

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

***HOUSING – RENT REPAYMENT ORDER - First-tier Tribunal’s failure to make a decision
– defence of reasonable excuse***

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

BETWEEN:

**MS LAREN RHODES
MS REBECCA QUILTER**

Appellants

and

MR GUY MANNERING

Respondent

**Re: Flat 6,
Latimer Gate,
Bernard Street,
Southampton,
SO14 3ER**

**Judge Elizabeth Cooke
Determination on written representations**

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Introduction

1. This is an appeal from a decision of the First-tier Tribunal (“the FTT”), on 11 November 2019, refusing to make a rent repayment order in favour of the appellants. They have been tenants of the respondent at his property, Flat 6 Latimer Gate, Bernard Street, Southampton and they sought a rent repayment order for the period 1 October 2018 to 16 March 2019. They say that during that period the property was a house in multiple occupation requiring a licence under the Housing and Planning Act 2016, and that the respondent was committing the criminal offence of managing or being in control of it when it did not have a licence.
2. The Tribunal gave permission to appeal on 5 February 2020 and directed that the appeal be determined on written representations as a review of the FTT’s decision. Representations have been written for the appellants by Flat Justice. The respondent has chosen not to take part in the appeal but has provided a copy of the bundle that he presented to the FTT.
3. In the paragraphs that follow I set out the relevant law, summarise the facts, explain the decision of the FTT and discuss the grounds of appeal.

The legal background

4. Section 72(1) and (5) of the Housing Act 2004 (“the 2004 Act”) provide:

“(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) and is not so licensed.

(5) In proceedings against a person for an offence under subsection (1) ... it is a defence that he had a reasonable excuse—

(a) for having control of or managing the house in the circumstances mentioned in subsection (1) ...”

5. An “HMO” is a house in multiple occupation, defined in section 254 of the 2004 Act using a number of “tests”. The “standard test” in subsection (2) states that a building or part of a building is an HMO 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.

6. Section 258 of the 2004 Act says:

(1) This section sets out when persons are to be regarded as not forming a single household for the purposes of section 254.

(2) Persons are to be regarded as not forming a single household unless—

(a) they are all members of the same family, or

(b) their circumstances are circumstances of a description specified for the purposes of this section in regulations made by the appropriate national authority.

(3) For the purposes of subsection (2)(a) a person is a member of the same family as another person if—

(a) those persons are married to, or civil partners of, each other or live together as if they were a married couple or civil partners;

(b) one of them is a relative of the other; or

(c) one of them is, or is a relative of, one member of a couple and the other is a relative of the other member of the couple.

(4) For those purposes—

...

(b) “relative” means parent, grandparent, child, grandchild, brother, sister, uncle, aunt, nephew, niece or cousin;

...”

7. Paragraph 6 of Schedule 14 to the Housing Act 2004 states that the following is not an HMO:

“(1) Any building which is occupied only by persons within the following paragraphs—

- (a) one or more persons who have, whether in the whole or any part of it, either the freehold estate or a leasehold interest granted for a term of more than 21 years;
 - (b) any member of the household of such a person or persons;
 - (c) no more than such number of other persons as is specified for the purposes of this paragraph in regulations made by the appropriate national authority.”
8. Section 61 of the 2004 Act requires every HMO to which Part 2 of the 2004 Act applies to be licensed, subject to certain exemptions that are not relevant here. Section 55(2) says that Part 2 of the 2004 Act applies to:
 - a. any HMO falling within any prescribed description of HMO, and
 - b. any HMO in an area that is designated under section 56 as subject to additional licensing if it is within the description specified in the designation.
 9. Regulations made under section 61 prescribe descriptions of HMO for that purpose, and include a requirement that the building is occupied by five or more persons living in two or more separate households. However, on 1 October 2018 the Southampton City Council, as the local housing authority, made a designation under section 56, which required the licensing of HMOs occupied by three or more persons in two or more separate households.
 10. Section 40 of the Housing and Planning Act 2016 (“the 2016 Act”) states:
 - “(1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence to which this Chapter applies.
 - (2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to—
 - (a) repay an amount of rent paid by a tenant, or
 - (b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy.”
 11. Among the relevant offences is the HMO licence offence created by section 72(1), set out above.
 12. Section 43 provides that the FTT may make a rent repayment order if it is satisfied beyond reasonable doubt that the offence has been committed

The facts

13. The facts so far as relevant can be briefly stated. Flat 6 Latimer Gate is an apartment with three bedrooms over three storeys within a larger house. The two appellants each rented a room in the apartment, sharing kitchen facilities and a lounge; the FTT found as a fact that Ms Rhodes occupied the property under a “Lodging Agreement” dated 1 April 2018, stated as beginning on 1 December 2017, paying £650 per month and that Ms Quilter occupied under a similar “Lodgings Agreement” dated 1 May 2017, stated as beginning on 1 July 2017 paying £750 per month. The FTT found that they were tenants. They left the property in the summer of 2019.
14. It is not in dispute that the property is within the additional licensing area referred to at paragraph 8 above with effect from 1 October 2018.
15. It is not in dispute that from September 2018 to mid-March 2019 the third bedroom in the property was occupied by John McDonald. That is the basis of the applicants’ application for a rent repayment order. It appears that in March 2019 officers of the City Council visited the property, and on finding three tenants there took the view that it was an unlicensed HMO. The respondent did not accept this but asked Mr McDonald to leave, which he did on 16 March 2019.

