IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2019] UKUT 0307 (LC)
Case No: RRO/2/2019

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – HOUSE IN MULTIPLE OCCUPATION – NEW EVIDENCE PRODUCED ON APPEAL

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

BETWEEN:

MS MARYLENE LISENKA NICANOR SALVA

Appellant

- and -

MR KULDIPA SINGH-POTIWAL

Respondent

Re: 9B Wrottesley Road,
London
SE18 3EW

Elizabeth Cooke, Upper Tribunal Judge

Determination on written representations

Introduction

1. This is an appeal from the decision of the First-tier Tribunal ("the FTT") refusing to make a rent repayment order against the respondent, who was the appellant's landlord from February 2017 until May 2018. The appellant had applied for the order on the grounds that the respondent had committed offences:

    a. under section 72(1) of the Housing Act 2004 by being in control or management of an unlicensed house in multiple occupation ("HMO") between October 2017 and May 2018,

    b. under section 1(2) of the Protection from Eviction Act 1977 by unlawfully evicting her, and

    c. under sections 1(3) and 1(3)A of the Protection from Eviction Act 1977 by harassing her.

2. The FTT was not satisfied beyond reasonable doubt that any of these three offences had been committed and therefore refused to make a rent repayment order. However, it granted permission to appeal because significant new evidence was produced in the application for permission. This appeal is a review of the FTT's decision and has been conducted on the basis of the parties' written representations. The appellant has been represented by Flat Justice, and the respondent has not been represented.

3. In the paragraphs that follow I set out the factual background and the issues before the FTT. I then consider the scope of the appeal, before turning to the appeal itself.

The factual background and the issues before the FTT

4. The respondent is the owner of 9b Wrottesley Road, London SE18 3EW. The appellant's evidence to the FTT was that she took a tenancy of a room in the house in February 2017 and that she became the fifth occupier at that point. Her cases is that the property required an HMO licence because it was on three floors and there were five people in occupation, and indeed that a new licensing scheme was introduced in October 2017 which meant that an HMO licence was needed even if there were only three occupiers. The appellant produced correspondence from employees of the Royal Borough of Greenwich by way of evidence that the respondent applied for a licence in May 2018.

5. The respondent's case was that there were only three people living at the property, and that he applied for a licence on October 2017 in anticipation of letting more rooms. He did not produce a copy of his application for a licence or any correspondence with the local housing authority.

6. As to the eviction, the appellant said that the respondent required her to leave on 12 June 2018, by text on 8 May 2018. This was then followed up by an email dated 14th May, which

asked her to vacate by 5th June. The FTT found that she left in May 2018. The respondent said that the appellant had a licence rather than a tenancy, that he was resident in the property, and that he had given the required notice.

7. As to harassment, the appellant complained of the respondent slamming the door, threatening he would inform the Filipino community about her, and threatening legal action. The respondent's case was that the allegations of harassment were made out of malice, and he complained in turn of harassment from the appellant and her partner.

8. The FTT cannot make a rent repayment order under section 40 of the Housing Act 2016 unless it is satisfied beyond reasonable doubt that the relevant offence has been committed. It was not so satisfied in respect of any of the three offences. As to the HMO offence, it was not convinced by the appellant's evidence about the number of people living at the house, nor by the evidence she produced from officers of the Royal Borough of Greenwich. I say more about this below.

9. As to the alleged eviction, the FTT found that this was a tenancy not a licence; it noted that the tenancy agreement required four weeks' notice and that the notice given by text on 8th May 2018 giving her five weeks to leave the property was sufficient to terminate the agreement. In any event the applicant left before 5th June 2018. The FTT therefore was not satisfied that the respondent had committed an offence under section1(2) of the Protection from Eviction Act 1977.

10. As to harassment, the FTT said that it did not find either party's evidence wholly persuasive. It accepted that the respondent's behaviour had not been perfect but took the view that the appellant shared the blame for the breakdown in relations. Again, it was not able to be satisfied to the criminal standard of proof that an offence had been committed.

