Neutral Citation Number: [2021] EWCA Civ 1871

Case No: C3/2021/0449

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (Lands Chamber)
Upper Tribunal Judge Elizabeth Cooke
[2020] UKUT 355 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/12/2021

Before :

LADY JUSTICE KING
LADY JUSTICE ASPLIN
and
LADY JUSTICE ELISABETH LAING

- -

Between :

PALMVIEW ESTATES LIMITED	**Respondent /Appellant**
- and -	
THURROCK COUNCIL	**Appellant/ Respondent**

- -
- -

Michael Paget (instructed by **Palmview Estates Limited**) for the **Appellant**
Nicholas Ham (instructed by **Thurrock Council**) for the **Respondent**

Hearing date: 24 November 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 11.00 a.m. on Thursday 9 December 2021.

Lady Justice Asplin:

1. This appeal raises a question about the proper construction of, and approach to, the statutory defence of "reasonable excuse" contained in section 72(5) of the Housing Act 2004 ("the 2004 Act"). The defence is available to a defendant in proceedings brought under section 72(1) of the 2004 Act which creates the offence of having control of or managing a house in multiple occupation which is required to be licensed under Part 2 of the 2004 Act but is not licensed.

Legislative landscape in summary

2. In order to understand the issue in this appeal it is important to have a grasp of the relevant legislative landscape. The 2004 Act was preceded by a consultation paper in April 1999 and a Green Paper in April 2000. The consultation paper described the health and safety concerns caused by houses in multiple occupation ("HMOs") and proposed a regime for licensing them. The view of the Government was that such a regime would reduce risk to life and other risks and improve the living conditions for tenants. See *R (Mohamed) v Waltham Forest LBC* [2020] EWHC 1083 (Admin), [2020] 1 WLR 2929, at [30].

3. Amongst other things, the 2004 Act defines an HMO and provides for a licensing regime. A licence authorises occupation of the house in question by not more than a maximum number of households or persons specified in the licence (section 61(2)); and the grant of a licence is subject to a series of detailed criteria which applicants must satisfy, relating to the reasonable suitability of the premises for multiple occupation, and the fitness of the applicant to be a licence-holder (sections 64–68).

4. As far as relevant to this appeal, Part 2 of the 2004 Act provides for HMOs to be licensed by local housing authorities where (i) they are in the relevant authority's district and fall within the relevant "prescribed description" of HMO; and (ii) are required to be licensed under section 61(1). See section 55(1) - (2).

5. By section 55(3), the appropriate national authority may, by order, prescribe the relevant description of HMOs for the purposes of the HMO licensing regime. On 1 October 2018, the Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 ("the 2018 Order") came into force, which modified the prescribed description of HMO to include those occupied by five or more persons divided between two or more separate households (article 4).

6. Section 61(1) of the 2004 Act provides that "[e]very HMO to which this Part applies must be licensed", subject to two exceptions to which I refer below. Section 63 provides that an application for a licence must be made to the local housing authority, in accordance with any requirements the authority may specify (section 63(1) - (2)).

7. Section 72(1) of the 2004 Act (which is of direct relevance in this appeal), provides that a person commits an offence if he is "a person having control of or managing an HMO which is required to be licensed" under Part 2 of the 2004 Act, but is not so licensed. Section 249A, however, provides that as an alternative (amongst others) to prosecution for the offence the local authority may impose a civil penalty where it is satisfied beyond reasonable doubt that a person has committed the offence. Schedule 13A to the 2004 Act provides that if the local authority does so, the person upon whom the penalty

is imposed may appeal to the First Tier Tribunal Property Chamber (Residential Property) (the "FTT"). On such an appeal the FTT must conduct a re-hearing of the matter, and can impose a penalty only if it is satisfied, beyond reasonable doubt, that the offence was committed.

