Neutral Citation Number: [2024] UKUT 313 (LC)

Case No: LC-2024-105

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

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

FTT Ref: LON/OOBB/HMF/2023/0033

4 October 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – RENT REPAYMENT ORDER – defence of reasonable excuse – incorrect information on local authority website – landlord's financial circumstances – utility payments

BETWEEN:

MRS DAISY OJUKWU

Appellant

-and-

CHUKWUNYERE PETER ONUOHA

Respondent

3 Fox Close,
London, E16 1NU

Upper Tribunal Judge Elizabeth Cooke

Royal Courts of Justice
1 October 2024

Ms Angela Delbourgo for the appellant, instructed by Goldfield Solicitors
Mr Jamie McGowan of Justice for Tenants for the respondent

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The following cases are referred to in this decision:

Acheampong v Roman [2022] UKUT 239 (LC)
Daff v Gyalui [2023] UKUT 134
LDC (Ferry Lane) GP3 Ltd v Garro and others [2024] UKUT 40 (LC)
Newell v Abbott [2024] UKUT 181 (LC)

Introduction

1. This is an appeal by Mrs Daisy Ojukwu against a rent repayment order made against her by the First-tier Tribunal ("the FTT"). She was represented in the appeal by Ms Angela Delbourgo of counsel and the respondent, her tenant Mr Peter Onuoha, was represented by Mr Jamie McGowan of Justice for Tenants; I am grateful to them both. Neither of them appeared before the FTT.

The legal background

2. This appeal is about the licensing requirements for houses in multiple occupation, or HMOs. Section 254 of the Housing Act 2004 sets out a number of "tests" to define an HMO, and the one relevant for present purposes is the "standard test" at sub-section (2). It describes what is perhaps the most widely-occurring type of HMO, the shared house where living accommodation such as a kitchen and living room is shared by occupiers who belong to more than one household:

> "(2) A building or a part of a building meets the standard test if–
>
> (a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;
>
> (b) the living accommodation is occupied by persons who do not form a single household (see section 258);
>
> (c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);
>
> (d) their occupation of the living accommodation constitutes the only use of that accommodation;
>
> (e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and
>
> (f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities."

3. Part 2 of the 2004 Act makes provision for the licensing of HMOs. Section 55 of the 2004 Act says this:

> "(1) This Part provides for HMOs to be licensed by local housing authorities where–
>
> (a) they are HMOs to which this Part applies (see subsection (2)), and
>
> (b) they are required to be licensed under this Part (see section 61(1)).
>
> (2) This Part applies to the following HMOs in the case of each local housing authority–
>
> (a) any HMO in the authority's district which falls within any prescribed description of HMO, and
>
> (b) if an area is for the time being designated by the authority under section 56 as subject to additional licensing, any HMO in that area which falls within any description of HMO specified in the designation."

4. To summarise section 55(1) and (2): HMOs to which Part 2 of the 2004 Act applies are (1) all those specified in the regulations and in addition (2) HMOs in an area specified by the local authority as being subject to additional licensing under section 56.

5. Section 61 requires all HMOs in both those categories to be licensed unless certain exemptions (not relevant to this appeal) apply.

6. For the first of those categories the requirement for a licence is set out in regulations and is often referred to as "mandatory licensing"; the Licensing of Houses in Multiple Occupation Regulations 2018, of which paragraph 3 provides:

> "An HMO is of a prescribed description for the purpose of section 55(2)(a) of the Act if it—
> (a) is occupied by five or more persons;
> (b) is occupied by persons living in two or more separate households;"

and meets one of the tests in section 254.

7. The second of those categories refers to an additional licensing designation under section 56 of the 2004 Act, which enables a local housing authority, if certain conditions are satisfied, to set up an additional licensing scheme so that more HMOs within their area (i.e. not just the ones specified in regulations) require a licence.

8. The proviso to all those provisions is Schedule 14 to the 2004 Act, which says so far as relevant to this appeal

> "1(1) The following paragraphs list buildings which are not houses in multiple occupation for any purposes of this Act other than those of Part 1. …
>
> 7.Any building which is occupied only by two persons who form two households."

