



FIRST-TIER TRIBUNAL

**PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case references : **BIR/37UJ/HML/2022/0002**

Property : **Park Lane Farm, 14 Park Lane, Sutton
Bonington LE12 5NH**

Applicant : **Mr Michael Wright**

Representative : **Mr David Wright**

Respondent : **Rushcliffe Borough Council**

Representative : **Ms Alison Walker, Solicitor**

Type of application : **An Appeal under paragraph 31 of Part 3
Schedule 5 of the Housing Act 2004
("the Act") against the decision of the
Respondent to refuse to grant an HMO
licence**

Tribunal members : **Judge C Goodall
Mr A Lavender BSc (Hons), CEHP**

**Date and place of
hearing** : **10 July 2023 at Nottingham Justice
Centre in person and 18 December 2023
by video hearing**

Date of decision : **13 February 2024**

DECISION

Summary

We determine that the Applicant was not a fit and proper person to hold an HMO licence at the time of the Council's decision to refuse his application for an HMO licence, and we therefore confirm their decision.

Background

1. 14 Park Lane, Loughborough ("the Property"), is a substantial domestic residence with 12 bedrooms. It is owned by Mr Michael Wright, the Applicant, who himself lives in the Property, and it is also occupied by tenants.
2. The Property is a house in multiple occupation. It was licensed by Rushcliffe Borough Council ("the Council") to be used as an HMO by a maximum of 20 persons under a licence dated 5 May 2017. The licence was issued to the Applicant. That licence expired on 4 May 2022.
3. The Applicant applied for a new licence, applying to be both the licence holder and the manager. On 21 September 2022, the Council issued a notice to the Applicant informing him that it was minded to refuse to grant the application, and inviting representations.
4. On 4 November 2022, the Council issued a Notice of Refusal to Grant a Licence.
5. On 2 December 2022, the Tribunal received a notice of appeal against the refusal of the HMO licence. Directions were issued, resulting in bundles of documents including statements of case and supporting documents being provided by the parties. At the final hearing, the Tribunal considered thirteen bundles, being:
 - a. The appeal application form;
 - b. The Council's first bundle dated 26 January 2023;
 - c. The Applicant's first bundle dated 26 February 2023;
 - d. The Council's second bundle dated 5 July 2023;
 - e. The Applicant's second bundle dated 8 July 2023;
 - f. Directions made by the Tribunal on 12 July 2023;
 - g. The Council's bundle of further documents requested by the Tribunal;
 - h. Applicant's table of breaches;
 - i. Copies of additional emails between the parties in August 2022;
 - j. A copy of the FPPMW (see paragraph 69 below);

- k. David Wright email dated 31 October 2022;
 - l. Steve Matthews email dated 3 November 2022 in response;
 - m. Further emails between 18 – 30 August 2022 between the parties.
- 6. A face to face hearing took place on 10 July 2023 at Nottingham Justice Centre. The Applicant was represented by his son, Mr David Wright. The Respondent was represented by the Council Solicitor, Mrs Alison Walker. The hearing did not finish and was adjourned for a second hearing day, this time via video hearing.
 - 7. The second day was fixed for 24 August 2023, but the Council’s representative then became unavailable for that date. The second day was therefore fixed for 18 December 2023. The significant time period between the first and the second day arose because David Wright commenced a university course in September 2023 and was not available to represent his father until the Christmas holidays. That hearing was concluded with a direction that final submissions be provided in writing.
 - 8. This document contains the Tribunal’s determination of the appeal and our reasons for so determining.

Law

Licensing and the fit and proper person test

- 9. The Housing Act 2004 (“the Act”) creates a statutory regime for licensing of HMO’s. All parties accept that the Property is an HMO which is subject to compulsory licensing under Part 2 of the Act. A person who has control of an HMO or manages it without a licence when the HMO is required to be licensed commits a criminal offence under section 72 of the Act. Alternatively, the appropriate local authority can impose a financial penalty on that person (section 249A).
- 10. Under section 64 of the Act, when an application for a licence is made, a local authority must either grant or refuse it. Before granting a licence, the local authority must be satisfied on matters that are referred to in section 64(3). The matters in that sub-section that are relevant in this case are those set out in sub-sections 64(3)(b), (c), and (d), which provides:
 - “(b) that the proposed licence holder—
 - (i) is a fit and proper person to be the licence holder, and
 - (ii) is, out of all the persons reasonably available to be the licence holder in respect of the house, the most appropriate person to be the licence holder;
 - (c) that the proposed manager of the house is either—
 - (i) the person having control of the house, or

- (ii) a person who is an agent or employee of the person having control of the house;
- (d) that the proposed manager of the house is a fit and proper person to be the manager of the house;
- (e) that the proposed management arrangements for the house are otherwise satisfactory. ...”

12. Section 66 of the Act provides:

S66 Tests for fitness etc. and satisfactory management arrangements

(1) In deciding for the purposes of section 64(3)(b) or (d) whether a person (“P”) is a fit and proper person to be the licence holder or (as the case may be) the manager of the house, the local housing authority must have regard (among other things) to any evidence within subsection (2) or (3).

(2) Evidence is within this subsection if it shows that P has—

- (a) committed any offence involving fraud or other dishonesty, or violence or drugs, or any offence listed in Schedule 3 to the Sexual Offences Act 2003 (c. 42) (offences attracting notification requirements);
- (b) practised unlawful discrimination on grounds of sex, colour, race, ethnic or national origins or disability in, or in connection with, the carrying on of any business;
- (c) contravened any provision of the law relating to housing or of landlord and tenant law; or
- (d) acted otherwise than in accordance with any applicable code of practice approved under section 233.

(3) Evidence is within this subsection if—

- (a) it shows that any person associated or formerly associated with P (whether on a personal, work or other basis) has done any of the things set out in subsection (2)(a) to (d), and
- (b) it appears to the authority that the evidence is relevant to the question whether P is a fit and proper person to be the licence holder or (as the case may be) the manager of the house.

(3A – 3C) not relevant to this case

(4) For the purposes of section 64(3)(b) the local housing authority must assume, unless the contrary is shown, that the person having control of the house is a more appropriate person to be the licence holder than a person not having control of it.

(5) In deciding for the purposes of section 64(3)(e) whether the proposed management arrangements for the house are otherwise satisfactory, the local housing authority must have regard (among other things) to the considerations mentioned in subsection (6).

(6) The considerations are—

- (a) whether any person proposed to be involved in the management of the house has a sufficient level of competence to be so involved;
- (b) whether any person proposed to be involved in the management of the house (other than the manager) is a fit and proper person to be so involved; and
- (c) whether any proposed management structures and funding arrangements are suitable.

(7) Any reference in section 64(3)(c)(i) or (ii) or subsection (4) above to a person having control of the house, or to being a person of any other description, includes a reference to a person who is proposing to have control of the house, or (as the case may be) to be a person of that description, at the time when the licence would come into force.

Obligations to which the licence holder is subject

- 11. Part 1 of the Act gives local authorities the power to inspect premises in its area and to issue enforcement notices if it is of the view that conditions or upkeep of a property fail to ensure adequate housing standards. It may take enforcement action, which includes the power to issue improvement notices, prohibition orders, and emergency prohibition orders. If served on the appropriate person, these bind that person irrespective of whether the property is an HMO or requires a licence.
- 12. The Act contains two other important provisions relating to a licence holder's obligations whilst operating a licence for an HMO, namely Licence Conditions, and Management Regulations.
- 13. Licence Conditions can be imposed upon a licence under section 67 of the Act. Breach of Licence Conditions is an offence under section 72(3) of the Act, subject to a reasonable excuse defence. If convicted, a person can be fined or alternatively a civil penalty may be imposed
- 14. Management Regulations may be made under section 234 of the Act. The Management of Houses in Multiple Occupation (England) Regulations 2006 were duly made under that section. They impose seven specific duties, though each duty is described in broad terms. Those duties that relate to maintenance or keeping in repair are to be assessed to a standard defined (in Regulation 11(2)) as is "reasonable in all the circumstances taking account of the age, character and prospective life of the house and the locality in which it is situated".

