UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – HOUSE IN MULTIPLE OCCUPATION – section 257 HMO subject to licensing requirement – appeal by one joint freeholder against grant of licence to other joint freeholders and one leaseholder – proper approach to rehearing of licence application by FTT – burden of proof – weight to be given to the local housing authority's decision – Pt. 2 and Sch. 5, para. 34, Housing Act 2004 – appeal allowed

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

BETWEEN:

HASTINGS BOROUGH COUNCIL

Appellant

-and-

MS LINDA TURNER

Respondent

Re: 10 Warrior Gardens,
St Leonards on Sea

Martin Rodger QC, Deputy Chamber President

5 October 2021

Royal Courts of Justice

Jonathan Manning, instructed by Hastings Borough Council, Legal Services, for the appellant
Dale Timson and *William J Richardson*, instructed by Advocate, for the respondent

The following cases are referred to in this decision:

Hastings Borough Council v Turner [2020] UKUT 185(LC)

Hesham Ali (Iraq) v Secretary of State for the Home Department [2016] UKSC 60

Hussain v London Borough of Waltham Forest [2019] UKUT 339 (LC)

I R Management Services Ltd v Salford City Council [2020] UKUT 81 (LC)

Kerr v Department for Social Development [2004] UKHL 23

London Borough of Brent v Reynolds [2001] EWCA Civ 1843, [2002] HLR 15

Marshall v Waltham Forest LBC [2020] 1WLR 3187

R v Crown Court at Warrington ex p RBNB [2002] 1 WLR 1954

R (Hope and Glory Public House Limited) v The City of Westminster Magistrates Court [2011] EWCA Civ 31

R v Hunt [1987] AC 352

Sagnata Investments Ltd v. Norwich Corporation [1971] 2 Q.B. 614

Stepney Borough Council v Joffe [1949] 1 KB 599

Introduction

1. This is an appeal from a decision of the First-tier Tribunal (Property Chamber) (the FTT) by which it allowed an appeal against the grant of a licence for a house in multiple occupation.

2. The appellant, Hastings Borough Council, is a local housing authority responsible for licensing houses in multiple occupation (HMOs). On 16 July 2019 it granted an HMO licence for a converted block of flats at 10 Warrior Gardens, St Leonards on Sea to three of the four joint freeholders of the building and to a company which owns the lease of one of the flats.

3. The respondent, Ms Linda Turner, is the leasehold owner of one of the five flats in the building. She is also one of the joint freeholders, but she is not one of those who applied for and were granted the licence. She objects in principle to the licence, and she appealed against the appellant's decision to grant it. By a decision issued on 7 September 2020 the FTT allowed her appeal and reversed the authority's decision. With the permission of this Tribunal, the authority now appeals the FTT's decision.

4. This is the second appeal to this Tribunal concerning the same application for an HMO licence for 10 Warrior Gardens. On 30 June 2020 the Tribunal allowed the local housing authority's appeal against a determination by the FTT that the building was not an HMO and so did not require licensing (*Hastings Borough Council v Turner* [2020] UKUT 185 (LC)). The Tribunal was satisfied that the building was an HMO and remitted the appeal against the grant of the licence to the FTT for further consideration. That further consideration resulted in the decision now under appeal.

5. At the hearing of the appeal both parties were represented by counsel. Mr Jonathan Manning appeared on behalf of the local housing authority. Mr Dale Timson assisted by Mr William J Richardson appeared on behalf of Ms Turner. Mr Timson and Mr Richardson provided their services *pro-bono* by arrangement through Advocate, the Bar *pro-bono* service. This was a complicated appeal which would not have been straightforward for Ms Turner to present without professional representation, and I am particularly grateful to Mr Timson and Mr Richardson for their assistance.

Statutory provisions for HMO licensing

6. Part 2 of the Housing Act 2004 (the 2004 Act) is concerned with the licensing of HMOs. By section 61(1), with exceptions irrelevant in this case, every HMO to which Part 2 applies must be licensed. By section 55(2)(b) an HMO will fall within Part 2 if it is in an area designated by the local housing authority under section 56 as subject to additional licensing.

7. It is an offence, contrary to section 72(1), 2004 Act to be a person having control of or managing an HMO which is required to be licensed under Part 2 but which is not so licensed. A person who commits that offence is liable on summary conviction to a fine (section 72(6)). The offence is also a relevant housing offence for the purpose of section 249A, 2004

Act, under which, as an alternative to prosecution, a person whose conduct amounts to the commission of the offence may be subject to a civil penalty of up to £30,000.

8. Section 63, 2004 Act requires that an application for a licence must be made to the local housing authority in accordance with such requirements as the authority may prescribe. By section 64(1), where an application is made the authority must either grant a licence in accordance with section 64(2) or refuse to grant a licence. Section 64(2) provides that the authority may grant a licence if they are satisfied as to the matters mentioned in section 64(3). Those matters include: that no banning order is in force against a lessor or licensor of the house or part of it; that the proposed licence holder is both a fit and proper person to be the licence holder, and is, out of all the persons reasonably available to be the licence holder in respect of the house, the most appropriate person to be the licence holder; that the proposed manager of the house is a fit and proper person to be the manager and is either the person having control of the house or an agent or employee of the person having control; and that the proposed management arrangements for the house are otherwise satisfactory.

9. The requirement in section 64(3)(b)(ii) that out of all the persons reasonably available to be the licence holder in respect of the house, the proposed licence holder should be the most appropriate person, is supplemented by section 66(4). That requires a local housing authority to assume, unless the contrary is shown, that the "person having control of the house" is a more appropriate person to be the licence holder than a person not having control of it. The expression "person having control" is defined by section 263, 2004 Act but this general definition is modified in the case of certain HMOs as explained below.

10. The requirement in section 64(3)(d) that "the proposed management arrangements for the house are otherwise satisfactory" is amplified by section 66(5)-(6) which require the local housing authority, in deciding that question, to have regard (among other things) to: whether any person proposed to be involved in the management of the house has a sufficient level of competence; whether any person proposed to be involved in the management of the house (other than the manager) is a fit and proper person to be so involved; and whether any proposed management structures and funding arrangements are suitable.

11. Section 66(1)-(2) supplements the requirement in section 64(3)(e)(i) that the proposed licence holder be a fit and proper person to be the licence holder by requiring that the local housing authority must, when deciding that question, have regard (among other things) to any evidence which shows that the proposed licence holder, or any associate of theirs, has: committed an offence involving fraud, violence or drugs or certain sexual offences; practised unlawful discrimination; contravened housing or landlord and tenant law; or acted contrary to an applicable code of practice. Other relevant considerations include a person's immigration status and financial solvency. By section 66(3C) a person is not a fit and proper person to hold a licence if a banning order under section 16 of the Housing and Planning Act 2016 is in force against them.