Relevant factual background

8. I have taken the facts from the decision of Upper Tribunal Judge Cooke sitting in the Upper Tribunal Lands Chamber (the "UT Judge"), the neutral citation of which is [2020] UKUT 0355 (LC). She, in turn, had taken the facts from the decision of Judge Shepherd and members sitting in the FTT. The FTT decision, which dealt with other alleged offences in addition to the offence under section 72(1) of the 2004 Act, was dated 18 February 2020 and had the case reference CAM-OOKG/HNA/2019/0016. Reference should be made to both of those decisions for the full background details.

9. Palmview Estates Limited, the Appellant, ("Palmview") purchased 521 London Road, South Stifford, Grays, Essex (the "Property") in March 2014 and converted it for occupation, with a shared kitchen, by six people. After complaints from some of the occupants, in September 2017, the Respondent, Thurrock Council ("the Council") served two Prohibition Notices on Palmview. They were served pursuant to section 20 of the 2004 Act and for these purposes it is relevant to note that they required certain works to be carried out at the Property, including the creation of a kitchen of a suitable size for use by six households. Palmview then built an extension to the kitchen in order to comply with the Notices.

10. The 2018 Order came into force on 1 October 2018 and, thereafter, an HMO licence was required in relation to the Property. It was common ground before the FTT that Palmview was aware of the new licensing regime and that it owns other properties in relation to which HMO licences are held.

11. In the meantime, on 3 May 2018, prior planning approval for the extension to the kitchen at the Property had been refused on the basis that a full planning application was required. Palmview appealed that decision and the appeal was allowed on 13 February 2019. The Council undertook further inspections of the Property in March 2019 and wrote to Mr Mordechai Sternlicht on 14 March 2019 about a number of things, including the lack of an HMO licence in relation to the Property. Mr Mordechai Sternlicht is an employee of Palmview Investments Limited, which manages the Property on behalf of Palmview. On 24 May 2019, the Council served a Notice of Intent to Impose a Financial Penalty on the basis of the lack of an HMO licence and served a Final Notice on 9 August 2019, imposing a penalty of £17,500.

12. Palmview had applied for an HMO licence for the Property on 16 July 2019 and appealed the Final Notice to the FTT on 6 September 2019. It did not dispute that it had been managing or was in control of the Property without an HMO licence. It relied upon the defence set out in section 72(5) of the 2004 Act. It was said that Palmview had a reasonable excuse for not having an HMO licence for the Property because Mr Mordechai Sternlicht had been informed by an employee in the Council's planning department that there was no point in applying for an HMO licence whilst the planning position in relation to the kitchen remained in dispute.

The FTT and the UT

13. As this appeal turns upon whether the UT and the FTT before it, erred in law in the way in which section 72(5) should be construed and the defence which it contains should be approached, it is important to set out the way in which the FTT dealt with the matter in some detail. First, at [1] it set out the alleged offences in relation to which the Notices had been served including at [a)] the alleged offence of being a person having control of or managing an HMO which is required to be licensed under section 61(1) of the 2004 Act but is not so licensed which it described as the "*license offence*" (adopting an unorthodox spelling, as it did at other parts of its decision).

14. At [2], the FTT explained that the Council alleged that Palmview "failed to apply for an HMO licence" for the Property for the period from 1 October 2018 when the 2018 Order came into effect until it applied for a licence on 16 July 2019. The FTT went on, also at [2], to state that: ". . . It was common ground that the premises are an HMO and that the Appellants [Palmview] knew of the mandatory licensing regime however the Appellants [Palmview] maintain that they have a reasonable excuse for not having a licence at the relevant time namely that they were led to believe by the Respondents that they would not get a licence."

15. At [3], the FTT set out the relevant parts of section 61 of the 2004 Act, which contain the requirement for HMOs to be licensed and section 72(1) and (5), being the relevant offence and the defence relied upon.

