



Neutral Citation Number: [2024] UKUT 349 (LC)

Case No: LC-2024-257

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

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

FTT REF: BIR/OOFY/HNB/2023/0002 AND 0003

14 November 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – CIVIL PENALTY – requirements of paragraph 2B of Schedule 14 to the Housing Act 2004, building managed or controlled by a Co-operative society where “all management decisions of the society are made by the members at a general meeting which all members are entitled to, and invited to, attend”.

BETWEEN:

NOTTINGHAM CITY COUNCIL

Appellant

-and-

HOUSING 35 PLUS LIMITED

Respondent

**27 Palin Street, Nottingham, NG7 5AD
29 Eland Street, Nottingham, NG7 7DY**

**Upper Tribunal Judge Elizabeth Cooke
6 November 2024**

Mr Andrew Lane, instructed by Nottingham City Council, Legal Services for the appellant
Mr Jonathan Manning for the respondent, instructed by Anthony Collins Solicitors

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Introduction

1. The Housing Act 2004 introduced licensing requirements for certain houses in multiple occupation (“HMOs”). Failure to comply with those requirements is a criminal offence which can lead to prosecution, or to the imposition of a financial penalty by the local housing authority under section 249A of the 2004 Act; commission of the offence can also be the basis of a rent repayment order. The 2004 Act sets out a number of definitions of HMOs, and Schedule 14 to the 2004 Act sets out certain buildings that nevertheless are not HMOs for the purposes of the licensing requirements. The present appeal is against a decision of the First-tier Tribunal that two buildings do not require an HMO licence because they fall within paragraph 2B of Schedule 14. The point was decided as a preliminary issue in an appeal to the FTT from financial penalties imposed by a local housing authority (pursuant to paragraph 10 of Schedule 13A to the 2004 Act).
2. The appellant is the Nottingham City Council; the respondent is Housing 35 Plus Limited, which manages the two properties concerned: 27 Palin Street, Nottingham, NG7 5AD, and 29 Eland Street, Nottingham, NG7 7DY. The appellant was represented by Mr Andrew Lane and the respondent by Mr Jonathan Manning, both of counsel, and I am grateful to them both.

The factual and legal background

3. The respondent is registered as a co-operative society under the Co-operative and Community Benefit Societies Act 2014. It was founded to provide housing for those who are homeless or at risk of homelessness, and while it prioritises persons over 35 it does accommodate some students. The FTT heard evidence that the respondent currently has 75 to 80 properties with 500 bed spaces.
4. On 23 March 2023 the appellant issued to the respondent financial penalty notices, each of £15,000, in relation to each of the two properties on the basis that the respondent had committed the offence created by section 72(1) of the 2004 Act of managing or being in control of an HMO that was required to be licensed and was not. The respondent appealed to the FTT on a number of grounds, one of which was that the properties were not HMOs (and therefore no offence had been committed) because of the provisions of Schedule 14 to the 2004 Act. The FTT decided that ground in the respondent’s favour, which meant that none of the other grounds was needed
5. Schedule 14 begins:

“1(1) the following paragraphs list buildings which are not houses in multiple occupation for any purposes of this Act other than those of Part 1.

(2) In this schedule “building” includes part of a building.”
6. Part 1 of the 2004 Act is about health and safety standards and is not relevant to this appeal. Paragraph 2B of Schedule 14 to the Housing Act 2004 reads as follows:

- “(1) A building where—
- (a) the person managing or having control of it is a co-operative society whose rules are such as to secure that each of the conditions set out in sub-paragraph (2) is met, and
 - (b) no person who occupies premises in the building does so by virtue of an assured tenancy, a secure tenancy or a protected tenancy.
- (2) The conditions are—
- (a) that membership of the society is restricted to persons who are occupiers or prospective occupiers of buildings managed or controlled by the society,
 - (b) that all management decisions of the society are made by the members (or a specified quorum of members) at a general meeting which all members are entitled to, and invited to, attend,
 - (c) that each member has equal voting rights at such a meeting, and
 - (d) that, if a person occupies premises in the building and is not a member, that person is an occupier of the premises only as a result of sharing occupation of them with a member at the member's invitation.
- (3) For the purposes of sub-paragraph (1) “*co-operative society*” means a body that—
- (a) is registered as a co-operative society under the 2014 Act or is a pre-commencement society (within the meaning of that Act) that meets the condition in section 2(2)(a)(i) of that Act,
 - (b) is neither—
 - (i) a non-profit registered provider of social housing, nor
 - (ii) registered as a social landlord under Part 1 of the Housing Act 1996.
- ...”

7. The point of paragraph 2B is obvious: where a building that would otherwise be an HMO is managed or controlled by a body of which the residents are all members with equal voting rights on all management decisions then there is no need for that body to be regulated in order to protect its members from their manager; they manage themselves and can protect themselves. The exemption applies whether the co-operative society manages and controls just the building in question, or (as in the present appeal) a number of buildings, provided that only and all the residents in the buildings are themselves the decision-makers.
8. The parties’ positions in the appeal are the same as before the FTT: the respondent says that its rules meet the terms of paragraph 2B and therefore the properties are not HMOs; the appellant says that the respondent’s rules meet them all except paragraph 2B(1)(a) in relation to paragraph 2B(2)(b), and that therefore the properties are HMOs.
9. Accordingly I have to set out the text of the relevant rules of the respondent.

The rules of Housing 35 Limited

10. The rules begin by providing for the respondent’s name, for its membership (all members must be occupiers or prospective occupiers of its properties), and its objects (essentially the provision of housing for occupation under licence agreements). It has a share capital and each member has a £1 share.

General meetings

11. Rule 21 provides that the co-operative shall meet in general meetings, either ordinary or annual. General meetings are convened by the secretary and each member is to be invited (rule 22). Rule 25 provides that each member is entitled to attend and vote at a general meeting, and rule 44 that every member shall have one vote (cast in person or by proxy).
12. The AGM is to be held once a year (rule 27) and its functions are to receive the accounts and the auditor's report, receive a report of the management committee on the state of affairs of the co-operative, elect the committee for the coming year, decide the frequency of ordinary general meetings to be held in the coming year, appoint the auditor and consider any other resolutions included in the notice of the meeting (rule 28).
13. Rules 29 to 34 are about ordinary general meetings, including their frequency and how they are convened. Rule 30 states:

“The functions of ordinary general meetings shall be to discuss all management decisions of the Co-operative that have arisen since the last general meeting.”
14. Rule 35 provides that the quorum at a general meeting is six members, of whom at least three are to be committee members. However, that provision is the result of an amendment of the rules; until 2019 the rule stated that the quorum was six members, or a tenth of the membership if greater than 60. Rules 36 to 47 provide for procedure and voting.
15. A number of other rules make provision for decisions to be taken by a general meeting. Rules 15(c) and 17 enable a general meeting to expel a member by a two-thirds majority. Rule 28(c), as we saw, requires the annual general meeting to appoint the management committee. Rule 57 enables a general meeting to remove a committee member by a majority vote. Rule 94 says that a general meeting may set aside any surplus funds arising to be donated or loaned for any purposes. Rule 119 enables a general meeting to amend the rules of the co-operative with a two-thirds majority vote.

The management committee

16. The rules then make provision about the committee. Rule 48 says this:

“The Co-operative shall have a management committee [called "the committee"] which shall control and direct the management of the day to day business of the Cooperative in accordance with its objects and these rules. The first committee members shall be the members who signed the application to register the Co-operative, which committee shall, as soon as may be practicable after the registration of the Cooperative under the Act, call an ordinary general meeting to elect a committee made up of Co-operative members to serve until the close of the following annual general meeting.”
17. Rule 49 states that the management committee shall have at least five and no more than 12 members; rule 50 says that it may not co-opt members. Rules 51 to 56 provide for the nomination and election of committee members. Rules 57 to 59 provides for their removal by resolution at a general meeting or, in certain circumstances, by a two-thirds majority of

the committee itself. Rules 60 to 68 make further procedural arrangements for the committee. Rule 69 says this:

