UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – HOUSE IN MULTIPLE OCCUPATION – section 257 of the Housing Act 2004 -- converted to self-contained flats – compliance with building regulations of 1991

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

BETWEEN:

HASTINGS BOROUGH COUNCIL **Appellant**

and

LINDA TURNER **Respondent**

Re: 10 Warrior Gardens,
St Leonards on Sea,
East Sussex,
TN37 6EB

Judge Elizabeth Cooke

Determination on written representations

Introduction

1. This is an appeal from the decision of the First-tier Tribunal ("the FTT") on a preliminary issue in the proceedings brought by the respondent, Ms Turner, who has appealed to the FTT against the grant of an HMO licence in respect of 10, Warrior Gardens, St Leonards on Sea, East Sussex TN37 6EB ("the property"). The decision on the preliminary issue was that the property does not require a licence because it is not a house in multiple occupation for the purposes of section 257 of the Housing Act 2004 ("the 2004 Act"). The appellant, the Hastings Borough Council, which has granted a licence on the basis that the property is a house in multiple occupation, appeals the FTT's decision.

2. The appeal was to have been heard at the Royal Courts of Justice on 21 April 2020, but that proved impossible because of the restrictions in force during the pandemic. I ordered that it be determined by written representations and gave directions to that end; the last of the representations was sent to the Tribunal on 13 May 2020. The appellant's submissions were drafted by Mr Jonathan Manning of counsel, and the respondent has not been legally represented; I am grateful to them both.

3. In the paragraphs that follow I set out the law, the background facts, and my decision. I am very conscious that the respondent has a great many concerns which I am not able to address because this is an appeal purely on a preliminary issue, namely whether the property is an HMO that requires a licence. But the consequence of my decision will be that the proceedings will continue in the FTT where her concerns can be heard.

The law

4. Part 2 of the 2004 Act is about houses in multiple occupation. Section 77 defines an "HMO" as a house in multiple occupation as defined by sections 254 to 257. Section 254 provides:

> "(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."

5. Of those five definitions, the one relevant to this appeal is sub-section (e), which refers to section 257. Section 257 provides:

> "(1) For the purposes of this section a "converted block of flats" means a building or part of a building which–
>
> (a) has been converted into, and
>
> (b) consists of,

self-contained flats.

(2) This section applies to a converted block of flats if–

(a) building work undertaken in connection with the conversion did not comply with the appropriate building standards and still does not comply with them; and

(b) less than two-thirds of the self-contained flats are owner-occupied.

(3) In subsection (2) "appropriate building standards" means–

(a) in the case of a converted block of flats–

(i) on which building work was completed before 1st June 1992 or which is dealt with by regulation 20 of the Building Regulations 1991 (S.I. 1991/2768), and

(ii) which would not have been exempt under those Regulations,

building standards equivalent to those imposed, in relation to a building or part of a building to which those Regulations applied, by those Regulations as they had effect on 1st June 1992; and

(b) in the case of any other converted block of flats, the requirements imposed at the time in relation to it by regulations under section 1 of the Building Act 1984 (c. 55)."

6. Not all HMOs have to be licensed, but only those to which Part 2 of the 2004 Act applies Section 55(2) says that. Part 2 of the 2004 Act applies to

> "(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."

7. The relevant provision there is section 55(2)(b), because the property is in an area that was designated by the appellant local authority, on 10 October 2017, as subject to additional licensing. One of the descriptions specified in that designation is "a converted block of flats to which section 257 of the Housing Act 2004 applies."

8. Therefore if the property falls within the description set out in section 257, then it is an HMO that has to be licensed.

The factual background

9. This is an appeal of a preliminary issue only. I will set out only the facts needed to understand that issue; I acknowledge that there is a great deal of factual background that I am omitting because it is not relevant to what I have to decide. Some or all of it will be explored in the rest of the FTT proceedings.

10. The respondent is a joint registered proprietor of the freehold of the property, along with Lewis Brown, Anne Barrett and Caroline Frost. She also holds a long lease of the ground floor flat. The property is a five-storey, late Victorian house – the respondent says that

Warrior Gardens was built in 1881 – and was converted decades ago into self-contained flats. The respondent refers to a conversion in 1956 which she says was not the first; the latest upgrade was in 1988.

11. As I mentioned above the appellant put in place an additional licensing scheme in 2017. In or about February 2019 it wrote to the freeholders (individually) to say that they needed to apply for an HMO licence.

