UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – prohibition notice– under Part 1 of the Housing Act 2004 – application for permission to appeal out of time – representation by housing authority – whether "good reason" for delay in applying for permission to appeal out of time – schedule 2, paragraph 10 Housing Act 2004 - whether waiver by housing authority – appeal dismissed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

SULTANA ANSARI

Appellant

and

LONDON BOROUGH OF SOUTHWARK

Respondent

Re: 32 Havil Street,
London
SE5 7RS

Before His Honour Judge Stuart Bridge
Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL
on
14 April 2015

Piers Harrison for the Appellant
Wayne Beglan for the Respondent

The following cases are referred to in this decision:

G v G (Minors: Custody Appeal) [1985] 1 WLR 647

Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd [1971] AC 850

Phonographic Performance Ltd v AEI Rediffusion Music Ltd [1999] 1 WLR 1507

Short v Birmingham City Council [2005] EWHC 2112(QB); [2005] HLR 6

DECISION

1. Should a person subject to a prohibition order be entitled to appeal that order over three years after it was made?

2. That is the single issue in this appeal from the preliminary decision of the First-Tier Tribunal (Property Chamber) ("the Ft T") given on 23 July 2014. Prohibition orders were served on Mrs Ansari, the owner of 32 Havil Street, London SE5 7RS, on 2 April 2011, the orders having been made two days earlier on 30 March 2011. Pursuant to the Housing Act 2004, Mrs Ansari had 28 days from that latter date in which to appeal, her time for doing so therefore expiring on 28 April 2011. It was 29 May 2014 when she commenced her appeal, seeking permission to appeal out of time. In due course, on 23 July 2014, the Ft T refused her such permission. Was the Ft T right to do so?

3. Permission to appeal the decision of the Ft T was granted by the Upper Tribunal on 23 October 2014.

The relevant legislation

4. Part I of the Housing Act 2004 introduced a new system for assessing the condition of residential premises and enforcing appropriate housing standards, in doing so replacing the previous system based on the concept of fitness for human habitation. The new system refers to two specific categories ('category 1', the more serious, and 'category 2') of 'hazard', that concept being defined by reference to an evaluation of the risk of harm to the health or safety of occupiers of the premises arising from a deficiency, usually in the dwelling itself. Local housing authorities are the enforcers of housing standards, the legislation imposing on them specific duties, notably to keep under review housing conditions in their area, to inspect premises to see whether category 1 or 2 hazards exist, and to take appropriate enforcement action in the event of category 1 hazards being identified. Where a category 2 hazard is considered by the authority to exist, the authority is under no duty, although it has power, to take such action.

5. There is a range of enforcement action available to an authority, listed in sections 5(2) and 7(2). The only one relevant to the current dispute is the prohibition order.

6. A prohibition order is an order, made by the authority itself, imposing a prohibition (or prohibitions) on the use of the premises, and the order may (as in the case before me) prohibit the use of the premises as a dwelling: see generally section 20. The legislation regulates the circumstances in which prohibition orders may (or must) be made, what the contents of the order must specify, and how and when an order may be suspended: see sections 20 to 23.

7. A person commits an offence if he, knowing that a prohibition order has become operative in relation to any specified premises, uses the premises in contravention of the order, or permits the premises to be so used: section 32(1). It is a defence in proceedings for such an offence that the person had a reasonable excuse for using the premises, or permitting them to be used, in contravention of a prohibition order: section 32(3).

8. The general rule (agreed to be applicable in this case) is that a prohibition order 'becomes operative at the end of the period of 28 days beginning with the date specified in the notice as the date on which it is made': section 24(2). In the event of an appeal being brought against an order, the order does not become operative until the order is confirmed on appeal or the time for appealing further expires: section 24(5); Schedule 2 paragraph 14. By section 24(6), if no appeal is made within the period for appealing, 'the order is final and conclusive as to matters which could have been raised on an appeal.'

9. Part 3 of Schedule 2 (as amended) regulates appeals. By paragraph 7, 'a relevant person may appeal to the appropriate tribunal against a prohibition order.' It is accepted both that Mrs Ansari is a relevant person and that the Ft T is the appropriate tribunal.

10. The time limit for such an appeal is set out in paragraph 10 of Schedule 2 which, so far as is relevant, reads:

> (1) Any appeal under paragraph 7 must be made within the period of 28 days beginning with the date specified in the prohibition order as the date on which the order was made.
>
> (3) The appropriate tribunal may allow an appeal to be made to it after the end of the period mentioned in sub-paragraph (1)… if it is satisfied that there is a good reason for the failure to appeal before the end of that period (and for any delay since then in applying for permission to appeal out of time).

