UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER), SECTION 11, TRIBUNALS COURTS AND ENFORCEMENT ACT 2007

HOUSING – RENT REPAYMENT ORDERS – the defence of reasonable excuse – local authority employee's representations – landlord's expectations of a tenant manager – litigation conducted by a local authority on behalf of the applicants for a rent repayment order

BETWEEN:

ELIZABETH D'COSTA **Appellant**

-and-

(1) PAOLO D'ANDREA
(2) HAPHOUNG VI PHAM
(3) CRISTINA ONICA-RAKOVSKY
(4) VICTORIA SANCHEZ TORRES
(5) ALEJANDRO SOLIANO VERDU AND MARIA JESUS YAGUES MIRAVETE
Respondents

Re: 164 Telegraph Place,
London,
E14 9XD

Judge Elizabeth Cooke
Royal Courts of Justice
8 June 2021

The appellant represented herself.
Mr Muhammed Williams of London Borough of Tower Hamlets for the respondents

The following cases are referred to in this decision:

IR Management Services Limited v Salford City Council [2020] UKUT 81 (LC)
R (on the application of Mohamed) v Waltham Forest LBC [2020] EWHC 1083 (Admin)
Rakusen v Jepsen [2020] UKUT 298 (LC)
Vadamalayan v Stewart and others [2020] UKUT 183 (LC)

Introduction.

1. This is Ms D'Costa's appeal from the decision of the First-tier Tribunal ("the FTT") to make a rent repayment order against her. It did so because it found that she had committed the offence of being in control of a house in multiple occupation ("an HMO") which required an HMO licence and did not have one. She argues that the FTT should have found that she had the defence of reasonable excuse and therefore had not committed the HMO licence offence, alternatively that for a number of reasons the total amount she was ordered to pay was too high, and in any event that the FTT's order should have specified the amount she had to pay to each of the occupiers of the property rather than a global sum.

2. I heard the appeal in the Royal Courts of Justice on 8 June 2021. Ms D'Costa presented her appeal herself, and Mr Muhammed Williams, a housing adviser with the London Borough of Tower Hamlets, represented the respondents. Ms D'Costa regarded the local housing authority's involvement in the proceedings as inappropriate; but section 49 of the 2016 Act states that a local housing authority may help a tenant to apply for a rent repayment order, for example by conducting proceedings or giving advice, and it was perfectly proper for the London Borough of Tower Hamlets to do so through Mr Williams.

3. In the paragraphs that follow I set out the legal and factual background and then summarise the FTT's decision and the grounds of appeal. I explain my conclusion that the appeal succeeds on the ground that Ms D'Costa had the defence of reasonable excuse, and I comment briefly on the other grounds of appeal.

The facts and the law

4. Section 43 of the Housing and Planning Act 2016 ("the 2016 Act") gives the FTT power to make a rent repayment order when it is satisfied, beyond reasonable doubt, that a landlord has committed any of the offences set out in section 40. One of them is the offence created by section 72 of the Housing Act 2004 ("the 2004 Act"), which states:

> "(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.
>
> … (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. Not all HMOs have to be licensed; only those specified in regulations made under section 55(2)(a) of the 2004 Act, or in a designation made by the local housing authority (section 55(2)(b)), subject to certain exceptions (section 61(1)). Regulations in force before 1 October 2018 specified HMOs of three or more storeys occupied by five or more persons in two or more households, but from 1 October 2018 the requirement for three or more storeys was dropped (in the Licensing of Houses in Multiple Occupation (Prescribed

Descriptions) (England) Order 2018) with the result that some HMOs that had not previously required a licence now did require one.

6. That is what happened to the appellant's property.

7. 164 Telegraph Place was Ms D'Costa's home when it was purchased in 2004; it is an end of terrace house with three bedrooms upstairs and two rooms downstairs as well as a kitchen and two bathrooms. Ms D'Costa's evidence was that she moved out in 2007 and has let it out ever since. In 2015 she let the property to a company named in the letting agreement as "FTC Property (Apartment Wharf)" and to which she has referred as FTC Limited trading as Apartment Wharf ("AW"). It was permitted to sublet, and its business model is to let out rooms in HMOs. The more occupants AW can place in a building the greater its profits, because the rent it pays is fixed; the rent payable by AW to Ms D'Costa was a £2,250 per month. AW let out all five rooms; prior to 1 October 2018 the property did not need an HMO licence because it had only two storeys but after that date, whenever there were five or more occupants, it did.