The scope of the appeal

11. It is not immediately obvious whether the appeal relates to the FTT's decisions about all three of the alleged offences. The FTT granted permission to appeal on 29 March 2019 "on the grounds set out by the applicant", and said that this was because she had produced significant new information in her written submissions. That new information included evidence from the Royal Borough of Greenwich about the date on which the respondent applied for an HMO licence. Accordingly it is clear that the appeal relates to the offence under section 72(1) of the Housing Act 2004, but it is not obvious whether the FTT's two other findings are within the scope of the permission. To answer that question I have to look at the appellant's grounds of appeal before the FTT.

12. Flat Justice wrote two letters to the FTT following the decision of 7 January 2019. On 1 February 2019 it wrote asking for the decision to be set aside under rule 51(2) (a) and (b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, which enables the FTT to set aside a decision disposing of proceedings if a relevant document was not sent to or received by a party or was not received by the FTT. The missing documents were said to be the respondent's application for an HMO licence, which he had been ordered to

produce, and new correspondence from the Royal Borough of Greenwich. The letter also said "we also regard that Ms Salva's eviction was unlawful" and gave a number of reasons for this, but said that "we are not requesting an appeal on this basis at the moment. However, we would hope that this matter would be re-visited in any new decision."

13. The FTT declined to set aside its decision. Flat Justice wrote again on 17 February 2019. The bulk of the letter was about the HMO licence offence. At paragraph 17.1 Flat Justice wrote "We repeat our assertion that Ms Salva's allegation of illegal eviction was not correctly addressed; [the FTT's] refusal to set aside makes no mention of any of the points we raised on this matter in our request to set aside." Paragraph 17.2 states that the respondent's insistence that Ms Salva had a licence and not a tenancy was an additional form of harassment under the Protection from Eviction Act 1977 section 1(3A).

14. I conclude from these letters, which together constituted the grounds before the FTT, that:

    a. Permission was granted to appeal the FTT's findings about the alleged HMO licence offence.

    b. Permission was not granted to appeal the findings on the offences of harassment. There is no mention of the FTT's actual findings on this point in Flat Justice's letter; the reference to the respondent's claim that the appellant was a licensee does not amount to a ground to appeal those findings. The appellant no doubt disagrees with the FTT's findings of fact on this point but her disagreement is not, and she has not claimed that it is, a reason for granting permission to appeal. It would have been helpful if the FTT had been explicit on this point but I take the view that on the material before it the FTT cannot have intended to give permission to appeal its findings on the harassment offence.

    c. Permission was granted to appeal the finding about eviction. The FTT's finding is challenged by the two letters taken together and therefore this point must come within the "grounds set out by the appellant."

15. I therefore consider the appeal first from the finding about the alleged unlawful eviction, and then go on to consider the HMO matter.

Unlawful eviction under section 1(2) of the Protection from Eviction Act 1977

16. The appellant's challenge to this decision is set out in Flat Justice's letter of 1 February. Flat Justice argues that the FTT accepted, at paragraph 41 of its decision, that the appellant had an assured shorthold tenancy, and that she was therefore entitled to two months' notice of termination of the tenancy under section 21 of the Housing Act 1988. It says that the notice to quit was not in the prescribed form (being by text), and that in any event the landlord was not entitled to serve notice under section 21 because of the lack of an HMO licence, gas certificate and other failings. The appellant's written submissions to the Upper Tribunal repeat these points.

17. The appellant in May 2018 was occupying her room in the property under a tenancy agreement dated 23 December (replacing an earlier agreement in similar terms). The agreement states at paragraph 2 "This agreement creates either a periodic agreement or an AST within Part 1 Chapter II of the Housing act 1988", and describes itself under the heading "Term" as a "rolling contract up to 12 month" (sic). The FTT found at its paragraph 41 that the appellant was a tenant not a licensee, but made no finding about what sort of tenancy she held and made no mention of an assured shorthold tenancy. Nor does the FTT explain why it found that the respondent had given proper notice by his text of 8th May. It may be that the FTT was convinced by the respondent's assertion that he was living in the house, or by his assertion that it was not the appellant's home, but if so the FTT does not say so and does not say why it accepted that evidence. So the findings about the tenancy and the notice are unclear.

18. However, the fact remains that there was no eviction. The respondent did not "unlawfully deprive the residential occupier of the premises". The appellant has not challenged the finding that she chose to leave before the expiry of the notice given by text. The FTT's finding about unlawful eviction was therefore correct, and the appeal on this point fails.