16. Thereafter, at [19] the FTT recorded that: Mr Sterlicht had said in evidence that he had understood that until the kitchen was extended an HMO licence would not be granted and that he was given the option for applying for a Temporary Exemption Notice under section 62 of the 2004 Act; he did not want to do so because he did not want to convert the Property back into a single residential unit; and he said that he had not been advised to apply for a licence on the basis that conditional permission might be given; and he considered that he was in a *Catch 22* situation. The FTT went on: "Whilst the Respondent's planning department wrongly maintained a position that the kitchen extension was unlawful the Appellants [Palmview] could not move forward and apply for a licence. It is right to say however, that the Appellants [Palmview] continued to let the premises notwithstanding the fact that there was no licence. Laura Bailey moved into the premises on 5th March 2019."

17. The FTT summarised Palmview's position at [29] in the following way: ". . . Mr Sternlicht said that there should be no penalty for the failure to license the premises between October 2018 and July 2019. The Appellants [Palmview] had been caught in a *Catch 22* situation. If the Respondents [the Council] had properly interpreted the planning rules they would have recognised that the new kitchen was lawful and the Appellants [Palmview] could have applied for an HMO licence at an earlier stage."

18. Then under the heading "Decisions The licence offence", the FTT stated:

> "42. The real question for the Tribunal is whether a landlord had a reasonable excuse for not applying for a licence if he was told or led to believe by the council that such an application was a waste of time in light of its own planning decision which was in fact unlawful?
>
> 43. This question breaks down into several sub-questions:

> First the general principle – I.e. would this scenario as outlined represent a reasonable excuse?
>
> If yes were the Appellants and more specifically Mr Sternlicht told or led to believe that the application was a waste of time?
>
> If yes was it reasonable for the Appellants to fail to apply for a licence as a result of this?
>
> 44. We consider that a landlord who did not apply for a licence because he was told or led to believe by the council that such an application was a waste of time would have a reasonable excuse for his failure to license."

19. Having accepted Mr Sternlicht's evidence that a Mr Ahmed in the Council's planning department had told him that he could not apply for an HMO licence because there was no planning permission for the kitchen [47], and concluded that, therefore, "Mr Sternlicht was told or led to believe that the application for a licence was a waste of time because of the planning barrier" [48], the FTT held that: "in the circumstances it was reasonable for the Appellants [Palmview] to fail to apply for a licence" [49]. It rejected the argument that Palmview should have evicted enough tenants to avoid the need for an HMO licence, concluding that such an approach might have been justified if "this were a case in which a landlord was deliberately continuing to operate an HMO without making any efforts to formalise the position legally . . ." [50]; decided that Palmview was entitled to approach the problem in the way it had, that Mr Sternlicht had been candid that it was a financial decision and that Palmview wanted to retain as many rooms as possible and could not be criticised for its approach [51]; and concluded that Palmview "had a reasonable excuse for having control of the premises [the Property] without a licence for the relevant period (October 2018 - July 2019)", and cancelled the Final Notice accordingly [52].

20. Before the UT, the Council argued that the FTT had made an error of law because it asked itself the wrong question. The offence is not the failure to apply for an HMO licence. It is managing or having control of an HMO without a licence and the reasonable excuse must relate to the offence. The UT agreed. It stated that: ". . .Whatever the reasons for not applying for a licence, what the FTT has to decide is not, as it said in its paragraph 42, whether the respondent had a reasonable excuse for not applying for a licence. The issue was whether it had a reasonable excuse for continuing to manage and control the HMO without one. The FTT's own analysis of what it had to decide in paragraphs 42 to 44 . . . set it off on the wrong track and prevented it from asking the right question" [34].

21. The UT Judge went on to consider whether although the FTT had signposted the wrong road, in fact, it took the right one. She recorded that she had asked Mr Paget, who also appeared for Palmview below, where the FTT had explained why a good reason for not applying for a licence also amounted to a good reason for continuing to manage and control the HMO without a licence and that he had referred to [52] of the FTT decision. She noted, however, that neither that paragraph nor any other part of the FTT's reasoning makes that link [35].