11. The appeal to the Ft T is to be by way of re-hearing but may be determined having regard to matters of which the authority were unaware, and the Ft T may by order confirm, quash or vary the prohibition order: Schedule 2, paragraph 11.

The facts

12. The premises with which this appeal is concerned are at 32 Havil Street, London SE5 7RS. They are owned by Mrs Sultana Ansari, the appellant in this case, and managed by her son, Mr Asif Ansari (hereafter 'Mr Ansari'). The building is on three floors, comprising a basement, a ground floor and a first floor. In November 2010, there were 9 self-contained living units in the premises; 2 in the basement; 4 on the ground floor; and 3 on the first floor. The premises were inspected by Laura Wilkinson of the respondent council on 29 November 2010. She indicated to Mr

Ansari that she was unhappy with the size of each flat, and, following his request, Ms Wilkinson sent to him (on 8 December 2010) the council's policy on minimum space standards and other guidance. Mr Ansari then asked Ms Wilkinson for an indication of what kind of notices the council was considering and invited her to serve draft notices. Ms Wilkinson informed Mr Ansari that it was likely that all of the flats would be prohibited for different reasons and that his mother should start evicting all the current tenants.

13. On 30 March 2011 the respondent made nine prohibition orders, one in respect of each living unit (described in the orders as a 'bed-sit') in the premises concerned. The orders were sent to Mrs Ansari under cover of a letter of the same date and received by her on 2 April 2011. It is accepted that no previous draft orders had been supplied to the appellant. In addition to the prohibition orders, the authority served an improvement notice and a notice pursuant to the Prevention of Damage by Pests Act 1949. Neither of those notices have been the subject of any appeal.

14. The prohibition orders are each addressed to Sultana Ansari and they are in similar form, stating as follows:

> 1. You are the owner of the residential premises at: 32 Havil Street, London SE5 7RS.
>
> 2. In the opinion of the London Borough of Southwark, Category 1 and Category 2 hazards as set out in Schedule 1 to this Order exist within 32 Havil Street, London SE5 7RS. The Council is required to take action under section 5 and has a power to take action under section 7 of the Housing Act 2004. No Management Order is in force under Chapter 1 or Chapter 2 of the Housing Act 2004 part 4.
>
> 3. In the opinion of the Council the works specified in Schedule 2 to this notice will remedy the hazard.
>
> 4. Under section 20 and section 21 of the Act the Council will prohibit the use of the [particular bedsit] for the following purpose: Living accommodation i.e. (living room or bedroom).
>
> 5. The part of the residential premises mentioned above may not be used for any purpose not approved by the Council and is approved for use for the following purpose(s): Storage.
>
> 6. The order is operative 28 days beginning with the date this order is made."

15. Each order then refers the recipient to Schedules 1 and 2 and stipulates, in bold at its foot, **'Your attention is drawn to the notes regarding the appeal procedure which accompany this Notice.'** Schedule 1 gives particulars of the deficiencies resulting in the Category 1 and Category 2 hazards, and Schedule 2 comprises a Schedule of works to remedy those hazards. Each order stipulates that Schedule 2 is 'to be read in conjunction with all other Prohibition Orders for the property.'

16. Each order contains a 'Statement of Reason' as required by section 8 of the Housing Act 2004 which Statement includes the following:

> 'The works that are necessary to remedy the hazards require some tenants to be displaced and units of accommodation to be removed. An Improvement Notice does not have the scope to do this so is not an appropriate course of action.'

17. Each order contains Notes which include information concerning the 'Right of Appeal against Prohibition Order' as follows:

> 'If you do not agree with this notice you may appeal against it to the Residential Property Tribunal but you must do this within 28 days from the service on you of this notice. The Residential Property Tribunal may allow an appeal to be made outside of the time limits if it is satisfied that there is a good reason for the failure to appeal before the end of that period and for any delay since then in applying for permission to appeal out of time.'

18. Reading all the prohibition orders together, as the Orders themselves had stipulated should be done, it is clear that the works required in order to comply with them would result in the conversion of the premises from 9 self-contained flats into 5 bedsitting rooms with a shared kitchen/diner and living room in the basement and a shared single bathroom on the first floor.

19. Mr Ansari responded to the prohibition orders by requesting of Ms Wilkinson the HHSRS Assessment Sheets in relation to each of the 9 flats. She responded on 6 April 2011, refusing to disclose those sheets but inviting Mr Ansari to make a request under the Freedom of Information Act to obtain them.

