Neutral Citation Number: [2016] UKUT 0039 (LC)
Case No: HA/15/2015

IN THE UPPER TRIBUNAL
(LANDS CHAMBER)

Royal Courts of Justice
Strand
London WC2A 2LL

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – Houses in Multiple occupation –HMO declarations

BETWEEN :

HEREFORDSHIRE COUNCIL **Applicant**

- and -

MARTIN ROHDE

Respondent

- -
- -

Christopher Lane, for the **Applicant**
The **Respondent** did not appear and was not represented

Hearing date: 13 January 2016

Before :

Judge Elizabeth Cooke sitting as a Judge of the Upper Tribunal

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DECISION

Introduction

1. On 6 October 2014 the Appellant, Herefordshire Council, served on the Respondent, Mr Rohde, a declaration that his property at 97 Brampton Road, Hereford, was a house in multiple occupation. I refer to that Declaration as "the HMO Declaration". Mr Rohde appealed to the First-tier Tribunal, and by a decision of 16 February 2015 the First-tier Tribunal revoked the HMO Declaration. The Appellant now appeals that revocation.

2. The appeal was heard before me at the Royal Courts of Justice on 13 January 2016. Mr Christopher Lane of counsel represented the Appellant, having served a skeleton argument and provided an appeal bundle (which includes the bundle provided to the First-tier Tribunal). Mr Rohde has taken almost no part in the appeal proceedings, save for a letter dated 24 October to which I shall refer later. He has not filed a respondent notice or statement of case; he did not attend the hearing before me and was not represented. At the close of the hearing I gave my decision, reserving my reasons.

The legal background, and the grounds for appeal

3. The regulation of houses in multiple occupation aims to ensure that decent conditions are provided for tenants. The legislation is to be found in the Housing Act 2004, and the provisions relevant to this appeal – which relate simply to how a "house in multiple occupation" is identified – are as follows:

> **254 Meaning of "house in multiple occupation"**
>
> (1) For the purposes of this Act a building or a part of a building is a "house in multiple occupation" if—
>
> (a) it meets the conditions in subsection (2) ("the standard test");
> (b) it meets the conditions in subsection (3) ("the self-contained flat test");
> (c) it meets the conditions in subsection (4) ("the converted building test");
> (d) an HMO declaration is in force in respect of it under section 255; or
> (e) it is a converted block of flats to which section 257 applies.
>
> (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.

[subsections (3) and (4) define the "self-contained flat test" and the "converted building test", neither of which is relevant to this appeal; nor are the provisions of sub-sections (5), (6), (7) and (8)]

255 HMO declarations

(1) If a local housing authority are satisfied that subsection (2) applies to a building or part of a building in their area, they may serve a notice under this section (an "HMO declaration") declaring the building or part to be a house in multiple occupation.

(2) This subsection applies to a building or part of a building if the building or part meets any of the following tests (as it applies without the sole use condition)—

(a) the standard test (see section 254(2)),

(b) the self-contained flat test (see section 254(3)), or

(c) the converted building test (see section 254(4)),

and the occupation, by persons who do not form a single household, of the living accommodation or flat referred to in the test in question constitutes a significant use of that accommodation or flat.

(3) In subsection (2) "the sole use condition" means the condition contained in—

(a) section 254(2)(d) (as it applies for the purposes of the standard test or the self-contained flat test), or

(b) section 254(4)(e),

as the case may be.

[Subsections (4) to (8) relate to the content of the notice and to the date on which it takes effect]

(9) Any relevant person may appeal to a residential property tribunal against a decision of the local housing authority to serve an HMO declaration.

The appeal must be made within the period of 28 days beginning with the date of the authority's decision.

(10) Such an appeal—

(a) is to be by way of a re-hearing, but

(b) may be determined having regard to matters of which the authority were unaware.

(11) The tribunal may—

(a) confirm or reverse the decision of the authority, and

(b) if it reverses the decision, revoke the HMO declaration.