9. The practical upshot of these provisions is that:

    a. Not all HMOs have to be licensed.

    b. HMOs of the shared house type (meeting the standard test of section 254) have to be licensed if they are occupied by five or more persons in two or more households (section 55(2)(a) and the 2018 regulations) but

    c. The local housing authority may designate an area of additional licensing and if it does so then the wider category of HMOs specified in the designation will have to be licensed in that area (section 55(2)(b) and section 56)

    d. But a building occupied only by two persons does not require an HMO licence even if they form two separate households (Schedule 14 paragraph 7).

10. Section 72 of the 2004 Act provides:

> "(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."

but section 72(5) provides that no offence is committed if the person concerned had a reasonable excuse.

11. The offence under section 72 is one of those in respect of which the FTT may make a rent repayment order, on the application of a tenant, pursuant to the Housing and Planning Act 2016; it may order the repayment of up to one year's rent paid while the offence was being committed. Section 44(4) of the 2016 Act provides:

> "(4) In determining the amount the tribunal must, in particular, take into account —
> (a) the conduct of the landlord and the tenant,
> (b) the financial circumstances of the landlord, and
> (c) whether the landlord has at any time been convicted of an offence to which this Chapter applies."

The factual background

12. The appellant holds a long lease, granted to her in 2003, of 3 Fox Close, London E16; it is a two-storey, three-bedroom maisonette. She used to live there, but in 2017 she moved out and let the rooms on assured shorthold tenancies, thereby becoming the landlord of an HMO that meets the standard test in section 254. 3 Fox Close has never been occupied by five or more persons in more than one household and so has never had to be licensed pursuant to the 2018 regulations.

13. The respondent, Mr Onuoha, has lived in the property since 2017 on an assured shorthold tenancy.

14. On 1 January 2018 the local housing authority designated an area, within which is Fox Close, as an area of additional licensing. The designation said that it:

> "… applies to all Houses in Multiple Occupation ("HMOs") that are privately rented under a tenancy or licence unless it is an HMO that is subject to mandatory licensing under section 55(2) of the Act or subject to any statutory exemption."

15. The effect of the designation is that within the designated area, HMOs occupied by five or more persons in two or more households were subject to mandatory licensing under section 55(2)(a) and the regulations, and HMOs occupied by three or four persons in two or more households were subject to the additional licensing requirement (sections 55(2)(b) and 56) (but not those occupied by only two people even if they formed two households, because of paragraph 7 of Schedule 14 to the 2004 Act).

16. The effect of the designation would not be apparent to a landlord reading it without legal advice, but the local housing authority provided information about the effect of the additional licensing designation on its website; more about that later.

17. By the summer of 2020 the property was occupied by Mr Onuoha and his daughter (who was then about 14), and by two other tenants: Ms Sara Olumide and her son, and the appellant's cousin Ms Ugochi Nwagwugwu. In August 2020 the appellant applied for an HMO licence. In December 2020, according to her witness statement in the FTT, she chased the local housing authority and was told that she was unlikely to get a licence

because she did not have the requisite planning permission; accordingly she gave her tenants notice to quit. In March 2021 her application for an HMO licence was refused.

18. Ms Olumide and her son left the property, in June 2021 according to the appellant and according to the respondent in August 2022.

19. On 1 January 2023 the respondent applied to the FTT for a rent repayment order on the ground that the appellant had committed the offence under section 72(1) of the 2004 Act. He claimed 12 months' rent for the period from April 2021 to April 2022; during that period he had paid £720 per month and so the maximum claimed was £8,640.