20. Mr Ansari then initiated discussions about alternative means of improving the premises. On 11 April 2011 he sent plans to Ms Wilkinson illustrating both the existing layout of the premises and a proposed new layout based on 9 flats.

21. On 13 April 2011 Mr Ansari sent Ms Wilkinson a letter indicating which of the alleged hazards had already been dealt with and stating how it was proposed to deal with the alleged hazards that remained. The letter stated:

> 'I am willing to make an undertaking to the effect that the works that I have outlined in the proposed plans and written in this letter will be carried out within an agreed period of time…
>
> 'Given that the deadline for appealing the notices is fast approaching a speedy response is necessary and would be appreciated. I would like to put a deadline of seven days for your response, which takes us to Monday 18 April, failing which I will instruct my counsel to file the appeals, as I need at least ten days to do so.'

22. On the same day, Ms Wilkinson replied rejecting the proposals contained in Mr Ansari's letter. Mr Ansari replied by return, informing Ms Wilkinson that she had not printed the plans sent by him correctly.

23. Ms Wilkinson was going on leave from 14 April 2011 until 30 April 2011. Accordingly, on 14 April 2011 Mr Ansari wrote to Gill Davies, another officer of the authority, requesting a discussion about the proposals he had made. He received a response later that day by Joanne Littleton, another officer, confirming "that no further action will be taken until Ms Wilkinson returns from leave."

24. Mr Ansari replied later that day to Ms Littleton, stating that her assurance did not deal with the fact that the time for appealing would shortly expire. The letter included the following text:

> 'I have quite clearly stated my position, in that I am willing to carry out substantial works to the building to remedy some of the "hazards" identified and am looking to discuss the possibility of retention of the flats in conjunction with the works. Unfortunately, given Ms Wilkinson's apparent inability to print/scale off the drawings correctly, she has suggested that the drawings that I have submitted (drawn up by an architect) are incorrect and wants to revisit the property to check her own measurements…
>
> 'I cannot contemplate commencing the works without some form of dialogue, following which I am hoping that we can find some agreement.'

25. It seems that Mr Ansari's attempt to initiate that dialogue were then somewhat frustrated by the absence on leave of officers in the relevant department. However, by 19 April 2011 Miss Emma Trott, the Team Leader for Housing Enforcement and Environmental Protection at the Council was in communication with Mr Ansari. On that day she informed Mr Ansari that an application to appeal out of time could be made and that the authority could give a written statement in support of such an application. Mr Ansari then asked her to confirm that the authority would indeed write in support of an application to appeal in time.

26. On 20 April 2011, Miss Trott wrote to Mr Ansari a letter which is heavily relied upon by the appellant. It reads as follows:

> 'I can confirm that if you do want to appeal at a later date we will write a supporting letter and if necessary can withdraw and re-serve if the RPT will not allow the appeal on the current notices (from our conversation with them yesterday I do not think this will be necessary).'

27. Miss Trott went on to confirm that the plans provided by Mr Ansari had been printed as instructed by him and there did not appear to be any problem with them. That was the final communication between the authority and Mr Ansari before the expiry of the time for appealing the prohibition notices on 28 April 2011.

28. On 6 May 2011, two days after Ms Wilkinson had been allowed access to the premises, Mr Ansari wrote to her:

> '[W]e have not submitted the appeals to the orders as Ms Trott suggested that in the event that we will do so, that Southwark will provide the supporting letter to allow an "out of time" appeal to take place.
>
> 'I hope of course that this will not be necessary and that you will look favourably on the proposals.'

29. There was further communication between Mr Ansari and the authority during the course of summer 2011. On 12 May 2011 Mr Ansari submitted the revised plans to the authority. On 21 June 2011 he informed Ms Trott that he was making an application for a Certificate for Development in respect of the property. On 23 August 2011 Ms Wilkinson was copied into an email to the authority's planning department asking for views on the proposed new layout for the premises. No reply was received from Ms Wilkinson. On 13 September 2011, Mr Ansari asked Ms Wilkinson for feedback on his proposals, to which she replied that she was waiting for feedback from the relevant fire authority.

30. On 19 October 2011 Ms Wilkinson wrote to Mr Ansari to confirm that the relevant fire authority had been consulted and that provided that there was adequate fire protection for each flat the authority would have no objection. She continued:

> 'From this department's perspective, if the measurements provided on your plans are completely accurate we will not raise any objections to your proposals as long as you receive the necessary planning permission for the first floor extension.'

