Case Reference: MAN/32UC/HMD/2010/0002

RESIDENTIAL PROPERTY TRIBUNAL
OF THE
NORTHERN RENT ASSESSMENT PANEL

DECISION OF THE RESIDENTIAL PROPERTY TRIBUNAL ON APPLICATION UNDER SECTION 255(9) OF THE HOUSING ACT 2004

Applicant:	Miss Kerry Mills
Respondent: **Represented by:**	East Lindsey District Council Mr Craig Roberts, Housing Standards Officer
Property:	Avondale Guest House, 28 Scarbrough Avenue, Skegness PE25 2SY
Date of Application To Tribunal	28 May 2010
Directions Issued:	3 June 2010
Date of Hearing:	3 September 2010 in Skegness
Tribunal Members:	Mr W M S Tildesley OBE (Chairman) Mrs E Thornton-Firkin

DECISION

The Appeal

1. On 28 May 2010 the Applicant appealed against a Notice issued by the Respondent on 21 April 2010 declaring that the property was a house in multiple occupation (HMO) pursuant to section 255 of the Housing Act 2004.

2. The Tribunal extended the time limit in which to make an Appeal and issued directions to progress the Appeal. On 3 September 2010 the Tribunal inspected the property which was followed by a hearing of the Appeal, at which both parties attended and gave evidence.

3. The Applicant believed that the property was not run as an HMO. She had taken in persons on housing benefit to help them out and at the request of the Respondent's housing department. The Applicant pointed out that her guests were on a daily or weekly tariff. She provided her guests with breakfast on request which was served between 9.00am and 9.30am daily. The Respondent, on the other hand, was of the view that the property was operating as an HMO, and not as a guest house. The Respondent considered that the occupation by persons on housing benefit constituted a significant use of the property which met the requirements for an HMO declaration.

4. The issue in this Appeal was whether the legal requirements for issuing an HMO declaration were satisfied, which are set out in section 255 of the Housing Act 2004.

The Evidence

5. The Applicant owned the property for about eight years. She originally lived in the property but moved out two years ago. The Applicant had not advertised the property as a guest house for several years. She relied on passing trade usually groups of young people knocking on the door and word of mouth. The Applicant did not supply details of the number of guests who had occupied the property on a traditional bed and breakfast basis. She originally took on people on housing benefit to help them out and at the request of the Respondents. The Applicant did not provide her housing benefit guests with cleaning and laundry services or meals unless they requested breakfast which was only supplied between 9.00am and 9.30am. The Applicant indicated that there was not a demand for breakfasts from the housing benefit guests. The lower level of services offered to housing benefit guests did not require the Applicant's regular presence at the property, and enabled her to spend less time on its management.

6. The Applicant indicated that she intended to relinquish control of the property. She was negotiating a lease of the property with a term of five to ten years with a Mr Cook, who at the time of the inspection was refurbishing the property.

7. On the 9 February 2010 Lincolnshire Fire and Rescue Authority advised Mr Roberts that in its opinion the property was operating as an HMO. On 16 April 2010 the Respondent's housing benefit team informed Mr Roberts that several occupants at the property were in receipt of housing benefit. On 20 April 2010 Mr Roberts visited the property and spoke to the Applicant, who confirmed that several occupants were in receipt of house benefit. They occupied single rooms and had no access to cooking facilities. The Applicant stated that she had not issued the occupants with a written tenancy agreement.

8. Mr Roberts identified the following occupants on housing benefit at the property:

> (1) Mr James Brown had been in occupation at the property from 7 May 2009 first in room 6 and then in ground floor room 1. The weekly rent was £75.
>
> (2) Mr Kenneth Brown occupied room 2 from 3 February 2010. The weekly rent was £85.
>
> (3) Mrs Diane Brown occupied room 4 from 20 January 2010. The weekly rent was £85.
>
> (4) Mr Russell Brown occupied room 6 from 10 September 2009. The weekly rent was £85.
>
> (5) Mr Kevin Adams moved into the property on 3 November 2008. As on the 20 April 2010 he occupied room 7. The weekly rent was £85.
>
> (6) Mr Liam O'Rourke occupied room 9 from 11 September 2009. The weekly rent was £75.