22. She went on as follows:

> "36. I do not agree with Mr Paget that to look for a reasonable excuse for managing and controlling the HMO without a licence, rather than for not applying for one, is impermissible because it narrows the defence. On the contrary it is vital to observe what the statute actually says. The focus must be on an excuse for committing the offence; there might be all sorts of reasons for not applying for a licence that might, or might not, not [sic] provide a reasonable excuse for the commission of the offence. As the appellant [the Council] says, there would not be a reasonable excuse where it was open to the landlord to avoid committing an offence altogether by legitimising its position – either by making an application or by taking steps to keep the number of occupants below five.
>
> 37. It is conceivable that a good reason for not applying for a licence might provide an excuse for committing the offence, for example the level of ignorance of the law referred to in *Daoudi*, noted above. I am not going to speculate on the possibilities. I am not persuaded that where a landlord fails to apply for a licence because it thinks it will be refused and for an incorrect reason, that amounts to a good reason not to apply (in view of the obvious advantage to a landlord of bringing itself within section 72(4)(b) and in view of the fact that an appeal system exists for cases where the local authority gets it wrong), let alone for committing the offence.
>
> 38. In this appeal the FTT found that that was a good reason for not applying for a licence; but the FTT did not ask itself the correct question, namely why that amounted to a reasonable excuse for committing the office. Had it done so it would have recognised that the two things are not the same, and that the reason given by Mr Sternlicht for not applying for a licence was not a reasonable excuse for committing the offence. The FTT made a mistake of law and thereby reached an obviously incorrect conclusion. For that reason its decision is set aside." "
>
> At [39], the UT Judge made clear that she had made no findings on the Council's second ground of appeal in which it challenged the findings of fact made by the FTT "because the FTT's decision is set aside, including its findings of fact, and the parties will start afresh at a re-hearing."

This appeal

23. Palmview appeals the UT's decision on two grounds. First, it is said that the UT was wrong to conclude that the FTT made an error of law in its approach to the "reasonable excuse defence" in section 72(5) of the 2004 Act and itself made an error of law in the way it interpreted the proper application of that sub-section. Secondly, it is said that the UT was wrong in law to conclude that the FTT gave inadequate reasons in reaching its conclusion that the reasonable excuse defence was satisfied.

24. In his oral submissions before us, Mr Paget, on behalf of Palmview, made no mention of the second ground of appeal and concentrated solely on whether the UT had been wrong to decide that the FTT had made an error of law.

25. Before turning to the substance of this appeal, it is helpful to consider the relevant statutory context in a little more detail. As I have already mentioned, section 61(1) of the 2004 Act provides that every HMO to which Part 2 of the 2004 Act applies must be licensed under that part of the 2004 Act. That requirement is subject to two exceptions: "(a) a temporary exemption notice is in force in relation to it under section 62 or (b) an interim or final management order is in force in relation to it under Chapter 1 of Part 4".

26. Section 62(1) provides that the section applies where a person having control of or managing an HMO which is required to be licensed under section 61(1), but is not licensed, notifies the local housing authority of his intention to take particular steps with a view to securing that the house is no longer required to be licensed. If such a notice is served, the house is not required to be licensed for the period during which the notice is in force (section 62(3) and (4)). (It was suggested that Palmview apply for a temporary exemption notice but it chose not to do so. It did not wish to restrict the occupation of the Property. See the FTT decision at [28].)

27. The relevant parts of section 72 are as follows:

> "Offences in relation to licensing of HMOs
>
> (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.
>
> . . .
>
> (4) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time –
>
> (a) a notification had been duly given in respect of the house under section 62(1), or
>
> (b) an application for a licence had been duly made in respect of the house under section 63,
>
> and that notification or application was still effective (see subsection (8)).
>
> (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 a house in the circumstances described in subsection (1) . . .
>
> as the case may be.

