UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2016] UKUT 0071 (LC)
Case Nos: HA/5/2015, HA/17/2015

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – HOUSE IN MULTIPLE OCCUPATION – licence conditions – whether conditions restricting use of under-sized bedroom to student or other person living as part of a group may lawfully be imposed - s.67, Housing Act 2004 – appeals dismissed

BETWEEN :

NOTTINGHAM CITY COUNCIL

Appellant

- and -

DOMINIC PARR
TREVOR PARR ASSOCIATES LIMITED

Respondents

- -

Re: 44 Rothesay Avenue, Nottingham NG7 1PU
50 Bute Avenue, Nottingham NG7 1QA

Determination on written representations

Martin Rodger QC, Deputy President

The following case is referred to in this decision:

Clark v Manchester City Council [2015] UKUT 0129 (LC)

Introduction

1. Is it lawful for an HMO licence to restrict the use of a bedroom to a particular category of occupier, such as students? In these appeals the first-tier tribunals thought that it was, but the local housing authority disagrees and challenges the terms of the licences granted by the tribunals.

The statutory framework

2. Part 2 of the Housing Act 2004 is concerned with the licensing of houses in multiple occupation ("HMOs"). Subject to minor exceptions section 61(1) requires every HMO to which Part 2 of the Act applies to be licensed. By section 63(1) an application for a licence must be made to the local housing authority, which is required by section 64(1) to grant a licence if it is satisfied of certain matters mentioned in section 64(3). One of those matters is that the house must be reasonably suitable for occupation by not more than the maximum number of households or persons specified in the application (or some other maximum number decided by the authority), or can be made suitable by the imposition of conditions under section 67.

3. A licence may include such conditions as the local housing authority consider appropriate for regulating all or any of the following matters specified in section 67(1):

(a) the management, use and occupation of the house concerned, and

(b) its condition and contents.

Section 67(2) provides examples of particular conditions which may be imposed; these include, at (a), "conditions imposing restrictions or prohibitions on the use or occupation of particular parts of the house by persons occupying it." By section 67(5) a licence may not include conditions imposing restrictions or obligations on a particular person other than the licence holder unless that person has consented.

4. The period for which a licence may be granted must not exceed 5 years (section 68(4)). It is an offence for a licence holder to fail to comply with any condition of the licence (section 72(3)).

5. The procedure for granting licences, and for appeals, is prescribed by Schedule 5 of the Act. By paragraph 31 a party dissatisfied with any of the terms of a licence granted by a local housing authority may appeal to the F-tT. By paragraph 34 such an appeal is to be by way of a re-hearing, and may be determined having regard to matters of which the authority were unaware. The F-tT may confirm, reverse or vary the decision of the authority and direct that it grant a licence on such terms as the tribunal may decide.

6. Appeals to the Upper Tribunal from decisions of the F-tT concerning HMO licensing are brought under section 11 of the Tribunals, Courts and Enforcement Act 2007 and are appeals on any point of law only.

The facts

7. The appellant is a local housing authority and the respondents are the holders of licences granted by the appellant for HMO's in its area.

8. Both respondents are in the business of providing accommodation for students. The first appeal concerns a house at 44 Rothesay Avenue, Nottingham which is owned by Mr Parr. His company, Trevor Parr Associates Limited, owns the house at 50 Bute Avenue, Nottingham which features in the second appeal.

9. As originally designed 44 Rothesay Avenue had five bedrooms, and 50 Bute Avenue had four, but in each case the respondents have carried out alterations to create an additional bedroom in what was formerly attic space.

10. The appellant considers that $8m^2$ is the minimum acceptable size for a bedroom in an HMO, and in carrying out its measurements it disregards all space with a floor to ceiling height of less than 1.53m. Each of the attic bedrooms has a sloping ceiling which reduces the area regarded by the appellant as useable living space below $8m^2$. At 44 Rothesay Avenue the attic room has a total floor area of $9.75m^2$ but, due to the sloping ceiling, only $5.89m^2$ has a floor to ceiling height of 1.53m or more. The room at 50 Bute Avenue has a floor area of approximately $11m^2$ of which $6.89m^2$ has a ceiling height of greater than 1.53m.