31. On the same date, Mr Ansari asked whether the authority would be formally withdrawing or suspending the prohibition orders pending an undertaking from him that the amendments would be made as per the plans submitted. Ms Wilkinson responded by email on 21 October 2011 confirming that once the works agreed upon had been completed she would re-inspect the property and that if the works were found to be satisfactory she would withdraw the prohibition orders. It is accepted, although the email itself is no longer in existence, that those were the terms of her response.

32. That appears to be the end of any significant communication between Mr Ansari and the authority for some considerable time. It is accepted that in the meantime substantial works were done to the premises.

33. Over two years later, on 28 April 2014 Ms Wilkinson re-inspected the premises. She did so without notice, having obtained an order from the Magistrates Court to secure entry. It is accepted that at the date of inspection flats 1, 7 and 8 were all occupied by tenants.

34. Following the inspection, Ms Wilkinson wrote to the appellant on 12 May 2014 indicating that the council was considering prosecution for an offence contrary to section 32 of the 2004 Act, cautioning her in the terms of the letter and offering her the opportunity to respond and give reasons for her actions either in writing or in the course of a tape-recorded interview at the authority's offices. The letter concluded by saying that if no response were received within 14 days legal proceedings would be instigated.

35. On 28 May 2014, Mr Ansari responded by letter inviting the authority to revoke or vary the prohibition orders on the basis that, following their inspection the authority would be satisfied that the hazard in respect of which the order was made did not exist, referring to the statutory duty contained in section 25 of the 2004 Act. In the same letter, Mr Ansari indicated that permission was now been sought to appeal the prohibition orders out of time.

36. The application to appeal the orders out of time was made on 29 May 2014.

The decision of the First Tier Tribunal

37. In the Ft T, Mr Harrison appeared for the appellant and Mr Beglan appeared for the respondent, as they have done before me. Mr Harrison included the relevant history of the matter in his Grounds of Application, in particular the communications between the respondent authority and Mr Asif Ansari, the appellant's son. He also provided a written skeleton argument.

38. The Ft T in its written decision concisely set out the submissions made before it, focusing, as Mr Harrison did then and does now, on Ms Trott's letter to Mr Ansari dated 20 April 2011. It referred to the fact that at the time of re-inspection of the flats on 28 April 2014 some had been let and that as a result the authority had threatened prosecution for breach of the prohibition orders. It also acknowledged Mr Harrison's submission that while Mr Ansari believed he had good grounds to revoke the prohibition orders in view of the substantial works carried out, revocation would not 'insulate him from prosecution for breaches which occurred between service and revocation.'

39. Mr Harrison's principal submissions before the Ft T were two-fold: first, that the appellant had good reason for the delay thereby enabling the Ft T to exercise discretion in her favour to extend the time for appealing; secondly, and alternatively, that by its conduct the respondent had waived the statutory time limit. In relation to those two principal submissions, the Ft T found as follows.

40. The Ft T declined to accept that the respondent had, in their letter of 20 April 2011, made a representation that they 'would support an appeal being made out of time, however much time had passed, whatever the circumstances were and irrespective of any changes or developments that had taken place.' There was, in the

view of the Ft T, 'no clear and unambiguous promise of the unlimited kind' Mr Harrison was proposing. The Ft T held, on the contrary, that the respondent had made no representation that an appeal could be made over three years later and accordingly no reliance could have been placed on such a representation.

41. The Ft T went on to hold that, while it was not possible to circumvent the provisions of Schedule 2, paragraph 10, to the 2004 Act by agreement of the parties, the fact that a respondent did not object to an appeal out of time would be a 'highly relevant factor':

> 'However, such agreement does not in itself constitute a 'good reason' for appealing in time. There must still be a good reason for the appellant's conduct or lack of action and the Tribunal must still, once a good reason has been established, exercise its discretion on whether the appeal may proceed.'

42. The Ft T then made the point that, even if it accepted Mr Harrison's construction of the 20 April letter (which it did not), that would be 'insufficient by itself' to justify an appeal out of time, making reference to the fact that Mr Ansari had been aware of the relevant time limit from the very beginning, and that he had had 'years to act':

> 'The Tribunal has its own interest in the efficient administration of justice and cannot allow such a lengthy period to pass just because the other party doesn't object. Even putting Mr Harrison's case at its highest, the Tribunal would neither regard it as a 'good reason' nor a sufficient basis for allowing the appeal to proceed.'

