# EASTERN RENT ASSESSMENT PANEL

# RESIDENTIAL PROPERTY TRIBUNAL

**Property** : 19 Newmarket Road, Cambridge, CB5 8EG

**Applicant** : Windhorse Trust

**Respondent** : Cambridge City Council

**Case Number** : CAM/12UB/HMD/2010/0001

**Type of Application** : Section 255(9) of the Housing Act 2004 ("the Act")
Appeal against the decision of the local housing authority to serve an HMO Declaration.
Determination of preliminary issue as to whether the HMO Declaration was validly served.

**Date of Hearing** : 11th August 2010

**Tribunal Members** : D S Brown FRICS MCIArb (Chair)
B M Edgington
Mrs I Butcher

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# DECISION

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The Tribunal reverses the decision of the Respondent to serve an HMO Declaration in respect of 19 Newmarket Road, Cambridge and revokes the Declaration.

# STATEMENT OF REASONS

## Background

1. On 30th March 2010 Cambridge City Council ("the Council") served on The Windhorse Trust ("Windhorse") notice of an HMO Declaration in respect of 19 Newmarket Road, Cambridge ("the Property"). On 22nd April, Windhorse lodged an appeal against that Declaration.

2. Directions were issued by the Chair of the Tribunal on 28th April. On 11 May, a further Direction was issued requiring the Council, in its statement of response to the application, to identify which parts of the Property it considers do not comply with "the sole use condition" contained in section 254(2) of the Act. In its Statement in Reply, at paragraph 5, the Council responded to this direction by stating "*the Property is entirely occupied as living accommodation and that is the only use of the accommodation*".

3. The Chair, having made a preliminary perusal of the Council's statement, requested the Case Officer to write to the Council, pointing out that section 255(2) provides that an HMO Declaration may be served on a building or part of a building if it meets any of the relevant tests **"(as it applies without the sole use condition)"** and that the sole use condition in this case, under section 254(2)(d), was that the occupation of the living accommodation constitutes the only use of that accommodation, as a result of which an HMO Declaration could not be served in respect of this property. The letter invited the Council the reconsider its position and, if it did not agree with this conclusion, to submit representations on this point, in which case Windhorse would also be permitted to submit representations and the tribunal would consider the issue in the light of the representations made. It was subsequently clarified to the parties that no decision had been made on the point but it had been raised and representations were invited so that if it was not agreed it could be fully considered by the Tribunal and if it was agreed the expense of a hearing could be avoided.

4. Both parties submitted representations on the issue and the Council requested a hearing. The Chair then directed that –

   The hearing will deal with the preliminary issue of whether or not the words *"(as it applies without the sole use condition)"* in section 255(2) of the Act preclude this Property from being subject to section 255 because the Property does comply with the sole use condition in section 254(2)(d)

   and

   if either party wished to raise any further points or arguments that had not already been raised they should do so in the form of a skeleton argument.

5. Windhorse indicated in a letter dated 22 June that it was not in a position to incur the costs of a hearing of the preliminary issue and "*for that reason alone*" acceded to the Council's submission. In view of this, the Council requested that the hearing be vacated. The Chair pointed out to the parties that as an expert tribunal, the RPT can raise, of its own accord, questions relating to the validity of declarations or notices and determine them after receiving representations from the parties. One of the Tribunal's options is to "confirm" the decision of the authority and it could not do so if it considered that decision to be invalid. The hearing was therefore to proceed and if the Tribunal determined that the Declaration was validly made, it would proceed to determine the appeal. Windhorse responded that it was still unable to incur the expense and would therefore not attend the hearing and requested that its written submissions be considered in the Tribunal's determination of this point.

**The Law**

6. The relevant provision are contained in section 255 of the Act. If a local housing authority are satisfied that subsection (2) applies to a building or part of a building they may serve an HMO Declaration declaring the building or part to be a house in multiple occupation.