11. In each case the appellant granted a new HMO licence which imposed a condition prohibiting the use of the attic bedroom for sleeping. Paragraph 36 of the licence for 44 Rothesay Avenue, provided:

> "That the second floor front bedroom be prohibited for the use of sleeping. This room will not be allowed for the use for sleeping until it has provided by way of alteration, adaptation or extension a useable floor surface area of $8m^2$ within a minimum ceiling height of 1.53m below the sloping ceiling from the floor."

The licence for 50 Bute Avenue limited the number of persons permitted to occupy the HMO to a maximum of 5 and provided, by paragraph 38, that:

> "The second floor front bedroom is not to be used as a sleeping room except where it is let in combination with another room within the property in such a way as to provide the occupant with the exclusive use of two rooms."

The restriction in paragraph 38 was supplemented by further conditions which contemplated that the restriction on sleeping in the room might be removed if alterations were carried out to increase the size of the room to $8m^2$ (excluding any area where the ceiling height is below 1.53m).

The proceedings

12. In each case the respondent appealed to the First-tier Tribunal (Property Chamber) ("the F-tT") seeking the removal of the prohibition on the use of the attic bedroom as sleeping accommodation. After inspecting the HMOs and considering the parties' written submissions, but without an oral hearing, differently constituted tribunals published their decisions on 5 November 2014 in the case of 44 Rothesay Avenue, and on 6 May 2015, in the case of 50 Bute Avenue.

13. The F-tTs allowed both appeals and deleted the relevant conditions. In the licence for 44 Rothesay Avenue the F-tT substituted an alternative condition of its own, namely that:

> "The second floor front bedroom may only be used for sleeping accommodation by a person engaged in full-time education and who resides in the dwelling for a maximum period of 10 calendar months over a period of one year."

No such condition was explicitly imposed in the licence for 50 Bute Avenue although in paragraph 58 of its decision the F-tT justified its conclusion by saying that "there are sufficient compensating features in the property to make it suitable for students or similar cohesive occupation for six persons in six households."

14. Each decision includes a comprehensive description of the property and the relevant attic room. Careful measurements were taken by the F-tT in the first case and dimensions were agreed between the parties and recorded in the decision in the second. Apart from the differences in the conditions which I have already mentioned the two decisions are very similar, and the second was obviously written after consideration of the first. Each decision included an almost identical assessment of the relevant bedroom. In the case of 44 Rothesay Avenue the F-tT said:

> "The area of the relevant bedroom having a height of less than 1.53m was utilised to accommodate a desk and for storage. The relevant room includes a double bed, desk, chest of drawers, bedside table, bookshelves and a built-in wardrobe. The pitch of the roof slope was such that it appeared possible to use the desk without undue risk of collision and any such risk could be reduced further by placing a chair in the area beneath the pitched roof window thereby eliminating the risk of collision when rising from the chair. The head of the bed was fitted under that part of the room with reduced height. A risk of collision could be avoided by turning the bed through 180º. The risk of collision when changing the bed linen could be avoided by pulling the bed out of the area with reduced headroom prior to performing that task."

The assessment in relation to 50 Bute Avenue was to identical effect.

15. The F-tTs referred in their decisions to the guidance issued by the appellant to its own housing officers, which includes the statement that:

> "Bedrooms in each HMO where there is adequate dining space elsewhere and where cooking facilities are not provided in the room, in respect of a one-person room, shall be a minimum of $8m^2$….. A degree of flexibility will sometimes be possible if other compensating features are present… The shape and useable living space is also a relevant factor."