> …
>
> (8) For the purposes of subsection (4) [ie. a defence to proceedings brought under s 72(1)] a notification or application is "effective" at a particular time if at that time it has not been withdrawn, and either—"
>
> the authority have not decided whether to serve a temporary exemption notice, or (as the case may be) grant a licence, in pursuance of the notification or application, or
>
> if they have decided not to do so, one of the conditions set out in subsection (9) is met.
>
> (9) The conditions are—
>
> that the period for appealing against the decision of the authority not to serve or grant such a notice or licence (or against any relevant decision of [the appropriate tribunal]) has not expired, or
>
> that an appeal has been brought against the authority's decision (or against any relevant decision of such a tribunal) and the appeal has not been determined or withdrawn.
>
> (10) In subsection (9) "relevant decision" means a decision which is given on an appeal to the tribunal and confirms the authority's decision (with or without variation)."

Other consequences of operating an unlicensed HMO are set out at sections 73 -75 of the 2004 Act.

28. The issue raised in this appeal is free from directly relevant authority. Therefore, it is necessary to apply general principles to the construction and application of the "reasonable excuse" defence in section 72(5) of the 2004 Act.

29. The starting point is that language is taken to bear its ordinary meaning in the general context of the statute in question: *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 397 per Lord Nicholls. To put the matter another way, "statutory language must always be given presumptively the most natural and ordinary meaning which is appropriate in the circumstances": *Maunsell v Olins* [1975] AC 373 per Lord Simon at 391F. There is no dispute that it is necessary, therefore, to give section 72(5) its ordinary and natural meaning in the context of the relevant parts of the 2004 Act as a whole.

30. In this case, it is not necessary to go far in order to establish the statutory context for section 72(5). In fact, it is not in dispute that section 72(5) contains a statutory defence to the offence which is set out at section 72(1). The plain language of sub-section 72(1) provides that the offence amounts to having control of or managing an HMO which is required to be licensed. Not surprisingly, therefore, the defence contained in section

72(5) also refers expressly to a reasonable excuse for having control of or managing a house in the circumstances described in subsection (1).

31. There is no definition of "reasonable excuse" in the 2004 Act. However, it seems to me that the plain meaning of the words used in the sub-section as a whole and taken in context is that there is a defence if, viewed objectively, there is a reasonable excuse for having control of or managing an HMO without a licence. It seems to me that it is obvious, therefore, that the reasonable excuse must relate to activity of controlling or managing the HMO without a licence. It is that activity which is the kernel of the offence in section 72(1).

32. Mr Paget's complaint is a narrower one. He says that the UT adopted an impermissibly narrow approach to the defence in section 72(5) and that the FTT was entitled to decide that a reasonable excuse for failing to apply for an HMO licence amounted to a reasonable excuse for the purposes of section 72(5). He submits that the UT itself erred in law by limiting the application of the section 72(5) defence.

33. He pointed out, on behalf of Palmview, that it is important to note that the offence contained in section 72(1), for which section 72(5) provides a defence, is one of strict liability. In other words, it is not an element of the offence that the defendant knew that the property he had control of or managed was a house in multiple occupation and was required to be licensed: *R (Mohamed) v Waltham Forest LBC* (supra) per Dingemans LJ at [40] – [48]. This forms part of the statutory context in which the "reasonable excuse" defence must be construed and applied. Mr Paget submits, therefore, that section 72(5) should be construed broadly in the light of the strict liability offence to which the defence relates. In fact, Mr Ham, on behalf of the Council, agrees. I also agree.

34. However, the offence to which the defence of having a reasonable excuse relates, is not framed in terms of failure to apply for a licence. The prohibited activity is controlling or managing an HMO without a licence. The reasonable excuse is framed expressly in terms of the offence itself. It must relate to the prohibited activity. As the UT Judge pointed out at [38] of her decision, not applying for a licence and controlling or managing an HMO without a licence are not the same thing. They are not logically concomitant: a person might have a perfectly reasonable excuse for not applying for a licence which does not (everything else being equal) give that person a reasonable excuse to manage or control those premises as an HMO without that licence.

35. This is demonstrated by Mr Ham's first hypothetical scenario set out in his written argument. He described the scenario as follows:

> "A person has control of or manages an HMO. They are aware that they do not meet the criteria for an application [for a licence] to be granted. This may be because either the property is simply not up to standard, or for example they have relevant convictions which would preclude them from obtaining a licence. A person in that situation would clearly have a reasonable excuse for not applying for a licence – because they know it would never be granted. . . ."