43. Dealing with the waiver argument, the Ft T considered that the issue was not a live one in view of its finding that there was no clear and unambiguous representation on the part of the Respondent. But even if it were, it declined to accept that the statutory time limit contained in paragraph 10 to Schedule 2 could be waived (as Mr Harrison contended) by analogy with the decision of the House of Lords in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850. That decision concerned a statute (the Landlord and Tenant Act 1954) which regulated the conduct of private contractual relations, where the time limit was for the sole benefit of one party. The Housing Act 2004 was different in that it regulated the enforcement of housing standards by public authorities in the public interest and the strict time limit contained in Schedule 2 was to provide a structure for enforcement action, to ensure certainty, and to support the effective administration of justice. It was not therefore possible, as a matter of law, for that statutory provision to be waived by the parties and thereby 'oust the Tribunal's power to govern its own procedure'.

44. The Ft T accordingly held that there was no basis upon which the Tribunal could permit the appeals to proceed and dismissed them as being out of time.

Appeal to the Upper Tribunal

45. This appeal is brought by permission of the Upper Tribunal, the Deputy President having granted such permission on 23 October 2014. The terms of the permission were that the appeal would be determined by the Upper Tribunal under its standard procedure as a review.

46. In the course of argument before me, I invited the parties to discuss the significance of the appeal being by way of review. It was accepted that the single question for me to decide was whether the decision of the Ft T was wrong in law: I shall expand upon this in a moment. It was also accepted that in determining that question I should be confined to the facts as presented to the Ft T, that I should not therefore have regard to the correspondence contained in the appeal bundle save and in so far as it was specifically referred to in the Grounds of Application advanced by Mr Harrison before the Ft T, and that I should not consider any developments subsequent to the decision of the Ft T. If I were to find that the Ft T had erred in law, then in those circumstances I may, and indeed should, have regard to the matters hitherto excluded as I would then be required to consider the application of the statutory provisions (and possibly promissory estoppel or waiver) anew.

47. At the commencement of his submissions on behalf of the respondent, Mr Beglan helpfully referred me to some pages in the White Book which he contended (and Mr Harrison accepts) aptly summarise the manner in which I am required to review the decision of the Ft T. For myself, the core principles which can be distilled from this text are as follows.

48. First, the grounds upon which an appeal is to be allowed are confined to (1) the decision of the lower court (in this case the FtT) being wrong; and (2) the decision of the Ft T being unjust because of a serious procedural or other irregularity. This is a case where the contention is simply that the decision below was wrong.

49. Secondly, 'wrong' means that the court below (1) erred in law; or (2) erred in fact; or (3) erred (to the appropriate extent) in the exercise of its discretion. This is a case where the facts upon which the Ft T proceeded are and were agreed. I am only concerned therefore with (1) or (3).

50. Thirdly, as to what constitutes a sufficient error in the exercise of discretion to warrant interference, I am to be guided by the words of Lord Fraser in *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647 at 652:

> 'the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible.'

51. Fourthly (and this is text composed by the editors of the White Book with reference to authorities, albeit text which both counsel endorse as representing the current state of the law):

> 'Reasons for judgment will always be capable of having been better expressed. A judge's reasons should be read on the assumption that the judge knew (unless he has demonstrated to the contrary) how he should perform his functions and which matters he should take into account…
>
> 'An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself.'

52. Fifthly, I should take into account the formulation of the threshold test for interference with a judicial exercise of discretion stated by Lord Woolf MR in *Phonographic Performance Ltd v AEI Rediffusion Music Ltd* [1999] 1 WLR 1507 at 1523:

> 'Before the court can interfere it must be shown that the judge has either erred in principle in his approach or has left out of account or has taken into account some feature that he should, or should not, have considered, or that his decision was wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale.'

53. Finally, in determining whether the decision of the Ft T was 'wrong', I should have regard to the way in which the parties' cases were then formulated.

54. Keeping those core principles in mind, I turn to the submissions made to me in the course of the hearing of this appeal.

Argument

55. Mr Harrison has submitted that the Ft T misconstrued Ms Trott's letter of 20 April and that, having done so, it erred in finding that there was no good reason for the delay in applying for permission to appeal out of time. In addition, he submitted that the Ft T did not sufficiently explain what it meant by its interest in the efficient administration of justice and that it gave undue weight to that factor when it came to engage in its balancing exercise. He submitted further that the Ft T did not give sufficient weight to the dilemma faced by the appellant in being unable to challenge the prohibition orders themselves in the event of any criminal prosecution for their breach being commenced by the respondent.