9. Mr Roberts obtained details of the occupants identified above from the housing benefit records kept by the Respondent. The Applicant agreed that the details were correct. She, however, pointed out that some of the Applicants did not pay their rent on time which was evidenced by the scale of arrears on the housing benefit application forms. Finally the Applicant confirmed that those occupants sharing the surname of the Brown were three generations of the same family.

10. Mr Russell Brown stated in his housing benefit application form regarding his situation and that of his mother's that

> "We have moved to Skegness on 10 September 2009 and we have remained here since then with no breaks. We did not return to Nottingham on 15 September 2009. This is where we feel safe and this is where we will make our permanent home".

11. The property was undergoing refurbishment at the time of its inspection by the Tribunal on 3 September 2010. The property comprised three floors. The Tribunal was unable to gain entry to every room on the first and second floors,

and relied on the Applicant's description of the facilities in the rooms not inspected

12. The ground floor contained the communal areas of a bar, dining room, lounge and public toilets. The communal areas at the inspection were in various stages of completion and not ready for use by residents and presumably the public. The ground floor room which had been occupied by Mr James Brown had been converted into public toilets and an office. A kitchen with an office was located behind the bar. The residents were not permitted to use the kitchen. A flat with two bedrooms, a bathroom and a lounge was situated off the kitchen. The lounge had patio doors giving access to the outside. The Applicant informed the Tribunal that Mr Cook was occupying the flat.

13. The first floor comprised six bedrooms. Two of which were occupied at the time of the inspection by Mr James Brown and Mr Kenneth Brown. The Applicant advised the Tribunal that three bedrooms were ensuite with the other bedrooms having a sink with one having a toilet, which was not connected to the waste pipe. There was also a communal shower and toilet on the first floor.

14. The second floor consisted of four bedrooms with one of them ensuite. Two bedrooms were occupied at the time of the inspection by Mr Adams, and another person whose name was unknown to the Applicant. The Tribunal understood that the bedrooms without an ensuite had the benefit of a sink. There was also a communal shower and toilet on the second floor.

15. The Applicant did not permit cooking facilities in the bedrooms. The Applicant supplied long term occupants with a small fridge. The property was protected by a smoke detection and fire alarm system. The doors to the rooms, however, did not comply with current fire safety regulations.

16. The layout of the property had not significantly changed between Mr Robert's visit on 20 April 2010 and the Tribunal's inspection on 3 September 2010.

The Legislation

The Purpose

17. HMOs are residential properties occupied by persons who do not form part of the same household and who share living accommodation such as kitchens and bathrooms. HMOs constitute a significant part of the housing stock and have some of the worst housing conditions in the country. Part 11 of the Housing Act 2004 (hereinafter referred to as the 2004 Act) was enacted to push up the living standards of HMOs in the private rented sector. This was achieved by giving new powers to local housing authorities in respect of the regulation of HMOs. The powers included the mandatory licensing of larger HMOs, additional and selective licensing for HMOs outside the mandatory

scheme, and management powers to directly intervene where necessary and to deal with particular problem properties on an individual basis. All HMOs (except for converted blocks of flats), including the licensed and those outside licensing, are subject to Management Regulations (see Management of Houses in Multiple Occupation (England) Regulations 2006, SI 2006/372).

18. The 2004 Act introduced a new definition of an HMO Section 254 provides that a building, or part of a building, is an HMO if it meets one of the following five tests:

(1) the standard test;

(2) the self contained flat test;

(3) the converted building test;

(4) an HMO declaration is in force in respect of the building (under s 255 of the HA 2004);

(5) the converted blocks of flats test.