15. Breach of the Management Regulations is an offence under section 234, subject to a reasonable excuse defence, and on conviction a fine may be imposed.

The appeal process

16. The provisions of Schedule 5 of the Act apply to appeals against a refusal to grant a licence (see section 71). Paragraph 34 of the Schedule applies. The appeal is to be way of re-hearing, but may be determined having regard to matters of which the Council were unaware. The Tribunal may confirm, reverse, or vary the local authority's decision, and it may direct the local authority to grant a licence on such terms as the Tribunal may direct.
17. In *Waltham Forest v Hussain & Othrs* [2023] EWCA Civ 733, the Court of Appeal decided that in conducting the re-hearing of the decision not to grant a licence, the Tribunal should only take account of material that was available to the Council as at the date of its decision not to grant the licence. There is one exception: material or information of which the Tribunal becomes aware after the date of the Council's decision can be used to assist the Tribunal if it endorses or supports a view that the local authority had in mind at the time of its decision (paragraph 70 of *Waltham Forest*). The example given is of a conviction after the local authority's decision arising from circumstances existing before the decision.
18. However, "bad behaviour" after the local authority's decision is considered (in paragraph 71) to be unlikely to be relevant to the question of whether the person was a fit and proper person at the date of the local authority's decision.
19. As to the way in which the Tribunal must approach the question raised in the appeal, the authorities suggest (see paragraph 16 of *Brent London Borough Council v Reynolds* [2001] EWCA Civ 1843) that our task is:

"to make [our] own decision on the application, in place of that made by the local housing authority, and not merely to act as a court of review of the LHA decision., That said, however, the [Tribunal's] jurisdiction is subject to the very significant condition that [it] should pay great attention to any view expressed by the local housing authority, and should be slow to disagree with it."

The Council's decision

20. The Council's decision ("the MTR Decision"), notified in the Notice dated 21 September 2022, was that it was minded to refuse a new licence for the following four reasons:
 - "1. You have contravened provisions of law relating to housing or landlord and tenant law (section 66(2)(c) Housing Act 2004);

2. You have acted otherwise than in accordance with a code of practice under section 233 of the Act (regarding management of HMO's) (section 66(2)(d) of the Housing Act 2004);
 3. The [Council] have considered contraventions of legislation relating to housing. That is where the Council has served a statutory notice for example an "Emergency Prohibition Order"
 4. The [Council] having considered your application of 01/08/2022 with the 'Rushcliffe Borough Council's Protocol for Assessing Fit and Proper Persons in Relation to House in Multiple Occupancy Licensing Policy 2022-2027' and requirements of the Housing Act 2004 and have determined that under Part 2 Section 64(3)(b)(i) of the Act you are deemed not a "Fit and Proper Person" to be the licence holder."
21. The MTR Decision notice informed the Applicant that he may make representations in relation to the proposal to refuse to grant his application within 14 days of the Notice. No representations were received within that time. The Applicant did send an email making representations on 31 October 2022.
 22. On 4 November 2022, the Council issued a final decision on the application for a licence. The reason was given as follows:

"The Applicant Michael Wright is deemed not to be a "Fit and Proper Person" to be a Licence Holder of a licence for a House in Multiple Occupation under Part 2 Sec. 66(3C) of the Housing Act 2004."
 23. It is accepted by the Council that the reference to section 66(3C) of the Housing Act 2004 ("the Act") was an error. They intended to base their decision to refuse to renew the licence on section 66(2)(c) of the Act – namely that the Applicant had "contravened [provisions] of the law relating to housing or of landlord and tenant law".

The Council's policy

24. The fourth reason set out in the MTR Decision related to the Council determination that the Applicant was not a fit and proper person to hold a licence in accordance with Rushcliffe Borough Council's Protocol for Assessing Fit and Proper Persons in Relation to House in Multiple Occupancy Licensing Policy 2022-2027 ("the Council Policy"). A copy is provided in the Appendix to this decision.
25. We were told by the Council that the decision to create a policy had first been mooted in November 2020. A final draft policy was produced on 5 May 2022 following internal consultation. It appears to have been adopted by officers of the Council rather than councillors, and there have been no Council committees or resolutions of the Council approving the policy. It has been published on the Council's website as an aide-memoire to assist interested parties in the interests of transparency.

26. In his evidence, Mr Matthews readily accepted that the Council's issues with the Applicant and the Property had been the drivers for development of the Policy. The Council officers were aware that the Applicant's licence was due for renewal in May 2022 and wished to have a policy in place for consideration of whether the Applicant was a fit and proper person to hold a licence. This case was the first time, he said, that the Council had refused a licence on the grounds that the proposed licence holder was not a fit and proper person.

Facts

27. This section of the decision sets out the factual background derived from our reading of the documentation provided in this case, the FTT's decision on the Applicant's appeal against a Prohibition Order dated 20 April 2021, and the evidence provided to us by the Applicant and by Mr Matthews on behalf of the Council.
28. The Applicant (with his then wife) bought the Property in 1993. From then until around 2012, it was used not just as a family home, but also to accommodate those to whom the Applicant offered help and support. A diverse range of occupiers lived there, including those who had problems with alcohol abuse or drugs, those whose relationships had broken down, and those who just needed a room to stay. It was not a facility which enjoyed full community support.
29. In or around 2015 the Property came to the attention of the Council, as it was suggested that it was being operated as a House in Multiple Occupation (HMO) under the Act, and that it therefore required a licence, and planning consent for change of use.
30. The Council refused planning consent, but this was eventually resolved, after a successful appeal by the Applicant, and the HMO licence was granted to the Applicant on 5 May 2017.
31. On 1 August 2019, the Council issued an Improvement Notice. Following a statutory inspection, they had identified two category 1 hazards (Fire Safety and Excess Cold) and one category 2 hazard (Collision).
32. The fire hazard scored 11,461 (Band A) on the HHSRS scoring system. Eleven deficiencies were recorded in the Notice, seven of which related to doors, their seals, intumescent strips, and closers. The other four deficiencies were inadequate fire protection, inadequate emergency lighting, existence of open fires, and inadequate fire-resistant construction.
33. A further inspection of the Property took place on 17 June 2020. A report produced as a result contained the following paragraph:

“[The Council] have received numerous complaints mostly from neighbours over the past 4 years relating to ASB, safeguarding, condition

and use of property, pests, noise, parking, accumulations and use of mobile dwellings.”

34. Following that inspection, the Council revoked the Improvement Notice dated 1 August 2019 and issued a Prohibition Order instead, dated 9 July 2020.
35. Five category 1 hazards were identified in that Order, as follows:
 - a. Electrical hazards (score 17,172 – Band A) – 18 deficiencies
 - b. Fire (score 7,060 – Band A) – 13 deficiencies
 - c. Personal hygiene, sanitation and drainage (score 4,706 - Band B) – 7 deficiencies
 - d. Excess Cold (score 5,847 – Band A) – 5 deficiencies
 - e. Domestic hygiene, Pests and Refuse (score 1,216 – Band C) – 6 deficiencies
36. The Applicant appealed the Prohibition Order. On 20 April 2021, the FTT quashed the Prohibition Order on the grounds that it was not the most appropriate enforcement action to take (see section 5 of the Act).
37. In its decision on the Prohibition Order, the FTT said (paragraph 119):

“... we do not consider the Property yet justifies a clean bill of health; indeed, it is some way from doing so. In our view, the Council would be justified in conducting a further inspection with a view to assessing the Property again under the HHSRS system.”
38. The FTT attached an Appendix to its decision listing the 49 deficiencies that had been in issue within the Prohibition Order hearing and indicating the FTTs view on those deficiencies. The Council had accepted that 15 of the 49 deficiencies had been resolved by the Applicant. There were 34 deficiencies that remained though, including:
 - a. Adequacy of the internal doors to protect from the risk of fire; the Tribunal was of the view that all such doors should be FD30S compliant, and an independent certification to that effect was required if they were not replaced with new doors;
 - b. Dirty ovens and food build up;
 - c. Poorly fitted and poorly maintained windows.
39. The Council did indeed re-inspect on 13 July 2021 by way of an informal visit by the Council’s Environmental Health Officer (Mr Matthews), who was to take over as liaison with the Applicant. Although the Applicant was

present at the re-inspection on 13 July 2021, he said he did not want to be directly involved with the Council because of the previous history of the relationship. He requested that the Council liaise with his son, Nathan, who's details were provided. However, Mr Matthews said that Nathan did not respond to numerous attempts to contact him.