12. On 19 March 2019 Mr Ian Lawson, who owns two flats in the property, applied online for an HMO licence, stating that he was the person managing the building and that he was applying on behalf of the four freeholders who would be the licence holder.

13. Mr Lawson stated on the application form, which I have in the bundle, that the property is terraced, has 5 floors and 5 flats, created by way of conversion and that more than one-third of the flats were occupied by people who paid rent (and therefore were not owner-occupied). In answer to the question "Does the conversion to flats comply with the 1991 Building Regulations (or later)?" he answered "no".

14. The appellant gave notice to the freeholders, including the respondent, on 18 June 2019 to say that it intended to grant an HMO licence. The respondent wrote back on 24 June 2019 saying that she objected to the grant of the licence because of the financial burden it would impose upon her, and making a number of complaints about Mr Lawson.

15. On 16 July 2019 the appellant notified the respondent that it had decided to grant a licence. A licence was granted on that date for the period 19 March 2020 to 18 March 2020. The respondent appealed to the FTT against the grant of the licence.

16. In her application to the FTT the respondent said "With regard to the 1991 standards requirements of HMOs I cannot see any reason why those standards were not met at the time our building was converted." She also said that there were no shared amenities in the property, which she said were required by section 257 of the 2004 Act (I believe she meant section 254). In her statement of case she made a number of complaints about the licensing scheme and about Mr Lawson. The FTT directed that the issue of whether the property was an HMO within the definition in section 257 of the 2004 Act was to be determined as a preliminary issue.

17. The FTT made its decision about the preliminary issue on 1 November 2019. At its paragraph 10 the FTT set out section 257(1) and (2), but not (3).

18. At its paragraph 11 said "the parties may also wish to consider the Licensing and Management of Houses in Multiple occupation and Other Houses (Miscellaneous Provisions) Regulations 2006 and the Licensing and Management of Houses in Multiple Occupation (Additional Provisions) (England) Regulations 2007".

19. At paragraph 13 the judge said:

> "I remind myself that these are adversarial proceedings and it is up to the Respondent to establish, on the balance of probabilities, that this building comes within the definition set out in section 257…"

20. At paragraphs 16 – 18 the judge said:

> "16. I find, on balance, that the definition in section 257 has been complied with save for the issue of whether the building was converted in accordance with the appropriate building standards and, if so, whether it still does not comply with them. SI 2006/373 also says that the property must meet prescribed standards. The long leases commenced in 1988 which means that the conversion is almost certain to have been in 1988 or beforehand. This means that the building work had to comply with the applicable regulations and/ or standards at the time the work was undertaken in accordance with the Building Act 1984.
>
> "17. There is no reference to any building regulations or consideration of prescribed standards in the Respondents' evidence. On pages of the Respondent's bundle, as part of their legal submissions, it says that the only 'evidence' the Respondent has of any failure to comply ·with building standards is in the application for a licence. That 'evidence' is at page 93 when, in answer to the question 'Does the conversion to flats comply with the 1991 Building Regulations (or later)?' The answer given by Mr. Lawson is simply 'No'.
>
> "18. This assertion on the part of the Respondent highlights the flaw in its case. If their only evidence on this issue is in Ian Lawson's application dated 19th March 2019, then why have they written to the Applicant on the 26th February 2019 telling her that the property is an HMO with the inference that if she does not apply for a licence, she will be prosecuted? Also, why do they restrict the standard to the 1991 Building Regulations when those regulations clearly did not exist at the time of conversion in 1988 or before?
>
> "19. The representations go on to say that a search was made on the Wealden District Council website and 'it is clear no applications have been made'. There is no evidence of when the conversion work was carried out, who made the search, what was searched and exactly what was found. There is no evidence of an examination of the building by anyone to find out whether any lack of building standards exists. In view of the wording of section 257 and the subsequent Statutory Instrument i.e. that the building "*did not comply with the appropriate building standards and still does not comply with them*" and does not meet prescribed standards, it seems to me from the evidence submitted, that these minimum requirements have not even been considered by the Respondent. Therefore, the property does not come within the definition of an HMO as defined by section 257 and the licence must therefore be revoked."

The appeal

21. The appellant says that the judge misunderstood section 257, and also that the evidence provided by the respondent was sufficient to establish that the definition was met.