56. Mr Beglan accepted that the proper construction of Ms Trott's letter was a question of law and therefore of itself susceptible to review by this Tribunal, but he submitted that the Ft T construed the letter correctly. He invited me not to be too

critical of the actual wording of the decision and to consider the decision as a whole in light of the submissions that had been made before, and duly recorded by, the Ft T. He submitted that the efficient administration of justice was clearly a relevant consideration in deciding whether the threshold conditions were satisfied as that was the very purpose of the statutory time limit. He further submitted that the Ft T clearly had in mind the position of the appellant as far as criminal proceedings were concerned, reference being made to submissions on that point.

57. Mr Harrison advanced, by way of alternative submission, the doctrine of waiver, contending that the appellant had relied to her detriment upon Ms Trott's letter in not applying to extend time earlier than she did. He submitted that paragraph 10 of Schedule 2 was a procedural provision capable of being waived (by analogy with the decision of the House of Lords in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850) and that in the circumstances of this case the respondent should not be permitted to object to the appeal being brought out of time.

58. Mr Beglan did not accept that waiver had any application in the statutory context of Schedule 2 to the 2004 Act and that, as the Ft T had ruled in its decision, the analogy being drawn was not appropriate. He submitted that in the circumstances of the case waiver did not add anything to the statutory time limit.

Discussion

59. The starting point must be the statute. I have set out above (in paragraph 10 of this decision) the terms of paragraph 10 to Schedule 2 to the 2004 Act. The effect of that provision is not the subject of any disagreement.

60. It is accepted by all that the Ft T was required first to direct itself whether it was satisfied of two things:

> (1) that there was good reason for the failure to appeal before the end of the period of 28 days (that is, before 28 April 2011); and
>
> (2) that there was good reason for any delay since then in applying for permission to appeal out of time.

61. The respondent has conceded that, as a result of the correspondence between its officers and Mr Ansari, the appellant did have good reason for not appealing before 28 April 2011, and indeed that seems to be the basis upon which the Ft T proceeded. The focus of the Ft T was therefore upon the subsequent delay in applying for permission to appeal out of time. It is accepted that unless the Ft T was satisfied that there was good reason for that subsequent delay it had no discretion to allow the appeal to be made.

62. There was no discussion before the Ft T, or before me, of the merits of any appeal were time to be extended. This is because the merits are not relevant at this stage. Unless the Ft T is satisfied that there is good reason for the delay in applying for permission to appeal out of time, then the Ft T cannot go on to consider the merits save in circumstances (none of which have been advanced before me) where the merits themselves provide or support the reason for the delay: see by analogy *Short v Birmingham City Council* [2005] EWHC 2112(QB); [2005] HLR 6, in particular at [26].

63. I must therefore turn to the correspondence between the respondent and Mr Ansari at the time of, and immediately following, the making of the prohibition orders. Mr Ansari was made aware by the terms of the orders (specifically the notes) that any appeal had to be made within 28 days. He knew that this was the position, and with that knowledge he prompted the respondent to respond expeditiously to his proposals for dealing with the premises in the hope that matters might be resolved before the time limit expired on 28 April 2011. The correspondence, as summarised above (and as before the Ft T) evidences his concern at the effect on the negotiations he was seeking to conduct of the authority's officers going on leave. This was the context in which Ms Trott, as Team Leader, sought to reassure him. She first consulted the Residential Property Tribunal and then communicated to him the substance of the advice she received. She then wrote her letter of 20 April.

64. The terms of the 20 April 2011 letter are significant. The letter confirms that the authority would support Mr Ansari if he wanted to appeal 'at a later date' by writing a letter to that effect. In addition, it intimates that the authority would 'if necessary' withdraw and re-serve [sc. the orders] if the Tribunal would not allow the appeal on the current notices.

65. It is clear to me that the ordinary construction of this letter is as follows. As at 20 April 2011 the respondent was assuring the appellant (through her son Mr Ansari) that one way or another she would have the opportunity to challenge the substance of the prohibition orders and that the authority would see it that she would not be prejudiced by failing to appeal the orders within the statutory time limit of 28 days.

66. The two ways she would obtain that opportunity were

> (1) by appealing the current orders (for which she would require to obtain permission to appeal out of time); or,
> in the event that that avenue was not open to her (because permission to appeal out of time was not granted by the Tribunal despite the authority supporting the application)
>
> (2) by the authority withdrawing the current orders, then making new orders to the same effect and serving them on her. Time would run afresh and the appellant would have 28 days from the date the new orders were made in which to make an appeal.