40. Mr Matthews wished to carry out another formal inspection, which was arranged for 4 November 2021 – somewhat delayed because of the difficulty of contacting Nathan. The outcome of that re-inspection was the issue of another Improvement Notice dated 13 January 2022. That Notice identified two category 1 hazards (excess cold and fire risk) and five category two hazards (damp and mould growth, domestic hygiene, electrical risk, collision / entrapment, and structural collapse).
41. The remedial work for the excess cold hazard included repair to defective timberwork in window frames (also remedial work required under the category 2 damp and mould growth hazard). Remedial work for the fire hazard included replacing internal doors with FD30S fire doors with intumescent strips and cold smoke seals.
42. The Improvement Notice was hand delivered to the Applicant at a meeting on 13 January 2022 at the Council's offices. The Applicant attended together with a representative called Dr Cummings.
43. On 14 January 2022 Mr Matthews wrote to the Applicant to draw his attention to matters that he said he also raised in the meeting relating to breaches of the Management Regulations. In that letter, he specified ten Regulations that he considered were being breached. He also drew the Applicant's attention to what he considered were three breaches of the Licence Conditions.
44. For the hearing, the Council provided a bundle of 56 photographs illustrating the condition of the Property all taken on 4 November 2021. They show (in a somewhat summarised list):
 - a. Damaged or missing plasterboard and flaking paintwork to walls in communal areas and in bedroom 5 and to a ceiling;
 - b. Missing skirting boards;
 - c. Rotting and flaking timberwork to some external windows, doors, and lintels;
 - d. A gutter in disrepair;
 - e. Evidence of some water ingress to first floor ceiling and to a wall below a window;
 - f. Poor decorative state in some areas;
 - g. Untidy and unclean areas both internally and externally;

- h. Some window frames in disrepair and evidence of blown double glazing units;
 - i. Damaged worktop and drawer fronts in 2nd floor kitchen;
 - j. A broken toilet seat;
 - k. Tripping hazard in garden.
45. The Applicant appealed the Improvement Notice on 2 February 2022. At the time of its decision to refuse the licence, that appeal had not been determined. During the course of 2022, there had been an attempt to resolve the appeal prior to trial, and the Council appear to have conceded that the category 2 hazard relating to structural collapse had been resolved or abandoned by the Council.
 46. Mr Matthews re-inspected on 9 February 2022 to check on the progress of works following the Improvement Notice. At that inspection, he observed that the Applicant had emptied a garden pond, and had removed the liner, resulting in a drained hole which, he thought, was 6 – 7 ft deep with 1ft of muddy water in the bottom. Mr Matthews regarded this as exposing people to a risk of falling between levels. Mr Matthews was also shown a garage which was being converted into a single persons flat. It had a mezzanine level some two metres in height from the floor, accessed by an old ‘A’ frame step ladder. It seemed to Mr Matthews from his observations that day, that the garage was being occupied, as bed linen and personal belongings were evident.
 47. The Applicant disputes that the pond was 6 – 7ft deep. His belief is that it was in the region of 1.2m deep. He also disputes that the pond was a hazard. Though it was open water, he points out that there are many places fully accessible to the public where there is unprotected access to open water, such as riverbanks.
 48. During the visit to the Property on 9 February 2022, Mr Matthews was accompanied again by Dr Cummings, who the Applicant had asked to represent him. Mr Matthews’s evidence was that on that visit he noticed ongoing or further breaches of the Management Regulations, all of which he pointed out at the time to Dr Cummings.
 49. An Emergency Prohibition Order was made by the Council as a result of Mr Matthews’s observations during his visit on 9 February 2022, dated 11 February 2022. It prohibited the use of the garage for residential or sleeping accommodation, and the use of the pool, which was to be secured using Heras fencing.
 50. The 13 January 2022 Improvement Notice had, as explained above, been appealed by the Applicant. The parties agreed that the appeal was suitable for mediation. The first mediation meeting took place on 20 April 2022. It was agreed that there would be monthly meetings to inspect progress in undertaking the works required in the Notice. The narrative below

explains regular visits to the Property by Mr Matthews pursuant to the mediation.

51. In May 2022, the question of renewal of the Applicant's HMO licence came to the fore. It is the Council's case that expiry of the Applicant's HMO licence had been drawn to his attention by reminder letters prior to its expiry on 4 May 2022. No copies of those letters were provided to the Tribunal. However, the Applicant accepted that he had received a reminder letter at some point.
52. No application for a new licence had been made prior to 5 May 2022. The Applicant's case is that he attempted to submit his application for a new licence on 26 May 2022, but from that date until 1 August 2022 he was beset by difficulties in understanding the process and by computer failures. In particular, he was confused by a question requiring him to say whether he was a fit and proper person, and he thought that was for the Council to determine. There was some delay in obtaining a Disclosure and Barring Service (DBS) check. The Applicant said he received an acknowledgment of receipt of his application on 27 June 2022.
53. The Council explained that the licence application form is to be found on their website. It contains a section called 'Fit and Proper Person' which has a number of yes/no questions for the Applicant to complete. The Council disagrees that the form requires the Applicant to decide himself whether he is a fit and proper person. That is to be assessed by the Council depending on the answers given by the Applicant.
54. The application was accepted as being complete by the Council on 1 August 2022. The Applicant accepted at the hearing that he had no excuse for a delay in applying for the new licence for about a fortnight after expiry of the old licence; he had been too busy to organise the application and had been overwhelmed by other things.
55. The Council took no action in pursuing the Applicant for any offence under section 72 of the Act for operating an HMO without a licence between 5 May and 31 July 2022, the date of receipt operating as the date from which no offence is committed whether or not the licence is granted.
56. Mr Matthews made further visits to the Property on 17 June 2022, 21 June 2022, 13 July 2022, and 17 August 2022 (as per the mediation agreement). It is his case that on 17 June 2022, he noted that some contraventions of the Management Regulations observed on 4 November 2021 were still present, and that the majority of defects listed on the Improvement Notice had not been attended to. He produced inspection notes of this inspection in which he cross-referenced the issues he had found in his inspection on 4 November 2021 with his observations on 17 June 2022.
57. Mr Matthews notes indicate:
 - a. Doors required to be fire doors had not yet been replaced;