7. Subsection (2) provides –

   *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))…….*

   *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.*

   It is the Council's contention that the standard test applies in this case.

8. Subsection (3) defines *"the sole use condition"* as the condition contained in section 254(2)(d), which is -

   *Their occupation of the living accommodation constitutes the only use of that accommodation.*

9. The right of appeal against an HMO Declaration is contained in section 255(9). Subsection 10 provides that the appeal will be "*by way of rehearing*" but "*may be determined having regard to matters of which the authority were unaware*". Subsection (11) provides that the Tribunal may confirm or reverse the decision of the authority and, if it reverses it, revoke the HMO declaration.

**The Council's Submissions**

10. The Council made submissions on the preliminary issue in a letter dated 8th June 2010. They can be summarised as follows –

11. The correct interpretation of the words "as it applies without the sole use condition" is that it is not necessary to show that the occupation of the accommodation by the persons concerned constitutes the only use of that accommodation in order to serve an HMO Declaration.

12. For the purpose of serving an HMO Declaration, section 254(2) subsections (a), (b), (c) (e) and (f) must apply. The sole use condition in (d) is not required by statute to be present in order that the local authority can serve an HMO Declaration.

13. There is no apparent legal reference or Government guidance that states that an HMO Declaration cannot be served where the sole use condition is satisfied.

14. There is guidance produced by LACORS in answer to a Frequently Asked Question "Should a hotel with long standing residents be licensed as an HMO?". The Council attaches a copy. Paragraph 1 states "*A hotel or part of a hotel is an HMO if it satisfies one of the HMO tests defined in section 254, ignoring the "sole use condition". The two key elements that need to be determined are firstly whether the hotel is the only or main residence of the longer term occupiers and secondly whether the occupation by these people is a significant use of the building*". The Council say that this is helpful in this case because it clarifies the correct application of section 255(2). With regard to hotel accommodation, no account is to be taken of the sole use condition and the two key elements are sections 254(2)(c) and 255(2). The Council is satisfied that the Property meets the standard test as it applies without the sole use condition and also that the occupation by persons who do not form a single household constitutes a significant use of that accommodation.

15. The Council refers to previous Residential Property Tribunal ("RPT") decisions on HMO Declarations. It acknowledges that they have generally related to guesthouses and hotels where the occupation of the building was by a mix of transient occupiers and households occupying part of the building in a more permanent manner. One decision by the London Panel stated "*...section 255(2) provides an important qualification in that it is not necessary to show the occupation of the accommodation by the persons concerned constitutes the only use of that accommodation (i.e. the sole use condition)."*

16. If a local authority only has power to serve an HMO Declaration where the sole use condition is not met, it would be impossible for the Authority to serve such a declaration on many residential properties which have, until now, been accepted as HMOs and therefore licensed.

**The Windhorse Submissions**

17. Windhorse refer to the Council's submissions and state, in summary, –

18. The fact that there is no apparent legal reference or Government guidance that states that an HMO Declaration cannot be served where the only use of the accommodation is living accommodation, thus satisfying the sole use condition, is not support for the Council's contention.

19. The RPT is not bound by the LACORS Guidance, which does not deal with the sole use condition, it deals with section 254(c) in the context of hotels. This is not an analogous situation.

20. In the London case referred to, the remark quoted is *obiter* as paragraph 31 of that decision states, "*The issue for the Tribunal therefore was whether or not in the present case the use of the accommodation by such persons amounts to significant use for the purposes of section 255(2) of the Act*". Therefore the issue in that case was whether the significant use condition applied, not the sole use condition.

**The Hearing**

21. The hearing was attended by three employees of the Council –
    Richard Lord, Team Leader Housing Standards
    Mike Bailey, Environmental Health Officer, Housing Standards
    And
    Claire Adelizzi, Senior Environmental Health Officer, Housing Standards (as an observer)

22. Windhorse had previously indicated that they would not attend the hearing but relied on their written representations.