36. If a reasonable excuse for not applying for a licence is interchangeable with a reasonable excuse for committing the offence in section 72(1), such a person would have a reasonable excuse for having control of or managing the HMO. It would be

possible to argue that it is a defence that a licence had not been applied for because in the circumstances, it would not be granted. That cannot be correct. Such a construction or application of section 72(5) is at odds with the statutory context in which it arises. It would drive a coach and horses through the offence itself. It would also undermine the object and purpose of the statutory licensing regime which is to promote proper housing standards for tenants of HMOs: *R (Mohamed) v Waltham Forest LBC* (supra) at [46].

37. That is not to say that, as the UT Judge pointed out, it may be possible for a failure to apply for a licence, in some circumstances, to amount to a reasonable excuse for controlling or managing an unlicensed property. Mr Ham provided an example of such circumstances in his second scenario which is as follows:

> "A person has control of and manages an HMO in an area not currently subject to licencing. The LHA implement a licencing scheme, and the person attempts to apply for a licence. In doing so, for reasons beyond their control, payment for a licence is not made (for example, a banking error which prevents payment going through, or prevents expected funds from clearing into their account to make payment). As a result of this delay the person is, for a brief period, in control of or managing an HMO which should be but is not licensed."

38. There may be many other examples. One is the circumstances which arose in *D'Costa v D'Andrea* [2021] UKUT 144 to which we were referred. In that case, the landlord offered to apply for a licence for her premises but was told by an officer of the local authority that she did not need one. She was also told that if the position changed she would be informed. Accordingly, she was under the impression that the use of her premises was lawful and that she would be informed if the position changed. As the UT Judge stated at [39] in that case, it is difficult to see why a landlord would not have the defence of reasonable excuse for having control of or managing an unlicensed HMO in those circumstances. She held that the "reasonable excuse" defence in section 72(5) of the 2004 Act applied.

39. In fact, as the UT Judge pointed out in this case, it is best not to speculate about the circumstances which may be sufficient to amount to a reasonable excuse for the purposes of section 72(5). It is necessary for the FTT to consider all of the relevant circumstances when seeking to determine whether the defence is made out and to view the matter objectively. It may be that the reason for failing to apply for a licence does provide a reasonable excuse for having committed the offence when viewed in the context of all the relevant circumstances of the case. As I have already made clear, the excuse in relation to failure to apply for a licence cannot lead, however, as a matter of course, to the conclusion that the defence is made out.

40. To return to this case, it seems to me that if the FTT decision is read as a whole, it is quite clear that it asked itself the wrong question and did not address its mind to the defence in section 72(5) of the 2004 Act. Having set out the offence correctly at [1a)] the FTT used a variety of formulations of the defence, none of which are the same as the terms of section 72(5) itself. Furthermore, the discussion centres upon the failure to apply for a licence rather than a reasonable excuse for managing or controlling the Property without an HMO licence.

41. The error is patently clear in [42] – [44] of the FTT decision. It is stated that the "real question . . . is whether a landlord had a reasonable excuse for not applying for a

licence" [42]. At [43] the question is analysed in terms of whether the "scenario" in relation to the planning application and the assertion of the local authority employee that in the circumstances there was no point in applying for a licence would represent a reasonable excuse and whether therefore, it was "reasonable to fail to apply for a licence [43]. The same formula is used in [49] and in the heading to that paragraph which reads: "Was it reasonable for the Appellants to fail to apply for a licence. . ." In my judgment, therefore, there can be no doubt that the UT Judge was correct to decide that the FTT was asking itself the wrong question.

42. I come to this conclusion despite the fact that the FTT returned to the correct formula when summarising its conclusions at [52]. All of the previous formulation of the test and the consideration of the conduct had been in error. The FTT was focussed solely on the failure to apply for a licence and accordingly, it used the wrong filter for its consideration of whether there was a "reasonable excuse" in this case. It seems to me that it merely summarised the defence and its conclusion in a formulaic fashion at [52] having already carried out its analysis on a flawed basis.