- b. Window frames were the same as before with many having rotting sills;
 - c. There were 87 specific concerns noted, being a composite of those included in the 13 January 2022 Improvement Notice and those listed as breaches of Management Regulations and Licence Conditions set out in the Councils letter of 14 January 2022. Mr Matthews recorded that 23 of those concerns had been resolved.
58. During his visit on either 17 June or 13 July 2022, Mr Matthews noticed that a man and a child had gained access to the pool area which was the subject of the Emergency Prohibition Order and were clearly intending to swim in it, in breach of the Order. The documentary evidence gives both dates (see paragraph 13 of the Council’s statement of case and the penultimate box on page 3 of the FPPMW document).
59. Following the mediation meeting on 21 June 2022, the Council agreed to issue a variation to the Improvement Notice (dated 22 June 2022). We assume that works originally required which had been completed were deleted in the varied Notice.
60. On 13 July 2022, Mr Matthews noted that some further works had been undertaken but the majority of the defects were still present.
61. The visit on 17 August 2022 had been at the request of the Applicant for the purpose of inspecting works he had undertaken to resolve the deficiencies identified in the Emergency Prohibition Order. At that visit, Mr Matthews was still not satisfied that the Management Regulations breaches identified on 4 November 2021 and notified to the Applicant on 14 January 2022 had been rectified.
62. No letters bringing the Council’s concerns about breaches of Management Regulations observed on the inspection visits on 21 June, 13 July, and 17 August 2022 were sent to the Applicant.
63. However, Mr Matthews followed up his visit on 17 August 2022 with an email to the Applicant dated 18 August. It contained the following paragraph:
- “I must add that my visit yesterday provided evidence of many breaches of the [Management Regulations]. These were pointed out to your son in detail and to the particular Regulation breached as we had a copy with us. ...”
64. The Applicant replied with an email on 22 August 2022 in which this paragraph was included:
- “Thank you for informing my son of the alleged breaches in the Management Regulations 2006. However, he is not an expert and has not been able to provide me with an adequate explanation of all the requirement. You will need to provide a list. ...”

65. Mr Matthews replied on 30 August 2022 to say:
- “I am not in a position to repeatedly provide you with lists of your failings, as you ask.”
66. That email was rather longer than just the extract above. Mr Matthews explained that his comments were observations made during his inspection. He drew the Applicant’s attention to his letter of 14 January 2022 in which breaches of the Regulations had been listed, and he said that some of them still remained. He suggested that it was for the Applicant to familiarise himself with the Regulations and work out how they applied to the Property, especially regarding cleanliness, maintenance and safety. He said that in his view the Applicant clearly still had a lack of understanding of his legal responsibilities.

Mr Matthew’s evidence of the fit and proper person decision by the Council and the Council’s reasons for it

67. On 31 August 2022, a meeting was held by four Council officers, including Mr Matthews and the Deputy Chief Executive of the Council to discuss how to respond to the Applicant’s application for an HMO licence. The meeting was minded to refuse the application. Mr Matthews therefore prepared a draft document to support that decision which was circulated as a draft to relevant personnel. That document was called “Fit and Proper Person MW Sept 2022” (“the FPPMW Document”).
68. It was then considered at a meeting on 21 September 2022 at which Mr Matthews, the Senior Licensing Officer, the Principal Licensing Officer and the Principal Environmental Protection and Housing Officer were present. All present agreed with the decision to refuse a licence. The MTR Decision was then issued.
69. Mr Matthews explained in giving oral evidence that there were five factors that particularly influenced them, being:
- a. history of anti-social activity at the Property;
 - b. opposition from local people to the activity at the Property;
 - c. the Council’s growing frustration with the Applicant’s apparent inability to receive and respond to the Council’s requirements;
 - d. the tendency of the Applicant to make things worse, the example given being his recent work to instal a pool and allow a garage to be used for accommodation;
 - e. the Applicant’s failure to establish communications with the Council, particularly his tendency to interpose a third party to communicate with the Council, the examples being his request that his sons Nathan and then latterly David be the people the Council should communicate with, and previously a person called Dr Cummings.

70. In his evidence, however, Mr Matthews said he relied on contravention of housing or landlord and tenant law as the main reason why the Applicant was not a fit and proper person, and that is certainly the thrust of the FPPMW Document. He held the view that a person on whom a statutory notice, such as an Improvement Notice or Emergency Prohibition Order had been served, had breached housing or landlord and tenant law. He also held the view that it was clear Management Regulations had been breached as he had the evidence to that effect in the photographic record. He was not of the view that there could be any reasonable excuse for keeping the Property in the state exhibited by the photographs. He accepted that the alleged breaches of the Management Regulations had not been put to the Applicant for him to answer.
71. Mr Matthews recounted the efforts the Council had taken over a number of years to persuade the Applicant to put the Property into a safe state. Following the quashing of the Prohibition Order, he had wanted to give the Applicant a fresh start and work with him to resolve the deficiencies the Council believed still existed. His main concern was the fire risk. He accepted that there were minor incremental improvement along the way, but the more serious hazards had not been dealt with by the Applicant. His frustration was the number of times the Council had to go back to the Property to discover the Applicant had still failed to resolve the problem.
72. Mr Matthews also had some difficulties working with the Applicant, who he said tended to hide behind representatives rather than deal with him direct. At one point in early 2022, Mr Wright had asked that a Dr Cummings should be his representative, then that his son Nathan should act as go-between, and finally his son David, who now represented him. Mr Matthews felt this was evidence that the Applicant was not able to establish a relationship with his regulating Council.
73. Mr Matthews was also frustrated by the Applicant's difficulty with opening letters, and his frequent demands to be told exactly what the Council required him to do. At times the Applicant had clearly had an issue dealing with the Council and regularly questioned the expertise of its personnel.
74. In addition, Mr Matthews said he did not believe the use of the Property as an HMO was financially viable.
75. Referring to the Council Policy, in his evidence Mr Matthews relied on the wording on page 2 saying that a person who was fit to manage the Property would be "able to comply with any licence conditions and deal with day-to-day issues that arise within an HMO", including engagement with the Council. In his view, the Applicant had conspicuously not been able to manage his relationship with Council, preferring litigation to co-operation.

76. The FPPMW Document draws attention to the need for the manager of the Property to be the person who complies with the Licence Conditions and who deals with day to day management issues such as repairs, emergencies, provision of services, tenant issues, management of behaviour, and engagement with agencies such as the Council, the Police and other agencies. It then records that the Applicant fails the tests set out in section 66 of the Act, in that he has contravened housing or landlord and tenant law and has breached a Code of Conduct. It specifically records that any person upon whom a statutory notice has been served is considered to have contravened housing or landlord and tenant law.
77. The evidence of contravention of housing or landlord and tenant law is said in the FPPMW Document to be:
- a. Service of the Improvement Notice dated 13 January 2022 (though it is noted that this is still subject to an appeal);
 - b. Breaches of Management Regulations set out in the letter dated 14 January 2022;
 - c. Breaches of Licence Conditions set out in the letter dated 14 January 2022;
 - d. Service of the Emergency Prohibition Order on 11 February 2022;
 - e. Ongoing or further Management Regulations breaches on 9 February 2022;
 - f. Operating premises which required a licence without holding a licence, contrary to section 72 of the Act between 5 May 2022 and 31 July 2022;
 - g. Further evidence of breaches of the Management Regulations noted during Mr Matthews visit to the Property on 17 June 2022;
 - h. Observation of a breach of the Emergency Prohibition Order dated 11 February 2022 during the inspection visit on 17 June 2022;
 - i. Further evidence of breaches of the Management Regulations noted during Mr Matthews visit to the Property on 13 July 2022;
 - j. Further evidence of breaches of the Management Regulations noted during Mr Matthews visit to the Property on 17 August 2022.
78. The FPPMW Document acknowledges that the Applicant has completed a number of the repairs required in the Improvement Notice, but comments that the Applicant attempts to make repairs himself, sometimes to a very poor standard, and that many items of repair remain outstanding.
79. As was mentioned in Mr Matthews evidence, there is reference to the Applicants difficulties, as perceived by the council, in communicating with

the Council and his preference to be absent during visits relying on representatives instead.

