

IN THE UPPER TRIBUNAL (LANDS CHAMBER)



Neutral Citation Number: [2018] UKUT 207 (LC)  
Case No: HA/15/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

*HOUSING – Right to Buy - whether appeal property particularly suitable for occupation by elderly persons – Para.11, Sched.5, Housing Act 1985 - appeal allowed*

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

BETWEEN:

MILTON KEYNES COUNCIL

Appellant

and

MR ROGER BAILEY

Respondent

12 Bryans Crescent  
North Crawley  
Buckinghamshire  
MK12 9LR

Peter D McCrea FRICS

Milton Keynes County Court  
on  
14 May 2018

*Meurig Tiley*, in-house solicitor, on behalf of the appellant  
Mr Bailey in person

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The following cases are referred to in this Decision:

*R. v Secretary of State for the Environment Ex p. West Oxfordshire DC* (1994) 26 H.L.R. 417

## DECISION

### Introduction

1. This short decision concerns a rare appeal under the right to buy legislation. Part V of the Housing Act 1985, as amended (“the Act”), gives most qualifying tenants in public sector housing the right to buy the freehold interest in their home, often at a substantial discount from market value. But an exclusion prevents tenants of certain types of housing from exercising the right to buy, including where the property is “particularly suitable ... for occupation by elderly persons”.

2. The appellant in this appeal, Milton Keynes Council (“the Council”), owns the freehold of 12 Bryans Crescent, North Crawley, Buckinghamshire, MK12 9LR (“the appeal property”). The respondent is the tenant, Mr Roger Bailey. Mr Bailey attempted to exercise his right to buy the freehold of the appeal property on 2 March 2017, but was refused by the Council on 15 March 2017 on the basis that the appeal property was particularly suitable for occupation by elderly persons, and so was exempt under the legislation. Mr Bailey appealed to the First-Tier Tribunal (Property Chamber) (“the FTT”), which in its decision dated 22 May 2017 allowed the appeal, determining that the statutory exception criteria under Part V had not been met and that the Council could not refuse Mr Bailey’s request to buy the freehold. The Council now appeals the FTT’s decision with the permission of the Deputy President, who determined that the appeal would be by way of a review of the FTT’s decision.

3. At the hearing, the appellant was represented by its in-house solicitor, Mr Meurig Tiley. Mr Bailey represented himself.

### Statutory Provisions and Ministerial Circulars

4. Insofar as relevant, Part V of the Act provides:

“118. The right to buy

(1) A secure tenant has the right to buy, that is to say, the right, in the circumstances and subject to the conditions and exceptions stated in the following provisions of this Part—

(a) if the dwelling-house is a house and the landlord owns the freehold, to acquire the freehold of the dwelling-house;

...

120. Exceptions to the right to buy

The right to buy does not arise in the cases specified in Schedule 5 (exceptions to the right to buy).”

5. Paragraph 11 of Schedule 5 to the Act creates the relevant exception:

“11.—

(1) The right to buy does not arise if the dwelling-house—

(a) is particularly suitable, having regard to its location, size, design, heating system and other features, for occupation by elderly persons, and

(b) was let to the tenant or a predecessor in title of his for occupation by a person who was aged 60 or more (whether the tenant or predecessor or another person).

(2) In determining whether a dwelling is particularly suitable, no regard shall be had to the presence of any feature provided by the tenant or a predecessor in title of his.

(3) ...any question arising under this paragraph shall be determined as follows.

(4) If an application for the purpose is made by the tenant to the appropriate tribunal or authority before the end of the period of 56 days beginning with the service of the landlord's notice under section 124, the question shall be determined by the appropriate tribunal or authority.

...

(5A) In this paragraph “the appropriate tribunal or authority” means—

(a) in relation to England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal;

...

(6) This paragraph does not apply unless the dwelling-house concerned was first let before 1st January 1990.”

6. The reference in paragraph 11(4) above to a landlord’s notice under section 124 is to the notice which a landlord is required to serve under that section either admitting or denying that the tenant has the right to buy.

7. Under section 11 of the Tribunals, Courts and Enforcement Act 2007, an appeal against a decision of the FTT lies to the Tribunal on a point of law only. In the case of a decision under paragraph 11 of Schedule 5 (which the decision of the FTT in this case was) no more general right of appeal is available (see s.231C(1)(b), Housing Act 2004).