8. It is not in dispute that in September 2017 an employee of the London Borough of Tower Hamlets, Mr Ali Hempstead, visited the property as a result of a complaint from a neighbour. Ms D'Costa's evidence was that she exchanged emails with Mr Hempstead and that she asked if she could apply for an HMO licence; she was told by Mr Hempstead by email that she could not because the property was not eligible (because it did not have three or more storeys), and that he would tell her if the position changed and the property needed a licence.

9. In July 2019 an officer of the London Borough of Tower Hamlets again inspected the property and got in touch with Ms D'Costa; she was told by the local authority on 31 July 2019 that the property needed an HMO licence and she applied for one the same day.

10. On the facts admitted in the FTT the property had should have been licensed since 6 October 2018, the date when a fifth occupant moved in; all the occupants had assured shorthold tenancies granted by AW. A sixth joined them in January 2019 (one room is shared).

11. With the assistance of the London Borough of Tower Hamlets those six sub-tenants applied to the FTT for a rent repayment order against Ms D'Costa.

12. The FTT directed that AW be added as a party. The Tribunal has held in *Vadamalayan v Stewart and others* [2020] UKUT 183 (LC) and in *Rakusen v Jepsen* [2020] UKUT 298 (LC) that both an immediate landlord and a superior landlord may be liable to a rent repayment order, provided that the FTT is satisfied, beyond reasonable doubt, that they have committed the offence defined in paragraph 72(1) of the 2004 Act (paragraph 4 above), which means that they must have "managed" or "had control" of the property while it was unlicensed.

13. Section 263 of the 2004 Act provides (so far as relevant) as follows:

> "(1) In this Act "person having control" , in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.
> (2) In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises.
> (3) In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises–
> (a) receives (whether directly or through an agent or trustee) rents or other payments from–
> (i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; …"

14. The section distinguishes between the "rack-rent for the premises", and the "rents or other payments from … persons who are in occupation as tenants or licensees of parts of the premises." A rack-rent is (broadly) a market rent; Ms D'Costa received a market rent for the premises from AW, which in turn received the rent from the occupiers. So either of them could have been guilty of the offence.[1]

The decision of the FTT and the grounds of appeal

The case for the parties in the FTT

15. The respondents to this appeal were of course the applicants in the FTT, being the six sub-tenants who occupied the property between 6 October 2018 and 31 July 2019. Their case in the FTT was that the property had been, for the period mentioned, an HMO that required a licence and there was no licence; Ms D'Costa was a landlord and was guilty of the offence, having been in control of the property, and so was AW, which managed the property. There is no requirement in the statute to prove that the landlord knew that the premises required a licence (*R (on the application of Mohamed) v Waltham Forest* LBC [2020] EWHC 1084 (Admin)), nor that the landlord was otherwise at fault for example because there was anything wrong with the building. The sub-tenants made witness statements confirming their occupation of the property; Mr Williams also made a number of witness statements explaining the local housing authority's involvement with the property.

16. Ms D'Costa and AW each argued that the other was responsible for obtaining a licence, because of their obligations as landlord and tenant in AW's lease.

17. Furthermore, Ms D'Costa referred (on the first page of her written submissions made on 18 March 2020, the day before the hearing) to section 72(5) of the 2004 Act and argued that she had the defence of reasonable excuse, on the basis that Mr Hempstead had told her by email that he would inform her if the house needed an HMO licence and yet the local housing authority did not do so, despite having visited the property on several occasions

[1] The FTT's explanation of this, at its paragraphs 48 to 54, is unhelpful, because it took the rack-rent referred to in section 263(1) as being what was paid for the rooms by the sub-tenants. However, the FTT reached the correct conclusion and there is no doubt that Ms D'Costa satisfied the definition of a person "in control" of the premises according to section 263.

during the relevant period. Ms D'Costa was not able to produce the emails from Mr Hempstead because they are not on her server; she wanted the local housing authority, through Mr Williams, to produce them but they were not produced.

18. Ms D'Costa argued that only AW should be liable, pointing out that she had no control over the occupation of the property, no access to the sub-tenants' deposits and no ability to give them notice; she made a number of complaints about the conduct of the local housing authority; and she raised a number of arguments about the amount payable if an order was made.

The FTT's decision

19. The FTT found that the property was an HMO that required a licence from 6 October 2018 until 31 July 2019 when an application for a licence was made, and that the offence was committed for that period. It determined that Ms D'Costa had committed the offence as a person "in control" of the HMO and that AW had committed it because it was "managing" the HMO.