The decision of the FTT

16. The FTT in its decision of 11 November 2019 set out the factual background. It noted that the applicants had produced a letter from Mr Angus Young, an Environmental Health Officer of the City Council, dated 24 June 2019 confirming that he had visited the property in March 2019 and found three tenants there but had taken no enforcement action after one of the tenants left in March. The applicants also produced a witness statement from Mr Young which said that City Council officers had visited the property on 13 March 2019 and found it to be an unlicensed HMO.
17. It was the respondent’s evidence before the FTT that he had understood that that was not the case, on the basis of the provisions of paragraph 6 of Schedule 14 to the 2004 Act, quoted above. He referred to the City Council’s website which stated:

“A resident landlord and/or family can have up to two lodgers living in the house. If you have three or more lodgers the house will require an HMO licence.”
18. The respondent’s case was that the property was his home, that he had two lodgers, and that Mr McDonald was a relative and a member of his household. If that was true then of course he fell within the “resident landlord exemption” set out in Schedule 14. It is not in dispute that the respondent married Mr McDonald’s sister in September 2019. It has not been suggested that they are otherwise related.
19. The FTT summarised the respondent’s evidence as follows:

“7. The Respondent broadly stated in his statement ... that he believed the Property was not classed as an HMO, and that at the time of the claim being September 2018 to mid-March 2019, his “brother-in-law” John McDonald, stayed in the Property, but that as a result of Paragraph 6(1)(b) of Schedule 14 of the Housing Act 2004, he submitted that the Property was being occupied by a member of the owner’s household and was therefore excluded from being an HMO. The Respondent further stated that the Property is his primary residence, and that he is employed full time as a captain of a private motor yacht, working abroad for up to 11 months of the year, as was the case, he said, during the period September 2018 to mid-March 2018. The Respondent further said that his brother-in-law was never asked to sign a lodgers agreement, and “never directly” paid any rent. The Respondent also referred to an email dated 1 October 2019 from Chris McGeehan an HMO Licensing Surveyor at the Council, stating:

“The information given to us at the time indicated that the property was in use as an HMO as indeed the third tenant was described as a friend which would make them not part of our household. My Interpretation is that were that person your brother-in-law (or equivalent at the time) then indeed the property would not have been an HMO...””

20. The FTT noted that the applicants did not accept the evidence that this was the respondent’s primary residence.

21. The FTT concluded:

“22. The evidence produced by the Council is directly contradictory: whilst Mr Young said in his formally made witness statement of 8 October 2019, that the Property was operating as an unlicensed HMO since September 2018 and until 16 March 2019 when Mr McDonald vacated, Mr McGeehan also of the Council, had said in an email dated 1 October 2019 that his interpretation as that if Mr McDonald was the Respondent’s brother-in-law (or equivalent at the time) then indeed the property was not an HMO. ...

23. In circumstances where there have been directly conflicting views and advice provided by the Council, including the statement to Mr Mannering by an officer of the Council, being an HMO Licensing Surveyor of that Council, that the property would not in the circumstances described, have been an HMO, and without having the benefit of either Council officer being present to respond to questions, the Tribunal cannot be satisfied beyond a reasonable doubt that the Respondent as landlord has committed the offence of letting an HMO without a licence.”

22. Accordingly the FTT refused to make a rent repayment order.

The appeal

23. The appellants have permission to appeal on the ground that the FTT failed to make its own decision on the evidence as to whether an offence had been committed.
24. That is manifestly the case. The FTT made no findings of fact as to whether the respondent was living at the property, and did not engage with the question how Mr McDonald could have been regarded as a member of the respondent's family at a time when the two were unrelated nor, if he was a family member, whether he was a member of the respondent's household (which is a different issue). There was no reason for the FTT to attach any relevance to the email sent by Mr McGeehan to the respondent; Mr McGeehan did not himself give evidence to the FTT and in any event his opinion evidence would have been irrelevant. It was for the FTT to decide whether the elements of the offence had been proved - to the criminal standard of proof as the 2004 Act requires - and whether the defence of reasonable excuse (section 72(5) of the 2004 Act, set out above) might have been made out. It seems to have been deterred from doing so by an irrelevant consideration, namely Mr McGeehan's opinion.
25. Accordingly the appeal succeeds. The FTT's decision is set aside and the matter is remitted to the FTT; in light of the obvious issues of credibility it is not open to the Tribunal to substitute its own decision for that of the FTT.
26. Because the appellants have been successful on appeal, I am minded to make an order that the respondent reimburse the fees they have paid to the Tribunal; if he wishes to argue that he should not do so he may make representation within 14 days of the date this decision is sent to him by the Tribunal.

Judge Elizabeth Cooke

29 June 2020