80. The FPPMW Document also stated that “it could be argued that Mr Wright puts his income and profits before the health, safety and welfare of his tenants”.
81. Against the background explained above, the four Council officers determined to issue the MTR Decision on 21 September 2022, and the final decision to refuse a licence on 4 November 2022 as explained above.
82. The MTR Decision explained that the Applicant may make representations so that the Council could take them into account in its final decision. The Applicant failed to provide representations within the time limit given, but Mr David Wright did provide some representations in an email dated 31 October 2022. The Applicant himself was said not to be able to respond in person due to his mental health.
83. The Council were not, as is apparent, persuaded to change their decision as a result of these representations.

Events post the decision to refuse to grant an HMO licence

84. Whilst arguably irrelevant following *Waltham Forest v Hussain*, for context, the Tribunal was informed of the following events after the date of refusal of the licence:
 - a. On 22 February 2023, the FTT issued its decision on the Applicant’s appeal against the Improvement Notice dated 13 January 2022. Some deficiencies had been rectified, or were not pursued by the Council, but eleven deficiencies were still in issue; 7 relating to category 1 hazards (Excess Cold and Fire), and 4 relating to category 2 hazards. Five of the seven category 1 deficiencies were upheld/confirmed, including the deficiency relating to excess cold. The FTT confirmed the deficiency relating to fire doors. One of the category 2 deficiencies was upheld/confirmed. The remaining five deficiencies were quashed.
 - b. On 16 February 2023, the Council laid an information with Nottingham Magistrates Court alleging offences under the Management Regulations. We assume that additional allegations were brought at a later date. We were informed at the hearing in December 2023 that the Magistrates had convicted the Applicant on 8 December 2023 of 12 offences under the Management Regulations. Six convictions were for offences occurring on 17 August 2022 and six were for offences occurring in 2023.
 - c. On 28 June 2023, the Applicants mortgagee secured a possession order against the Property. We were informed at the hearing in December 2023 that that was due to be executed on 15 February 2024.

The Applicant's case

Character witnesses

85. The Applicant provided three character witnesses. The Tribunal had written statements from all of them, and two gave oral evidence.
86. A former resident (2015 – 2019) (who did not appear at the hearing) provided a written statement. The witness had previously worked for organisations dealing with homelessness, including management of HMO's. His evidence essentially contained three key threads, which we attempt to summarise. Firstly, he commended the kindness of the Applicant in providing a home to those who otherwise would be difficult to house, including going out of his way to help the residents with personal issues. Secondly, he said that he perceived a record of persecution by the Council of the Applicant, possibly driven by the groundswell of local opinion against the type of resident living at the Property. Thirdly, he testified that in his opinion the Property was safe, warm, and welcoming.
87. A retired social worker provided a witness statement and gave oral evidence. She is a deacon at a local Baptist church and told us that the Applicant had been a part of the local Baptist community for over 30 years. She commended his caring attitude towards his residents, finding him to be a tolerant, non-judgmental and caring person. She considered that the Property was good enough, though she did say that the Property was messy, and there was always work to do.
88. The local Baptist minister also provided a written statement and oral evidence. The focus of his evidence was on the value to the residents and the community from the way in which the Applicant provided a service to vulnerable people (including those with problems associated with alcohol or drugs). He gave examples of people who had been able to turn their lives around through living at the Property and associating with the Applicant.

Finances

89. The Applicant provided some financial information in his oral evidence. He said that the Property essentially breaks even in cash terms, though between December 2022 and November 2023 he thought there had been a loss of about £10,000.00. He put gross annual income at around £70,000.00 with around £40,000.00 in expenses, meaning that he made a surplus of about £30,000.00 per annum, when fully occupied

The Property

90. The Applicant did not accept that he had failed to carry out necessary work at the Property. In particular, of the 31 items listed in the Council's letter of 14 January 2022, he had completed 27 of the items listed by October 2022. He decided not to complete some of them because the Improvement Notice was under appeal and he was waiting the outcome of the appeal.

Relationship with the Council

91. The Applicant said that he thought Mr Matthews was aggressive and confrontational, as the first thing he did when he took on the role of liaising with the Applicant was to issue an Improvement Notice. The Applicant found that to be unbearable.
92. A specific example of Mr Matthews's confrontational approach is his refusal to specify his detailed requirements for compliance with the Council's demands, as is shown in the email exchange following the 17 August 2022 meeting detailed in paragraphs 63 – 66 above.
93. The Applicant accepted that he finds it hard to deal with confrontation. He said he is tender hearted, but needs clarity. He has no problem with an uncomfortable message, but he does not need that to be delivered aggressively. For that reason, he tried to put an intermediary between himself and Mr Matthews.
94. The Applicant also said that there had been a point when he had not been able to open letters from the Council. He felt they were targeting him. An example (though after the Council's decision date on the licensing decision) had been the issuing of their Magistrates Court summons for breaches of the Management Regulations. The summons had been issued in February 2023, but was only served on the Applicant in April 2023, a week before the hearing.

Final submissions

95. These were prepared by Mr David Wright, and they succinctly and competently summarise the Applicant's key points;
 - a. Mr Matthews refused to engage in effective dialogue with the Applicant, the example being his refusal on 30 August 2022 to provide a list of the breaches of Management Regulations he had noted during his visit to the Property on 17 August 2022.
 - b. That in fact there is a clear history of compliance by the Applicant with the Council's requirements. There were 73 deficiencies listed in the 13 January 2022 Improvement Notice, which had reduced to 11 by December 2022, of which only 6 were upheld by the Tribunal.
 - c. The creation of the Council's policy on approving fit and proper persons appeared to have been written in order to find against the Applicant. That was unfair.
 - d. The Council had an aggressive attitude towards the Applicant. This was demonstrated by Mr Matthew's decision to serve the Improvement Notice personally on the Applicant at their meeting on 13 January 2022, that being the least helpful and most hurtful way in which it could have been communicated.

- e. The HHSRS risk assessment system is not the most suitable risk assessment tool. The Council should have used the BATNIC risk assessment tool.
- f. No-one has been harmed in all the years that the Applicant has managed the Property, and many have been greatly helped.
- g. Taking all these matters into consideration, the Tribunal should order that the Applicant be granted an HMO licence.

The Council's case

- 96. The Council's statement of case focussed on what it regarded as contraventions of housing or landlord and tenant law as the foundation of its view that the Applicant is not a fit and proper person to hold an HMO licence.
- 97. With regard to reason no 2 in the MTR Decision related to breach of a Code of Practice, the Council had been of the view that the Management Regulations were a Code of Practice under section 233 of the Act, and evidence of breach would be relevant evidence under section 66(2)(d) of the Act to take into consideration when assessing whether the Applicant was a fit and proper person to hold an HMO licence.
- 98. On enquiry from the Tribunal, the Council accepted that no code of practice existed relating to HMO properties and it no longer intended to rely upon section 66(2)(d) of the Act.
- 99. In their final submissions, the Council argued:
 - a. They are entitled to rely on the breaches of law they identified as evidence that the applicant is not a fit and proper person. Their case is that they should have regard to any "wrong doings" of the Applicant, that wording being set out in Draft Guidance on licensing and management provisions in Parts 2, 3, and 4 of the Housing Act 2004, published by H M Government.
 - b. The Applicant runs a chaotic establishment, in a precarious financial state, in a Property that leaves residents safety at risk arising from his failure to observe the Management Regulations and comply with the requirements of statutory notices issued under the HHSRS system. An example was the Applicant's deliberate decision to delay repairing rot in some of the window frames at the Property until the outcome of the Improvement Notice appeal. This highlights that his pervading attitude was that the standards he was being asked to comply with were an imposition, rather than good practice.
 - c. The Applicant has felt overwhelmed by the responsibility of managing an HMO. He was unable to engage properly with the Council.

- d. The Applicant has demonstrated that he adopts a reactive rather than a proactive approach to maintaining the Property and keeping its residents safe.
- e. The Applicant did not make himself fully aware of the regulatory standards he was expected to comply with.
- f. In summary, the Council were of the view that the Applicant is not capable, competent, and willing to provide a safe, clean and compliant property for his residents. The Tribunal should uphold the Council's decision to refuse to grant the Applicant an HMO licence.