“The business of the Co-operative shall be conducted by the committee which may exercise all such powers as may be exercised by the Co-operative in accordance with its objects and these rules and are not by these rules or by statute required to be exercised by the Co-operative in general meeting. The committee shall in all things act for and in the name of the Co-operative. Without prejudice to the general powers conferred on the committee by these rules, the committee may exercise the following powers to:

- (a) purchase, sell, build upon, lease, mortgage or exchange any property or land and to enter into any contracts and settle the terms of such contracts;
- (b) compromise, settle, conduct, enforce or resist either in a Court of Law or by arbitration any suit, debt, liability or claim by or against the Co-operative;
- (c) determine from time to time the terms and conditions upon which the property of the Co-operative is to be let, leased or sold, and to make, revoke, and alter and at all times enforce as it thinks fit, such terms and conditions;
- (d) appoint and remove all solicitors, architects, surveyors and employees;
- (e) appoint and remove managing agents and to determine from time to time their remuneration and the terms and conditions upon which the managing agents are to act on behalf of the Co-operative;
- (f) pay all such expenses, including travelling expenses, as are properly incurred by any committee members in the execution of his or her duties;
- (g) take up corporate membership of any secondary co-operative from which the Co-operative purchases services;
- (h) become a member, affiliate or subscribe to the International Co-operative Alliance, Co-operatives UK, the Confederation of Co-operative Housing, the Wales Co-operative Centre, Community Housing Cymru, and/or the National Housing Federation; or
- (i) affiliate or subscribe to any other organisation that will assist the Co-operative achieve its objects in such manner as the members voting at a general meeting of the Co-operative may from time to time determine.”

18. A number of rules refer to further functions of the committee. Rule 12 says:

“The committee may within their absolute discretion and in accordance with the procedure which may be laid down from time to time by the Co-operative in general meeting admit or refuse to admit any person to membership of the Co-operative save that such person must be a licensee or prospective licensee of the Co-operative.”

19. Rule 15 provides for a member to cease to be a member in certain circumstances, for example, by rule 15(g)(iii), if he or she is a prospective licensee of a property and

“is reasonably deemed by the committee to have no real and present prospect of being offered a licence of a home in a property owned or managed by the Co-operative within the following twelve months.”

20. Rules 26 and 31 provide for the committee to decide the time, place and date of general meetings (recalling that the frequency of ordinary general meetings is determined by the AGM under rule 28, see paragraph 13 above). As also rule 57 enables the committee to remove a committee member who has breached the terms of their occupation licence or their obligations as a committee member of the co-operative's rule, or for "any other reason deemed by the committee as material or serious enough to warrant removal of the member from the committee."
21. By rule 76 the committee can appoint officers of the Co-operative in addition to the chair, treasurer and secretary. Rule 77 provides:

"The Co-operative officers and other officers, if any, shall act under the supervision control and direction of the committee ..."
22. Rule 105 requires the committee to submit the Co-operative's accounts for audit.

The FTT's decision

23. It will be recalled that paragraph 2B(2)(b) of Schedule 14 to the 2004 Act requires:

"that all management decisions of the society are made by the members ... at a general meeting which all members are entitled to, and invited to, attend."
24. Obviously the rules provide for general meetings to be held, both annual and ordinary, and for all members to be entitled to and invited to attend and vote. The issue the FTT had to decide was whether the rules provide for "all management decisions" to be taken by the members in general meetings, as argued by the respondent, or whether they provide for some or all management decisions to be taken by the management committee (comprising a few but not all the members), as the appellant argued. In the appeal Mr Manning pointed out that either way, the respondent is a self-governing organisation and there is no question of anyone who is not a member being able to take any management decisions; but that is not enough to satisfy the statute which requires that all management decisions are made by the members at meeting to which all are invited.
25. The FTT took the view that the rules so provide:

"17. In our judgement the structure of the Applicant is clear from its Rules. It is governed by its Members in General Meeting. Day to day running of the business is undertaken by the Management Committee. There is nothing unusual in this arrangement. Most organisations have a decision making board which delegates the running of the organisation to its appointed managers.