12. These general licensing provisions are modified in the case of converted blocks of flats which are HMOs because they fall within section 257, 2004 Act. Such an HMO is referred to in the Act as a "section 257 HMO" and by section 61(5) the appropriate national authority is given power, by regulations, to modify the provisions of Part 2 and the meaning of the expressions "person having control" and "person managing" in section 263 in relation to those HMOs.

13. A "section 257 HMO" is a building which has been converted into and consists of self-contained flats, less than two-thirds of which are owner occupied, and the building work undertaken in connection with the conversion did not comply with building standards equivalent to those imposed by the Building Regulations 1991 (section 257, 2004 Act).

14. Where the building in question is a section 257 HMO and a person has been granted a long lease of a flat within the HMO, the "person having control" of the HMO means (with irrelevant exceptions) the person who is the lessee of the whole of the HMO or (if there is no such person) the freeholder of the HMO (section 61(7)-(8), 2004 Act, as inserted by regulation 3, Houses in Multiple Occupation (Certain Blocks of Flats) (Modifications to the Housing Act 2004 and Transitional Provisions for Section 257 HMOs) (England) Regulations 2007).

15. Additionally, the matters of which the local housing authority must be satisfied before it may grant a licence for a section 257 HMO are supplemented by the same regulations by the insertion of section 64(4), as follows:

> "When deciding whether the proposed licence holder is a fit and proper person to be the licence holder the local housing authority must take into consideration whether the person has control of the HMO and the extent to which he has control over it."

16. Procedures relating to the grant or refusal of HMO licences are found in Schedule 5, 2004 Act. Before granting a licence the local housing authority must serve a notice on the applicant for the licence and each "relevant person", and consider any representations received in response (para.1). The notice must state that the authority are proposing to grant a licence and set out their reasons. Where the authority decides to grant a licence they must serve a copy of the licence and a notice setting out their reasons for deciding to grant it on the applicant and each relevant person (para.7). A "relevant person" is a person who has an estate or interest in the HMO (other than any tenant under a lease with an unexpired term of 3 years or less) (para.13).

17. Part 1 of Schedule 5 contains the only provisions detailing the steps which an authority is required to take before deciding whether or not to grant an HMO licence.

18. Part 3 of Schedule 5, 2004 Act is concerned with the right to appeal. By paragraph 31(1) it is made clear that either the applicant for the licence or any relevant person may appeal to the appropriate tribunal against a decision to grant or to refuse to grant a licence. By paragraph 34(2) any appeal is to be by way of a re-hearing but may be determined having regard to matters of which the authority were unaware.

19. It is also relevant to refer to provisions contained in the Licensing and Management of Houses in Multiple Occupation (Additional Provisions) (England) Regulations 2007 which apply only to section 257 HMOs. Regulations 4 to 11 impose a range of duties on managers (and occupiers) of section 257 HMOs relating to the provision of contact information, fire safety, the design and structural condition of the building, drainage and water supply, gas safety, the maintenance of common parts, shared gardens and occupiers' living accommodation, and rubbish disposal.

20. These detailed requirements mirror those applicable to other types of HMO but, by regulation 3, their application in the case of section 257 HMOs is qualified in certain respects. In particular, the duties of a manager of a section 257 HMO "only apply in relation to such parts of the HMO over which it would be reasonable to expect the licence holder, in all the circumstances, to exercise control". This qualification is clearly intended to reflect the fact that section 257 HMOs will typically contain a number of flats which are let on long leases over which the "person having control" of the HMO (the head-lessee or freeholder of the whole building) may have very little control or management responsibility.

The relevant facts

21. 10 Warrior Gardens is a substantial late Victorian house converted during the twentieth century into five self-contained flats. Since 2007 the freehold has been jointly owned by the respondent and the leaseholders of two of the other flats: Mr Black, Mr Brown and Ms Barett. The respondent is the leaseholder of the ground floor flat; Mr Brown and Mr Black jointly own the lease of the lower ground floor flat; and Ms Barett owns the lease of the third floor flat.

22. There are two other flats in the building. The first-floor flat is owned by Mr Ian Lawson and the second-floor flat is owned by Indigo Properties UK Ltd (Indigo), a company of which Mr Lawson is a director. It appears that Mr Lawson (and possibly Indigo) may be entitled to a share of the freehold in the building as a result of their ownership of the leases of their flats, but the respondent has objected to Mr Lawson acquiring any interest in the freehold and, for the time being, neither he nor the other joint freeholders have brought that issue to a head.

23. 10 Warrior Gardens is a "section 257 HMO". That is, it is a building which has been converted into and consists of self-contained flats, less than two-thirds of which are owner occupied, and the building work undertaken in connection with the conversion did not comply with building standards equivalent to those imposed by the Building Regulations 1991 (section 257, 2004 Act).

24. The building is in part of the Borough of Hastings which was designated by the authority as an area subject to additional licensing under section 56, 2004 Act with effect from 4 May 2018. The designation required all section 257 HMOs in the locality to be licensed under Part 2 of the 2004 Act.

25. In February 2019 the authority sent letters to each of the joint freeholders of the building informing them that, as the persons responsible for the control of the property, they must apply for a licence, and warning them that a failure to do so could result in their prosecution or the imposition of a financial penalty.

26. On 19 March 2019 Mr Lawson completed an on-line HMO licence application for the building in which he named himself and the four joint freeholders as the proposed licence holders. Following objections from the respondent it was agreed that Mr Lawson and the three joint freeholders other than Ms Turner would jointly be the licence holders. As part of the application process Indigo, Ms Barett, Mr Brown and Mr Black each signified their willingness to abide by the conditions of the licence.

27. On 18 June 2019 the authority gave notice of its intention to grant the licence and invited representations, including from Ms Turner. Having considered those representations, on 16 July it proceeded to grant the licence for a term of 12 months from 19 March 2019 subject to its standard HMO conditions. The joint licence holders were Indigo (rather than Mr Lawson personally), Ms Barett, Mr Black and Mr Brown and it identified Indigo as the manager of the property.

The proceedings before the FTT

28. Ms Turner appealed against the grant of the licence to the FTT. In her grounds of appeal she disputed that the building was an HMO. She also objected to Mr Lawson being granted a licence (although he was not in fact one of the licence holders). He lived a considerable distance from the property and Ms Turner suggested that he would be unable effectively to manage it. She also referred to incidents involving water leaks from Mr Lawson's flat and anti-social behaviour by his tenants as reasons why neither he nor any company with which he was concerned should be granted a licence.

29. The FTT's preliminary decision that the building was not an HMO was subsequently reversed by this Tribunal, and the appeal was remitted to the FTT for consideration of Ms Turner's other grounds of objection to the grant of the licence.