20. It then considered the exercise of its discretion as to the amount to be awarded. As to the landlords' conduct, it said:

> "[Ms D'Costa] states that in September 2017 (at which point the Premises did not require a mandatory licence) she asked Mr Ali Hempstead of London Borough of Tower Hamlets to advise her should the premises need a licence in the future, and that this was not done. She submits that she applied for a licence as soon as she became aware that one was required. The tribunal find that Ms D'Costa genuinely believed that she would be told by Tower Hamlets if the premises required a licence. Further she was entitled, under the terms of her agreement with FTC, to expect them to advise her should a licence become necessary and they did not do so."

21. In looking at the amount to be paid the FTT went on to say:

> "[Ms D'Costa] received rent of £22,137.10 during the period. She has committed a technical offence but she believed that she would be advised should a mandatory licence become necessary. It is not an obligation on Tower Hamlets to do so but she might reasonably have expected [AW] to advise her, as set out in their agreement."

22. Therefore the FTT reduced the sum Ms D'Costa was to pay, from the £22,137.10 she received by way of rent from AW for the period of the offence (being nearly ten months) to the sum of £16,000. AW was ordered to pay back £6,218.53, being the rent it received from the occupiers less the rent it paid to Ms D'Costa, less what it paid for the utilities used by the occupiers.

23. The FTT in its decision made no mention of the defence of reasonable excuse.

The grounds of appeal

24. The appellant has sought permission to appeal on a number of grounds, all of which were rejected by the FTT. This Tribunal granted permission on five grounds:

> Ground 1: whether the FTT was entitled to make rent repayment orders against both the AW and the applicant, without taking into account their different roles as the immediate and superior landlords and as the person managing the HMO and the person having control of the HMO, and without giving reasons for making the order against both.
>
> Ground 2: whether the FTT was entitled to make a rent repayment order in favour of six applicants without specifying how much was to be paid by each landlord to each applicant.
>
> Ground 3: whether the FTT ought to have considered the defence of reasonable excuse and whether, on the facts found by the FTT, the applicant had, or may have had, a reasonable excuse for being the person in control of an unlicensed HMO which was required to be licensed.
>
> Ground 4: Whether the FTT failed to have regard to an agreement limiting the period of the offence to 6 October to 30 November 2018 which agreement is said to have been reached between the pries at the original hearing in the presence of the FTT.
>
> Ground 5: Whether the FTT failed to have regard to evidence of conduct by the tenants which was relevant to the exercise of its discretion when fixing the amount of the rent repayment order.

25. Ground 2 was, rightly, conceded by Mr Williams at the hearing of the appeal, although he was not able to assist the Tribunal with any suggestion as to the amounts that should have been ordered and wanted the matter be remitted to the FTT for it to decide the amounts. As to the rest of the grounds, ground 3 has to be considered first, because if Ms D'Costa had the defence of reasonable excuse then no rent repayment order could be made against her.

Ground 3: the defence of reasonable excuse

26. Not all landlords are aware of the defence of reasonable excuse, and it is important for the FTT to be alert to the possibility that the facts may give rise to it even where the landlord has not mentioned it. As the Deputy President put it in *IR Management Services Limited v Salford City Council* [2020] UKUT 81 (LC) at paragraph 40:

> "I would add, finally, that the issue of reasonable excuse is one which may arise on the facts of a particular case without an appellant articulating it as a defence (especially where an appellant is unrepresented). Tribunals should consider whether any explanation given by a person managing an HMO amounts to a reasonable excuse whether or not the appellant refers to the statutory defence."

27. But in this case the defence was set out loud and clear in Ms D'Costa's written submissions. She is entitled to a decision about the defence and needs to understand why the defence is not available if that is indeed the case. Either the FTT decided that Ms D.Costa did not have the defence and failed to say so and to explain why, or it failed to consider the defence at all. For that reason alone the FTT's decision must be set aside.

28. The Tribunal has been provided with the witness statements given to the FTT and so can substitute its own decision on the point rather than remitting the proceedings to the FTT. It does so on the basis that there is no appeal from any of the findings of fact that the FTT made.

29. As I said above, Ms D'Costa argued that she had the defence of reasonable excuse because of the assurance she said was given to her by Mr Hempstead. It is not in dispute that Mr Hempstead visited the property in September 2017; it is not clear whether it is in dispute that he and Ms D'Costa were in touch by email. Her evidence was that she offered to obtain a licence and was told by Mr Hempstead that the property was not eligible for an HMO licence but that he, or the local authority, would tell her if the position changed and the property needed a licence. I say "he or the local authority" because the exact words used are not known. It is not in dispute that another local housing authority representative visited the property on a number of occasions after 6 October 2018 and was aware that the property needed a licence, and Ms D'Costa argued that she should have been told, in line with the assurance she received.