18. Rule 30 specifically provides that General Meetings shall "discuss all management decisions". This is entirely consistent with the wording of Paragraph 2B(2)(b) which refers to "all management decisions". Rule 44 provides for equal voting rights at General Meetings. We find that this satisfies the requirement for "all management

decisions” to be made by Members in General Meeting on the basis of equal voting rights at such a meeting as required by Paragraph 2B(2)(c).

19. The powers of the Members in General meeting to take “all management decisions” can be contrasted with the duties of the Management Committee under Rule 48 to “control and direct the management of the day to day business”. Rule 69 provides that “the business of the Co-operative shall be conducted by the committee”. Put simply the Members make all the decisions and the Committee conducts the day to day business. This ensures the primacy is accorded to the Members in General Meeting.

20. We find that on a plain reading the effect of the Rules is to secure that all management decisions are made by Members in General Meeting.”

26. The FTT also decided, having heard evidence and looked at minutes, that in practice the buildings are managed in accordance with the requirements of paragraph 2B(2).
27. The appellant has permission to appeal, granted by this Tribunal, on the ground that the FTT was wrong about the rules.
28. The appellant also has permission to appeal on a second ground, that the FTT was in error in making its findings of fact about the way the respondent is managed. In the appeal the parties agreed that what actually happens in practice does not matter; if the rules secure that the conditions in paragraph 2B(2) are met then whether or not the co-operative is managed in accordance with them is irrelevant, and likewise even if the co-operative is so managed if the rules do not “secure” that that happens the building falls outside the exception. Therefore neither addressed me about ground 2 and I have not decided ground 2. Therefore the FTT’s findings of fact remain undisturbed.

The appellant’s case on appeal

29. The appellant’s case is that the FTT was wrong to find that rule 30 provides for the general meeting take management decisions. The word “discuss” in rule 30 means exactly what it says. The role of the ordinary general meeting is to discuss the management decisions that have been made by the management committee since the last general meeting; in addition, certain decisions are expressly reserved to the general meeting as we saw above (paragraph 15). Aside from those reserved matters, management decisions are *taken* by the committee. Rule 69 enables the committee to exercise “all such powers as may be exercised by the Co-operative in accordance with its objects and exercised these rules and are not by these rules or by statute required to be exercised by the Co-operative in general meeting”, and goes on to give examples at rule 69(a) to (i). There is no provision for the general meeting to take management decisions; and in any event, even if it can, rule 69 unambiguously enables the committee to take management decisions without the involvement of a general meeting. And that is consistent with rule 48, which provides for the committee to “control and direct the management of the day to day business of the Cooperative.”

The respondent’s case

30. Mr Manning urged the Tribunal to look at the way the rules are intended to operate, which is as the FTT described; the general meeting takes all the management decisions and the management committee, far from actually taking any management decisions, merely implements those decisions.
31. Mr Manning's reading of rule 30 is therefore different from that of the appellant. The word "discuss" means "make" or "take" so that, as the FTT said, rule 30 provides for all management decisions to be taken by the general meeting and indeed reserves those decisions to it. It should be read alongside rule 44, which provides for decisions to be taken on a one-vote-per-member basis.
32. The language of rule 48, Mr Manning argued, is different. The emphasis is on what happens day-to-day and on executive functions rather than on decision-taking. Rule 69 therefore provides examples of things that the committee can do, which are purely day-to-day matters that it is impracticable to have the general meeting do.
33. And rule 69 then has to be read in conjunction with rule 30. Because rule 30 reserves management decisions to the general meeting, those decisions are "by these rules ... required to be exercised by the-operative in general meeting". Therefore insofar as any of the matters listed (a) to (i) are management decisions, the committee has to refer the actual decision to the general meeting. It can draft a letter of appointment for a managing agent, for example, but it cannot decide to appoint one; it can draft the terms of a new occupation licence, so that the general meeting does not have to do so, but it then has to put those terms to the general meeting for decision. The use of the word "determine" in paragraph 69(c), in the context of the terms of a letting or sale, cannot mean that the committee decides for itself without reference to anybody else; it means that the committee can produce a draft, upon which the members in general meeting will decide.
34. The same goes for other functions that the rules give to the management committee. All management decisions are taken by the general meeting under rule 30, and in those instances where the committee is given a decision-making power that is not a management decision. Thus rule 12 provides:

"The committee may within their absolute discretion and in accordance with the procedure which may be laid down from time to time by the Co-operative in general meeting admit or refuse to admit any person to membership of the Co-operative save that such person must be a licensee or prospective licensee of the Co-operative."
35. Mr Manning explained that the general meeting decides the procedure for admitting members, and that is a management decision; the actual admission of an individual is done by the committee – and has to be, so that personal details are not shared in the general meeting – and is not a management decision. Equally, the removal of a committee member by the committee under rule 57(b) is not a management decision. The decision to appoint another officer under rule 76 is either not a management decision, or is subject to rule 30 so that the actual decision is taken by the general meeting and the committee merely implements that decision; but in Mr Manning's view appointing an officer it is not a management decision.

36. Mr Manning pointed out that if management decisions can be taken by the committee as well as by the general meeting, there is a potential problem of conflicting decisions. What if the committee decides to raise a rent and the general meeting decides not to? There is no provision in the rules to resolve that conflict. But that does not arise; all management decisions are reserved to the general meeting by rule 30 and the management committee merely implements those decision.
37. Mr Manning asked rhetorically what is the purpose of the general meetings if they are simply a talking-shop to discuss management decisions rather than to take them. And what is the purpose of the elaborate provisions for convening the meetings and for their quorum and procedure if they are not making management decisions? Mr Manning observed that in two previous decisions the FTT has held that the respondent's rules satisfy the requirements of paragraph 2B(2)(b), although he acknowledged that those decisions do not create a precedent.
38. Finally Mr Manning expressed the view that if the respondent's constitution does not meet the requirements of paragraph 2B, no fully mutual co-operative society could do so since this, he said, was a typical set of rules.

Discussion and conclusion

39. The appeal turns on the construction of rules 30, 48 and 69, and primarily on the meaning of rule 30. Does "discuss" mean "discuss", as the appellant says, or something else? Does "to discuss all management decisions of the Co-operative that have arisen since the last general meeting" mean that the general meeting discusses what the committee has decided since the last meeting, or does it mean to take all management decisions that have become necessary since the last meeting?
40. I take no account of Mr Manning's suggestion that if this respondent does not meet the requirements of paragraph 2B(2)(b) of Schedule 14 no fully mutual co-operative society can do so. There is no evidence to that effect, and if there were it would be irrelevant to the construction of the statute. As Mr Lane observed, it would not be difficult to draft rules that satisfied the statutory requirement. Nor am I concerned with previous decisions of the FTT.
41. The system described by Mr Manning, on his reading of the rules, is that all management decisions are made by the respondent in general meeting, with the committee simply carrying out their instructions, as well as making trivial non-management decisions (Mr Manning gave the example of buying a pint of milk). Such a system could be workable, but in my judgment that is not the system described by the rules. The appellant's construction of rule 30 is obviously correct. I say that for three reasons.
42. The first is that that is the plain meaning of rule 30. As a matter of ordinary language to discuss is not the same as to decide. Where the rules wish to talk about deciding they do so explicitly; hence the words of rule 12, which confer an "absolute discretion", and hence the use of the words "determine", "appoint", etc in rule 69. If the rules wanted the general meeting to take management decisions it would have said so. This is not, as Mr Manning suggested, a "purely semantic" point; it is about the plain meaning of words. As for the

subject matter of those discussions, decisions “that have arisen since the last general meeting” is not the clearest way of putting things, but it seems to me mean that the general meeting is to discuss management decisions that have been made (by the committee) since the last general meeting, not to make decisions on issues or problems or the like that have arisen since the last general meeting and now have to be decided upon. It may also mean discussion of management issues that have arisen and have not yet been decided since the last meeting; but rule 30 provides for the general meeting to discuss them, not to decide.