The tribunals also referred to the appellants' reliance on a professional practice note on amenity standards for HMOs published by the Institute of Environmental Health Officers in September 1994. The Institute recommended a minimum bedroom size of 6.5m^2 in HMOs occupied on a shared basis, normally by members of a defined social group such as students or young single adults who enjoyed exclusive use of a bedroom but would share other facilities including a communal living space. It referred to HMOs occupied in that way as "category B houses".

16. Both tribunals found that the appellant's guidance on space provision for HMO's was reasonable as general guidance, but noted that some flexibility was permitted if other compensating features were present. They considered that in each of the rooms the area with the reduced headroom was of some value for the uses already described. It would be "arbitrary" to dismiss the value of those areas summarily; what was required was an assessment of the particular characteristics of the individual room, because "while in many instances such space may indeed be of little value and thus quite properly disregarded, that is not universally the case."

17. The tribunals next took into account the communal living space in the respective HMOs. In both cases this was significantly larger than the minimum contemplated by the appellant's own requirements for additional living space. The F-tTs regarded this "over-provision" as a compensating feature which could be taken into account in applying the appellant's own guidance, although they refused to treat external space as significant, despite its availability for bicycle storage. Each F-tT concluded that the attic rooms were adequate as study/bedrooms "where cohesive living is envisaged" and that there were sufficient compensating features in the HMOs to make them suitable for "student or similar cohesive occupation for six persons in six households."

The appeals

18. The Tribunal granted permission to appeal on two grounds. The first, in summary, is whether the F-tTs were wrong in law to distinguish between different types of occupants when framing the licence conditions for the HMOs. The appellant contends that the willingness of a particular group of occupiers, such as students, to accept lower standards of accommodation, and the willingness of a licensee to restrict occupation to such occupiers, are not relevant considerations and should not be taken into account in formulating licence conditions. It also submits that in the case of 44 Rothesay Avenue it was not permissible to impose a restriction on occupation of the relevant rooms for only 10 months out of 12. The appellant's case is that conditions which inhibit the use of an HMO for occupation by the specified number of households, of any type, for the full five year term of a licence, are unlawful.

19. Permission to appeal was also granted in the Rothesay Avenue case on the additional ground that the condition was unenforceable. It is said to be impossible for the appellant to police compliance with the condition restricting the use of the attic room to persons in full time education and in occupation for no more than ten months of the year without visiting the HMO on a very regular basis.

20. Section 67(1)(a) and (2)(a) of the 2004 Act provide that a licence may include conditions for regulating the management, use and occupation of an HMO, and that these may impose restrictions or prohibitions on the use or occupation of particular parts of the HMO by persons occupying it. The appellant nevertheless submits that a condition limiting the use of part of an HMO to a particular category of occupier is unlawful. It points out that sections 64 and 65 (which deal respectively with prescribed standards for occupation and suitability to manage an HMO) both refer to "persons" and do not distinguish between different categories of potential occupiers. No reference is made in the Act to a lesser standard being suitable for a property occupied by some categories, such as students or others whose mode of occupation might be described as "cohesive". On the contrary the purpose of the Act is to protect occupiers from the consequences of poor quality living accommodation by the application of objective standards. The willingness of an individual or category of occupiers to accept lower standards therefore cannot be a relevant factor in HMO licensing.

21. In each of the appeals the appellant also contends that the undersized room ought not to have been regarded as suitable for occupation as a bedroom at all, and that the compensatory features found by the F-tTs were insufficient to overcome the deficiency in size. The question for the F-tT in each case was whether the houses were reasonably suitable for use as HMOs for the specified numbers of occupiers. In each case the F-tT was satisfied, following an inspection, that the house was suitable for six occupiers, subject only to the conditions I have mentioned. This is an appeal on a point of law only, and if those conditions were lawful it is not for this Tribunal to substitute its own view for that of the F-tT.