43. In the circumstances, it is not clear that the FTT would have reached the same conclusion had it addressed the correct question and taken into account all of the relevant circumstances. Such matters might include whether the landlord has failed to take simple steps in order to avoid committing the offence. These might, depending on the circumstances, include reducing the occupancy of the premises and applying under section 74(2)(a) of the 2004 Act or applying for a licence under section 74(2)(b). In fact, Mr Paget accepted that the FTT would be entitled to take such matters into account although he said it did not have to do so. It seems to me that had the FTT's focus been upon section 72(5) as properly construed and had it considered all of the relevant circumstances, it might have decided that there was a reasonable excuse for committing the section 72(1) offence or it might not have done so. It could not be said that there was only one conclusion which the FTT could have arrived at, if properly directed. Accordingly, the UT was entitled, and also right, to remit the matter to the FTT for re-hearing so that the FTT could address the correct question in the light of all the relevant facts. To put the matter another way, in my judgment, the error of law was material.

44. This is not a case in which the appellate tribunal sought to find an error of law by means of narrow textual analysis and to substitute its own decision. First, the UT was correct in its construction of and approach to section 72(5) and in identifying the error of law made by the FTT. Secondly, and in any event, the UT Judge did not seek to substitute her own decision for that of the FTT. As I have already mentioned, she set aside the FTT's decision, including its findings of fact, and remitted the matter for a full re-hearing - [39] and [40]. She did so having made clear at [37] that a good reason for not applying for a licence might provide an excuse for committing the offence but that she was not going to speculate on the possibilities. It was in that context that she stated at [37] that she was "not persuaded that where a landlord fails to apply for a licence because it thinks it will be refused for an incorrect reason, that amounts to a good reason not to apply (in view of the obvious advantage to a landlord of bringing itself within section 72(4)(b) and in view of the fact that an appeal system exists for cases where a local authority gets it wrong), let alone for committing the offence".

45. The circumstances are a long way from the cases in relation to appellate interference with the exercise of discretion by a first instance judge to which we were briefly

referred: see *In re C (A Child) (Adoption: Placement Order)* [2013] 1 WLR 3720 at [38] and [39] and *Re F (Children)* [2016] EWCA Civ 546 at [23].

46. As to the second ground of appeal, as I have already mentioned, Mr Paget did not address us upon it orally. In any event, I also agree with Mr Ham that the nub of the complaint in relation to the UT is that it was wrong to decide that the FTT had applied the wrong legal test when construing and applying section 72(5). Despite the terms of the second ground, it seems to me that the UT did not conclude that the FTT gave inadequate reasons in reaching its conclusion that the defence in section 72(5) was satisfied. Instead, having decided at [34] that the FTT had asked itself the wrong question, the UT Judge noted at [35] of her decision that she had asked Mr Paget on behalf of Palmview, "where the FTT had explained why a good reason for not applying for a licence also amounted to a good reason for continuing to manage and control the HMO without a licence. Mr Paget pointed to paragraph 52 . . . But neither that paragraph nor any other part of the FTT's reasoning makes that link". It seems to me that she was questioning whether, despite the fact that it looked as if the FTT had misdirected itself as to the nature of the defence in section 72(5) and had set off on the wrong track, in fact, it had linked what it considered to have been good reasons for not applying for a licence to the offence to which the section 72(5) defence is directed. She was looking to see whether the FTT decision might nevertheless be saved. Mr Paget was unable to point to a link in the FTT's reasoning and as a result, the UT Judge concluded quite properly that the FTT had applied the wrong legal test. In my judgment, therefore, the second ground of appeal is misconceived.

47. For all the reasons set out above, I would dismiss the appeal.

Lady Justice Elisabeth Laing:

48. I agree.

Lady Justice King:

49. I also agree.