(12) In this section and section 256 "relevant person", in relation to an HMO declaration, means any person who, to the knowledge of the local housing authority, is—

(a) a person having an estate or interest in the building or part of the building concerned (but is not a tenant under a lease with an unexpired term of 3 years of less), or

(b) a person managing or having control of that building or part (and not falling within paragraph (a)).

256 Revocation of HMO declarations

(1) A local housing authority may revoke an HMO declaration served under section 255 at any time if they consider that subsection (2) of that section no longer applies to the building or part of the building in respect of which the declaration was served.

(2) The power to revoke an HMO declaration is exercisable by the authority either—

(a) on an application made by a relevant person, or

(b) on the authority's own initiative.

…

(4) A person who applies to a local housing authority for the revocation of an HMO declaration under subsection (1) may appeal to a residential property tribunal against a decision of the authority to refuse to revoke the notice.

…

(6) The tribunal may—

(a) confirm or reverse the decision of the authority, and

(b) if it reverses the decision, revoke the HMO declaration.

260 HMOs: presumption that sole use condition or significant use condition is met

(1) Where a question arises in any proceedings as to whether either of the following is met in respect of a building or part of a building—

(a) the sole use condition, or
(b) the significant use condition,

it shall be presumed, for the purposes of the proceedings, that the condition is met unless the contrary is shown.

(2) In this section— …

(b) "the significant use condition" means the condition contained in section 255(2) that the occupation of the living accommodation or flat referred to in that provision by persons who do not form a single household constitutes a significant use of that accommodation or flat.

4. The provisions of section 254 are modified by paragraph 7 of Schedule 14 to the Housing Act 2004 which states that any building occupied by only two persons who form two households is not an HMO.

5. The effect of these provisions is that although a building may be a house in multiple occupation because it meets certain factual criteria – for example the "standard test" in section 254(2) - it will also be a house in multiple occupation where the local authority has made an HMO declaration under section 255. Section 255 enables the local authority to make an HMO declaration if it is satisfied that the building meets the "standard test", but with an important modification: rather than having to find that all six conditions in section 254(2) are met, the local authority need only be satisfied that "the occupation, by persons who do not form a single household, of the living accommodation or flat referred to in the test in question constitutes a *significant use* of that accommodation or flat" (my emphasis) rather than the "only use" as required in section 254(2)(d). And in proceedings where there is an issue as to whether that "significant use" provision is met, section 260 provides that it is presumed to be met unless the contrary is shown.

6. In this case the Appellant issued the HMO Declaration in October 2014 in reliance on a body of evidence, which I shall discuss in due course. When the Respondent appealed to the First-tier Tribunal his appeal was determined on the papers following an inspection of the property by the Tribunal on 16 February. Its decision, of the same date, records what the Tribunal saw, namely a 1960s semi-detached house, in very poor decorative order with waste and debris in the front and back gardens and most of the rooms, one single bed in the property, and no evidence that anyone was resident. The Tribunal concluded, at paragraph 16 of its decision, that "there was no evidence of occupation by more than two persons at the date of the Tribunal's inspection on 16th February 2015 and accordingly the Tribunal revokes the HMO Declaration at that date".

7. The Appellant sought permission to appeal from the First-tier Tribunal on the basis that it had erred in law in basing its decision on what it saw on the date of inspection rather than considering the evidence on the date of the decision to serve the HMO declaration. The First-tier Tribunal refused permission, but permission was granted by the Upper Tribunal on 11 September 2015. In its grounds of appeal the Appellant articulates three reasons why the First-tier Tribunal fell into error.

8. First, it says that the First-tier Tribunal should have determined matters at the date of the declaration and not simply on the basis of its inspection at a time when the house had been cleared.

9. Second, it says that the First-tier Tribunal does not appear to have taken into account the fact that the test for a HMO declaration, set out in section 255 of the Housing Act 2004, is of "significant use" rather than of sole use (see paragraph [5] above).