30. Having considered Ms Turner's objections the FTT gave directions requiring the authority to set out its reasons for regarding Indigo as a suitable licence holder "despite the fact that it is some 40 miles away from the property." The appellant complied with that direction and submitted a statement of case supported by a witness statement from Ms Deborah Watts, one of its environmental health officers, explaining that it had granted the licence to all of the freeholders except Ms Turner and to Indigo and that Ms Watts had made enquiries which had not yielded any evidence calling into question Indigo's suitability to hold a licence. It was commonplace for licence holders to live some distance from the properties for which they were responsible and in Ms Watts' experience this need not have a detrimental effect on their ability to comply with their obligations as licence holders. Ms Watts exhibited documents to her statement which she said showed that Indigo was trying to comply with the conditions of the licence and trying to put suitable management arrangements in place.

31. Ms Turner filed evidence in response to the authority's case, focussing on her concerns about Mr Lawson. She provided details of a series of issues concerning the occupation and management of the first-floor flat which, she suggested, demonstrated that Mr Lawson was not a fit and proper person to hold a licence. I will return to those matters and to the documents relied on by Ms Turner in support of her case later in this decision.

The FTT's decision

32. At the request of Ms Turner and with the agreement of the local housing authority the FTT reached its decision on the papers, without holding an oral hearing. In paragraph 8 of its decision it recorded that it had considered all of the papers filed for the purpose of the appeal including the documents exhibited to the statements provided by Ms Watts and Ms Turner.

33. At paragraph 9 the FTT summarised Ms Turner's objections to the grant of the licence in the following six points:

(a) all the licensees live at or trade at premises far from the property and are therefore unsuitable to be licence holders or managers;

(b) none of the licensees have "control" of the building;

(c) Mr Lawson has historically had tenants that caused a continuous nuisance by playing loud music and the current tenants have two dogs who bark all the time;

(d) there was a water leak from Mr Lawson's flat which Ms Turner had asked him to deal with but he did not; as a result she suffered an electric shock one night when she got up to see what was happening and turned her light on to see that water had leaked onto her floor; she had had to get a plumber out;

(e) work organised by Mr Lawson, for example work to repair a roof, was often overcharged for or not done at all;

(f) the classification of the property as an HMO may affect Ms Turner's mortgage and the value of her property.

34. The authority's case was that all of the licensees were responsible people and there was no evidence that they had committed any of the offences or conduct referred to in section 66(3), 2004 Act. Moreover, "the only reason that people away from the property had been appointed is because the applicant, Ms Turner, as the only freehold owner living in the property, refused to be involved".

35. In paragraph 19 of its decision the FTT explained what it understood to be its task:

> "This tribunal's duty is to determine whether there are any grounds for saying that this local authority has made an incorrect decision when considering the provisions of section 64 and section 66 of the 2004 Act."

36. The FTT accepted that Mr Lawson had arranged for work to be undertaken to the building over the years and therefore appeared to have sufficient control to undertake management of the common parts. It acknowledged that there was no evidence that the licence holders or the manager had any relevant convictions, but it continued at paragraph 26 of the decision as follows:

> "Indigo is named as both a licence holder and manager. It is agreed by the respondent that it was not the manager when the application for a licence was made. The respondent can only say that there is no evidence to suggest that Indigo is not a fit and proper person. The evidence is that Indigo is owned by Mr Lawson. There is clear evidence that Mr Lawson's management qualities are not acceptable which may or may not be true but has simply not been investigated. Assumptions have been made which, according to the evidence submitted, did not involve any such investigation."

The FTT explained that it needed to know what investigations had been undertaken by the authority into the "serious allegations" made by Ms Turner "about incompetent

management on the part of Mr Lawson". It appeared to the FTT that the authority had not considered whether the proposed licence holders were the most appropriate persons to be licence holders, as required by section 64(3)(b)(ii).

37. The FTT expressed its conclusions in paragraphs 30 to 33 of its decision as follows:

> "30. [The authority] … should have considered whether there were suitable management structures and funding arrangements in place and, in addition, whether the proposed management arrangements were satisfactory. Those considerations should have involved an investigation into the applicant's allegations. It is understood that the other freehold owners did not object but they do not live at the property and may have been completely unaware of the problems faced by the applicant."

Having referred to arguments by Ms Turner about human rights and the value of her property, the FTT concluded:

> "33. Thus, on the evidence produced by the parties, the tribunal is satisfied that while a licence could be issued to the three other freehold owners, assuming that the applicant still does not want to be a licensee, it is not satisfied either that there are suitable management structures and/or funding arrangements in place, or that either Indigo or Mr Lawson are either fit and proper or "satisfactory persons or managers". This appeal succeeds."

38. It is apparent that the FTT did not reach any conclusion on the allegations made by Ms Turner about what it had described in paragraph 26 as "Mr Lawson's management qualities". Those allegations, according to the FTT, "may or may not be true".

39. Reliance was also placed by Mr Timson on observations made by the FTT when it refused permission to appeal. It emphasised at that time that the appeal had been by way of a "re-hearing" (a matter which it had not referred to in the decision itself) and explained:

> "In other words, the Tribunal must be satisfied – even before hearing from the person appealing – that the local authority has exercised its powers in accordance with the primary legislation."

The FTT also suggested that there ought to have been "a detailed witness statement from Mr Lawson or someone else from Indigo setting out what they told the local authority at the time (if anything) about their experience of management and the proposed management structures and funding arrangements." In paragraph 10 of its refusal the FTT summarised the position, as it saw it:

> "The [authority] lost the case because it apparently did not understand the law i.e. that it was a re-hearing which meant, in effect, that it had to go through all the statutory requirements and satisfy the tribunal that it had complied with them. All of them. It failed to do so for the reasons set out in the decision."

The grounds of appeal

40. The appellant was granted permission to appeal on the following two grounds:

> (1) That the FTT had erred in law by failing to accord any respect to the authority's decision. Rather than requiring the authority to demonstrate that the applicants were fit and proper persons to be granted an HMO licence, on an appeal against the authority's decision to grant a licence the burden ought to have been put on Ms Turner to satisfy the FTT that the authority's decision was wrong.
>
> (2) In any event the FTT failed to conduct any analysis of the evidence before it and its conclusion that there was no evidence that the licence holders were fit and proper persons was contrary to the evidence.

41. The respondent's grounds for resisting the appeal, drafted by Mr Timson, answered the appellant's first ground by saying that, as the appeal to the FTT was by way re-hearing, the burden was not on Ms Turner to establish why a licence should not be granted but rested on the authority to prove the basis of its decision. As to the second ground of appeal it was said that it must fail because the authority had provided no evidence as to the management structures or funding arrangements which were to apply to the HMO under the licence orders.