Discussion

- 100. This case is not about the Applicant's character. On the contrary, his character witnesses confirm him to be a caring and well-intentioned person with a genuine concern for a group of people who others find it more difficult to befriend and support. We accept the evidence his witnesses gave us about his character and the utility of the service he provides.
- 101. This case, though, is about whether the Applicant is capable of understanding and implementing the requirements and characteristics of a licence holder seeking to run a challenging property providing accommodation to a challenging client group.
- 102. Our view is that the facts recited above establish the following:
 - a. The Applicant was unable to provide a safe and regulatorily compliant environment throughout 2022 and for some time before for the residents at the Property;
 - b. The Council were in September 2022 in possession of an abundance of evidence that would have justified it in bringing proceedings for breach of the Management Regulations, and making orders or continuing proceedings under the Housing Act 2004 to ensure that the Property was fit to be let;
 - c. The Applicant had demonstrated by September 2022 that he did not understand the statutory obligations he was working under in being the licence holder for the Property;
 - d. The Applicant displayed the characteristics of being a highly defensive person, unable or unwilling to listen to reasonable criticism and not constitutionally able to establish a working relationship with the Council's appointed licensing officer;
- 103. We outline the evidence below on which we have based our conclusions in the preceding paragraph.
 - a. *Condition of the Property consistently and over a long period*

104. The facts outlined above show that there had been significant concerns about the condition of the Property since 2019. The 2020 Prohibition Order decision confirmed the existence of deficiencies as at that date.
105. The Council considered it needed to serve a further Improvement Notice in 2022, at which point it also identified a significant number of concerns about compliance with the Management Regulations.
106. Regular checks of the Property were made by Mr Matthews by agreement in order to facilitate an attempt to mediate the appeal proceedings brought by the Applicant against the Improvement Notice dated 13 January 2022 and to check compliance with the allegations of breach of the Management Regulations contained in the 14 January 2022 letter.
107. Photographs of the condition of the Property as at 4 November 2021, 13 June 2022 and 17 August 2022 were provided to the Tribunal. Many of the photos from the later visits are of deficiencies identified on 4 November 2021. We have compared photographs of the same deficiencies taken between 7 and 9 months later. In respect of the photographs (for the parties' benefit) on pages 45, 57, 58, 59, 64, 69, 84, 89, 90, 91, and 92 in Bundle 2, there is no or only minor improvement.
108. Repairs to window frames (which was noted as an outstanding issue by the Tribunal in the 2020 Prohibition Order case) had still not been undertaken. It is entirely clear to us that the state of the window frames was wholly unsatisfactory in 2020, no work had been done on them by June 2022 despite this being raised on 13 and 14 January 2022. The same can be said about cleanliness in the kitchens, and the standard of decoration generally, which confirms a reactive rather than proactive approach on the part of the Applicant.

b. Breaches of law, including the Management Regulations

109. The Council's letter of 14 January 2022 drew the Applicant's attention to its allegations that the Management Regulations were being breached. Seven months later, on 17 August 2022, Mr Matthews found that there were still breaches present at the Property.
110. We take the view that the Council were fully justified in concluding in September 2022 that in its view the Management Regulations were being breached when they considered whether to grant a licence.
111. The Council provided the following table to us in its final submissions. Our view is that the Applicant had breached the Management Regulations identified, evidenced from the photographs referred to in the table. We cannot accept that the disrepair evident in the photographs is tolerable because the Applicant prefers to run a house of "imperfect character". Regulation 11(2) is not a licence to convert requirements to keep the HMO in "good repair", "clean", or "safe" into a lower standard than that, viewed objectively and reasonably. Our view is that none of the conditions evidenced by the photographs are to a standard that is reasonable in the circumstances, and in compliance with the Regulations.

Table of Management Regulations breaches

Regulation	Breach	Evidence (page) 4/11/21	Evidence (page) 17/08/22
4(1)(b)	Damage on plaster on 1 st floor fire escape route with no skirting	45	159
7(1)(a)	Ground floor shared kitchen - filthy area below base units with no kickboards	57	165
7(1)(a)	Ground floor passage/escape route poor decorative repair	58	161
7(1)(a)	Ground Floor shower room poor decorative repair	59	166
7(2)(d)	Ground Floor kitchen window disrepair and rotting timbers	64	167
7(2)(d)	Ground Floor kitchen window disrepair and rotting timbers	65	168
7(2)(f)	Ground Floor kitchen cupboard showing dirty conditions	69	174-179
8(2)(a)	Room 10 missing plaster around cables	84	B3 p57
8(2)(c)	Disrepair to window in Room 11	89	184
8(2)(c)	Disrepair to window Room 5	69	181 (top)
8(2)(c)	Disrepair to window Room 9	90 (top)	182
8(2)(c)	Disrepair to window Room 3	90 (bottom)	180 (top)
8(2)(c)	Disrepair to window Room 10	92-94	183
8(2)(c)	Disrepair to window Room 12	91	185

112. In addition to breaches of the Management Regulations, we find that for a short period the Applicant operated an HMO without a licence, contrary to section 72 of the Act.

c. Lack of understanding of statutory obligations

113. On his own admission, the Applicant failed to apply for a new licence on expiry of his current licence by the date of its expiry. Operating an HMO which is unlicensed is a serious criminal offence and yet the Applicant appears to have had no insight into the consequences of his failure to apply for a new licence on time. Already being under regulatory scrutiny, we are very surprised that applying for a new licence was so low on his priority list.
114. In similar vein, allowing an occupier of the Property to reside on a narrow mezzanine in a garage, which had not been granted planning consent for

residential use, or building regulation approval for any works required to convert it into residential use, was highly unwise and particularly naïve.

d. Personal characteristics

115. The Applicant was clear when giving evidence that there was personal animosity between himself and Mr Matthews. His case is set out in paragraphs 91 – 94 above, and the Applicant attaches much significance to the email exchange referred to in those paragraphs.
116. Our assessment of this email exchange is that far from establishing that Mr Mathews was unreasonably demanding, it establishes that the Applicant was being unduly un-cooperative in his dealings with Mr Matthews. Our view is that a person who is suitable to hold an HMO licence would focus on fully understanding the Regulations and then making sure they were complied with. He would and should have taken all reasonable steps to ensure the kitchen cupboards were clean, or the windows were in good repair (for example). Instead, it appears to us that the Applicant's nature is to challenge the messenger, rather than comply with the message. He appears to us to be a reactive, rather than a pro-active manager.
117. Under this heading, we also express concerns about the regularity with which the Applicant failed to take up the management challenges he faces personally. He regularly asked the Council to deal with his representatives, or proxies. This happened when Dr Cummings was put forward to be the person the Council should deal with, and subsequently his sons Nathan and David have been his spokesperson.
118. This may possibly have something to do with the Applicant's mental health. His son David was upfront with the Council in his email on 30 October 2022 in response to the MTR Decision, in that he explained that the Applicant was unable to deal with the MTR Decision because of his mental health.
119. Nobody should be subject to criticism as a result of having a mental health condition, and we express our sympathy to the Applicant. We cannot ignore the fact though that a person who is fit to be an HMO licence holder and manager has to have a degree of robustness at least to a standard that enables that person to be the public face of the Property which that person manages.

How must the Tribunal approach the question of whether the Applicant is a fit and proper person to hold an HMO licence?

120. In the light of our conclusions in paragraph 102 above, our task is now to consider whether, as a result of our re-hearing of the Applicant's application to be granted a licence, we consider the Applicant to be a fit and proper person to be granted a licence.
121. Our first question is to consider whether the Council, in our view, made the right or wrong decision for the right or wrong reasons.