The FTT's decision

20. The FTT looked at the "standard test" in section 254 of the 2004 Act, set out above at paragraph 2, and found that the property satisfied that test and therefore was an HMO. It recorded that there was some dispute about this, as follows:

> "11. Mr Manna [Mrs Ojukwu's solicitor] submitted in his skeleton argument that, to constitute a HMO, there must be at least 3 separate households. The parties were ready to dispute the date when one of the tenants, Ms Sara Olumide, left the property (the aforementioned screenshot of text messages was relevant to this issue) - the Respondent said 21st June 2021 and the Applicant said August 2022. If the Respondent had the right date, it would mean that there had been only 2 households in the property for the majority of the period the Applicant has claimed for the calculation of the RRO, namely 10th April 2021 to 9th April 2022.
>
> 12. However, the above definition of an HMO only requires 2 separate households. On the Respondent's own case, there were at least two separate households in the property from before the Additional Licensing scheme came in until August 2022 so that the property satisfied the definition of an HMO for the whole of that period. This would not be a sufficient number of households to bring the property within the mandatory statutory scheme but it is sufficient for Newham's Additional Licensing scheme. Further, therefore, the property should have been licensed under the Additional Licensing scheme throughout that period."

21. That is not quite right: as we saw (paragraph 6 above), mandatory licensing under the regulations takes effect when the HMO is occupied by five or more persons in *two or more* households; the difference between mandatory and additional licensing is in the number of occupiers, not the number of households. If Ms Olumide left, with her son, in the summer of 2021 then until her departure the property came within the mandatory licensing requirement (five occupiers), and after she left it required a licence under the additional licensing scheme (three occupiers); if she did not leave until the summer of 2022 then the property fell within the mandatory licensing requirement throughout the period. The FTT was therefore correct to find that the property required an HMO licence throughout the period, although its misunderstanding about the basis of that requirement meant that it failed to make a finding of fact about when Ms Olumide left (because the FTT thought it did not matter); and that is unfortunate for reasons to be seen.

22. Be that as it may, the FTT found, on the basis of the criminal standard of proof, that the appellant had been managing or in control of the property throughout the period and did not have a defence of reasonable excuse; it noted that she had not sought to claim a reasonable excuse but considered whether her ignorance of the licensing requirements might constitute that defence and decided that it could not, since she had not taken steps to inform herself about the law. It therefore found that she had committed the offence under section 72(1) of the 2004 Act and determined that a rent repayment order should be made.

23. The FTT then discussed the Tribunal's decision in *Acheampong v Roman* [2022] UKUT 239 (LC) and declined to follow it insofar as it indicated that the FTT should deduct from the rent claimed any sums paid for utilities. It determined that the appellant "displayed a profound ignorance of what it meant to be a landlord", but acknowledged that she did not evade her licensing responsibilities in order to maximise her profit but just because she did not know what to do, which it said was "mitigation to a degree". It ordered her to repay 75% of the full amount claimed by the respondent., namely £6,480.

The appeal

24. Permission to appeal was granted by this Tribunal on two grounds, first that the appellant was not guilty of the offence because she had a reasonable excuse and second, failing that, that the amount she was ordered to pay was too high because the FTT failed to take into account mitigating circumstances. I take those grounds in turn.

The defence of reasonable excuse

25. The appellant said she had two defences of reasonable excuse. One was that having been told in December 2020 that she was unlikely to get an HMO licence she took steps to regularise the position by serving notice to quit on her tenants.

26. I think it is fair to say that the point being argued is that the appellant did all she could. The difficulty is that she did not make a very good job of it; the notices to quit that she served on her tenants were not in the correct form and were therefore invalid (as the FTT found, and the appellant has not argued otherwise). And she took no steps to enforce the notices; the aftermath of the pandemic she may have faced difficulty in doing so, but at any rate she took no steps towards enforcement. Importantly, once her application for an HMO licence was refused in March 2021 she did not apply for a temporary exemption notice from the licensing requirement pending the tenants' compliance with the notice to quit, under section 62 of the Housing Act 2004, which would have been the correct thing to do. I do not accept that the taking of these wholly ineffective steps to regularise the position can amount to a defence of reasonable excuse, although I agree it should have been considered as a mitigating factor.