23. Mr Lord reiterated the Council's opinion that the HMO Declaration was properly served. He said that there is nothing in the legislation that prevents the Council from serving a Declaration, it allows Windhorse to challenge their decision by appeal to the Tribunal. There is no other means of doing so. If the Council could not serve an HMO Declaration, the only option would be to criminalise Windhorse and that cannot be what Parliament intended.

24. He asserted that section 255 was intended to reduce the burden of sole use to "significant use". Rather than be satisfied that the use as living accommodation is the sole use, the Council had to be satisfied that it is a significant use. In this case it is a significant use and also the sole use. Significant use is not defined in the Act.

25. The Tribunal asked Mr Lord what he thought the purpose of section 255 is. He replied that section 254 defines what an HMO is. He believes that the policy behind section 255 was to cover hotels and guesthouses where use as living accommodation satisfied the "significant use" test. The relevant part of the building could then be an HMO. He was asked, if the purpose of section 255 was to permit a local authority to bring into the definition of an HMO properties that failed the standard test under section 254, might that not suggest that section 255 was

intended as an additional qualification to apply to properties that cannot qualify under section 254. He agreed that this could be one interpretation.

26. It was put to him that if Parliament had intended the interpretation that he put forward, the words in brackets in section 255(2) would be "whether or not the sole use condition applies". He conceded that this is possible but indicated that the Council has taken advice from LACORS and has put forward its position.

**The Tribunal's Conclusions**

27. We have considered all of the representations and evidence.

28. The rules of interpretation of statutes require application of the literal rule, that is to give the words their plain, ordinary and literal meaning, unless that would result in an absurdity. Furthermore, the Act must be construed as a whole, so it is appropriate to consider the context, within the Act, of the relevant section.

29. The wording of Section 255(2) is that the subsection applies to a building or part of a building if it *"meets any of the following tests (as it applies without the sole use condition)"*. Unfortunately this wording lacks clarity and we consider that there are two possible interpretations.

30. Firstly, it could intend that one deletes subsection (2)(d) from section 254 and then applies the reduced list of qualifications to the property and if it meets those requirements and the use as living accommodation constitutes a significant use an HMO Declaration can be served.

31. Such an interpretation begs the question – what, then, is the purpose of section 254(2)(d)? If Parliament had intended that any property which satisfies the test in section 254 with "significant use" substituted for "sole use", why include the sole use test at all?

32. Moreover, if the intention was that section 255 would apply to properties which meet the test in section 254 as well as those which fail under the sole use test, the words in brackets would be *"whether or not it meets the sole use condition"* or other words to similar effect.

33. For these reasons we reject that interpretation.

34. Secondly, it could be intended to give a local authority the option of classifying as an HMO a property that is otherwise excluded solely because it fails to meet the requirement of section 254(2)(d). This interpretation is supported by the wording at the end of section 255(2), *"and the occupation...of the living accommodation...referred to in the test in question constitutes a <u>significant</u> use of that accommodation"* (our emphasis). This demonstrates that what Parliament had in mind was occupation to a lesser degree than sole use.

35. In the example quoted by Mr Lord, whilst it might be possible for a part of a hotel or guesthouse, or indeed any other building, to be classified as an HMO, there are circumstances where it could be preferable for the whole building to be so classified so that the licensing regime applies to the whole or, alternatively, section 255 could act as a safeguard to prevent a landlord from evading licensing by, for instance, letting two floors of a building for residential use and retaining one floor as storage, so that the living accommodation, being less than two storeys, did not qualify for licensing but the local authority considered that licensing should apply in order to achieve the objectives of the Act.

36. We conclude that this second interpretation is correct. Section 255(2) does not mean that it is not necessary to show that the occupation of the living accommodation constitutes the sole use of that accommodation in order to serve an HMO Declaration, it means that a Declaration can only be served if it does not constitute the sole use (but does constitute a significant use). It is not that the sole use condition is not required to be present, it must not be present.