30. It is necessary to look closely at the evidence given to FTT since its finding on this point was ambiguous. As we saw (paragraph 20 above), it said that Ms D'Costa "genuinely believed" that she would be told by the local authority if she needed a licence but, as Mr Williams argued, genuine belief may be insufficient. Did the FTT find that that belief did indeed arise from an assurance given by the local authority through its employee?

31. Ms D'Costa's first witness statement, dated 19 December 2019 said:

> "In September 2017, Mr Ali Hempstead from Tower Hamlets visited the property as a result of a complaint and also decided to investigate if the property was a HMO. He confirmed that it was not a HMO but would advise if this changed. This is confirmed in Mr Williams' statement and despite my request, these emails have not been disclosed by Tower Hamlets, despite this being part of standard disclosure."

32. In her further submissions dated 18 March 2020 Ms D'Costa said:

> "Tower Hamlets informed me that I did not require a licence in November 2017 even though I offered to obtain one and Mr Ali Hempstead (the investigating officer) said he would let me know if the rules changed, he did not."

33. In her written submissions made at that FTT's invitation on 14 July 2020 she said:

> "I was in regular contact with Tower Hamlets and offered to obtain a licence in November 2018 and was told it was not a requirement and they would let me know if things changed."

34. The references to November may be an error since Ms D'Costa refers to September elsewhere; nothing turns on that.

35. Ms D'Costa made a Subject Access Request of the local authority in August 2019, after she applied for a licence. She said that she did so in order to get a copy of the emails. Mr Williams explained to me, and I accept, that that request received a proper response, but that response did not include disclosure of emails. Had Ms D'Costa had legal advice she would have made a formal application to the FTT for an order for disclosure.

36. Mr Williams in his witness statement dated 16 December 2019 mentioned Mr Ali Hempstead's visit in 2017. He made two later statements in which he did not mention Ms D'Costa's evidence that she was given an assurance by Mr Hempstead that she would be told if the property needed a licence. Nor did he produce the email correspondence, which the local authority would be likely to have been able to do. Mr Williams told me that he did not produce it because he did not believe that a local authority employee could possibly have given that assurance. Mr Williams told me that the point did not come up at the hearing before the FTT. His recollection must be at fault there since it was an important matter on which Ms D'Costa gave evidence, and on which I am sure she would not have remained silent at the hearing before the FTT (which was not recorded).

37. It may be unlikely in general that a local authority employee would promise a landlord that he would do so, but without more information about Mr Hempstead it is not possible to say whether it was likely that he did so. The only evidence on the point is Ms D'Costa's evidence that he did. It is surprising that Mr Williams did not instigate a search for the correspondence, in the interests of those he was representing since he was sure that it could not contain the assurance that Ms D'Costa said it contained, and in any event in order to assist the Tribunal.

38. The FTT did not make explicit its finding of fact about Ms D'Costa's evidence that she was given an assurance by Mr Hempstead. But there is absolutely no reason to suppose that in finding that Ms D'Costa "genuinely believed that she would be told by Tower Hamlets if the premises required a licence" the FTT intended to say that that belief was irrational (as Mr Williams suggested to me) or that she had made up and then believed the assurance. There is no suggestion in the FTT's decision that it doubted Ms D'Costa's credibility. If it had found that she was lying in her evidence about the correspondence with Mr Hempstead it would have said so. I take the FTT's finding to mean that it accepted her evidence that Mr Hempstead told her, and that that was the source of her belief.

39. It is difficult to understand why a landlord would not have the defence of reasonable excuse to the offence created by section 72(1) of the 2004 Act where he or she has been told by a local authority employee that their property does not need an HMO licence and that they will be told if that situation changes, and I find that Ms D'Costa had that defence.

She therefore did not commit the offence and no rent repayment order can be made against her.

40. Absent the unusual circumstances of the correspondence with Mr Hempstead, it would have been important for the FTT to consider whether any of Ms D'Costa's other arguments gave her a defence of reasonable excuse.