42. As a preliminary matter, and at Ms Turner's specific request, Mr Timson invited the Tribunal to reconsider its grant of permission to appeal on the grounds that the application by the authority appeared, on the information available to them, to have been filed 17 days after the expiry of the period allowed by rule 21(2) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010. Having investigated the Tribunal's records I am satisfied that the application was filed within time, although it was not recorded on the Tribunal's electronic case management system until after time had expired. That may not have been explained correctly to Ms Turner when she asked the Tribunal's staff when the application has been filed. The administrative delay has no effect on the issue of the authority's compliance with the time limit.

Ground 1: did the FTT err in its approach?

43. In support of his submission that the FTT was wrong to consider that any burden of proof lay on the authority Mr Manning referred to the decision of the Court of Appeal in *R (Hope and Glory Public House Limited) v The City of Westminster Magistrates Court* [2011] EWCA Civ 31 in which the Court considered the proper approach to an appeal, conducted by way of re-hearing, against a local authority's decision on a licensing application. At [48]–[49] Toulson LJ said:

> "48. It is normal for an appellant to have the responsibility of persuading the court that it should reverse the order under appeal, and the Magistrates' Courts Rules 1981 envisage that this is so in the case of statutory appeals to Magistrates' Courts from decision of local authorities. We see no indication that Parliament intended to create an exception in the case of appeals under the Licensing Act 2003.

> 49. We are also impressed by [counsel's] point that in a case such as this, where the licensing sub-committee has exercised what amounts to a statutory discretion to attach conditions to the licence, it makes good sense that the licensee should have to persuade the Magistrates' Court that the sub-committee should not have exercised its discretion in the way that it did rather than that the Magistrates' Court should be required to exercise the discretion afresh on the hearing of the appeal."

44. Mr Manning also submitted that the FTT's approach overlooked the well-established principle that, in an appeal against a decision of a local authority acting in its regulatory capacity, the decision of the authority is entitled to respect from the appellate tribunal, and should only be reversed where there is a clear and proper basis for doing so. He referred once again to Toulson LJ's judgment in *Hope and Glory* in support of his proposition that the favourable conclusions of the local housing authority were themselves a factor which weighed in favour of a finding, on a re-hearing, that the relevant facts had been established:

> "45. It is right in all cases that the Magistrates' Court should pay careful attention to the reasons given by the licensing authority for arriving at the decision under appeal, bearing in mind that Parliament has chosen to place responsibility for making such decisions on local authorities. The weight that magistrates should ultimately attach to those reasons must be a matter for their judgment in all the circumstances, taking into account the fullness and clarity of the reasons, the nature of the issues and the evidence given on the appeal."

45. Mr Manning also relied on authority in this Tribunal on the proper approach to appeals against decisions of local housing authorities under the 2004 Act. In *Marshall v Waltham Forest LBC* [2020] 1WLR 3187 the Tribunal (Judge Cooke) considered *Hope and Glory* and other decisions of the Court of Appeal and emphasised that the FTT, in carrying out a re-hearing, should start from the decision-maker's policy and afford great respect to its decision (para. 62).

46. In response, Mr Timson submitted that because an appeal to the FTT was by of re-hearing, the burden was not on Ms Turner to establish why a licence should not be granted but rather rested on the authority, which, as he put it, "has to prove the basis of its decision over again". He suggested that approach was consistent with the common law principle that the burden of proof lies on the party alleging the existence of facts and not on the party denying them. It also reflected the difficulty of proving a negative. It was therefore for the local housing authority to prove that the licence holders were fit and proper and that the management and financial arrangements were satisfactory.

47. Mr Timson relied on the decision of the House of Lords in *R v Hunt* [1987] AC 352, at 374, where Lord Griffiths agreed that:

> "If the linguistic construction of the statute did not clearly indicate upon whom the burden should lie the court should look to other considerations to determine the intention of Parliament such as the mischief at which the Act was aimed and practical considerations affecting the burden of proof and, in particular, the ease or difficulty that the respective parties would encounter in discharging the

> burden. I regard this last consideration as one of great importance for surely Parliament can never lightly be taken to have intended to impose an onerous duty on a defendant to prove his innocence in a criminal case and the Court should be very slow to draw any such influence from the language of a statute."

48. Mr Timson submitted that a local housing authority would have access to the necessary information to determine whether an applicant was fit and proper, whereas a person in the respondent's position would not.

49. Mr Timson also developed an interesting alternative line of argument, suggesting that it may not be appropriate to analyse the exercise of the local authority's licensing powers in adversarial terms at all, because both the authority and the FTT on an appeal were exercising an inquisitorial jurisdiction. Neither the authority, nor the applicant for a licence (nor indeed a relevant person giving notice of the application), is in the position of a litigant and, at least between the applicant and the local housing authority, their positions ought not to be treated as adverse to one another. An applicant required a licence to enable the property to be used lawfully as an HMO, and the authority has no interest in denying a licence to a fit and proper person. In carrying out its function of granting or refusing licences the authority was therefore in the same position as the FTT on an appeal.

50. In support of this submissions Mr Timson referred to the decision of the Tribunal (Holgate J and Judge McGrath CP) in *Hussain v London Borough of Waltham Forest* [2019] UKUT 339 (LC), at [140], where the roles of the authority and the FTT were equated:

> "The FTT determines an appellant's entitlement to a right or privilege conferred by a licence granted under the legislation (or the removal of that right in the event of revocation). It is impossible to see how the legal analysis can be any different when a decision of the same nature is previously taken by the licensing authority from which the appeal is brought."

The Tribunal was therefore satisfied in *Hussain* that decisions by a local housing authority to grant or refuse applications for a licence involved "proceedings before a judicial authority" for the purpose of section 4(6) of the Rehabilitation of Offenders Act 1974.

51. In *Kerr v Department for Social Development* [2004] UKHL 23 the House of Lords considered whether, under social security legislation for the payment of funeral expenses in Northern Ireland, the applicant or the paying department bore the risk of uncertainty over whether the conditions of entitlement were satisfied. Both Lord Hope and Baroness Hale distinguished the position of a social security claimant and the adjudicating department from those of litigants. At [14]-[15] Lord Hope said that:

> "… the position of the department is not to be regarded as adverse to that of the claimant. In this case too the process is inquisitorial, not adversarial.
>
> In this situation there is no formal burden of proof on either side. The process is essentially a fact-gathering exercise, conducted largely if not entirely on paper, to which both the claimant and the department must contribute."

52. Baroness Hale was of the same opinion, at [62]:

> "What emerges from all this is a cooperative process of investigation in which both the claimant and the department play their part. The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced."