37. The lack of legal reference or Government guidance does not alter the interpretation of the words.

38. Guidance produced by LACORS has no statutory authority. We find that the guidance quoted is misleading. It is not a question of a building satisfying the test "ignoring" the sole use condition, it must satisfy the test without the sole use condition being present.

39. Previous RPT decisions are, of course, not binding on this Tribunal. Two of the members of this Tribunal sat on the Norwich case referred to by the Council and can state that the interpretation and application of section 255 were not raised or considered in that case. As stated by Windhorse, the Tribunal in the London case did not consider the question of sole use but directed itself to consider whether the occupation "amounted to significant use" (para. 31).

40. The Council's point about the impossibility of serving an HMO Declaration on many residential properties which have previously been accepted as HMOs and licensed is correct but irrelevant to the interpretation of section 255.

41. The fact that an HMO Declaration cannot be served if a building fully meets the relevant test produces an unfortunate deficiency in the legal provisions in that if a local authority considers that such a building is an HMO but the relevant person disagrees and refuses to apply for a licence, the only recourse for the authority is to prosecute and the relevant person's only means of obtaining an independent ruling on the issue is by a defence in criminal proceedings. If he is mistaken in what may well be a genuine belief that his property is not an HMO, he will be criminalised. This is clearly a less satisfactory arrangement than that available where the sole use condition does not apply and the authority can serve an HMO Declaration which can be challenged before an RPT. We recognise and commend the Council's concern about criminalising Windhorse in this case but it is not the function of an RPT to seek

to make good any such deficiency and, indeed, we do not have the jurisdiction to do so.

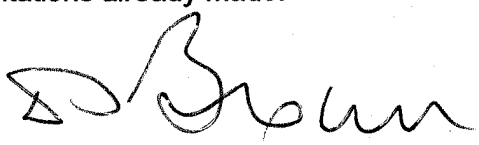
42. However, paragraph 31 of Schedule 5 to the Act provides that the applicant or any relevant person may appeal to an RPT against a decision by a local housing authority to refuse to grant a licence or to grant a licence (our emphasis). In our opinion, if a landlord were to make an application "under protest" while maintaining that the property qualified for exemption under Schedule 14, this provision would allow him, or any other "relevant person", to appeal to an RPT against the subsequent granting of the licence and thus obtain a decision on the issue by an RPT. Whilst an appeal against the grant of a licence by the person who applied for it would be unusual, it seems to us that this could be a pragmatic way of resolving the difficulty which arises in cases such as this and avoiding criminal proceedings.

43. Properties which are HMOs and licensed as such remain HMOs, they are unaffected by section 255.

44. In summary, we find that the purpose of section 255 is to enable a local authority to bring into the licensing regime properties which would otherwise be excluded because they do not comply with the sole use requirement. The section only applies to properties which comply with subsection (2). The Council admits that 19 Newmarket Road does meet the sole use condition and we therefore find that it does not comply with subsection (2) and so is excluded from the provisions of section 255. Accordingly, we reverse the decision of the Council to serve an HMO Declaration and we revoke the Declaration.

ADDITIONAL ADVICE
(not forming part of the decision)

45. We are conscious of the fact that this decision leaves the parties in the position that the dispute between them remains unresolved and that the Council has no wish to criminalise Windhorse simply because of the difference of opinion. It might assist the parties if we were to give an opinion as to whether or not exemption under Schedule 14 applies but there remains a possibility that the Council will decide to prosecute Windhorse if no licence application is made and under those circumstance it would be improper for us to express any prejudgement on the issue which might be prejudicial to the criminal proceedings. However, if the parties were to follow the application and appeal process outlined in paragraph 42 above, this Tribunal would be prepared to determine an appeal against the granting of the licence on the grounds that the property is exempt under paragraph 5 of Schedule 14 to the Act and, in order to save the parties unnecessary expense, to do so on the basis of the representations already made.

**Signed:**  **Date:** 25th August 2010

D S Brown FRICS MCIArb