10. Third, it points out that no reference was made by the First-tier Tribunal to the presumption of significant use contained in section 260 (see paragraph [5] above).

Decision on the appeal

11. The Appellant's principal argument is that the First-tier Tribunal did not do what the statute directed it to do. It revoked the HMO Declaration on the basis of what it saw when it inspected the property on 16 February 2015. The Appellant says that what it should have done was to confirm or reverse the decision to serve the HMO declaration in October 2014, and to do so on the basis not only of its inspection but also of what was available to the local authority when it made its decision. In other words, the First-tier Tribunal made a decision about the HMO Declaration whereas what it should have done was to make a decision about the local authority's decision; and in addition the First-tier Tribunal looked at insufficient material.

12. As a matter of construction of the statute that argument must be right. The First-tier Tribunal is to deal with the appeal by way of a re-hearing. It must look at the evidence, but it can also take into account new evidence of which the local authority was unaware, according to section 255(1)(b). So it is looking at matters afresh; but what it is looking at is the local authority's decision. The First-tier Tribunal may confirm or reverse that decision, and if it reverses the decision it can then revoke the HMO declaration. The First-tier Tribunal in this case did not follow the path laid out for it in section 255(11). In formal terms, it erred by revoking the HMO Declaration without first confirming or reversing the local authority's decision. But more fundamentally, it made a decision solely on the basis of the physical state of the property in February 2015, rather than taking into account all the evidence available to the local authority in addition to its own later inspection.

13. The Appellant points out that for the First-tier tribunal to make its decision solely on the basis of its inspection makes a mockery of the protection that Parliament intended to create, by making it far too easy for a landlord simply to clear the house out the day before an inspection (since, as in this case, the owner will have been told when the inspection would take place). It would also be likely to increase the incidence of hasty and perhaps unlawful evictions. I agree. My decision rests on the construction of section 255 and the statute's words about what the First-tier Tribunal is to do, but had there been any ambiguity there I would have been further persuaded by the fact that these unhelpful consequences would follow if the First-tier Tribunal could determine an appeal simply on the basis of the state of the property on the date of its inspection.

14. On that basis this appeal must succeed. I can deal very briefly with the Appellant's two other grounds. First, the First-tier Tribunal did not appear to take into account the requirement that the test for an HMO declaration is significant use, not sole use. The First-tier Tribunal's decision did refer to that test in its opening paragraph, but it made no further mention of it; indeed, the fact that it made its decision on the basis of a "spot check" indicates that it did not have in mind the fact that the HMO Declaration would be valid if the significant use test was met, even if the house stood empty on one or more days during the year.

15. Had the First-tier Tribunal had that in mind it might also have been aware of the presumption in section 260: the starting-point of the appeal has to be that the significant use test is met, unless the contrary is shown. And manifestly the contrary is not shown by the fact that on a particular occasion the house was unoccupied. No mention of that presumption is made in the First-tier Tribunal's decision.

16. Accordingly this appeal is allowed and the First-tier Tribunal's decision is reversed.

Re-determining the Respondent's appeal against the HMO Declaration

17. I am then asked by the Appellant to re-determine the Mr Rohde's original appeal against the HMO Declaration, rather than remitting it to the First-tier Tribunal for a fresh decision.

18. It follows from what I have said above that the decision to be made by this Tribunal is whether to confirm or reverse the Appellant's decision to serve the HMO Declaration on 24 October 2014, taking into account the evidence available to the Appellant at that date and also, pursuant to section 254 (1) (b), any evidence that was not available to it. Accordingly what was seen by the First-tier Tribunal in the course of its inspection on 16 February 2015 is part of what I have to take into consideration. My starting-point is the presumption that the significant use condition is met.