53. Mr Timson therefore suggested that, if the FTT's analysis of the burden of proof was incorrect, it was nevertheless justified in expecting the authority to make all necessary enquiries to satisfy itself (and the FTT) that the conditions of entitlement to a licence had been satisfied. In this case the authority had asked no questions about the financial and management arrangements and the FTT had been entitled to conclude that there was no material on which a decision could be taken to grant a licence.

54. At the conclusion of argument on the first ground of appeal I indicated to the parties that I was satisfied that the FTT had adopted the wrong approach and that the appeal would succeed on that basis. I will explain my reasons.

55. First, it is not appropriate, in my judgment, to approach an appeal from a local housing authority on an HMO licensing matter on the basis that the authority is required to prove to the satisfaction of the FTT the facts on which its decision was based so that, unless it does so, the appeal must be allowed. The primary role of the authority in cases such as this is an adjudicative one. It receives an application for a licence and determines it in accordance with the procedures in Schedule 5, 2004 Act. The onus of satisfying the authority that the conditions for the grant of a licence are made out falls on the applicant for the licence. Paragraph 34 of Schedule 5 provides that an appeal from the authority's decision will take the form of a "re-hearing" before the FTT, but the role of the authority is not thereby transformed into that of a litigant in adversarial proceedings.

56. Nor does the fact that the decision itself may have been in the applicant's favour, and that the appellant may be a "relevant person", dissatisfied with the outcome, alter the authority's role in the proceedings. If steps are not taken to ensure that the applicant for a licence is joined as a party to the appeal the person best able to provide the necessary evidence on a rehearing will be absent, as they were in this case. In rare cases such as this one, where the appeal is brought by someone who was not the applicant for the licence, the FTT should give directions for the applicant to be joined as a party, otherwise the outcome of the appeal risks being unfair.

57. The authority will no doubt wish to make available to the FTT the material on which it based its decision (at least where that material is not apparent from the reasons given in the notice under paragraph 7) but in my judgment it is not apt to regard that expectation as imposing an evidential burden. The authority will also be entitled to participate in the appeal and to seek to explain or defend its decision if it chooses, but I do not think it is obliged to do so and it could quite properly take the view that its decision spoke for itself.

58. Secondly, and closely related to the first point, I also accept Mr Manning's submission that on a matter involving the exercise of a discretion, or an evaluative judgment, the authority's decision was entitled to respect and that, on a re-hearing, the onus was on Ms Turner to persuade the FTT to take a different view. On an appeal by way of re-hearing from a decision of a regulatory authority it falls to the appellant to lead evidence and to establish a basis on which the appellate tribunal can be satisfied that a different outcome is justified. That principle is of long standing, and although it is reflected in the Magistrates' Courts Rules which were under consideration in *Hope and Glory*, it does not depend on those Rules. That is clear from *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60, at [45], in which Lord Reed SCJ cited Toulson LJ's explanation in *Hope and Glory* at [45] in support of the general proposition that:

> "Where an appellate court or tribunal has to reach its own decision, after hearing evidence, it does not, in general, simply start afresh and disregard the decision under appeal."

59. The same principle was applied to HMO licensing by the Court of Appeal in *London Borough of Brent v Reynolds* [2001] EWCA Civ 1843, in which, at [16], Buxton LJ said this

> "Mr Arden Q.C., who appeared before us for Brent, accepted that the appeal was a complete rehearing. Accordingly, the judge hears evidence and makes up his own mind on the facts; and his task is to make his own decision on the application, in place of that made by the LHA, and not merely to act as a court of review of that LHA decision. That said, however, the county court's jurisdiction is subject to the very significant condition that the court should pay great attention to any view expressed by the LHA and should be slow to disagree with it. That principle is to be found in the judgments of the majority of this court in *Sagnata Investments Ltd v. Norwich Corporation* [1971] 2 Q.B. 614."

60. *Sagnata* was one of the decisions referred to by the Court of Appeal in *Hope and Glory* and by Lord Reed in *Hesham Ali*. It concerned an appeal against a local authority's refusal of a gaming licence for an amusement arcade. At 633G, Edmund Davies LJ described an appeal to Quarter Sessions from a decision of a public authority as a "half-way house" between a new trial, uninfluenced by what the local authority had done, and "an appeal proper, in which the local authority's decision is to be regarded as of considerable weight, and is not to be reversed unless their decision is shown to be wrong." Such an appeal proceeds "by way of a complete rehearing" but "this conclusion does *not* involve that the views earlier formed by the local authority have to be entirely disregarded". The proper approach, Edmund Davies LJ explained, had been established by Lord Goddard C.J. in a case about the licensing of street traders, *Stepney Borough Council v Joffe* [1949] 1 KB 599, where, after confirming that the statute provided for an unrestricted appeal, he continued, at 602:

> "That does not mean to say that the court of appeal, in this case the metropolitan magistrate, ought not to pay great attention to the fact that the duly constituted and elected local authority have come to an opinion on the matter, and ought not lightly, of course, to reverse their opinion. It is constantly said (although I am not sure that it is always sufficiently remembered) that the function of a

> court of appeal is to exercise its powers when it is satisfied that the judgment below is wrong, not merely because it is not satisfied that the judgment was right."

61. Mr Timson relied on the Tribunal's decision in *I R Management Services Ltd v Salford City Council* [2020] UKUT 81 (LC) which concerned the allocation of the burden of proof on the issue of whether the manager of an HMO had a reasonable excuse for conduct which, without such an excuse, would amount to a relevant housing offence exposing the manager to the risk of a financial penalty under section 249A, 2004 Act. The Tribunal concluded, after considering the decision of the House of Lords in *R v Hunt* [1987] AC 352 that Parliament intended that the manager seeking to take advantage of the statutory defence of reasonable excuse should be required to prove the necessary facts. Mr Timson referred to the Tribunal's observation in paragraph 27 that the elements of the offence itself did not include the absence of a reasonable excuse, and that the absence of such an excuse "is not one of the matters which must be established by the prosecutor".

62. I do not think that passage assists Mr Timson or undermines the application of the well-established approach to "re-hearing" appeals in regulatory proceedings. In paragraph 27 of *I R Management Services* the Tribunal was considering the elements of the statutory offence of failing to comply with management regulations made under section 234, 2004 Act. Those elements are the same whether the context is a criminal prosecution or a determination of liability for a civil penalty. The reference to what had to be established by a prosecutor was simply part of the Tribunal's analysis of the elements of the offence, and it was not focussed on an appeal against a finding (whether civil or criminal) that the offence had been committed.