22. For their part, the respondents do not dispute the entitlement of the appellant to formulate guidance to be applied by its own officers, but a failure to apply that guidance in an appropriate case is not an error of law because, as the guidance itself acknowledges, it must be applied with some flexibility if the circumstances of a particular case so require.

23. In *Clark v Manchester City Council* [2015] UKUT 0129 (LC) the Tribunal confirmed that a local housing authority was entitled to give guidance on the factors it would take into account in determining whether a house was reasonably suitable for use as an HMO by a certain number of occupiers, including guidance which identified room dimensions which would ordinarily be regarded as too small to provide adequate sleeping accommodation. The Tribunal nevertheless drew attention to the over-arching statutory consideration that the HMO as a whole must be reasonably suitable for occupation by not more than the maximum number of households or persons specified, and at paragraph 49 said that:

> "Such guidance should not exclude the possibility that a room which falls short of the recommended size will nonetheless be capable of being taken into account as sleeping accommodation if other circumstances mean that, viewed as a whole, the house is reasonably suitable for the stated number. Guidance on how space with restricted head height, such as beneath a slopping ceiling, ought to be treated is also appropriate, but again subject to the possibility of exceptions."

In considering the weight to be given to such guidance, and having regard to the fact that an appeal to the F-tT proceeds as a re-hearing, the Tribunal suggested, at paragraph 53, that:

> "In every case the views of the local housing authority will be relevant and merit respect, but once the tribunal has carried out its own inspection and considered all of the characteristics of the property, including the size and layout of individual rooms and any compensating amenities it will be in a position to make its own assessment of the suitability of the house for the proposed number of occupiers."

Neither party in this appeal challenges those observations. The question is, however, whether in licensing an HMO for a specified number of households an authority, or the F-tT on appeal, may restrict the use of a particular part of the HMO to persons having particular characteristics.

24. I sympathise with the appellant's contention that it would be dangerous for the subjective wishes of a particular occupier or category of occupiers to be given weight in the formulation of licence conditions. In areas of housing shortage such an approach would create a risk that individuals or groups who were willing to accept sub-standard accommodation because of the difficulty of finding anything else may be deprived of the protection which the Act is designed to provide. But while the subjective wishes of particular occupants are not legitimate consideration when formulating licence conditions, I do not think that is a criticism which can be made of decisions in these appeals.

25. It is quite a different thing to take into account the subjective views of individuals, and to have regard to the suitability of an HMO for occupation by a particular category of occupier. The categorisation of HMOs before the 2004 Act clearly recognised that, and the same awareness is apparent in guidance published with the current regime in mind. Obviously none of that guidance can change the meaning of the legislation, but it provides a useful point of reference.

26. The 1994 practice note published by the Institution of Environmental Health Officers demonstrated a clear awareness of different modes of occupation. It described "category B houses" as "houses occupied on a shared basis". These would normally be occupied by members of a defined social group e.g. students or a group of young single adults. The occupiers would each enjoy exclusive use of a bedroom but would share other facilities including communal living space. The anticipated duration of the occupancy would often be finite and occupiers may spend periods of it (e.g. vacations) away.

27. The current amenity standards published by the appellant in conjunction with other East Midlands authorities also recognise that different facilities may be required for different modes of occupation; for example, "in HMOs where the occupants tend to live separately there should ….. be a sink/wash hand basin within the living units."

28. In support of their case the respondent provided extracts from the guidance published by a number of local authorities in England which apply different considerations (or a greater degree of flexibility) to the licensing of houses for students. A good example is Birmingham which adopts a minimum room standard of 6.5m^2 where communal living space is provided but notes "that many houses that are used to provide shared accommodation for students may have one bedroom which is marginally below the required floor area of 6.5m^2. In such cases it is acceptable to allow for up to 10% shortfall in floor areas" if certain other conditions are met. Those conditions included that the

occupiers must have approached the landlord as a group wishing to rent the house under the terms of a joint contract and must decide amongst themselves who will occupy the smallest room. Exeter's HMO standards are said to be "adjusted" when they are applied to "shared-house HMO's to make them more suited to the type of living pattern occurring in these properties." A shared-house HMO is described as one where, although they are unrelated to one another, the occupiers live in a similar way to a family. Typically the house would have been rented by a group of sharers such as students or work colleagues, each occupant would have his or her own bedroom and would share the other facilities of the house, and there would usually be a significant level of social interaction.