41. In particular, it would have needed to look closely at the business relationship between Ms D'Costa and AW, and at the expectations that each had of the other. The FTT took the view that Ms D'Costa was entitled to expect AW to tell her if the property needed a licence (see paragraphs 20 and 21 above). That would appear to have been a misunderstanding of clause 2.33 of AW's lease, which required the tenant "Within seven days after receipt of any notice given or order made by any competent authority in respect of the Property [to] give full particulars therefore to the Landlord". The enactment of a statutory instrument is not a "notice or order" and does not trigger that obligation. But having made that finding the FTT ought to have given consideration to whether that gave her a defence of reasonable excuse. I do not need to explore that further in light of the fact that Ms D'Costa so clearly has a defence arising from the assurance given to her by the local authority employee. The question whether a freeholder's relationship with its tenant manager, whether as defined by the terms of the lease or otherwise, can give the freeholder the defence of reasonable excuse to an HMO licence offence will have to await another day.

The remaining grounds of appeal

42. If ground 3 had not succeeded the Tribunal's attention would have been focused on the other grounds. I have mentioned ground 2 above. I would have found that there was no substance in grounds 4 and 5 on the basis of the evidence before the FTT and the explanations I was given by Ms D'Costa at the appeal hearing; I believe she misunderstood what was said before the FTT about the significance of the date of 30 November 2018 (ground 4), and she had produced no evidence of misconduct by the tenants (ground 5).

43. Had ground 3 not succeeded, the Tribunal's attention would therefore have been focussed on ground 1, which is in essence that the FTT did not give proper consideration to the arguments before it about the relative culpability of the two landlords when deciding the amounts ordered against each. It is true that, as Mr Williams argued, the FTT did offer an explanation for its apportionment of liability between the two landlords. That explanation was a purely arithmetical one, simply calculating the net amounts of the sub-tenants' rent left in the hands of the immediate and superior landlord respectively, less a deduction from what Ms D'Costa received in view of what the FTT regarded as mitigating circumstances. But the FTT did not address Ms D'Costa's point about the extent of her involvement with the sub-tenants, which she said had been so minimal that it was not appropriate for her to have to pay so much more than did their immediate landlord which was a professional organisation with specialist knowledge about HMOs.

44. Because Ms D'Costa has the defence of reasonable excuse it is not necessary to make any findings about this ground, but I observe that where the FTT considers similar cases in the future it may need to go beyond a simple arithmetical approach to the apportionment of

liability. There is no substance in Ms D'Costa's argument that a rent repayment order can in any event be made against only one landlord; but where two are involved then the extent of each one's control of the property and their relative culpability will obviously be relevant.

Conclusion

45. The appeal succeeds. The FTT's decision is set aside because it failed to consider the defence that Ms D'Costa had expressly raised, and that in any event should have been considered in view of the evidence before the FTT and the facts it found. Substituting its own decision the Tribunal finds that Ms D'Costa had the defence of reasonable excuse provided by section 72(5) of the 2004 Act and therefore was not guilty of the offence in section 72(1), and that no rent repayment order can therefore be made against her.

46. This is not a jurisdiction in which the Tribunal has power to award costs except pursuant to rule 10(3) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 ("if the Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings"). Any application under that rule is to be made within 21 days of the date on which this decision is sent to the parties. The Tribunal is minded to order the respondents to reimburse the fees paid by the Appellant to the Tribunal unless they provide written submissions saying why that order should not be made, within 21 days of the date on which this decision is sent out. If representations are made about costs by either party, the Tribunal will give directions for the other to respond.

A further observation

47. As I observed at the outset of this decision, the statute itself empowers a local housing authority to support tenants in an application for a rent repayment order, to the extent of conducting proceedings for them.

48. A local authority is a public body with duties to the public, and with a strong interest in the administration of justice. The local housing authority chose to conduct the proceedings for the sub-tenants and to have Mr Williams give evidence for them, yet chose not to produce the correspondence between Ms D'Costa and Mr Hempstead (or, at least, not to conduct a search for that evidence), even though it knew that Ms D'Costa wanted it to be produced and that it would have been of assistance to the FTT. It is regrettable that Ms D'Costa made a number of allegations about Mr Williams' integrity and that of other representatives of the local authority, which I have no doubt were unfounded; but as she saw things she was being treated very unfairly, and it is unsurprising that she drew adverse conclusions from that behaviour. The Tribunal rejects Ms D'Costa's allegations of bad faith, but it does express disappointment in the way the local housing authority conducted this litigation for the sub-tenants. If the local authority chooses to enter the fray it should take pains to do so in a way that is fair to all parties.

Upper Tribunal Judge Elizabeth Cooke

18 June 2021