UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – HOUSE IN MULTIPLE OCCUPATION – defence of reasonable excuse for having control of or managing an HMO that is not licensed as required by the Housing Act 2004 – burden of proof – nature of the defence

AN APPEAL UNDER SCHEDULE 13A, HOUSING ACT 2004

BETWEEN:

THURROCK COUNCIL

Appellant

and

PALM VIEW ESTATES

Respondent

Re: 521 London Road,
Grays,
Essex,
RM20 4AD

Judge Elizabeth Cooke

Royal Courts of Justice
25 November 2020
and
14 December 2020

Nick Ham for the appellant
Michael Paget for the respondent

The following cases are referred to in this decision:

IR Management Services Limited v Salford [2020] UKUT 81 (LC)
Thurrock Council v Khalid Daoudi [2020] UKUT 209 (LC)

Introduction

1. This is an appeal from the decision of the First-tier Tribunal ("the FTT") to cancel a civil penalty imposed upon the respondent by the appellant for the offence of managing or being in control of a house in multiple occupation ("an HMO") that is required by the Housing Act 2004 to be licensed, when it was not so licensed. The FTT reached that conclusion because it found that the respondent had the defence of reasonable excuse.

2. The first ground of appeal is that the FTT applied the wrong burden of proof. The second is that the FTT made an error of law and made unsustainable findings of fact when it decided that the respondent had a reasonable excuse. The Deputy President, in giving permission, directed that the appeal be by way of review with a view to re-hearing. The matter was listed on 25 November 2020. At that hearing the respondent argued, and the appellant conceded, that ground 1 failed. The matter was then re-listed on 14 December 2020 for a review of the FTT's decision, on the issue of law raised by ground 2.

3. The appellant was represented by Nick Ham and the respondent by Michael Paget, both of counsel, and I am grateful to them both.

4. In the paragraphs that follow I set out the legal background and the undisputed facts, and I explain the outcome on ground 1 and my decision on ground 2. Ground 2 succeeds but, as I shall explain, the Tribunal has not conducted a re-hearing.

The law

5. The legal background is not in dispute. The Housing Act 2004 ("the 2004 Act") defines a house in multiple occupation and sets up a licensing regime. The Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 ("the 2018 Order"), which came into force on 1 October 2018, says which HMOs have to be licensed.

6. Section 72(1) of the 2004 Act defines the offence under consideration here ("an HMO licence offence"). It will be useful to have in mind section 72(1), (4) and (5):

> "(1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed.
>
> (4) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time–
>
> (a) a notification had been duly given in respect of the house under section 62(1), or
>
> (b) an application for a licence had been duly made in respect of the house under section 63,

and that notification or application was still effective (see subsection (8)).

(5) In proceedings against a person for an offence under subsection (1) … it is a defence that he had a reasonable excuse …for having control of or managing a house in the circumstances described in subsection (1)."

7. Section 249A of the 2004 Act provides that as an alternative to prosecution for an HMO licence offence (among others) the local authority may impose a civil penalty where it is satisfied beyond reasonable doubt that a person has committed the offence. Schedule 13A to the 2004 Act provides that if it does so, that person can appeal to the FTT. The FTT must conduct a re-hearing of the matter, and can impose a penalty only if it is satisfied, to the criminal standard of proof (beyond reasonable doubt), that the offence was committed.

The factual background

8. I take what I understand to be the undisputed facts, insofar as they are relevant, from the FTT's decision; in case I am wrong and any of the facts I am about to set out are not agreed, I point out that I have heard no evidence and am not making any findings of fact.

9. The respondent bought 521 London Road, South Stifford, Gray's, Essex, on 18 March 2014. The property was converted for occupation by six people with a shared kitchen.

10. In 2017, following complaints from two of the residents, the appellant inspected the property; on 20th September 2017 it served on the respondent two Prohibition Notices pursuant to section 20 of the Housing Act 2004. The detailed law relating to those notices is not relevant to this appeal; the crucial point is that the notices required work to be carried out, including the creation of a kitchen of a suitable size for 6 households since the one provided was too small. The respondent built an extension to the kitchen so as to comply with the notices.

