that he should have exercised more caution in questioning Ms Wilkinson's report on what she saw on inspection, given that he was not present and that his own inspection took place much later.

75. It is now clear that Mr Fitzgerald had no real evidence for the statement in his witness statement that the Applicant clearly wanted to co-operate with the Respondent. In addition, on being invited to do so he retracted his statement that the Respondent had disregarded its own enforcement policy and also retracted his assertion that the assessments had been manipulated by Ms Wilkinson to exaggerate the hazards.

76. Mr Fitzgerald was unable to show where it was stated in the Operational Guidance or the Enforcement Guidance that in assessing the risks the housing authority should consider the ages of the actual

tenants in occupation, despite having made this assertion in his witness statement.

77. As regards Mr Fitzgerald's focus on the importance of using National Worked Examples, in our view he has placed too much weight on the relevance of these. In relation to certain hazards very few National Worked Examples exist, and even where a reasonable number of National Worked Examples do exist it is sometimes difficult to find one which is sufficiently analogous to the actual potential hazards under consideration for it to be particularly useful. In any event, Ms Wilkinson has given credible evidence that she referred to local examples and to in-house information and expertise.

78. Mr Fitzgerald now accepts that he had no proper reason to assume that Ms Wilkinson had failed to go through appropriate managerial procedures and peer review in carrying out her assessment. As regards Ms Wilkinson's opinion on the state of disrepair of the French doors in Flat 2, on seeing a photograph of those French doors he confirmed that the photograph justified Ms Wilkinson's opinion. In addition, Mr Fitzgerald's opinion on the Section 257 HMO issue was seemingly based on little objective evidence.

79. In the above circumstances the question unavoidably arises as to how much weight to place on Mr Fitzgerald's evidence. In particular, the nature of his criticisms of Ms Wilkinson's abilities and integrity is problematic, given that he was unable to justify those criticisms, and he was also unable to substantiate a number of other assertions. In addition, some of his evidence appeared to indicate an unquestioning acceptance of what the Applicant or her son had told him, notwithstanding his duty to the Tribunal. In short, in spite of his undoubted experience in this field we found many aspects of his evidence to be unconvincing, and his unsupported criticisms of Ms Wilkinson did in part serve to undermine his own credibility.

80. Ms Wilkinson came across very professionally in her witness statements and in cross-examination. Her evidence was generally credible, although in our view there is room for disagreement with some of her conclusions, as referred to below in respect of the relevant flats.

Refusal to revoke prohibition orders

81. The procedural issues have been dealt with above, and we now turn to the merits of the decisions themselves.

82. In relation to Flats 4 and 5 we agree with the refusal to revoke the relevant prohibition order. On the basis of the agreed flat sizes (11.93 square metres in aggregate for Flat 4, and 13.87 square metres in

aggregate for Flat 5) we consider that each of these flats is too small to live in, even if restricted to single person use. We have reached this conclusion based on the space required for a reasonable level of amenities for sanitary and personal washing/bathing and for the provision and safe use of kitchen facilities. We have also considered ingress and egress, as well as circulation space within the flat. We have noted the space standards referred to by the Respondent in communications over a lengthy period of time with the Applicant, including the reference to British Standards and documents issued by the London Government Association (Mayor's Housing Design Guide) and the HMO standards adopted by the Respondent which, as stated above, are within the range of reasonable minimum standards. There is a common desire between the parties to see Flats 4 and 5 put back in use as living accommodation, and to that end the parties may wish to explore the option of combining Flats 4 and 5 to provide a unit of accommodation suitable for use as a double letting.

83. In relation to Flats 7 and 8 we agree with the refusal to revoke the relevant prohibition order on the basis that both flats are not currently usable. The Applicant has conceded that the mezzanines cannot safely, or at least should not, be used for sleeping purposes. We agree with the Respondent that it is not practical merely to prohibit the use of the mezzanines for sleeping but otherwise allow the flats to continue to be occupied, as ongoing compliance with a condition of this nature is not something that the Respondent – with its limited resources – can be expected to police effectively.

84. In our view there are two possible options in relation to Flats 7 and 8. One option is for the parties to explore the use of Flats 7 and 8 as one double room, although in this scenario the Applicant would need to remove the staircases to prevent the mezzanines being used for sleeping purposes. The other option is to keep the two flats as separate flats but in each case for the Applicant to (i) remove the staircases in a manner approved by the Respondent acting reasonably, (ii) use the mezzanines only for storage, accessed by a ladder and (iii) enlarge and reconfigure the shower room to the Respondent's reasonable satisfaction.

Improvement notices

85. We have carefully considered the written evidence of both parties including the statutory guidance on HHSRS and the evidence given by the experts when examined and questioned during the hearing. The assessment of hazards and the scoring process were conducted by the Environmental Health professionals on different days at different times of the year. We had the opportunity to inspect prior to the first day of hearing during which time dampness measurements were taken jointly by the experts who agreed at the hearing that the hazard was more serious in the basement rooms than both had observed when they had previously inspected. Mr Fitzgerald stated he would have increased the

likelihood of harm and thus the scoring beyond that of Ms Wilkinson had he been presented with such disrepair at an inspection of the Property.

86. We are satisfied that the hazards referred to in the improvement notices were present at the times of initial inspection and service of the improvement notices. We are also satisfied that the scale of the hazards as category 1 or 2 was established and that it was appropriate for the Respondent to determine to take appropriate enforcement action.