19. In fact it is not clear that the decision of 24 October 2014 is now in dispute. I mentioned above that Mr Rohde wrote to this Tribunal. His letter dated 24 October 2015 says:

> "I can state that I have nothing to add to THIS CASE. It has never been disputed that it WAS A HMO only prior to inspection, stated in the original response in this case". (Mr Rohde's capitals)

20. I have not been shown that "original response". But it seems to me that Mr Rohde does not dispute that the property was a house in multiple occupation before it was inspected in February 2016. However, for the avoidance of doubt I can say that, regardless of Mr Rohde's agreement, I am satisfied that the conditions set out in section 254(2), the "standard test", as modified by section 255 and the "significant use" condition, were met and that the Appellant's decision was correct and was founded on abundant evidence.

21. I have the bundle of evidence submitted to the First-tier Tribunal, containing a number of witness statements. Taking these in date order, first PC Roger Bradley visited the property on 6 August 2014 to execute a search warrant. He found that there were three upstairs bedrooms each with a separate lock, occupied by three individuals who he says were adult men, unrelated to each other. He also saw a large room downstairs, and was told by Mr Rohde that it was a bedroom for other tenants, currently a Romanian couple. PC Keith Ramone visited the property on 16th August 2014 following a report of a burglary. He too found three people living separately upstairs, and he gives their names and dates of birth; he also gave the names and dates of birth for three people living in the downstairs room, which he described as a "dormitory".

22. Then there is the evidence of Jacqueline O'Mahoney and Charles Yarnold, both Environmental Health officers working for the Appellant, who inspected the property on 18 August 2014. They were shown around by Mr Rohde and his partner, who said that there were three occupants; they found evidence of 3 occupants with separate bedrooms but shared amenities; Mr Yarnold's statement mentions the tenants' names, and they correspond to three listed by PC Ramone as the occupiers of the first floor. There was also as a portacabin set up ready for use, Mr Rohde said, by the tenants for bikes and dogs. In the course of their inspection the two officers found a number features giving rise to health and safety concerns, including the gas and electrical installations; correspondence with Mr Rohde ensued, and it was his unsatisfactory response that gave rise to the decision to serve the HMO notice. I should add that Mrs O'Mahony had intended to attend the hearing before me, but was unable to do so because of illness. Accordingly no oral evidence was given, but I have been able to reach a clear view on the basis of the witness statements.

23. Indeed, it is hardly surprising that on the basis of the evidence of the two police officers and its own two Environmental Health officers the Appellant concluded that the conditions set out in section 254(2) of the Housing Act 2004 were met, and decided to serve the HMO Declaration. I have also of course to take into account the fact that the property was empty when the First-tier Tribunal inspected on 16 February 2015. That is not sufficient to displace the presumption that the "occupation of the living accommodation… by persons who do not form a single household constitutes a significant use of that accommodation" (to quote from section 255(2)), either on 24 October 2014 when the HMO declaration was served or on the date of the First-tier Tribunal's inspection. It may well have been a temporary change.

24. In my extracts from the statute, above, I included part of section 256, so as to draw attention to the fact that where circumstances have changed the property owner can apply to have an HMO declaration revoked, or the local authority can revoke a declaration on its own initiative. In this case if the use of the property has changed since the date of the HMO Declaration, and has changed so much that the significant use condition is no longer met, Mr Rohde can ask the local authority to revoke it, and if it refuses he can appeal to the First-tier Tribunal.

25. But the decision of the Appellant to serve the HMO Declaration on 24 October 2014 is confirmed, and it takes effect from the date of this decision in accordance with section 255(7) of the Housing Act 2004.

26. I am told by Mr Lane that the Appellant will be making an application for costs within the next 14 days.

Dated: 25 January 2016

Judge Elizabeth Cooke

Addendum on Costs

I have read the Appellant's application for costs, sent to the Upper Tribunal by letter dated 3 February 2016. The application does not demonstrate that Mr Rohde acted unreasonably in appealing to the First-tier Tribunal the Appellant's decision to serve an HMO declaration, and accordingly the application is refused.

Dated: 17 February 2016

Judge Elizabeth Cooke