63. In every case before it, it is for the FTT to decided what approach it should take to the conduct of the hearing and to the order in which the parties call their evidence. In this case the FTT appeared to treat that as a question to be determined by its view of where the burden of proof lay. The suggestion in its refusal of permission to appeal that it was required to be satisfied that the authority had correctly exercised its powers - "even before hearing from the person appealing" – is inconsistent with what Toulson LJ said in *Hope and Glory* at [35] about the order in which evidence might be received:

> "The only unusual feature about this type of appeal is that all parties have carte blanche to call evidence. It does not, however, follow that the respondent to the appeal should bear the responsibility of showing that the order should be upheld and so should be required to present its case first."

64. I am therefore satisfied that by requiring the authority to discharge a burden of proof, and by failing to give weight to the decision of the authority, the FTT was wrong in the approach it took to the appeal.

65. The Tribunal has often explained, as it did in *Marshall*, that on a re-hearing it is for the FTT to make up its own mind on the basis of the material presented to it and giving proper weight to the decision of the authority. Its task is not to conduct a review of the authority's decision-making. In this case there is some reason to think that the FTT lost sight of that role (it mentioned it for the first time in its refusal of permission to appeal). Its criticisms, at

paragraph 30, that the respondent "should have considered whether there were suitable management structures and funding arrangements in place and, in addition whether the proposed management arrangements were satisfactory" and should have undertaken "an investigation into the applicant's allegations" were irrelevant once the matter came before the FTT on appeal. They were of course matters for the authority to consider when it made its own decision, but at the stage of the FTT's determination of the appeal the task of deciding whether there were suitable management structures or funding arrangements and of forming a view on any relevant allegations was that of the FTT, and not of the authority. That task was to be performed on the basis of the material put before the FTT, which could include material which was not provided to the authority when it made its decision (paragraph 34(2)(b), Schedule 5, 2004 Act).

66. There are no grounds for criticising the authority in this case for failing to undertake extensive investigations of its own, as the FTT suggested was necessary. The statutory scheme in paragraphs 1 and 7 of Schedule 5, 2004 Act, contemplates only that the authority will invite representations from relevant parties and consider them. It will then be in a position to take into account matters within its own knowledge or which have been brought to its attention; if it becomes aware of a matter of concern it will no doubt ask the applicant for a response, but there it is likely to end. It is for the authority to determine whether it has sufficient information to make a determination. HMO licensing is not a bespoke form of regulation; every HMO in an authority's district which is of a prescribed description or is in an area designated as subject to additional licensing, is required by sections 55 and 61 to be licensed and there will often be many hundreds of HMOs in a licensable district. The statutory scheme is not designed or fit for the purpose of an inquisition.

67. Mr Timson argued that the FTT had understood and properly performed its function. He relied on the statements in the refusal of permission to appeal and in paragraph 33 of the decision that it was not satisfied that there were suitable management structures or funding arrangements in place or that either Indigo or Mr Lawson were fit and proper persons. But it is clear that the FTT reached that conclusion based on its mistaken assumption that it was for the authority to persuade it of those matters, rather than for it to reach its own conclusion based on the material available to it.

68. Nowhere in its decision did the FTT address the evidence before it or consider what conclusions could be drawn from it about the matters relevant to the determination of an application for an HMO licence. It said that it had considered all of the material exhibited to the evidence of Ms Watts and Ms Turner but it reached no conclusions on that evidence saying only, of Ms Turner's allegations, that they "may or may not be true". It made no critical assessment of the evidence nor any attempt to identify which parts of it were relevant. Those were necessary components of a determination of the appeal by way of re-hearing. Their absence from the decision is a separate reason why the appeal must be allowed and the FTT's decision set aside.

Ground 2: whether the FTT's conclusions were contrary to the evidence

69. The authority was also granted permission to appeal against the FTT's conclusion that the necessary qualifying conditions for the grant of a licence had not been made out. This was said to be contrary to the evidence before it. Having decided that the FTT approached its

task on a fundamentally mistaken basis (ground 1) there is no need for separate consideration of ground 2.

Re-hearing

70. When it granted permission to appeal the Tribunal indicated that the appeal would be a review with a view to a re-hearing (i.e. that if the appeal was allowed this Tribunal would reach a decision of its own on the evidence rather than remitting the matter to the FTT for further consideration). Both parties were understandably keen that the matter be concluded without a further hearing and neither requested the opportunity to file further evidence which might have dealt with the management of the building since the grant of the licence in September 2019.

71. I have considered whether it is necessary for the successful applicants for the licence, Indigo, Ms Barett, Mr Brown and Mr Black, to be given notice of the re-hearing and the opportunity to make representations and to submit evidence of their management of building since 2019. They ought to have been joined as interested parties by the FTT as their interests are clearly engaged in the outcome. I have concluded that the better course is to consider whether the objections raised by Ms Turner, and the evidence provided in support of it, cast sufficient doubt on the authority's grant of the licence to require an answer from the licence holders. If not, no purpose would be served by further prolonging these proceedings to enable the licence holders to participate.

72. Having regard to section 64(3), 2004 Act, the matters of which I need to be satisfied before a licence can be granted are:

    (1) that no banning order is in force against a lessor or licensor of the house or part of it;

    (2) that the proposed licence holders, Indigo, Ms Barett, Mr Brown and Mr Black, are both fit and proper persons to be the licence holder, and, out of all the persons reasonably available to be the licence holder in respect of the house, are the most appropriate person to be the licence holder;

    (3) that Indigo, the proposed manager of the house, is a fit and proper person to be the manager and is either the person having control of the house or, an agent or employee of the person having control; and,

    (4) that the proposed management arrangements for the house are otherwise satisfactory (this requires consideration of the competence of the proposed manager and any other person proposed to be involved in the management of the house; whether such persons are fit and proper persons; and whether any proposed management structures and funding arrangements are suitable).

73. The authority made enquiries and was satisfied that there was no relevant banning order in force, and that none of the applicants had committed any of the offences which might disqualify them from being considered "fit and proper". The FTT accepted that as correct, and there is no evidence before me to suggest otherwise.

74. When considering whether the proposed licence holders are fit and proper persons it is necessary to bear in mind the responsibilities for which they are being assessed. The purpose and requirements of a fit and proper person test were explained by Lord Bingham, giving the leading judgment in the House of Lords in *R v Crown Court at Warrington ex p RBNB* [2002] 1 WLR 1954, at [9]:

> "It does not lend itself to semantic exegesis or paraphrase and takes its colour from the context in which it is used. It is an expression directed to ensuring that an applicant for permission to do something has the personal qualities and professional qualifications reasonably required of a person doing whatever it is that the applicant seeks permission to do. In a case such as the present an applicant for a justices' licence under the 1964 Act seeks permission to run a public house. Thus before granting a licence justices (or the Crown Court on appeal) must think the applicant has the personal qualities and professional qualifications reasonably required of a person seeking to run the particular public house for which he or she seeks a licence. The judgment must be made not only in relation to the particular applicant but also in relation to the particular premises. But the focus is on the particular applicant's suitability to run the particular public house."