11. On 1 October 2018 the 2018 Order came into force, which meant that from that date onwards the property required an HMO licence. The respondent owns a number of other properties and holds HMO licences for them, and the FTT said that it was common ground between the parties that the respondent knew about the licensing regime.

12. In the meantime planning permission for the respondent's kitchen extension was refused; the respondent appealed that decision and the appeal was allowed on 13 February 2019

13. The appellant undertook further inspection visits in March 2019; on 14 March 2019 it wrote to Mr Mordechai Sternlicht about (among other things) the absence of an HMO licence. Mr Mordechai Sternlicht is an employee of Palmview Investments Limited which manages the property as agent for the respondent. His brother Mr Hersch Sternlicht is the director and shareholder of the respondent. On 24 May 2019 Mr Mordechai Sternlicht attended a PACE interview. On 20 June 2019 the appellant served a Notice of Intent to Impose a Financial Penalty on the basis of the absence of an HMO licence, and a Final Notice on 9 August 2019 imposing a penalty of £17,500.

14. The respondent applied for an HMO licence on 16 July 2019 and appealed the Final Notice to the FTT on 6 September 2019.

15. The respondent did not dispute that it had been managing or in control of the HMO without a licence; but it relied upon the defence of reasonable excuse in section 72(5). The reasonable excuse for which it argued was that Mr Mordechai Sternlicht had been told by an employee of the appellant in its planning department, Mr Dulal Ahmed, that there was no point in applying for an HMO licence while the planning position for the kitchen remained in dispute.

16. The FTT in paragraph 41 of its decision said this:

> "Once the defendant has raised a defence, it is for the prosecution to show that the excuse was not reasonable to the criminal burden of proof."

Ground 1 of the appeal

17. The parties agree that what the FTT said at paragraph 41 was incorrect. It was understandably incorrect because there was then no authority directly on the offence in question; but the law is now clear, following the Tribunal's decision in *IR Management Services Limited v Salford* [2020] UKUT 0081 (LC). The HMO licence is defined in section 72(1) of the 2004 Act, while the defence is set out separately in section 72(5); the absence of reasonable excuse is not art of the definition of the offence. Therefore this is a defence that the defendant, in criminal proceedings, or the respondent in these civil proceedings, must prove to the civil standard of proof.

18. However, the parties also agree that ground 1 fails because, despite what the FTT said at paragraph 41, what it went on to do was exactly what it would have done had it set out the burden of proof correctly. It heard the respondent's evidence and made findings of fact upon it, and on that basis found that the defence was made out. Had it been applying the criminal burden of proof it would not have made those findings; instead it would have regarded the respondent as having discharged an evidential burden and turned to the appellant's evidence so as to consider whether the appellant had shown that it did not have a reasonable excuse.

19. Ground 1 therefore fails.

Ground 2 of the appeal

The FTT's decision

20. So the FTT was working on a correct basis and was looking to the respondent to make out the defence of reasonable excuse, to the civil standard of proof. Ground 1 fails, but ground 2 is that the FTT was in error as to the nature of the defence. At paragraph 42 and following it said:

> "The real question for the Tribunal is whether a landlord had a reasonable excuse for not applying for a license if he was told or led to believe by the council that such an application was a waste of time in light of its own planning decision which was in fact unlawful?
>
> 43 This question breaks down into several sub-questions:
>
> > First the general principle – I.e. would this scenario as outlined represent a reasonable excuse?
> >
> > If yes were the Appellants and more specifically Mr Sternlicht told or led to believe that the application was a waste of time?
> >
> > If yes was it reasonable for the Appellants to fail to apply for a license as a result of this.
>
> 44. We consider that a landlord who did not apply for a license because he was told or led to believe by the council that such an application was a waste of time would have a reasonable excuse for his failure to license."