67. Mr Ansari wrote back on 6 May 2011 confirming that no appeal had been made within the statutory time limit and clearly stating that his reason for not doing so was the assurance of the respondent that they would support an appeal out of time.

68. There can be little doubt, and the respondent does not seek to contend otherwise, that the effect of this correspondence must be that the appellant had good reason for its failure to appeal before 28 April 2011. Her son, who was acting as her agent, had been reassured by the respondent that he would in due course have the opportunity to challenge the substance of the allegations being made. In those circumstances it is difficult to believe that any tribunal would fail to find that there was good reason for her failure to appeal within the statutory time limit. The Ft T correctly concluded, in my judgment, that there was good reason for the failure to appeal within 28 days of the orders being made.

69. That being the case, the Ft T was clearly right to pose as its central question whether there was good reason for any delay after the expiry of the time limit in applying for permission to appeal out of time. The delay was, of course, significant: over three years. The length of the delay cannot, in my judgment, of itself (that is, without more) prevent an application being made. Each case is fact specific, and there may be cases where a tribunal is rightly satisfied that despite a delay of three years, or even greater, there is good reason for it.

70. Once the time limit had expired, Mr Ansari submitted revised plans and it was October before he received a considered response, in the terms of the letter of 19 October 2011. The response was positive, albeit qualified, assuring Mr Ansari that provided the measurements were completely accurate (size of the rooms having been one of the main points of concern) and planning permission for the first floor extension was obtained, the authority would not raise objections to the proposals. Mr Ansari then explicitly sought assurance about the prohibition orders, in particular whether the authority would be withdrawing or suspending them on his undertaking that the works would be carried out in accordance with his plans. No such assurance was given. Ms Wilkinson responded by email, saying that she would withdraw the prohibition orders if and when she was satisfied, following a re-inspection, that the works had been completed as agreed.

71. That was how the matter was left. Mr Ansari had asked the authority to withdraw the prohibition orders. It had implicitly refused to do so. It had explicitly stated that it would only withdraw the prohibition orders once it had had the opportunity to inspect the premises and to satisfy itself that the works had been satisfactorily completed. Mr Ansari must be taken to have known the terms of the prohibition orders: that the use of any of the flats in the premises for living accommodation was prohibited. Yet when Ms Wilkinson re-inspected, not at the initiative of Mr Ansari, but pursuant to an order of the magistrates' court, in April 2014, it was discovered that three of the flats had been re-let and were occupied by tenants. In argument before me, Mr Harrison described the actions of Mr Ansari in re-letting the premises without making any efforts to contact the authority as 'not very clever'. That is something of an under-statement. It is certainly the case that Mr

Ansari's decision to re-let without first going back to the authority casts important light on the application which he is continuing to pursue.

72. The position had in my judgment been made absolutely clear to Mr Ansari as a result of the October correspondence. The prohibition orders made the previous April remained in place. He was expected to inform the authority when the works had been carried out. The premises would be re-inspected, and if they were found to comply with the conditions set out in Ms Wilkinson's letter of 19 October 2011, then no further action would be taken, save to withdraw the prohibition orders. Yet in full knowledge of the continued existence of the prohibition orders, and of the authority's expectation that he would inform them when the works had been completed such that the premises became, in effect, habitable once more, he decided to let them out.

73. The Ft T held that, in those circumstances, there was no good reason for the delay in applying for permission to appeal out of time. I find that this decision cannot be impugned as being wrong in law.

74. The Ft T held that there was no representation on the part of the respondent 'that they would support an appeal being made out of time, however much time had passed, whatever the circumstances were and irrespective of any changes or developments that had taken place' or 'that he could appeal over three years later.' I do not consider that finding is capable of challenge as being wrong in law.

75. I accept that there was a representation, in April 2011, that the authority would support an appeal out of time and that it would ensure that Mr Ansari would have the opportunity to make a legal challenge to the prohibition orders. But that representation was made in a particular context, and at a particular time, when the parties were negotiating the scope and content of the works necessary to comply with housing standards. The position changed as a result of the correspondence in October 2011, the effect of which was to qualify the earlier representation. The position thereafter was that Mr Ansari was expected to contact the authority and give it the opportunity to inspect the premises before any flats were re-let. If Mr Ansari had done that, and the authority had either failed to inspect within a reasonable time or informed him, following inspection, that he must not re-let, then Mr Ansari could reasonably have expected at that stage to be able to challenge the prohibition orders in one of the two ways set out in paragraph 66 above. But that is not what Mr Ansari did. Instead, having carried out some works to his own satisfaction, he re-let without informing the authority. In those circumstances, the conduct of Mr Ansari was such that he could no longer be said to have continued to act in reliance upon the representation made in April 2011 by the respondent.