75. In *Hussain v London Borough of Waltham Forest* at [66[to [67] the Tribunal referred to Lord Bingham's explanation and applied it to the fit and proper person test in Parts 2 and 3 of the 2004 Act:

> "A licence holder (or manager of a house) must have the personal qualities and qualifications reasonably required of a person seeking to have the responsibilities of holding a licence under that legislation for the premises in question, including his or her ability and willingness to comply with relevant requirements of housing law and landlord and tenant law, which comprise those of the licensing regime itself, such as the proper provision of information in a licence application."

76. No doubt has been cast on the personal qualities and qualifications of Ms Barett, Mr Brown and Mr Black, three of the four applicants for a licence. The FTT said at paragraph 33 of its decision that it was satisfied that a licence could be issued to them and it was not suggested on behalf of Ms Turner that that conclusion was wrong. The authority was satisfied that they (together with Indigo) were fit and proper persons to hold a licence; giving weight to that assessment, and in the absence of material capable of casting doubt on it, I reach the same conclusion. Not only are they three of the four joint freeholders, but they also hold the long leases of two of the flats in the building. Their management of those flats has not been called into question.

77. The concerns which Ms Turner expressed to the authority and to the FTT concerned only Mr Lawson's fitness to be the holder of a licence. In fact, of course, Mr Lawson is not a licence holder, but a company of which he is a director is. There is no evidence concerning the size, governance or corporate structure of Indigo and I will assume in Ms Turner's favour that her complaints against Mr Lawson are equally relevant to the fitness of Indigo to hold a licence.

78. Mr Timson identified six matters which Ms Turner wished to be taken into account, details of which were contained in her statement to the FTT.

79. First, Ms Turner had objected to the presence of satellite dishes on the exterior of the building, including outside the first-floor flat belonging to Mr Lawson. These were in contravention of planning control as the property is in a conservation area. The material relied on in support of this complaint includes correspondence from the Borough Planning Officer to the freeholder in October 2005 and April 2006. Mr Lawson did not become registered proprietor of his leasehold interest in the first floor flat until July 2006, so I disregard those complaints. In September 2007 a planning officer asked the freeholders to arrange for two new dishes to be removed or relocated to the back of the building. In January 2010 an enforcement officer wrote to the freeholders asking for information and were supplied with Mr Lawson's name and that of the occupiers of the basement and first floor flats. There is no evidence that either the enforcement officer or the freeholders raised the matter with Mr Lawson at that time, nor is there evidence of how long the dishes remained (other than that they had been removed in response to the complaint in 2005). The only evidence that Mr Lawson or Indigo was contacted about the presence of a satellite dish is an email in June 2018 from a member of staff at Indigo thanking Ms Turner for raising the issue with them and stating that the tenant had been contacted to see if the satellite dish belonged to her.

80. Secondly, Ms Turner complains of water ingress into her flat from above, which she said had caused substantial damage and distress over the years. The documentary evidence concerning this matter begins with an email from Mr Lawson to the freeholders in November 2010, stating that a water tank "located in the common ways" but serving his flat may indeed be leaking; he had requested a quotation for remedial work and expected to resolve the problem in the near future. A separate issue was identified by Ms Turner in an email to her fellow freeholders in September 2012, when water was said to be "coming directly from the first floor flat's overflow" and running down the rear wall of the building, causing damage to Ms Turner's flat. Indigo had been informed and Mr Lawson has come to inspect the problem within a day or two of it being reported. He told Ms Turner that it appeared to him that the problem was not coming from his flat but from further up the building. Ms Turner would not agree to a contractor being appointed by the freeholders to establish the source of the problem and Indigo eventually gave the instruction. Its plumber investigated and found that the source of the leak was indeed coming from the first floor flat, which was empty at the time. A further issue was documented in March 2018 when Ms Turner reported that water had poured down the wall of her flat while the tenant upstairs took a shower. Indigo instructed the tenant not to use the shower or bath and arranged for an independent plumber to attend as soon as he could, which was the day after the incident. The plumber could not locate any source of the leak and asked for access to Ms Turner's flat to investigate further, but Ms Turner refused, saying that her plumber had dealt with leaks on six previous occasions and was sure that they came from the first floor flat. There is no evidence whether or when the source of the problem was identified or rectified. There is also evidence of complaints by Ms Turner in May 2018 to Ms Barett, the leaseholder of the second floor flat, about water escaping from her flat which, she suggested, had "clearly been an issue for some time".

81. Thirdly, Ms Turner has been repeatedly disturbed by what she describes as the anti-social behaviour of the tenant of the first floor flat, including the barking of dogs (despite these

being prohibited in the building) and the playing of loud music. In October 2007 an environmental health office wrote to the occupier of the first floor flat and advised Ms Turner to keep a noise diary if problems recurred. By 2013 a new tenant had moved in and in January email exchanges between Ms Turner and an environmental health officer suggest that noise was again a problem and that the police had become involved and a noise abatement notice had been served. On this occasion there is evidence that Indigo was informed and had warned the tenant of the consequences of further disturbances. Whether the problem persisted or not is unclear, but in March 2018 Ms Turner again contacted the authority about noise.

82. Fourthly, Ms Turner objected to the attendance at the property of contractors who wished to carry out an inspection during the first coronavirus lockdown in May 2020. There was no emergency and the contractors were not wearing personal protective equipment. In her statement Ms Turner stated that they had informed her that they were there on behalf of "the freeholder Mr Lawson/Indigo".

83. Fifthly, Ms Turner objected to the suitability of Mr Lawson on the ground that he did not live close by and that she was the only person with an interest in the building who was on site and available to deal with problems.

84. Sixthly, Ms Turner said that the individual flats in the building had been subject to a selective licensing requirement since 2015, but that Mr Lawson had not applied for a licence for his own flats until 2019.

85. I have no doubt that, as the only leaseholder resident in the building, Ms Turner has shouldered more than a fair share of responsibility for identifying and addressing problems, as well as being the only one who has to put up with the daily consequences of disrepair and unneighbourly behaviour. Nevertheless, I place little weight on the proximity of Indigo's offices in Brighton to the property as a reason for doubting its suitability jointly to hold a licence. The evidence demonstrates that it has responded promptly to concerns raised with it by sending tradesmen or local agents to investigate, and there is no reason to believe that mere distance renders it unable to manage the property effectively. For understandable reasons (she has no tenants in the building, and without the presence of tenants the building would not be an HMO at all) Ms Turner has not been willing to join in the application for an HMO licence, but all other interests in the building are owned by absentees and the effect of her refusal is that the licensees will inevitably be absentees.