122. As the Council based their written decisions (i.e. the MTR Decision and the final decision) almost exclusively on section 66(2)(c) of the Act (erroneously referred to as section 66(3)) – namely that the Applicant had contravened housing or landlord and tenant law – the starting point must be to consider the correct interpretation of section 66.
123. The first point is that by virtue of section 66(1), the decision is the local authorities to make. In making the decision it must “have regard (among other things) to any evidence within subsection (2) or (3)”. That would suggest that it must base its decision on evidence, but the factors in subsections (2) and (3) are not exclusive sources of evidence.
124. The second point to consider is the meaning of “contravene” in subsection (2)(c). In this case, the Council have relied on breaches of the Management Regulations and section 72 of the Act. But none of the statutory routes available to the Council to establish beyond doubt that these provisions have been contravened, namely prosecution or imposition of a financial penalty, have been followed. The question is when a “contravention” is established. Does it have to be after completion of a statutory process, or were the Council permitted to determine “contravention” outside of a structure in which that decision can undoubtedly be reached?
125. We take account of the fact that under the Housing and Planning Act 2016, local authorities were given powers to issue financial penalties themselves if they considered that an offence under section 72 or breaches of the Management Regulations had occurred. But these decisions were within a structure that allowed an appeal against those local authority determinations to the FTT.
126. On the other hand, it would be somewhat restrictive if a local authority were not permitted to consider strong evidence that in their view demonstrated the commission of offences by an applicant for a licence. And if the applicant wished to take the matter further, it could exercise its right of appeal against a decision not to grant a licence, where the appeal came to the very same forum that would consider appeals against financial penalties. So, the decision would be reviewed by a body which had jurisdiction to determine contraventions of housing or landlord and tenant law depending on the route through which that allegation had been made.
127. Our view is that we do not have to determine this difficult question. Our interpretation of section 66 is that sub-section (1) is primary. As pointed out above, it requires the local authority to decide the question based on the evidence.
128. Our view is that sections 66(2) and (3) are not restrictive checklists that must then be satisfied if a person is to be found not to be a fit and proper person. They are only one source of evidence on which a local authority can rely. If convictions or financial penalties have been imposed already

(with appeal processes completed), that would be highly persuasive evidence of lack of fitness.

129. But convictions or financial penalties are not essential. We take the view that if a local authority reaches the view that there are strong grounds for prosecuting for breach of the Management Regulations, or failure to obtain a licence, that is a view which it may take into account when making decisions about whether a person is a fit and proper person. By “strong grounds”, we mean that a local authority has assessed the facts, taken the view that an offence has been committed beyond any reasonable doubt (including taking into consideration any defence available to the landlord, though the burden of proof for any reasonable excuse defence is “balance of probabilities”, the burden of proof being on the defendant), and has reached the view that it would be justified in taking the case to a court or imposing a financial penalty.
130. We lean towards the view that a contravention of housing or landlord and tenant law is not established until the statutory processes to establish an offence have been completed, though we may be wrong. But the point is that this distinction does not matter. Strong grounds for considering that contraventions have occurred (in the Council’s view) which could have been prosecuted or penalised, can and should be taken into account, as they are part of the evidence available to the Council which it must consider by virtue of section 66(1), even though “contraventions” may not fall within section 66(2)(c).
131. Our view is that the Council’s reasons given in its final notice were unhelpful in explaining its real reasons for refusing to grant a licence to the Applicant. Those reasons were explained by Mr Matthews in his evidence, but were not adequately identified in the final notice. As is explained below, our view is that the Council reached the right decision, but for the wrong reasons.

What decision should this Tribunal make on the appeal?

132. Our view is that the Council did have strong grounds for believing that breaches of the Management Regulations had taken place, and they were entitled to take that evidence forward into their FPPMW document and to rely upon it when making that decision, and that we also should take that into account.
133. It so happens that, after the issue of the final notice, the Applicant was convicted of breaches of the Management Regulations, which we in fact may take into account as per paragraph 70 of the Court of Appeal decision in *Waltham Forest* (see paragraph 17 above).
134. Likewise, our view is that, whilst they did not prosecute, the Council were entitled to take into account the Applicant’s inexplicable failure to apply for a new licence before the expiry of his old one, and we should too.
135. And it was, in our view, legitimate for the Council to take into account the circumstances under which it made the Emergency Prohibition Order on

11 February 2022. That incident supported the proposition that the Applicant did not pay much attention to regulatory requirements. We agree.

136. We also take the view that, whilst the proceedings relating to the appeal against the 13 January 2022 Improvement Notice were still under appeal, the Council were entitled to take into account the vigour with which the Applicant seemed to oppose many of the requirements it considered to be unopposable, such as the failure to deal fully with fire risk or excess cold requirements, which it had been pursuing for nearly three years.
137. The Applicant had been under notice as a result of the Prohibition Order case (in particular the Tribunal's views set out in the Appendix to that decision), the Improvement Notice of 13 January 2022, the Council's letter of 14 January 2022, and the oral comments made by Mr Matthews at regular inspections during 2022, that the Property was not of a satisfactory standard. By September 2022, it, and we, are entitled, to reach a conclusion that the Applicant was not capable, by reason of lack of aptitude or competence, of meeting that satisfactory standard.
138. We can also take into account our conclusions in paragraph 102 above.

What factors may we (and the Council) not take into account

139. There are some factors that, in our view, the Council wrongly took into account in its decision:
 - a. Its reliance on breach of a Code of Practice (see paragraph 97 & 98 above);
 - b. The opposition in the community to the operation of the Property sometimes to house people with challenging behaviour. We do not think that the use of the Property per se could be a relevant factor in determining whether its manager was a fit and proper person;
 - c. Arguably, the policy it introduced in May 2022, at least in so far as it was presented as an objective, Council approved, policy. We consider that this was a self-serving document, introduced without approval by any Council committees. The policy determines that the taking of any enforcement action under the Act would be evidence that that person was contravening housing law. We consider that to be controversial. We agree that any person who fails to comply with any enforcement action would be susceptible to prosecution or other enforcement action, but the purpose of the HHSRS system is to identify risks, and enforcement action is taken to ensure those risks are mitigated, rather than to determine wrong doing by the person against whom the enforcement action is taken. It is subsequent failure to comply with the enforcement notice that becomes a breach of housing or landlord and tenant law, not the issue of a notice itself, in our view;

- d. The adequacy of financial arrangements for the Property. There is no evidence that the Council had details of the Applicant's financial position in Sept – Nov 2022.

Decision

140. We must conduct a rehearing of the application for a licence in this appeal, rather than review the Council's decision, though we must give that decision due weight.
141. Our determination is that the Applicant was not a fit and proper person to hold an HMO licence at the time of the Council's decision to refuse his application, and we therefore uphold their decision.
142. Our reasons differ from those of the Council. They are:
 - a. Our findings in paragraph 102 above, which persuade us that the Applicant is not capable by reason of aptitude or capability of running an HMO to the standards required;
 - b. Our view (irrespective of whether a contravention of housing or landlord and tenant law had been established) that there was strong evidence of:
 - i. breach of the Management Regulations, (see paragraph 110 - 111 above) (subsequently successfully prosecuted);
 - ii. that the Applicant committed an offence under section 72 of the Act for at least two weeks, and potentially longer when he failed to apply to renew his previous licence;
 - iii. that the Applicant exposed a person to risk, as observed by the Council on 9 February 2022, in allowing a person to reside in an unconverted garage with unsafe access to the sleeping accommodation, and in creating a hazardous pool area.

Appeal

143. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)

Appendix

Rushcliffe Borough Council's Protocol for Assessing Fit and Proper Persons in Relation to HMO Licences 2022-2027

The aim of this document is to ensure that all licensable houses in multiple occupation (HMO's) have appropriate arrangements in place to ensure that they are satisfactorily managed by fit and proper persons in accordance with the Housing Act 2004.