8. Prior to 1 April 2005, determinations under paragraph 11(4) of Schedule 5 were made by the Secretary of State, who provided guidance on how applications would be dealt with in DoE Circular 13/2003. This was updated in December 2004 by the Deputy Prime Minister’s Office in ODPM Circular 07/2004. On 1 April 2005, responsibility for the determination of appeals was transferred to the “appropriate tribunal or authority” under section 181 of the Housing Act 2004. Circular 07/2004 was alive to this impending change, indicating that “the criteria set out in this circular will not be binding on [the appropriate tribunal or authority] but they will be guided by them in general terms. Each case will, however, be decided on its own merits.”

9. Circular 07/2004 outlined the main points on which the Secretary of State would normally be expected to be satisfied in considering applications under paragraph 11 of Schedule 5:

“a) There should be ease of access on foot to the dwelling. In assessing ease of access, consideration should be given to:

- the number and size (in particular the height) and curvature of any steps up to the dwelling itself, and also of any steps in the immediate vicinity where these must be negotiated to gain access to it (the dwelling);
- the presence or absence of handrails, or other means of support, alongside any steps up to the dwelling and in its immediate vicinity that need to be negotiated to gain access to it;
- the gradients of ramps, paths, pavements or other means of access to the dwelling and in its immediate vicinity, where these must be negotiated to gain access to it;

In general access is unlikely to be regarded as easy if it is necessary to climb three or more steps (in addition to the threshold) and there is no handrail;

b) the accommodation should normally be on one level. The Secretary of State is unlikely to regard a dwelling with two or more floors as being particularly suitable for occupation by an elderly person. However, he may be prepared to make exceptions for dwellings with up to three internal steps, or with stair-lifts or similar devices provided by the landlord;

c) in the case of a flat above ground floor level, there should be access by a lift which is available at all times (except for very short periods of routine maintenance or occasional breakdowns);

d) there should be no more than two bedrooms, designated as such in the tenancy agreement;

e) there should be heating arrangements which;

- function reliably;
- provide heat to at least the living room and one bedroom;
- may safely be left on overnight

f) the dwelling should be located reasonably conveniently for shops and public transport, having regard to the nature of the area (the Secretary of State may take into account reliable means of transport other than those provided by public bodies – for instance, transport provided by shops or voluntary organisations);

in an urban area, the dwelling should be located no more than 800 metres (half a mile) from both the nearest shop selling basic food items and the nearest public transport stop. Basic food items include bread and milk;

in a rural area, the dwelling should be located no more than 800 metres (half a mile) from the nearest public transport stop, and such transport should be available from this point frequently enough to provide at least three opportunities for shopping each week.”

10. It is worth noting at this point that the only authority which either party could cite as to the application of paragraph 11 of Schedule 5 was an appeal against the Secretary of State's determination in *R. v Secretary of State for the Environment Ex p. West Oxfordshire DC* (1994) 26 H.L.R. 417, which I deal with below.

### **The FTT's decision**

11. The appeal property was described by the FTT as follows:

“8. The property is a semi-detached brick bungalow with a tile roof constructed in 1967. The areas under the windows are clad in ship-lap upvc behind which it is understood there is a breeze-block wall. The property is located in a close of similar bungalows.

9. Externally the property is in fair to good condition with upvc doors and double-glazed windows. There are gardens to front and rear. The entrance to the front door of the bungalow is along a sloping path with a hand rail to one side. There are three steps excluding the threshold to access the front door of the property and two steps at the rear. The front steps are shallow and are wide providing easy access.

10. Internally the accommodation comprises a hall, kitchen, 'L' shaped living room, bedroom and a bathroom. The primary source of space heating is an eco-biomass WindHager boiler to radiators run on bulk wood pellets. This heating system is programmable and can be left on unattended overnight. The boiler is about [one and a half metres] in height and there is a hopper in the top covered by a lid into which the pellets are emptied to feed the boiler. The pellets are delivered in 15 kilogramme bags which are stored in a large plastic receptacle outside the back door. There is a secondary heating system in the living room of an electric thermostatic convector and in the bathroom of an electric hot air heater. Water heating is either by the central heating boiler or by an electric immersion through an insulated cylinder. The accommodation is all on one level.

11. The property is situated within 800 metres from two bus stops with a regular bus service to Bedford town centre (three buses a day). The route to the bus stop is relatively level. There is also a convenience store within 800 metres.”