87. Mr Fitzgerald placed great emphasis on National Worked Examples of hazards and of scoring, but no examples were given by him in evidence other than anecdotally. When questioned he stated that for the 29 hazards under HHSRS there were probably around 200-250 such examples available to reference. He admitted that there were no worked examples for hazard 28 (Position and Operability of Amenities). Ms Wilkinson stated that she used local examples applicable to the housing stock in Southwark and that peer review was in place with her senior professional colleagues. She also stated that she was aware of the national worked examples but that in her view it was more appropriate and helpful to refer to local examples, and this is a practice that we consider to be sound and convincing.

88. It was acknowledged by Mr Fitzgerald that he had not seen the Property on the same day as Ms Wilkinson when she made her assessments under HHSRS and that what she had seen at the time could be construed, and scored, differently on another occasion. We consider that the Respondent acted reasonably and within its own criteria to determine that improvement notices should be served, and we do not consider it appropriate to alter the likelihood or outcomes proposed by the Respondent. However, we do have comments on certain items in the specifications contained in Schedule 2 to the notices, and these are listed by flat below:

<u>Flat 1</u>

89. We agree that there is a problem with damp, but we consider that whilst the Respondent's specified remedy is the ideal solution it is not the only solution. The specified remedy is arguably more expensive than necessary and it would also permanently reduce the size of the room.

90. Regarding the shower room, we are slightly surprised by the very large change in likelihood of harm from 1 in 9,074 to 1 in 100. However, the shower tray is very small indeed and a bulky person would have significant difficulties in using the shower comfortably and safely. It would be difficult to bend down, and it would be hard for the shower to be used by a wide range of people as envisaged by the Guidance. The British Standard adopted by the Respondent is expressly referred to in

the Guidance relating to the hazard 'Position and Operability of Amenities etc'. There is no room for a grab rail, and we are not persuaded that the bathroom has sufficient free user space all over to facilitate use without strain. Therefore we accept that the shower room needs to be enlarged and/or reconfigured to reduce the risk of harm.

91. Applying the above points, the first bullet point in Schedule 2 to the improvement notice should in our view be amended by adding the word *"Either:"* at the beginning and replacing the words at the end *"(NOTE: alternative methods of tanking will be considered)"* with the following:-

"Or: instruct a specialist damp proofing contractor who is a member of a recognised trade body to prepare a report and specification of works to remedy the damp affecting the unit and follow his/her recommendations subject to approval by the Council".

92. In relation to the second bullet point in Schedule 2, in our view this should be amended by adding the word *"Either:"* at the beginning and inserting the following wording at the end:-

"Or: enlarge and reconfigure shower room to the Council's reasonable satisfaction".

93. In relation to the third bullet point, we agree that it was appropriate for the Respondent to require this work to be carried out. It is common ground that the work has now been done but in our view it is inappropriate to vary part of an improvement notice simply to reflect the fact that it has subsequently been complied with.

Flat 2

94. In relation to the first bullet point in Schedule 2 to the improvement notice, our view is the same as in relation to Flat 1.

95. In relation to the second bullet point, we are satisfied on the basis of the evidence that the French doors need renewing and accept that the Respondent's specified method of remedying the problem is appropriate and proportionate.

96. In relation to the third bullet point, our view is the same as in relation to the second bullet point for Flat 1.

Flat 3

97. The only work specified in relation to this Flat is to take down the partitioning to the shower room to allow the room to be increased in

size and to erect new partitioning. In our view, for the reasons already given in relation to Flat 1, the existing shower room is too small. As regards the Respondent's proposed works, Flat 3 is big enough for this to be a reasonable solution and we also consider the proposed solution to be fair and proportionate. We therefore uphold this improvement notice.

Flat 6

98. In relation to the first bullet point in Schedule 2 to the improvement notice, our view is the same as in relation to Flat 1.

99. As regards the second bullet point, this is no longer an issue but it was correct to specify the work at the time and therefore there is no need to vary the notice in this regard.

100. As regards the third bullet point, this has now been dealt with but again it was correct to specify the work at the time and therefore there is no need to vary the notice in this regard either.

Cost applications

101. No cost applications have been made.

Name: Judge P. Korn **Date:** 14th December 2015

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. The application for permission to appeal must arrive at the regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

Appendix

Variations to Schedule 2 to improvement notices relating to Flats 1, 2 and 6

Flat 1

1. Wording in first bullet point to be amended by adding the word *"Either:"* at the beginning and replacing the words at the end *"(NOTE: alternative methods of tanking will be considered)"* with the following:-

   "Or: instruct a specialist damp proofing contractor who is a member of a recognised trade body to prepare a report and specification of works to remedy the damp affecting the unit and follow his/her recommendations subject to approval by the Council".

2. Wording in second bullet point to be amended by adding the word *"Either:"* at the beginning and inserting the following wording at the end:-

   "Or: enlarge and reconfigure shower room to the Council's reasonable satisfaction".

Flat 2

1. Wording in first bullet point to be amended by adding the word *"Either:"* at the beginning and replacing the words at the end *"(NOTE: alternative methods of tanking will be considered)"* with the following:-

   "Or: instruct a specialist damp proofing contractor who is a member of a recognised trade body to prepare a report and specification of works to remedy the damp affecting the unit and follow his/her recommendations subject to approval by the Council".

2. Wording in third bullet point to be amended by adding the word *"Either:"* at the beginning and inserting the following wording at the end:-

   "Or: enlarge and reconfigure shower room to the Council's reasonable satisfaction".

Flat 6

Wording in first bullet point to be amended by adding the word *"Either:"* at the beginning and replacing the words at the end *"(NOTE: alternative methods of tanking will be considered)"* with the following:-

"Or: instruct a specialist damp proofing contractor who is a member of a recognised trade body to prepare a report and specification of works to remedy the damp affecting the unit and follow his/her recommendations subject to approval by the Council".