21. The respondent to this appeal was of course the appellant in the FTT.

22. The FTT went on to consider the evidence given by the parties and made findings of fact as to what had happened in the course of Mr Sternlicht's communications with the appellant. It accepted his evidence that Mr Ahmed told him "that he could not apply for a licence because there was no planning permission for the kitchen" (paragraph 47 of the FTT's decision) and that therefore "Mr Sternlicht was told or led to believe that the application for a licence was a waste of time because of the planning barrier" (paragraph 48). It found that the respondent's conduct was reasonable (paragraph 49). It rejected the appellant's argument that the respondent should have evicted enough tenants to rectify the issue (so as to take the number of occupants back to below five, so that no offence would be committed). The FTT said at its paragraph 50 "If this were a case in which a landlord was deliberately continuing to operate an HMO without making any efforts to formalise the position legally such a draconian approach could be justified but that was not the case here."

23. At paragraph 52 the FTT concluded:

> "In summary the Tribunal finds that the Appellants had a reasonable excuse for having control of the premises without a license for the relevant period (October 2018 – July 2019). The appeal in relation to the license offence succeeds and the Final Notice dated 9th August 2019 is cancelled."

The arguments on the appeal

24. The appellant says the FTT made an error of law in that it asked the wrong question. The offence is not the failure to apply for an HMO licence. The offence is managing or being in control of an HMO without a licence. Even if the respondent had a good reason for not applying for a licence, the appellant says that that does not amount to a reasonable excuse for continuing to manage the HMO without one.

25. For the appellant Mr Ham argued that even if it believed that it would be refused an HMO licence, the respondent did not for that reason have a reasonable excuse to continue managing or being in control of the HMO without one. There were other options open to it. First, it could have kept the number of occupants below five so that it did not need a licence. In a situation where it was unable immediately to give notice to one of more occupants it could nevertheless have informed the local authority that it was going to do so, pursuant to section 62 of the 2004 Act, and it would then have had the defence set out in section 72(4)(a),

26. Alternatively, the respondent could have applied for a licence and availed itself of the defence in section 72(4)(b). There was no reason not to apply for a licence, and as things turned out it would have been granted one when the planning issue was resolved, says Mr Ham, or if not it could have appealed the refusal to grant a licence.

27. As Mr Ham put it, "However aggrieved, however right it was about the planning situation, it cannot have been reasonable for the respondent knowingly to break the law by continuing to operate an HMO without a licence. The reasonable - albeit temporarily irksome – approach was to seek to rectify matters through legitimate means."

28. Mr Ham suggested that for the respondent to continue to manage the property without a licence, because it thought it could not get one, was analogous to a person who continued to drive without a licence, knowing that they would be refused a driving licence if they applied for one.

29. Mr Paget for the respondent starts from the proposition – which Mr Ham agrees – that there is no limit on the range of defences possible under section 72(5). The Tribunal has already observed in *Thurrock Council v Khalid Daoudi* [2020] UKUT 0209 (LC) at paragraph 26 that there might be circumstances, for example, where a landlord was genuinely unaware, for a good reason, of the requirement to get a licence. There might be a case where, as Mr Ham suggested, a landlord was in the process of applying but then was prevented from completing the application by reason of extreme ill-health. But Mr Paget argued that the defence goes far wider than such examples and Parliament had intended it to be widely construed.

30. Mr Paget rejects the analogy with driving without a licence; there is no defence of reasonable excuse to that offence. Here there is such a defence, and it is not limited by the statute to any particular set of circumstances.

31. Mr Paget observes that almost all cases where section 72(5) is relied upon there will have been no application for a licence. Where an application has been made, section 72(4) provides a defence and section 72(5) is not needed. Therefore, he argues, it is no answer to

a plea of reasonable excuse that the respondent could have taken steps to regularise the situation that would have meant that no offence was being committed. Section 72(5) is intended to operate where the offence *is*, absent that defence, being committed. That being the case, he argued, the FTT was right to focus on the reason for not applying for a licence.