19. During the passage of the legislation concerns were expressed that some types of property, such as a hotel or a guest house which had mixed occupational use of accommodation for the homeless and tourist accommodation, may not be caught by the legislative requirements for HMOs. In this respect local housing authorities were given the power to make an HMO declaration under section 255 of the 2004 Act. This declaration applied to a building which was occupied by two or more households as their only or main residence, if this type of residence amounted to a significant use of the accommodation. The critical feature of section 255 was the replacement of the sole use criterion which was part of the other tests for an HMO with the criterion of significant use. Thus a hotel or a guesthouse may be an HMO if the accommodation for the homeless constituted a significant use of it.

20. The effect of an HMO declaration is that the property could then be subject to either mandatory licensing (if it has three or more storeys, is occupied by five or more persons who form two or more single households) or additional and selective licensing if the relevant local authority has such a scheme. The property would also be subject to the Management of Houses in Multiple Occupation (England) Regulations 2006, SI 2006/372.

HMO's Declarations

21. Section 255 of the 2004 Act provides that a local housing authority may declare a building or part of it a HMO if it is satisfied that the following requirements are met:

> " (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.

(b) Not relevant
(c) Not relevant
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".

22. Section 254(2) defines the criteria for the standard test which for the purposes of this Appeal excludes the sole user criterion:

(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;
(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 ;
(d) Not relevant
(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.

23. Section 254 (8) defines basic amenities and self contained flats. Basic amenities mean a toilet, personal washing facilities and cooking facilities. A self contained flat must have, amongst other matters, all three basic amenities available for the exclusive use of the occupants.

24. Section 258 sets out when persons are to be regarded as not forming a single household for the purposes of section 254. Section 258(2) provides that persons are to be regarded as not forming a single household unless they are all members of the same family.

25. Section 260 provides that it shall be presumed that the significant use criterion is met unless the contrary is shown.

The Appeal Provisions

26. Section 258(9) gives a relevant person a right of appeal to the 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. Such an appeal is by way of a re-hearing but may be determined having regard to matters of which the authority were unaware. On Appeal the Tribunal may confirm or reverse the decision of the authority, and if it reverses the decision, revoke the HMO declaration.

27. Under section 259 a local housing authority may on its own initiative or on application revoke an HMO declaration if it considers that the conditions of section 255(2) no longer applies to the relevant building.

28. The issue concerning the appeal powers is whether the Tribunal is restricted to an examination of the facts as at the time of when the declaration is made or whether the examination can be extended to the facts as at the appeal hearing. The preferred view is that the Tribunal is confined to the facts as at the date of the HMO declaration. The reasons for this view are that an appellant may undermine the purpose of the legislation by making temporary changes to the occupational arrangements in the interim period between the date of the declaration and the hearing. Further the appellant has a right to apply for revocation of the declaration if the requirements of section 255(2) no longer apply, which is the appropriate course to take if the circumstances change.

29. In view of the uncertainty of whether the Tribunal can have regard to new circumstances arising after the date of the HMO declaration, the Tribunal in this Appeal will highlight the changes in the facts from the 20 April 2010 when the declaration was made and decide whether those changes have an impact on the facts found.

The Facts Found on the Requirements of Section 255(2) of the 2004 Act

30. The issue in this Appeal is whether the requirements for an HMO declaration have been met. The Tribunal considers each of the requirements in turn:

31. ***One or more units of living accommodation not consisting of a self-contained flat or flats*****:** the property had twelve bedrooms, each of which constituted a unit of accommodation. The bedrooms were not self contained flats because they did not have the benefit of the three basic amenities of toilet, personal washing and cooking facilities. There were no material changes in the facts from the date of the declaration. The Tribunal is satisfied that this requirement is met in respect of the property.

32. ***The living accommodation is occupied by persons who do not form a single household*****:** there were six persons occupying the property on 20 April 2010. Four of those persons belonged to the same family, and constituted a single household. On 3 September 2010 five persons occupied the property. Two of those persons belonged to the same family, and constituted a single household. The Tribunal finds that there were three households as at 20 April 2010 and four households on 3 September 2010. The Tribunal is satisfied that this requirement is met in respect of the property.