12. The issue before the FTT was whether the boiler, and in particular the arrangements for fuelling it, meant that the appeal property was, as the Council claimed, “particularly suitable ... for occupation by elderly persons”. The Council relied on the fact that whilst a frail elderly person would have difficulties in loading the hopper, the Council had arranged for a contractor to visit the appeal property once or twice a week to fill the boiler, and said that it would replace the boiler with an electric equivalent if it became particularly problematic.

13. The FTT determined that the requirement under paragraph 11(6) of Schedule 5 that the property was first let before 1 January 1990 was met. It was also satisfied that what it termed the “letting test” (that under paragraph 11(1)(b) the property was let to a tenant who was aged at least 60) had been met.

14. The FTT then applied what it termed the “suitability test”, which it considered to be a subjective assessment based on the criteria set out in Circular 07/2004 (outlined in paragraph 9 above). The FTT found that, measured against the criteria, the appeal property was suitable for an elderly person, for example: the front steps were shallow and wide; there was easy access along a sloping path; there were only two steps to the rear access; the accommodation is on one floor and there is only one bedroom; and the property is situated no more than 800m, over level ground, from public transport and shops.

15. However, as regards the heating arrangements, whilst the FTT was satisfied that the heating system was controllable and could safely be left on overnight, it was concerned about the need to fuel the boiler with the wood pellets. While the hopper could be filled in small quantities, the large heavy bags of pellets would have to be physically moved from the storage point to the boiler. It considered that the level of manual handling required to operate the heating system in the normal course of occupation exceeded that which an elderly person “able to live independently despite some limitations owing to age” (as defined in Circular 07/2004) would be able to undertake. Additionally, it found that the single thermostatic convector type wall mounted electric heater at one end of the large L-shaped living room was an insufficient substitute to meet the criteria. For these reasons, the FTT determined that the appeal property was not particularly suitable for occupation by elderly persons and therefore allowed Mr Bailey’s appeal.

## **Grounds of Appeal**

16. The appeal against the FTT’s decision is brought on four grounds.

17. First, that the FTT wrongly interpreted and wrongly applied the law. It is argued that the FTT applied an improperly restrictive approach by which unless the appeal property satisfied each individual sub-criterion set out in Circular 07/2004 it could not fall within the paragraph 11 exception to the right to buy, rather than making an overall judgment in the round. It is also said that, in any event, Circular 07/2004 merely provides guidance and does not provide a mandatory set of criteria additional to paragraph 11 of Schedule 5.

18. Secondly, it is said that the FTT had regard to irrelevant considerations, and did not have regard to relevant considerations. The guidance at para. 12 of Circular 07/2004 refers to heating “arrangements” which function reliably. The FTT’s conclusion that the heating system could not be considered to be reliable had been reached without taking account of the arrangement that the Council had entered into with the contractor that supplies the pellets for it to fill the hopper with pellets. The FTT heard evidence that the contractors

continue to be engaged to load the hopper on a weekly or twice weekly basis, but it is said that evidence was left out of account. There was no proper basis upon which the FTT should have ignored this evidence and instead proceed on a false or hypothetical basis that the tenant had to manage the hopper on his own. The arrangement is no different from, for example, an oil-fired heating system where the contractor, rather than an elderly occupier, would fill an oil tank. Additionally, the FTT left out of account the Council's offer to replace the biomass boiler with an electric boiler should it prove unsuitable.

19. Thirdly, it is suggested that the FTT was not entitled to conclude that elderly people as a class would not be able to load the hopper. While the panel reminded itself that the test for the application of paragraph 11 of schedule 5 does not relate to disabled or infirm elderly people, it then concluded without any explanation or qualification that the level of manual handling required would exceed what any elderly people could achieve. The FTT accepted that pellet bags would not need to be lifted up to the hopper as smaller containers could be used to load the hopper, but it did not explain why an elderly person could not transfer the pellets from the store to the boiler in similarly sized containers. Again, it is said, the FTT failed to look at the position in the round.

20. Fourthly, in the alternative, the FTT failed to have regard to relevant considerations in that it failed to have regard to the electric night storage heaters present in the living room and bedroom as an alternative manner of satisfying the statutory criteria.