19. I appreciate that the appellant believes she was evicted by virtue of the pressure that the respondent's behaviour inflicted on her; but I have found that there is no appeal in respect of the allegations of harassment. In the absence of a physical eviction, for example by her being locked out, the appeal must fail on this point.

The offence under section 72(1) of the Housing Act 2004

20. Under section 72(1) of the Housing Act 2004 it is an offence to have control of or to manage an HMO which is required to be licensed but is not so licensed. Throughout the time of the appellant's tenancy an HMO had to be licensed if it was occupied by five or more persons in two or more separate households, met the test under section 254(2) of the Housing Act 2004, and had three or more storeys.[1] The test in section 254(2) requires the building to consist of one or more units of living accommodation not being a self-contained flat or flats, occupied by persons as their only or main residence who are paying rent (to paraphrase the relevant points of the provision).

21. The appellant's case before the FTT was that the property met those conditions from the beginning of her tenancy in February 2017. Moreover, from 1 October 2017 the Royal Borough of Greenwich ("the RBG") introduced a new licensing scheme which meant that an HMO licence was needed even if there were only three occupiers. The respondent did not dispute that a new licensing scheme had taken effect with that requirement.

22. The appellant therefore had to convince the FTT both that the property required a licence, and that it did not have one.

[1] The requirement for three storeys was removed on 1 October 2018 when the Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 came into force.

Did the property require an HMO licence?

23. As to the requirement for a licence, the appellant explained that rooms in the house were let out to Filipino nurses. She set out a schedule of the names of the tenants throughout the period of her tenancy, showing that for the most part there were five, with 3 in January 2018. She also produced copies of messages from a WhatsApp group set up by the respondent for communications with the tenants, which she said showed that there were always five tenants apart from January 2017, and also showed that the respondent was not living in the house. She called as a witness a fellow tenant, Lyle Almaras, who made a statement and attended the hearing. Ms Almaras lived at the property from May to July 2018, and her evidence was that five rooms were occupied in the property.

24. The respondent's case was that there were never more than three occupiers from January 2017 to May 2018, and that he applied for an HMO licence in early October 2017. He too produced a schedule showing numbers of occupiers, and a statement from Ms Agregado who, on the appellant's case, occupied a room, but whose evidence was that she was an occasional guest. She did not attend the hearing. The respondent also said that the appellant did not live at the property as her only or main residence.

25. The FTT found that both cases had a degree of plausibility; it made no finding as to whether Ms Agregado was living in the property. It made no mention of the appellant's WhatsApp messages.

Did the respondent apply for a licence in October 2017?

26. In her application to the FTT the appellant stated that she had been told by Richard Hugill of the Royal Borough of Greenwich that the respondent applied for a licence on 1 October 2017. However, with her statement of case she provided a copy of a letter from Mr Hugill dated 20 August 2018 stating that the respondent applied for a licence in May 2018 and therefore committed an offence between October and May 2018. She also produced an email exchange with Mr Martin Turner of the Royal Borough of Greenwich who confirmed that no application had been received from the respondent for an HMO licence until 30 May 2018, and that the licence had eventually been issued on 17 August 2018. He also confirmed that if the property was occupied by five or more persons before May 2018 then the landlord was committing an offence, but that the Royal Borough of Greenwich had no evidence of such use other than the appellant's statement.

27. The respondent's case was the there was no requirement for a licence before October 2017 (because of the number of occupiers) and that he had applied for one on 1 October 2017 (and therefore had a defence under section 72(4) of the Housing Act 2004). He produced a copy of his licence, dated 17 August 2018, but no copy of his application, and he gave no explanation for the ten month delay in the granting of the licence.

28. The FTT rejected the appellant's case, for four reasons:

a. The fact that the two communications from Mr Hugill "flatly contradicted" each other as to the date of the application.

b. A concern that Mr Hugill stated categorically that the respondent had been committing an offence when he had not been convicted and the RBG did not appear to have taken any action about the respondent.

c. Doubts as to the appellant's motives in contacting Mr Turner when she had already had information from Mr Hugill.

d. Doubts as to the authenticity of Mr Hugill's letter and of the email from Mr Turner.