33. ***The living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it*****:** the six occupants on 20 April 2010 were in receipt of housing benefit in respect of

their occupation at the property. The length of their continuous occupation of the property ranged from two months to 17 months with four persons living at the property for periods in excess of six months. Mr Russell Brown indicated in his housing benefit application form that he and his mother regarded the property as their home. Three of the occupants on 20 April 2010 were still there at the time of the Tribunal's inspection on 3 September 2010. No details were known of the other two occupants present on that date, except that one occupant was probably Mr Cook, the potential lessee for the property.

34. The Tribunal considers the facts on 20 April 2010 that all occupants were in receipt of housing benefit, their length of occupation, and the contents of Mr Russell Brown's letter demonstrated that they occupied the property as their only or main residence. The Tribunal is satisfied that this requirement is met for the facts as on 20 April 2010.

35. The picture on 3 September 2010 was less clear. The Tribunal finds that the three occupants who had continued to live at the property from 20 April 2010 were treating the property as their only or main residence. The details of the other two occupants were unknown. The Tribunal, however, considers that the requirement is met for the facts on 3 September 2010 because the three persons who treated the property as their only or main residence constituted two households.

36. ***Rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation*:** the Applicant charged the occupants rent of £75 or £85 per week in respect of their occupation at the property. The facts of no formal written tenancy agreement, and that the occupants did not always pay their rent were irrelevant. The Tribunal finds that this requirement is met.

37. ***Two or more of the households share one or more basic amenities or the living accommodation is lacking in one or more basic amenities*:** the living accommodation was lacking in cooking facilities which is sufficient ground for the Tribunal's finding that this requirement is met.

38. ***The occupation by those persons who do not form a single household and treat the property as their sole or main residence constitute a significant use of that property:*** there is no definition of significant use within the 2004 Act. Guidance issued by Lacors[1] refers to the definition of significant use in *The Sweet and Maxwell Housing Law Encyclopaedia* which states that it is more than de minimus rather than predominant. Lacors' guidance suggests that just a few people living there as their only or main residence (say occupying at least ten per cent of the rooms) may constitute significant use.

[1] Exhibited at CR2 of Mr Robert;s bundle

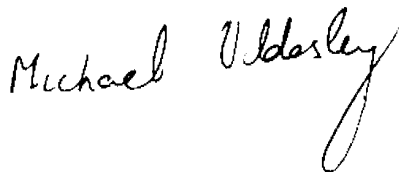
39. Section 260 of the 2004 Act provides that significant use is presumed unless the contrary is shown. The Applicant's evidence of use of the property by tourists was vague and lacking in detail. The Tribunal considers that the evidence showed that the property had not been used as a traditional guest house for some time, which was supported by the Applicant's admission that she had not lived at the property for about two years implying that her day to day presence at the property was not required. The Tribunal concludes on the evidence that the occupation of the property by persons not forming a single household and treating it as their sole or main residence had been the principal use of the property for at least the past 18 months. The Tribunal is satisfied that the significant use requirement is met.

40. The fact that the new lessee if a lease is granted may change the future use of the property was not a relevant consideration for this appeal. The new lessee has the option of applying for a revocation of the declaration, if it is confirmed by the Tribunal.

The Decision

41. In view of its findings in paragraphs 31 to 40 the Tribunal is satisfied that the requirements of section 255(2) of the 2004 Act have been met in respect of the property whether as at 20 April 2010 or 3 September 2010.

42. The Tribunal, therefore, dismisses the Appeal and confirms the HMO declaration made on 20 April 2010 in respect of the property.



MICHAEL TILDESLEY OBE
MEMBER OF RESIDENTIAL PROPERTY TRIBUNAL
DATE: 23 September 2010