32. Mr Paget accepted that whether or not an excuse is "reasonable" is not a subjective question. It is not open to a landlord to decide that he does not need to apply for a licence because his name is Smith. And if the landlord's reason for not applying was that he had convictions that would preclude him from having a licence, that would not be a reasonable excuse. Here, however, there was objectively a reasonable excuse in that the appellant's employee had told the respondent that there was no point in applying, in circumstances where the appellant was in the wrong; the respondent was not in fact in breach of planning law and succeeded in its appeal. In the circumstances therefore its conduct was reasonable. As Mr Paget put it in his skeleton argument, "If an application is going to be refused for invalid, unlawful reasons then there is a reasonable excuse for having no licence." The appellant should not be allowed to profit from its own wrong by levying a civil penalty when the reason for the respondent's failure to apply was the appellant's own wrongdoing.

Conclusions on ground 2

33. Mr Ham's driving licence analogy is not apt for the obvious reasons set out by Mr Paget. In the driving licence example, there can be no reasonable excuse. In the case of an HMO offence, there can.

34. I take the view that the FTT made an error of law as the appellant argues, because it was wrong about what the reasonable excuse is *for*. Whatever the reasons for not applying for a licence, what the FTT has to decide is not, as it said in its paragraph 42, whether the respondent had a reasonable excuse for not applying for a licence. The issue was whether it had a reasonable excuse for continuing to manage and control the HMO without one. The FTT's own analysis of what it had to decide in paragraphs 42 to 44, quoted above, set it off on the wrong track and prevented it from asking the right question.

35. We saw in the discussion of ground 1 above that although the FTT appeared to set off on the wrong track in its analysis of the burden of proof, nevertheless it took the right road and made a finding of fact on the basis of the evidence produced by the respondent. It is right to ask whether the same thing has happened here; might the FTT have signposted the wrong road but in fact taken the right one? To that end I asked Mr Paget where the FTT had explained why a good reason for not applying for a licence also amounted to a good reason for continuing to manage and control the HMO without a licence. Mr Paget pointed to paragraph 52, which I have quoted above. But neither that paragraph nor any other part of the FTT's reasoning makes that link.

36. I do not agree with Mr Paget that to look for a reasonable excuse for managing and controlling the HMO without a licence, rather than for not applying for one, is impermissible because it narrows the defence. On the contrary it is vital to observe what the statute actually says. The focus must be on an excuse for committing the offence; there might be all sorts of reasons for not applying for a licence that might, or might not, not

provide a reasonable excuse for the commission of the offence. As the appellant says, there would not be a reasonable excuse where it was open to the landlord to avoid committing an offence altogether by legitimising its position – either by making an application or by taking steps to keep the number of occupants below five.

37. It is conceivable that a good reason for not applying for a licence might provide an excuse for committing the offence, for example the level of ignorance of the law referred to in *Daoudi*, noted above. I am not going to speculate on the possibilities. I am not persuaded that where a landlord fails to apply for a licence because it thinks it will be refused and for an incorrect reason, that amounts to a good reason not to apply (in view of the obvious advantage to a landlord of bringing itself within section 72(4)(b) and in view of the fact that an appeal system exists for cases where a local authority gets it wrong), let alone for committing the offence.

38. In this appeal the FTT found that that was a good reason for not applying for a licence; but the FTT did not ask itself the correct question, namely why that amounted to a reasonable excuse for committing the offence. Had it done so it would have recognised that the two things are not the same, and that the reason given by Mr Sternlicht for not applying for a licence was not a reasonable excuse for committing the offence. The FTT made a mistake of law and thereby reached an obviously incorrect conclusion. For that reason its decision is set aside.

39. In its grounds of appeal at paragraphs 17 and following, still within ground 2, the appellant also challenged the actual findings of fact made by the FTT. This aspect of the ground of appeal was not pursued at the hearing; I make no findings on it because the FTT's decision is set aside, including its findings of fact, and the parties will start afresh at a re-hearing. Mr Ham did add at the end of his submissions a rationality challenge, namely that no reasonable tribunal could have found that the defence was made out. I do not need to make a finding about that, having already set aside the FTT's decision.

Conclusion

40. In conclusion, the appeal succeeds. Both counsel agreed at the close of the hearing on the second ground that it would be appropriate to remit the matter to the FTT for a re-hearing, and therefore I do so rather than conducting the re-hearing in this Tribunal.

Elizabeth Cooke

Judge of the Upper Tribunal

15 December 2020