27. The other defence argued by the appellant is that she was misled by the information given on the local housing authority's website into thinking that she did not require a licence. There is no mention of this in her witness statement in the FTT but the grounds of appeal say this:

> "In the Appellants dealing with Newham Council they kept referring her to their website for what HMO is and how to go about applying for a licence. The website defined HMO as comprising more than 3 separate household. HMO is a property that is occupied by three or more unrelated individual household who

share facilities such as kitchen or bathroom, or do not have exclusive occupation of the whole property."

28. The FTT in its refusal of permission to appeal revealed that this point had been raised at the hearing, although nothing was said about it in its decision:

> "8. The Respondent' Grounds of Appeal allege at paragraph 2 that Newham Council's website "defined HMO as comprising more than 3 Separate house hold. HMO is a property that is occupied by three or more unrelated individual household who share facilities such as kitchen or bathroom, or do not have exclusive occupation of the whole property."
>
> 9. At the hearing and in considering this appeal, [the judge] checked the Newham Council website which states:
>
> > Apply for an additional licence if you operate a house in multiple occupation that is shared by three to four tenants living in two or more households.
>
> 10. This was put to the Respondent at the hearing. No evidence was provided at the hearing or ½rith [sic] the appeal in support of the Respondent's allegation. It is also inherently unlikely that Newham would put advice on its website which contradicted the designation for Additional Licensing which was clearly not limited to 3 or more households."

29. It is not generally a good idea for a tribunal to seek out evidence for itself. If the FTT felt that it needed to see additional evidence about what the website said at the date of the hearing it should have invited the parties to provide it, perhaps to agree it, and that could have been achieved during a short adjournment during the day of the hearing. As it is, the appeal now turns on information sought out by the FTT itself, without the parties being able to check that the FTT looked at the right part of the website and recorded correctly what it read.

30. The appeal turns on that information because, inherently unlikely or not, the advice on the website as recorded by the FTT did contradict the designation for additional licensing, although the FTT did not spot the problem: a property falls within the additional licensing designation if it has 3 or more *occupiers*, not tenants, in two or more households (see paragraph 15 above). Significantly, if Ms Olumide and her son left in June 2021 then from that point onwards the property had two tenants (Mr Onuoha and Ms Nwagwugwu – Mr Onuoha's daughter was not a tenant), not three, and a landlord looking at the website would conclude that the property did not need a licence.

31. It appears from what the FTT said in its refusal of permission to appeal that the appellant gave evidence at the hearing that she had been misled by what she read on the website. What she said is not known, because the FTT did not record it - although there may be some echo of what was said about it at the FTT's paragraph 11, set out at paragraph 20 above. I understand from Mr McGowan that a transcript of the hearing was requested, but was said by the FTT not to be available. It is also known that the appellant's representative did not argue that the appellant had a reasonable excuse on the basis of what was said on the website (because the FTT said that the appellant did not claim to have a defence of

reasonable excuse) - but that is unsurprising if her representative like the FTT did not notice that the website was incorrect.

32. For the respondent Mr McGowan makes two important points. The first is that the appellant was obviously not relying on this misinformation when she applied for an HMO licence in August 2020. I accept that; but if – as Mrs Delbourgo suggested – she relied upon the website in summer 2021, and if as she said in her witness statement Ms Olumide left in June 2021, the appellant would certainly have been misled by the website into believing she did not need a licence. As Ms Delbourgo said, that would explain why she took no further steps to regularise the position: she checked the website and could see that with only two tenants she did not need a licence (or so Mrs Delbourgo argued; what the appellant said she did is not known because the FTT did not record the evidence). Mr McGowan agreed that if that is what happened then she would have a defence of reasonable excuse from the point when Ms Olumide left.

33. Second, Mr McGowan says that even if the appellant did look at the website in June 2021, she has alleged a different misunderstanding; she said the website indicated that three households had to be present for the additional licensing requirement to bite. In other words she alleged a misunderstanding about households, not a misunderstanding about tenure.