Duties of a person managing an HMO

Under the provisions of The Management of Houses in Multiple Occupation (England) Regulations 2006, any person managing an HMO of any size has a duty of care in respect of providing information to occupiers, taking safety measures, maintaining water supply and drainage, maintaining gas and electricity supplies, maintaining common parts and living accommodation and providing waste disposal facilities. In addition to these requirements, any person applying for an HMO licence must be able to prove to the council that they are a fit and proper person.

The decision to issue an HMO licence

In deciding whether to issue a licence, the council must be satisfied that there are acceptable management arrangements in place or that such satisfactory arrangements can be put in place by the imposition of conditions in the licence.

In considering whether the management arrangements are satisfactory, the council must have regard to the following:

- The suitability of the proposed licence holder and manager (if different) and any other person involved in the management of the property; that is to say that they are in each case a "fit and proper person"
- The competence of the proposed licence holder/manager to manage the building
- The suitability of management structures
- The adequacy of financial arrangements

This document considers the meaning of fit and proper person, the council's approach to deciding whether a person is fit and proper and the factors that the council will take into account when making such decisions. This protocol relates to applications for new licences, as well as to existing licences and applications for their renewal.

What is a fit and proper person test?

Before issuing an HMO licence, the Housing Act 2004 states that the council must be satisfied that the proposed licence holder and manager of the

property are a fit and proper person. If not, the licence must be refused unless other satisfactory arrangements can be agreed.

The test is designed to ensure that those responsible for holding the licence and managing the property are of sufficient integrity and good character to be involved in the management of an HMO and that as such, they do not pose a risk to the welfare or safety of persons occupying the property.

A licence may be revoked where the council no longer considers the licence holder to be a fit and proper person and/or that the management of the house is no longer being carried out by persons who are in each case fit and proper to be involved in its management.

The licence holder and manager (if different), and any other person involved in the management of the HMO must also sign the official declaration on the HMO licensing application form.

The council may consult with other councils and with council departments and may use any information contained within the database of rogue landlords and property agents under chapter 3 of the Housing and Planning Act 2016.

The council will consider a person to be “fit and proper” if satisfied that they:

- have not committed an offence involving fraud or other dishonesty, or violence of drugs, or any offence listed under schedule 3 to the Sexual Offences Act 2003 (section 66(2)(a) of the Housing Act 2004).
- have not practised unlawful discrimination on grounds of sex, colour, race, ethnic or national origins or disability in or in connection with the carrying on of any business (section 66(2)(b) of the Housing Act 2004).
- have not contravened any provision of the law relating to housing or landlord and tenant law (section 66(2)(c) of the Housing Act 2004).
- have not acted otherwise than in accordance with a code of practice under section 233 of the act (regarding management of HMOs) (section 66(2)(d) of the Housing Act 2004).
- are not subject to a banning order under section 16 of the Housing and Planning Act 2016

In addition to the above, the council will consider any contravention of legislation relevant to housing. This may include where the council has served a statutory notice, carried out works in default of a notice, taken a prosecution or issued a civil penalty.

The nature of the contravention and its relevance to the management of an HMO and the potential harm associated with the contravention will be taken into consideration.

In relation to any contravention of a provision of the law relating to housing, the council will take into account whether a proposed licence holder or manager:

- Has had a licence revoked, refused or has been convicted of breaching the conditions of a licence under parts 2 or 3 of the Housing Act 2004 or is / has operated an HMO without an appropriate licence in place.
- Owns or manages or has owned or managed an HMO or house which has been the subject of a control order under section 379 of the Housing Act 1985 in the five years preceding the date of the application; or any appropriate enforcement actions described in section 5(2) of the Housing Act 2004 (in relation to category 1 hazards).
- Owns or has previously owned a property that has been the subject of an interim or final management order whilst in their ownership, or a special interim management order under the Housing Act 2004.
- Is subject to a banning order under section 16 of the Housing and Planning Act 2016.
- Owns or has previously owned a property for which the council has taken action as described in section 5(2) of the Housing Act 2004, which includes the service of an Improvement Notice, Prohibition Order, Emergency Prohibition Order, Hazard Awareness Notice, Demolition Order or Emergency Remedial Action.

Each case will be decided on its own merits, taking into consideration the circumstances surrounding the contravention, where there has been more than one contravention, repeating nature of contraventions and of any evidence demonstrating good character since the contravention(s).

Membership of a government approved redress scheme

There is a legal requirement for all letting agents and property managers in England to belong to a government approved redress scheme. There are three approved schemes:

- Ombudsman Services Property (www.ombudsman-services.org/property)
- Property Redress Scheme (www.theprs.co.uk)
- The Property Ombudsman (www.tpos.co.uk)

Membership of an approved redress scheme will be expected for all property managers associated with licensable HMOs. Any manager who is not a member will not be considered to be a fit and proper person.

Failure to be a member of an approved scheme is also a legal offence with fines of up to £5000.

How will the council make their decision?

Where there is evidence of a relevant offence, unlawful discrimination, contravention, banning order or breach of the code of practice, the council may decide that the person is not fit and proper. Each case will be decided on its own merits and such evidence will not necessarily lead to a conclusion that a person is not a fit and proper person. The council will act reasonably, proportionately, and consistently in its approach to making a decision. It will consider those factors relevant to a person's fitness to hold a licence and/or manage an HMO and disregard those which it considers are not relevant.

Consideration of "persons associated or formerly associated" with the proposed licence holder or manager

Where there is evidence that a person associated, or formerly associated with a proposed licence holder or manager has committed any offence specified in section 66(2) of the Housing Act 2004, that evidence may be taken into account in determining the proposed licence holder's or manager's fitness. The purpose of this requirement is to ensure that only fit and proper persons hold licences or are in any way involved in the management of licensed properties. It would not be appropriate for a licence to be granted to someone, or for someone to be the manager of a property, if that person was merely acting as a front for someone else, who would be considered to be unfit to be the manager or licence holder.

Duration

If someone is determined by the council to fail the fit and proper person test, this will usually remain the case for a period of 5 years. However, the council may consider it appropriate (in the event of lesser offences) to apply a condition to the licence to allow the licence to operate for a reduced term, e.g., 12 months. The conduct of the licence holder can then be monitored, and this taken into consideration in subsequent licensing applications. The council will, in doing so, have regard to this document and the applicant will need to provide sufficient evidence that they are now a fit and proper person.

If the licence holder or manager is found to not be fit and proper, the council will notify them in writing.

What happens if the licence holder fails the fit and proper test during the duration of the licence?

Should the council become aware that a licence holder or manager of an HMO commits an offence or breach which would result in the failure of the fit and proper test during the duration of the licence, the council may revoke the licence. At all times the council will consider all evidence available and make decisions in accordance with this protocol.

Should the licence holder be subject to a banning order under section 16 of the Housing and Planning Act 2016 during the duration of an existing licence, the licence holder will fail the fit and proper test and the council must revoke the licence.

What to do if you feel you have been treated unfairly

If you feel you have unfairly been refused an HMO licence you may appeal to the Council, explaining exactly why you believe you should have been granted a licence. The Council will review your case and respond to you within a reasonable timespan.

Residential Property Tribunal

If you are still unhappy with the response, you may appeal to the Residential Property Tribunal. This application must be made within 28 days of the notification of the Council's decision.

Extent of any determination

Where any person involved in the management of a licensable property is deemed not to be a fit and proper person then that determination will apply not only to the licence application under consideration but to all licences to which that person is a party. This information may also be shared with other council's which may have an involvement with the persons assessed.

Data sharing

Information obtained and used for the purpose of determining whether a licence holder or manager is a fit and proper person may be shared with other councils, council department or statutory bodies. Licence applicants agree to this when they sign the application form.