22. The respondent in her written representations quotes guidance published by the Department of Communities and Local Government in 2007 to the effect that the HMO legislation was not intended to regulate owner-occupied properties. She is very concerned about the impositions that she says an HMO licence would place upon her and the increased costs arising from HMO status, for example of insurance. She has provided information about the date of construction and conversion of the property, and I have used in my summary of the facts the dates that she provided, which I believe are not in dispute. She has described the flats and says that there is no sharing of facilities and that the flats are entirely self-contained. She lives in her flat but the rest are rented out by the long leaseholders. She has provided information about the standard of the windows, the smoke alarms and so on – none of which is relevant to the preliminary issue. She says that Mr Lawson is not a fit and proper person to manage the property and makes it very clear that he is not authorised by her to do so.

23. This decision is only about the preliminary issue.

24. I cannot address any of the other matters raised by the respondent.

Did the FTT misunderstand section 257 of the 2004 Act?

25. Section 254 of the 2004 Act sets out five alternative tests for an HMO. They are not cumulative; the requirements of each are separate.

26. The appellant's case is that the building falls within section 254(1)(e) because it meets the definition in section 257.

27. Section 257 defines an HMO as:

- A building
- Which has been converted into and consists of self-contained flats
- Where the conversion work did not comply with the appropriate building standards and still does not and
- Where less than two-thirds of the flats are owner-occupied

28. Only one of those points is in dispute, namely whether the conversion work complied with the appropriate standards. If it did not then the building is an HMO. There is no need for

there to be shared facilities, as is required in the more familiar from of HMO described in section 254(2) under the "standard test".

29. The regulations to which the FTT referred at its paragraph 11 have no relevance to section 257.

30. Subsection (3) of section 257 says that the "appropriate building standards" are those of the 1991 Building Regulations if the building work was completed before 1 June 1992. The work was completed, according to the respondent, in 1988, and therefore the appropriate standards are those of the 1991 regulations.

31. The FTT was in error when it said that the building work had to comply with the 1984 Building Regulations; the FTT made a mistake because it did not refer to section 257(3). If the building work failed to comply, and still does not comply, with the 1991 Building Regulations then it is an HMO. All the points set out in the section, and in my paragraph 27 above, are met and nothing else is relevant.

Was there sufficient evidence that the property fell within the definition in section 257?

32. The appellant issued a licence in response to an application. It was told by the applicant that the requirements of section 257 were met and, unsurprisingly, accepted that. It had already contacted the freeholders of the property to say that a licence was required, presumably on the basis of its own estimate of the age of the property and the date of the conversion.

33. The respondent was the applicant in the FTT. She appealed the grant of the licence. It was for her to prove that the property was not an HMO within the definition of section 257; the FTT was in error when it said at its paragraph 13 that it was for the respondent in the FTT to prove that the property was an HMO.

34. The respondent has not offered any evidence at all that the property met, or meets, the standard of the 1991 Building Regulations. All she has said is that she cannot see why the standards of the 1991 Building Regulations would not have been met. She has provided no evidence and no reasoned basis for her assertion that the property is not an HMO, and the FTT was in error when it found in her favour on the preliminary issue.

Conclusion

35. Accordingly the appeal succeeds, and the decision of the FTT on the preliminary issue is set aside. The Tribunal substitutes its own decision, which is that the property fell within the definition of an HMO in section 257 of the 2004 Act and, because of the appellant's designation of the area in October 2017, required an HMO licence.

36. I am sorry that I have had to deal so briefly with a matter that as caused the respondent so much distress. I have tried to set out the legislation clearly so that she can see what the statute requires. There are clearly further issues to be addressed because it is a matter for

concern that the person designated in the licence as the manager of the property – a company controlled by Mr Lawson – is one to which one of the freeholders has such vehement objection, but that is not a matter on which I can make any decision. No doubt the FTT will give directions for the determination of the appeal in the light of that decision.

37. I do not think that the grant of the licence is going to cause the problems that the respondent anticipates. Most of the property is not owner-occupied, and the licence introduces protection and safeguards for those who rent the other flats. I do not believe that it will invalidate her mortgage. I do not believe that it is an infringement of her human rights. One of the purposes of HMO licensing is to tackle anti-social behaviour, and it may that some of the problems the respondent says she has experienced with her neighbours may be able to be resolved as a result of the local housing authority's involvement. I hope that the parties may be able to discuss matters in a way that will offer some reassurance to the respondent about the many concerns that she has raised.

Judge Elizabeth Cooke

Re-issued 2 July 2020