86. Nor do I place any weight on Ms Turner's concerns about the need for, or timing, of any application by Mr Lawson for individual licences for his own flats; no evidence relevant to those matters is before the Tribunal.

87. I will assume the truth of the facts asserted by Ms Turner about what she has observed and experienced concerning water penetration into her flat and into the common parts. With the exception of the leak in 2010 which Mr Lawson acknowledged as having come from the water tank serving his flat I cannot assume that the source of the water ingress was as Ms Turner believes it to have been, as there is no persuasive evidence to that effect; nor is there evidence of who is responsible for the repair of water tanks located in the common parts of the building or of water pipes or outfalls on the exterior of the building. There is also

evidence that Ms Turner has made similar complaints about water coming from the second floor flat, and repeated references in the correspondence I have been shown to the poor condition of the guttering and rainwater goods on the exterior of the building. These demonstrate the need for proper management to be provided for the building, but they do not prove that any particular leaseholder has neglected their responsibilities.

88. The most serious of the remaining difficulties encountered by Ms Turner are the instances of noise and other anti-social behaviour coming from the first floor flat. The contemporaneous evidence on those matters is episodic (they generated written complaints in 2007, 2013 and 2018) and it is not clear whether the problem has been continuous between those recorded episodes or has been resolved and then recurred. Nevertheless, I appreciate that noise and other disturbances from neighbours are capable of causing huge distress in residential buildings and I do not doubt that the experiences she reports are genuine. But, like the evidence of satellite dishes and inconsiderate contractors attending unmasked during the pandemic, Ms Turner's complaints are about the behaviour of people other than Mr Lawson and Indigo. The tenant of the first-floor flat is not an applicant for a licence, and when the limited evidence is examined to see what light it sheds on the suitability of Mr Lawson or Indigo to hold a licence, the picture which begins to emerge is of them responding appropriately to complaints raised with them. Enquiries were made about ownership of the satellite dish in June 2018; what results were yielded is not known. In 2010, 2012 and 2018 plumbers were sent to the building to investigate the source of water penetration, which remains largely unconfirmed so far as the evidence is concerned. In 2013 the tenant of the first-floor flat was warned by Indigo about noise disturbance; there is no evidence that Ms Turner followed the environmental health officer's suggestion to keep a noise diary if the problems persisted and no evidence that the tenant remains. Nor is there any evidence of problems in the twelve months or more since Ms Turner made her statement to the FTT.

89. The authority was satisfied that the joint applicants were fit and proper persons and I take that assessment into account. It has experience of standards of property management in its district and the evidence shows that it engaged with Mr Lawson by telephone and email when considering how to deal with the application. It issued a "fit and proper person certificate" to Indigo in March 2019, which was intended to demonstrate its suitability to hold licences generally. The material in evidence before me does not lead me to a different conclusion. I am satisfied, as I must be before a licence can be granted, that the proposed licence holders are fit and proper persons.

90. Section 64(3)(b)(ii) requires that out of all the persons reasonably available to be the licence holder in respect of the house, the proposed licence holder should be the *most* appropriate person. Section 66(4) requires me to assume, unless the contrary is shown, that the "person having control of the house" is a more appropriate person to be the licence holder than a person not having control of it. Because the property is a section 257 HMO with no headlease (and no tribunal appointed manager or RTM company) the "person having control" is the freeholder, or rather the joint freeholders, being three of the four proposed licence holders and Ms Turner (section 66(7)-(8)).

91. The only persons who have put themselves forward as willing to be licence holders are the three joint freeholders and Indigo. Ms Turner has positively refused to become involved. Because of her refusal it is not possible for the person having control to hold the licence, as

that would require her participation. The closest that could be achieved to the statutory gold standard would be for the three willing joint freeholders to hold the licence, but they have applied jointly with Indigo which is both a property management company and the leaseholder of one of the flats; no justification has been provided for Indigo and Mr Lawson's exclusion from a share of the freehold to which they both claim to be entitled as long leaseholders. Even if consideration of alternative managers is warranted where none has come forward, it is difficult to see why a smaller group of interested parties might be preferable. There is no evidence that Ms Barett, Mr Brown and Mr Black are prepared to take responsibility without Indigo, and I am satisfied that all four are jointly the most appropriate persons to hold the licence.

92. The requirement in section 64(3)(d) that "the proposed management arrangements for the house are otherwise satisfactory" troubled the FTT. But the authority was satisfied of Indigo's competence and I agree with its assessment; I have already concluded that the licence holders are fit and proper persons; that leaves only the question whether any proposed management structures and funding arrangements are suitable

93. The extent of the necessary structures and arrangements must be understood in the context of the management responsibilities placed on a manager of a section 257 HMO by the 2007 Regulations (referred to in paragraphs [19] and [20] above). Those responsibilities apply only in relation to those parts of the HMO over which it would be reasonable to expect the licence holder, in all the circumstances, to exercise control. Those parts are the common parts, the structure and exterior of the building, and any garden or external areas not demised by the leases of the flats. In other words, the management responsibilities of the licence holder will extend only to parts of the property which are likely already to be the responsibility of the freeholders. Assuming, as I do, that the leases in the building are in conventional form, three of the proposed licence holders are already responsible for the discharge of those overlapping responsibilities in their capacity as joint freeholders, and all of the leaseholders will be responsible for meeting the cost through a service charge. Mr Timson suggested that I could not safely make any assumption about what might be in the leases of the flats, and that they might be defective, or contain onerous responsibilities, or lack necessary fund-raising powers such as a modern service charge structure. But the leases appear from the evidence to have been granted in 1999 or 2006. There is nothing in the evidence to justify an assumption that this property is out of the ordinary or lacks the sort of contractual arrangements invariably put in place when long leases are granted in residential buildings. I am satisfied on the basis of that inference from the evidence that the management arrangements for the house are satisfactory.

94. The effect of granting a licence to the willing freeholders is that, in addition to their contractual responsibilities (which they will continue to share with Ms Turner), they will also be accountable to the local housing authority for compliance with the conditions of the licence. When the licence falls for renewal the authority will be entitled to inspect the property and require any hazards to health to be attended to. That may yield benefits for the residents of the building, including Ms Turner, although it may also require expenditure which has previously been avoided. The alternative to the grant of a licence would be that Ms Turner and her fellow freeholders (but not Indigo or Mr Lawson, who are not currently freeholders and therefore not persons having control of the property) would be committing an offence under section 72(1), 2004 Act. Mr Timson was unable to explain why that would be in anyone's interests and it may be that Ms Turner simply did not appreciate the

consequence of a successful outcome to her appeal against the grant of a licence. Whether she did or not, I have no doubt that the proper outcome of her appeal is to confirm the decision of the authority to grant the licence.

Martin Rodger QC,

Deputy Chamber President

21 October 2021