21. The appellant submitted that the appeal was of wider importance given that the only authority on the application or interpretation of paragraph 11 of Schedule 5, was *R. v Secretary of State for the Environment Ex p. West Oxfordshire DC*, but that provided little guidance since it concerned whether the previous appellate decision maker had properly applied his own policy to the issue of location.

22. The FTT declined to review its decision and refused permission to appeal. The appellant's renewed application to the Tribunal was granted by the Deputy President on 3 November 2017.

## **Discussion**

23. As the appellant submits, there is little jurisprudence on the application of paragraph 11 of Schedule 5. In *R. v Secretary of State for the Environment Ex p. West Oxfordshire DC*, Hutchison J held that the Secretary of State had either departed from or misinterpreted his own published policy in determining that a house in a rural area was not particularly suitable for accommodating persons of pensionable age on the sole ground that it was not within walking distance of any shops selling basic foodstuffs. The relevant published policy, DoE Circular 3/90, provided that the dwelling should be reasonably conveniently located for shops and public transport, "having regard to the nature of the area" – those last eight words being inserted following representations by the Association of District Councils in response to a previous draft. Thus, the Secretary of State had in



policy terms accepted that housing located in rural areas which was suitable for the elderly might not be located within walking distance of shops selling basic necessities, and that other factors such as the provision of public transport or delivery services had to be considered. In reaching his decision that the right to buy was not capable of being exercised the Secretary of State had failed to make inquiries having regard to the nature of the area, and had he done so the local authority would have been able to provide detailed evidence on the issue, including that a local shop was one mile away and provided a delivery service.

24. The *West Oxfordshire* decision is of only limited assistance, since it concerns a determination by the Secretary of State in apparent contravention of his own policy. Circular 3/90 and its successor were not binding on the FTT (although it was entitled to have read to them as examples of factors relevant to the question whether a property was particularly suitable as accommodation for elderly people). What can be taken from it is the danger of taking too narrow a view of the effect of a particular factor, and the need to have regard to the wider picture – or what a valuer would call “stand back and look”.

25. In my judgment it would be surprising if the appeal property, which in all other respects was suitable to house an elderly person, and is located in a cul-de-sac of similar properties all of which appear to have been designed specifically for that purpose, was prevented from being considered particularly suitable for occupation by elderly persons because of one individual feature. That cannot have been the intention of the parliamentary draftsman who adopted a non-prescriptive approach which invites consideration of the suitability of the property in the round. I accept the Council’s submission that the characteristics of the property must be assessed in aggregate, and not looked at individually. The question in a case such as this is whether the property is particularly suitable. Some features may tend in one direction, while others point the other way. Some features may be so significant in themselves that they make the property positively unsuitable (for example that it could only be reached by a very steep staircase). But what is required is an assessment of the whole. By focusing on a single feature, the FTT did not make such an assessment and I accept the Council’s first ground of appeal.

26. Additionally, I accept that the FTT was wrong to attribute no weight to the arrangements which the Council had made to have the boiler filled with fuel as and when required. Just as it was legitimate in the *West Oxfordshire* case to take account of the delivery service offered by the local shop as a factor tending to minimise the effect of the distance of the property from local facilities, it was necessary for the FTT to assess the suitability of the appeal property in its full context (which included the availability of assistance in re-filling the boiler). The appeal is therefore successful on the first and second grounds. I am unpersuaded by the third and fourth grounds, which challenge the FTT’s assessment of the difficulty which, unaided, most elderly people might experience with the boiler, and its assessment of the utility of the night storage heater. In my judgment those were both relevant factors which the FTT was entitled to take into account as part of a broad assessment but that is of no consequence since the first two grounds of appeal are enough to get the appellant home.

27. In the circumstances, it is inappropriate to remit the decision to the FTT. The only factor which prevented the FTT from finding the appeal property particularly suitable was the need to refuel the boiler. Since that difficulty can be, and is, overcome completely by the service provided by the delivery contractor, and since the appeal property is otherwise entirely suitable, I am satisfied that the only proper conclusion available on the facts of this case is that the exception in paragraph 11 of Schedule 5 of the Act applies. Instead, I determine that the appeal property is particularly suitable for occupation by elderly persons. Accordingly, the appeal succeeds, with the result that Mr Bailey cannot exercise his right to buy the freehold.

Dated: 17 July 2018

A handwritten signature in black ink, appearing to read 'P D McCrea', with a long horizontal flourish extending to the right.

P D McCrea FRICS