29. These examples of guidance by local housing authorities modifying space standards for particular modes of occupation are not in any way related to the views of specific individuals, but they do recognise that certain categories of occupier may wish to occupy accommodation in a particular way. Certain types of accommodation may lend themselves to different styles of occupation and it would be surprising if the Act did not reflect that. Section 67 permits licence conditions relating to the "use and occupation" of the housing concerned, and specifically contemplates that different restrictions may apply to the use and occupation of particular parts of a house. The purpose of all conditions is to ensure that the HMO is suitable for the number of persons permitted to occupy it, and I can therefore see nothing unlawful in formulating a condition applicable to a particular mode of occupation by a category of occupiers if the house is suitable for them in greater numbers than it is for a different mode of occupation. I reject the appellant's submission that the Act requires that an HMO must be capable of occupation by all potential occupiers.

30. In the case of 44 Rothesay Avenue the F-tT formulated a specific condition requiring that the attic room be used as sleeping accommodation only "by a person engaged in full-time education and who resides in the dwelling for a maximum period of 10 calendar months over a period of 1 year." It is clear from the reasons given for the decision that the condition was formulated on the basis that the property was one "where cohesive living is envisaged". By "cohesive living" the F-tT clearly had in mind the level of shared activity and social interaction to be expected in a "shared-house" or "Category B" HMO, as described at greater length in the policy documents of other local authorities.

31. I am satisfied that there is nothing unlawful in a condition restricting the use of sleeping accommodation in part of an HMO to a person in full-time education, if the decision maker is satisfied that, looked at as a whole, the HMO is suitable for the number of households specified in the licence. An alternative condition, perhaps more closely reflecting the reason for permitting the use of a room smaller than would normally be acceptable, might require that the occupiers be members of a group who intend to share the communal living space, but I do not think the reference to students makes the condition unlawful.

32. Nor do I consider that the references to "cohesive living" and the restriction in the use of the bedroom to a period of 10 months in the year are unlawful. The concept of "cohesive living" is capable of being described in a number of different ways but the basic idea of a house shared by a number of individuals, not forming a family, but who nevertheless wish to share, communal living facilities and enjoy a significant level of social interaction is readily understood. The time limit is more difficult to police but not to an unreasonable extent, as the contracts under which these HMOs are occupied are required by other conditions of the licences to be made available to the appellant for

inspection and it is normally to be expected that a person in full time education may spend a significant period of the year elsewhere during university vacations. Once again I do not think that the addition of this restriction makes the condition as a whole unlawful. If I had accepted the appellant's submission that the time limit is impossible to police and ought therefore not to have been included, the more appropriate solution would be to delete the 10 month restriction, rather than permanently to prohibit the use of the room as a bedroom.

Disposal

33. I will therefore dismiss both appeals. In the case of 50 Bute Avenue I have already noted that the F-tT's decision omitted any restriction at all on the use of the attic room, despite indicating in its reasoning that the room was adequate as a study/bedroom and that the problems envisaged by the appellant could be overcome by the insertion of an appropriate condition in the licence. It may be that the omission was unintentional but in any event I consider it is appropriate to give fuller effect to the F-tT's reasons by directing the appellant to grant the licence on the conditions previously approved by the F-tT but including the following additional condition:

> "The second floor front bedroom may only be used for sleeping accommodation by a person engaged in full-time education and who resides in the dwelling for a maximum period of 10 calendar months over a period of one year."

Martin Rodger QC

Deputy President

9 February 2016