43. Second, that reading of rule 30 is consistent with rule 48 which – in distinct contrast to rule 30 - makes provision for the committee to “control and direct the management of the day-to-day business of the Cooperative.” Rule 48 does not say that the committee shall implement the decisions of the general meeting. It is to control and direct, and that is not consistent with an inability to decide anything. And what it controls and directs is the day-to-day “management”; I do not understand how that does not mean that the committee takes management decisions. That is why it is called a management committee.
44. Third, Mr Manning’s construction of rule 30 makes it very difficult to understand rule 69. In his skeleton argument he said that “the matters referred to by Rule 69 do not relate to management decisions at all, but, by Rule 48, to the control and management of the day-to-day business of the Co-operative”. That is puzzling. Why is a decision about the management of day-to-day business not a management decision? Mr Manning is perhaps reading “management decisions” in rule 30 as being policy decisions, or higher level decisions in some sense, as distinct from the day-to-day management decisions referred to in rule 69; I do not think that is a workable distinction, and even if it were, who could then say which level of management decisions is referred to in paragraph 2B(2)(b) of Schedule 14? That paragraph simply says “all management decisions”, and I take that to mean all of them, high-level or day-to-day.
45. At the hearing, Mr Manning accepted that some of the matters listed in rule 69 could require management decisions – for example, the appointment of a managing agent. He explained that the management decision has to be made by the general meeting, and the committee simply puts it into effect. The same goes for other matters described in the rules as functions of the committee. But that means that the committee in considering, for example, the appointment of a managing agent under rule 69, the creation of a new office under rule 76, or the expulsion of a committee member under rule 57a, has to be clear whether it is a management decision or not. If it is, the decision has to be made by the general meeting and the committee must then follow instructions. But there is no criterion for ascertaining the nature of a particular decision. It is not at all obvious to me that the appointment of an additional officer, for example, is not a management decision, nor the admission of an individual as a member. If the committee gets it wrong, their decisions could be challenged as being taken without authority. Mr Manning’s construction sets the committee an impossible task.
46. I therefore agree with the appellant’s construction. The management committee, as its name implies, is empowered to make management decisions. They might be described as day-to-day management decisions, but they are management nonetheless. The function of the general meeting is to discuss those decisions so that the members all have a voice in what is happening and can make their views known to the committee, both about decisions already made and about future decisions. That does not make it a pointless

talking shop; other statutory provisions enable occupiers of buildings to be able to express their views to management without actually making the decisions, for example the consultation procedures for major works under section 20 of the Landlord and Tenant Act 1985.

47. The general meeting certainly does make some decisions, namely those reserved to them by the rules (as rule 69 points out) such as expelling members (rule 15c), electing the committee (rule 28), appointing the auditor (rule 67) and changing the rules themselves (an important policy decision that is not left to the committee) (rule 119). But day-to-day management decisions are made, and all the powers of the respondent that are not reserved to the general meeting are exercised, by the committee.
48. Therefore the respondent's rules do not "secure" that "all management decisions of the society are made by the members (or a specified quorum of members) at a general meeting which all members are entitled to, and invited to, attend" as paragraph 2B(2)(b) requires. The FTT was wrong about that and its decision about the effect of the rules is set aside.

Conclusion

49. In conclusion, the appeal succeeds. That means that the buildings were HMOs, and the matter is remitted to the FTT so that it can make a decision on the respondent's other seven grounds of appeal from the financial penalties to the FTT.

Upper Tribunal Judge Elizabeth Cooke

14 November 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.