The appeal on the HMO licence issue

29. Since the date of the FTT's decision Flat Justice for the appellant has obtained a letter dated 25 February 2019 from Ms Zelenka, Head of Environmental Health at the Royal Borough of Greenwich, explaining why contradictory information had been given to the appellant – it seems that a new database had been used from October 2018 and there had been problems with data migration and transfer. She confirmed that the respondent applied for an HMO licence on 21 May 2018; that that application was incomplete; and that the application was accepted as complete on 29 June 2018. Hence the grant of the licence in August 2018. It was Ms Zelenka's letter that prompted the FTT to give permission to appeal. Flat Justice has also obtained, by means of a request under the Data Protection Act 2018, a copy of the respondent's application of 21 May 2018.

30. New evidence is not normally admitted on an appeal. As the respondent correctly points out, it must pass the test of *Ladd v Marshall* [1954] 3 All ER 745. Denning LJ, as he then was, said that there were three conditions to be fulfilled for fresh evidence to be admitted:

> "first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case. Although it need not be decisive; the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible".

31. The respondent in his written submissions to the Tribunal takes issue with the admission of new evidence, on the basis that it must pass the *Ladd v Marshall* tests, but does not explain why it does not meet those requirements. He still maintains that he applied for a licence in October 2017, but has not produced a copy of his application. He suggests that his application has been lost in the course of migrating data to the new system. He maintains his case about the number of occupants.

32. The respondent has also provided a transcript of a phone call he says he has had with Ms Stent of the Royal Borough of Greenwich about his licence application. It appears that the point the respondent was trying to establish in that call was that the housing authority did not have evidence about the number of occupiers in the property before May 2018. That is not in dispute, and it is for the appellant to prove that a licence was required.

33. I have summarised very briefly the respondent's extensive written submissions, some of which are no longer relevant because they relate to the alleged offences under the Protection from Eviction Act 1977. I have summarised briefly because the respondent's submissions do not really address the central issue in this appeal, which is the compelling new evidence obtained from the Royal Borough of Greenwich by Flat Justice.

34. This evidence was obtained with some difficulty. The copy of the application required an application under the Data Protection Act 2018, since the respondent failed to provide it. The appellant went to the FTT with evidence both from Mr Hugill and from Mr Turner that the respondent had applied for a licence in May 2018; understandably she did not seek yet another official to tell her what she had already been told. Indeed, she was criticised by the FTT for communicating with Mr Turner, so it would be very harsh to criticise her now for not having obtained Ms Zelenka's evidence. I take the view that the evidence could not have been obtained with reasonable diligence for use at the hearing before the FTT.

35. The new evidence clearly passes the other two tests in *Ladd v Marshall*; it is credible, being from an officer of the RBG; and it is likely to have an important influence on the rest of the case. In the light of the new evidence it may well be that the FTT could be satisfied beyond reasonable doubt that the property was unlicensed from 1 October 2017 until a valid application was made. Accordingly the new evidence is admissible.

36. Further concerns arise from the FTT's analysis of the evidence produced by the appellant. The FTT expressed doubt about the authenticity of the letters from Mr Hugill and Mr Turner; the respondent said that they might be fabricated, but the FTT did not explain why it found that suggestion credible. Nor is it possible to see what the FTT meant when it referred at paragraph 36 to "the question as to the Applicant's motives in supplementing Mr Hugill's letter with an exchange of emails with Mr Turner."

37. Of course, the FTT could not be satisfied that the respondent had committed an offence unless it was also sure about the number of occupiers in the property. The appellant complains that Ms Agregado's evidence was given some weight by the FTT; she says that she had understood that the evidence from witnesses who did not attend would not be admissible, and had therefore not produced letters from three other residents at the property who were not able to attend the hearing. Those letters have not been produced to the Tribunal and so I make no finding about them. What is clear is that the appellant's evidence from the WhatsApp group was dismissed without analysis by the FTT; it may be that the FTT was persuaded by the respondent's suggestion that it was fabricated, but it has not said so and has not said why. I find that relevant material was ignored.

38. Accordingly the appeal from the FTT's decision about the alleged HMO offence is allowed; the FTT's decision is set aside and the matter is remitted to the FTT for a re-hearing.

Elizabeth Cooke
Upper Tribunal Judge

15 October 2019