76. I do not consider that the two other points made by the appellant are particularly strong.

77. First, the appellant criticises the Ft T for making reference to its own interest in the efficient administration of justice without explaining adequately explain what it

meant by that. I agree with the respondent that it is self-evident that the purpose of the statutory time-limit is to ensure that justice is administered in a timely and efficient manner. The longer the delay between the expiry of the time-limit and the application being made to extend time, then it follows that the greater is the risk that justice would not be done. The point did not merit or require further exposition.

78. Secondly, the appellant contends that, in that part of its decision in which it set out its reasons, the Ft T did not refer to the dilemma facing the appellant: namely that in the event of her being prosecuted she would not be able to challenge the substance of the allegations upon which the prohibition orders were based. However, it is clear from the decision as a whole that the Ft T did have the point in mind, referring to it as part of the submissions made to them by counsel for the appellant.

Waiver

79. The alternative submission of the appellant is based upon the doctrine of waiver. He relies upon the House of Lords decision in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850. As is well known, the *Kammins* decision concerned Part II of the Landlord and Tenant Act 1954, and in particular section 29(3) of that Act which at that time (it has since been amended) provided that:

> 'No application under section 24(1) of this Act shall be entertained unless it is made not less than two nor more than four months after the giving of the landlord's notice under section 25 of this Act or, as the case may be, after the making of the tenant's request for a new tenancy.'

80. The tenants made an application to the county court under section 24 prematurely (that is, less than two months after making a request for a new tenancy). The landlords, having filed an answer, waited until four months had expired from the date of the tenants' request for a new tenancy and then took the point that the court had no jurisdiction to 'entertain' the tenant's application.

81. By a majority, the House of Lords held that the requirements of section 29(3) were 'procedural' only and that they could therefore be waived by the landlord. However, also by a majority, they held that on the facts of the case the landlords had not waived their right to object that the tenants' application was bad.

82. Each of their Lordships' speeches in *Kammins* makes clear that what is involved is the construction of the statutory provision concerned, set in its statutory context of a formulation of the mutual rights and obligations of the parties to a tenancy of business premises. It is important to emphasise that Part II of the 1954 Act contained no provision allowing for applications out of time: indeed that was the problem which the tenants had to surmount and ultimately failed in their attempt to do so.

83. It is certainly the case, as the Ft T observed, that the statutory regime according security of tenure to business tenants is very different in its purpose and in its application from the statutory regime providing for the imposition and enforcement of housing standards. In *Kammins*, Lord Diplock, in his celebrated speech, advocates and applies a purposive construction to the 1954 Act, and, as the Ft T notes, in doing so emphasises (at 881) that the statutory requirements 'are clearly imposed solely for the benefit of that party to whom the notice is given, whether he be the landlord or the tenant'. Part 1 of the 2004 Act does not have such a narrow remit, and I agree with the Ft T that the local authority cannot be said to be taking action for its own benefit, but rather is empowered, and sometimes obliged, to act for the benefit of local residents generally and the occupiers (actual or potential) of the subject properties.

84. But in my judgment the more significant difference, which ultimately denies a role to the doctrine of waiver, is that Parliament has, in enacting paragraph 10(3) of Schedule 2, accepted that in certain circumstances appeals should be able to be made out of time, provided that the intending appellant can cross the threshold there set down. I agree with the Ft T that the time limit contained in paragraph 10(1) of Schedule 2 is intended to provide a clear structure for enforcement action and to ensure there is certainty for all affected. It is not as 'strict' a time limit as section 29(3) of the 1954 Act, and that is because of the dispensing power conferred by paragraph 10(3).

85. In my judgment, where Parliament has clearly legislated for circumstances in which a statutory time limit can be dispensed with, setting out with clarity as it has done in Schedule 2 to the 2004 Act when appeals or applications can be made outside the statutory time limit, that provision is to be followed. As the Ft T succinctly put it:

> It is simply not possible for parties to waive the effect of paragraph 10(1) and thereby oust the Tribunal's power to govern its own procedure.

86. I should add that I do not consider, even if waiver were open to the appellant, it would avail her on the facts of this case. The issues it raises can and have been fairly considered by the Ft T in considering whether the appellant had made its case under paragraph 10(3).

87. The appellant therefore failing on her alternative submission, I must dismiss her appeal.

Dated: 22 May 2015

His Honour Judge Stuart Bridge