34. I am unimpressed by that point. The hearing before the FTT took place in July 2023, two years after the appellant is said to have looked at the website. Two years on she may have misremembered the wording, while recalling correctly that she thought she did not need a licence because she had only two of whatever-it-was, not three. As we saw from the FTT's decision itself (FTT's paragraph 12, quoted at paragraph 20 above) it is not difficult to get the requirements muddled.

35. Again: the Tribunal is hampered because it does not know what the appellant's evidence was. At the very least the FTT's decision has to be set aside because it does not explain why, having asserted at the hearing that she had been misled by the website, the appellant did not have the defence of reasonable excuse from the point when Ms Olumide left. In addition, the FTT made an error of law in reading the local housing authority's website as a correct explanation of the legal position when it was not. It may be, depending upon what the appellant's evidence was, that the FTT also failed to take into account relevant evidence which would have demonstrated that the appellant had the defence of reasonable excuse from when Ms Olumide left.

36. It is not possible for the Tribunal to substitute its own decision on this point, first because the FTT neglected to make a finding of fact about when Ms Olumide left (see paragraph 21 above) and second because it is not known what the appellant's evidence was about the website, and in particular about when she looked at it and what effect that had upon her actions.

The amount of the rent repayment order

37. As to the amount of the rent repayment order, Mrs Delbourgo made three points.

38. The first was that if the actions taken by the appellant, and the misunderstanding arising from the website, did not amount to the defence of reasonable excuse then they should have been taken into account as matters of mitigation. The second was that the FTT took

no account of the appellant's very straitened financial circumstances, despite there being evidence in the bundle in the form of a schedule of her income and outgoings. Mrs Delbourgo referred to *Daff v Gyalui* [2023] UKUT 134 where the Tribunal (the Deputy President, Martin Rodger KC) referred to the need in some cases for the FTT to take an "inquisitorial approach" and question a landlord about their financial circumstances where necessary. The third was that the FTT made an error of law in failing to deduct so much of the rent as was paid for the utilities consumed by the tenant in accordance with the Tribunal's decision in *Acheampong*.

39. Mr McGowan argued that since the FTT was not taken to the appellant's financial schedule by her legal representative it was acceptable for it not to say anything about it in its decision. He pointed out that the landlord in *Daff* had provided substantial information about her circumstances whereas in the present case the appellant provided very little. As to the utilities he conceded that the FTT made an error of law in that respect (as explained in the Tribunal's decision in *LDC (Ferry Lane) GP3 Ltd v Garro and others* [2024] UKUT 40 (LC) and in *Newell v Abbott* [2024] UKUT 181 (LC) (both decisions of the Deputy President, Martin Rodger KC).

40. As the FTT's decision has to be set aside in any event because of the failure to address the potential defence of reasonable excuse arising from the incorrect information on the website, I need not say very much about these points. As to Mrs Delbourgo's first point, it is difficult to see how the appellant's efforts, unsuccessful though they were, to regularise her position might not be regarded as mitigation even if she did not have a defence of reasonable excuse. Had the first ground of appeal failed I would have allowed it on this point.

41. As to the appellant's financial circumstances, the statute (section 44(4) of the 2016 Act, see paragraph 11 above) requires the FTT to take them into account. Even in a case such as this one where the landlord was represented and the point was not raised, it is surprising that the FTT did not ask the advocate whether there was any material in the evidence or the bundle about the landlord's means. Had it done so it would no doubt have been taken to the relevant page in the bundle. That would not have been an inquisitorial or in any way an unusual approach and might be regarded as a sensible way for the FTT to assure itself that it was complying with the statutory requirements. As to the utilities I need say no more in light of the Tribunal's decisions referred to above.

42. As things stand the matter has to be remitted to the FTT for a re-hearing, and no doubt at a re-hearing the points above will be borne in mind.

Conclusion

43. The FTT's decision is set aside, and the matter is remitted to the FTT for a re-determination by a different panel.

Upper Tribunal Judge Elizabeth Cooke

4 October 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.